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THE
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COURT RULES.

COURT OF APPEALS OF KENTUCKY.

ADDITIONAL RULES.*

XX. Rule III shall govern appeals in criminal cases involving only misdemeanors. In felony cases, the brief of the appellant must be filed 5 days before the case is set for hearing.

XXX. Adopted March 13, 1908, by Kentucky Court of Appeals. Whenever a party desires to file a brief after the time allowed by rule three (3), or a petition for rehearing, he must before filing the same, furnish to counsel for the adverse party a copy of the brief, or the petition for rehearing, and file with the brief, or petition, a notice showing

that he has delivered to counsel the copy required.

XXXI. Adopted June 11, 1908, by Kentucky Court of Appeals. To enable the court at the opening of each term to proceed with the business before it, the clerk is directed hereafter to docket the civil cases beginning with the third day of the term, and setting them for seven days. When a record is filed he will set the case and notify the parties or their counsel of the day it is set for.

The appellant in his statement of parties to the appeal, will give the name and address of appellee's counsel, or appellee's address.

*For rules as previously adopted, see 92 S. W. ix.

COURT OF APPEALS OF MISSOURI.

Rules of Practice in the St. Louis Court of Appeals.*

Revised June 30, 1908. To be in Force August 1, 1908.

Rule 1.—PRESIDING JUDGE. The presiding judge shall superintend all matters of order in the court room.

Rule 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the court so directs.

Rule 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order. This rule has no application to causes whereof this court has original jurisdiction.

Rule 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the clerk's office within five days after taking the same.

Rule 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error except by consent of parties.

Rule 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his

*For rules as previously adopted, see 67 S. W. vii.

attorney, previous to the making of the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

Rule 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

Rule 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Rule 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

Rule 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the al-

lowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Rule 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

Rule 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for this court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of —, 188—, executed on the — day of —, 188—;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 15.—ABSTRACTS IN LIEU OF TRANSCRIPTS, WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 813, Rev. St. 1890, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the clerk of this court. Objections to such complete or additional ab-

abstract shall be filed with the clerk of this court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

Rule 16.—ABSTRACTS; WHEN FILED AND SERVED. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least fifteen days before the day on which the cause is set for hearing, and file four copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file four copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 17.—ABSTRACTS; WHAT THEY SHALL CONTAIN. The abstracts mentioned in rules 15 and 16 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 18.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Rev. St. 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full

understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as prima facie evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

Rule 19.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the clerk of the court, at least one day before the cause is called for trial, four copies of a brief, containing: First. A clear and concise statement of the pleadings and facts shown by the record. Second. An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. Third. If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said statement, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and counsel for respondent, or defendant in error, shall at least eight days before the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing such copies with the clerk, and all abstracts and briefs shall be nine inches in length with an outside margin of one and one-half inches on each page."

Rule 20.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

Rule 21.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of coun-

sel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

Rule 22.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the court shall otherwise direct.

Rule 23.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15, unless said counsel is prevented from filing his briefs by failure of opposing counsel to file and serve their briefs in the time and manner prescribed by said rule 15. No counsel shall be deprived of oral argument when prevented from complying with rule 15 by opposing counsel.

Rule 24.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this court respecting the same.

Rule 25.—MOTIONS FOR REHEARING. Every motion for rehearing should be founded on suggestions of some party to the case, or of counsel, pointing out distinctly such grounds of error as are claimed to exist in the judgment of this court or in the opinion delivered. Such motion must be filed within ten days after delivery of the opinion of the court, and a copy of the motion, with any brief to be submitted in support thereof,

shall be served upon the opposite party within the same period.

Rule 26.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Rev. St. 1879, as amended by act concerning practice in civil cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

Rule 27.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed sixty minutes, unless the court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the court a written or printed argument.

Rule 28.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 29.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appear-

ance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 30.—In view of the rulings of the supreme court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the circuit court or the supreme court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the supreme court has appellate jurisdiction.

Rule 31.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance

with a sworn statement of expenditure paid or incurred upon the appeal.

Rule 32.—WHEN APPEAL IS RETURNABLE; CERTIFICATE OF JUDGMENT; TRANSCRIPT. In all cases where appeals shall be taken or writs of error sued out to this court after August 1, 1906, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Rev. St. 1899, within the time by said sections provided, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that the supreme court nor this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Rev. St. 1899.

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THE
SOUTHWESTERN REPORTER.
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WALKER v. LUNDSTRUM.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. CONTRACTS — ACTIONS FOR BREACH — DECLARATION OF LAW — QUALIFICATION ON RIGHT TO RECOVER.

A declaration of law stated substantially that if defendant contracted with plaintiff for certain services to be rendered in erecting a building, and plaintiff performed such services as he could, but was prevented from completing the contract by defendant's refusal to build, the plaintiff was entitled to the agreed price, provided the suit was not brought before the building would have been completed had defendant proceeded with its construction. *Held*, that the language of the proviso only qualified plaintiff's right to recover on the contract, and did not apply to a case of quantum meruit as contended by defendant.

2. SAME—RIGHT TO RECOVER FOR SERVICES—EFFECT OF DEFENDANT'S REFUSAL TO PERFORM.

Where a party to a contract forbids its performance by the other or interferes with its performance by the other to an extent amounting to a refusal of performance, the one interfered with may recover as if he had performed the contract.

[Ed. Note.—For cases in point. see Cent. Dig. vol. 11, Contracts, §§ 1424-1434, 1508-1515.]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by James F. Walker against N. E. Lundstrum. From a judgment for plaintiff, defendant appeals. Affirmed.

T. C. Tadlock and Frank L. Forlow, for appellant. H. T. Harrison, for respondent.

BROADDUS, P. J. This is a suit by plaintiff to recover damages for breach of contract. He was employed by defendant as an architect in forming and drawing plans and specifications, and making estimates for, and superintending, an opera house building at Alba, Jasper county, Mo. The contract was entered into in September, 1906. The defendant was to pay plaintiff 5 per cent. on the estimated cost of the building, which according to plaintiff's statement was \$10,000, exclusive of the heating fixtures and furnishings. In October the pencil sketches were completed, the plans approved, and payment of \$50 was made on the contract. The evidence tended to show that, when plaintiff told

defendant the building would cost \$10,000, he said he would rather it would not cost over that sum, but, if it cost even \$12,000, he could build it. Defendant afterwards paid plaintiff the additional sum of \$50 on the contract. He employed a contractor to calculate on the cost of building by the day, and ordered some of the materials for the work. Soon after he left with two car loads of horses for the southern market, and on his return in December refused to go on with the construction of the building. The evidence tends to show that plaintiff held himself in readiness to go on with the work. The defendant's evidence tends to show that the estimated cost of the building was not to exceed \$10,000, and that the one contemplated by plaintiff would cost \$14,000. The court sitting as a jury found for plaintiff and rendered a judgment for \$300, from which defendant appealed.

As the suit was upon contract, it is the defendant's contention that the court committed error in giving declaration of law No. 1. It is as follows: "The court declares the law to be that if it believed from the evidence that the defendant entered into a contract with the plaintiff to render services for him as architect in forming and drawing plans and specifications, and making an estimate for, and superintending the erection of, an opera house at Alba, Jasper county, Mo., and that defendant agreed to pay plaintiff the sum of 5 per cent. on the cost thereof, that plaintiff drew the plans and specifications and made an estimate of the cost thereof, and that plaintiff was prevented from completing said contract by the refusal of defendant to build or cause to be built said opera house building, then you should find for the plaintiff for the sum of 5 per centum on the estimated cost of said building, less \$100 heretofore admitted as a credit thereon, provided if the court further finds that this suit was not brought before the building would have been completed had the defendant proceeded with the construction of the same." It is the claim of defendant that the language "provided * * * that this suit was not brought before the building would have been completed," etc., applies to a case on quantum meruit. We cannot see why. The instruc-

tion bases plaintiff's right to recover on the contract, and not for services had and received, and the language referred to only qualifies his right to recover on his contract. The court tried the case upon the theory, as shown by the instructions on both sides, that it was a suit for damages for breach of contract. It is the settled law of this state that "where a party to a contract forbids its performance by the other, or interferes with its performance by the other to an extent which amounts to a refusal of performance, the other party thus interfered with may recover as if he had performed his contract." *Halpin v. Manny*, 57 Mo. App. 59; *Peck & Co. v. Roofing & Corrugating Co.*, 96 Mo. App. 212, 70 S. W. 169; *Boland v. Glendale Quarry Co.*, 127 Mo., loc. cit. 524, 30 S. W. 151; *Halsey v. Meinrath*, 54 Mo. App. 341.

We find no error in the record. Cause affirmed. All concur.

RAY v. DODD et al.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

A petition for false imprisonment, charging that a commitment was issued after an appeal had been taken and a sufficient bond given, and not charging that the arrest, trial, and conviction before the justice were illegal and without jurisdiction, was properly not permitted to be amended so as to charge that the prosecution was based on an offense committed in a different township and for that reason the justice had no jurisdiction, since such amendment, if made, would substitute one cause for another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686-709.]

2. CRIMINAL LAW—EFFECT OF APPEAL.

A justice of the peace had no jurisdiction to issue a commitment where an appeal had been taken and a sufficient bond given.

3. OFFICERS—LIABILITIES FOR OFFICIAL ACTS—JURISDICTION.

The rule that a public officer is not responsible for a judicial determination, however erroneous and however malicious the motive, is applicable only where he had jurisdiction.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Charles H. Ray against Thomas Dodd and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. L. Shannon and H. A. Fankersley, for appellants. T. C. Tadlock, for respondents.

BROADDUS, P. J. This is a suit for false imprisonment. The allegations of the petition, in substance, are that the defendant Thomas Dodd, a justice of the peace for Preston township, Jasper county, and I. Y. Byers, of said township, unlawfully combined together for the purpose of depriving plaintiff of his liberty, and that, in pursuance of such unlawful combination, the said Dodd on the 23d day of August, 1907, issued a certain commitment and delivered the same

to the defendant Byers. The commitment omitting caption is as follows: "Whereas, complaint has been made before me, a justice of the peace of said county, upon the oath of Fannie Ray, that Chas. H. Ray late of the county of Jasper and state of Missouri did on the 16th day of August, 1907, commit an assault and battery upon Fannie Ray, and whereas, the said Chas. H. Ray was brought before me upon a warrant duly issued upon the information of H. L. Bright, assistant prosecuting attorney, and has been examined by me on such charge and required to give a bail in the sum of \$200.00 for his appearance before the circuit court of said county, on the first day of the next term thereof, which requisition he has failed to comply with, you are therefore commanded to receive the said Chas. H. Ray into custody in the jail of the county aforesaid, there to remain until discharged by due course of law." The petition recites that the commitment was delivered to the defendant Byers, who arrested plaintiff and delivered him to the jailer of the county, who put him in prison in the jail. And it is further alleged that plaintiff had complied with the said requisition and had given the necessary bond with good and sufficient securities which had been approved by the defendant Dodd. The defendants pleaded justification, in that they were public officials and acting within the scope of lawful authority. The facts brought out in the trial were that plaintiff had been charged by his wife, Fannie, with an assault and battery upon her person, and that she made affidavit to that effect, and that a warrant was duly issued by defendant Dodd for his arrest, which was executed by defendant Byers, who brought him before the justice, where he was tried and found guilty of the charge and his punishment assessed at a fine of \$10; that he appealed from the judgment of the justice to the circuit court, and gave a good and sufficient bond for appearance at such court, which was approved by defendant Dodd; and that soon thereafter the defendant Dodd issued the said commitment and delivered the same to the defendant Byers who arrested plaintiff and delivered him to the jailer of the county who placed him in jail, where he remained a few minutes, when he was released at the suggestion of his attorney on the ground that he had not been surrendered into the hands of the officer by his securities on the appeal bond. It was shown that the Constable Byers made an effort to have the securities surrender plaintiff into his custody, but that they did not accede to his solicitations. It sufficiently appears that defendant Dodd was chargeable with the knowledge that plaintiff's securities had made no request to have plaintiff taken into custody when he issued said commitment. The court at the instance of defendants gave an instruction to the jury to find for defendants, whereupon plaintiff took a nonsuit, and, after taking

all necessary steps, brings his case here by appeal.

During the trial plaintiff asked leave to file an amended petition, setting up that the proceedings against plaintiff before defendant Dodd were based on an offense alleged to have been committed by plaintiff in another and different township from Preston, which fact was known to defendants at the time, and for that reason the justice had no jurisdiction to try the case. The request of plaintiff the court refused, and we think properly, for the amendment would have the effect of creating a different issue altogether on a different cause of action. The petition does not charge that the arrest, trial, and conviction of plaintiff before the justice was illegal, and without jurisdiction, but that the commitment issued after he had taken an appeal and given a sufficient bond, and his incarceration in jail thereunder was illegal. It was an effort to substitute one cause of action for another.

We do not agree with the defendants' contention that they were not liable as they were acting under lawful authority. The justice had no jurisdiction to issue the commitment, and, as it was void, it did not justify the constable in making the arrest. It is the law "that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. * * * It, of course, only applies where the judge or officer had jurisdiction of the particular case, and was authorized to determine it." *Reed v. Conway*, 20 Mo. 23; *Patzack v. Von Gerichten*, 10 Mo. App. 424. This seems to be the view taken of the law in all the courts of the country. But plaintiff failed to make out a case under his petition, in that he did not prove that defendants formed a conspiracy, or that there was any union of purpose, to unlawfully imprison the plaintiff.

The cause is affirmed. All concur.

BARBER ASPHALT PAVING CO. et al. v. FIELD et al.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

COSTS — STENOGRAPHER'S FEE — "TRIAL" — WHAT CONSTITUTES.

Rev. St. 1899, § 10,116 (Ann. St. 1906, p. 4608), provides that "in every case tried, * * * where an official stenographer is appointed, the clerk of said court shall tax up the sum of three dollars." Section 690 (page 700) provides that "a trial is the judicial examination of the issues between the parties, whether they be issues of law or fact." *Held*, that the hearing and granting of a motion for judgment on a stipulation to abide the final result of another case, and the examination of the stipulation and the pleadings in order to render judgment, was not a "trial," and that the stenographer's fee was improperly charged.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7093-7103, 7821.]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by the Barber Asphalt Paving Company against Richard H. Field and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

See 97 S. W. 182.

R. H. Field, for appellants. Charles W. German, County Counselor, for respondents.

BROADDUS, P. J. This is an appeal from a judgment of the Jackson county circuit court against defendants for certain costs. The history of the case is as follows: Previous to May 8, 1902, there were pending in the circuit court of Jackson county three suits of the Barber Asphalt Company against Richard Field and Annie C. Field, numbered, respectively, 2,388, 1,017 and 2,393. On that date a judgment had already been rendered in No. 2,388, and it was agreed by the parties that defendants should appeal No. 2,388, and that the other cases should abide the final result in that case, and that, if it was affirmed, "the judgment shall be entered by the said circuit court in said suits numbered 1,017 and 2,393 in favor of the plaintiff in each of said suits, respectively, according to the prayer of the petition." The judgment in the case appealed was affirmed by the Supreme Court of the state, and finally the Supreme Court of the United States. 27 Sup. Ct. 782, 51 L. Ed. 328. On June 20, 1907, the plaintiff paving company filed a motion in this cause for judgment for the amount of the special tax bill in suit and for costs, as per the said stipulations of May 8, 1902. On June 28th next following the court made an order sustaining said motion, and rendered judgment for plaintiff for the amount of said tax bill, interest, and costs of the suit. Among the items of costs taxed was the sum of \$5.25 for 21 continuances and \$3 for stenographer's fee. Mr. Gorman the county counselor, in open court stated that no claim would be made for the \$5.25 for the 21 continuances, and filed a statement of the clerk of the court that that item had been abated and stricken from the judgment for costs.

The only remaining question before the court is whether the \$3 item for stenographer's fee is a legitimate charge of costs in the case, for which the defendants are liable. Section 10,116, Rev. St. 1899 (Ann. St. 1906, p. 4608), provides as follows: "In every case tried, except for the collection of delinquent or back taxes, in any circuit court or division thereof, where an official stenographer is appointed, the clerk of said court shall tax up the sum of three dollars, to be collected as other costs, and paid by said clerk into the county treasury, toward reimbursing the county for the compensation allowed such stenographer as hereinbefore provided." The claim of the defendants is that there was no such trial as the statute contemplates. The

plaintiff, instead of awaiting the call of the case on the docket for trial, proceeded by motion, at which time defendants objected to the hearing of the motion, and asked for a hearing on the issues raised by their answer. The court, however, disregarded defendants' request and proceeded to render judgment as per the stipulations. The county counselor insists that the hearing of the motion was a trial, for the reason that the court was compelled to, and did, examine the stipulations, in order to ascertain the terms of the agreement and to examine the pleadings in order to ascertain the amount of the tax bill in suit, in order to render its judgment; that is to say, that the court had to examine the stipulations and the pleadings in order to judicially render a correct judgment. The trial contemplated in said section 10,116 is that as defined in section 690 of the statute, viz.: "A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact." The Supreme Court, in construing the word "trial," quoted from the definition made by the Massachusetts court, and adopted by Bouvier, to be "the examination before a competent tribunal according to the laws of the land of the facts put in issue in a cause, for the purpose of determining such issue." And a similar quotation is made from Black's Law Dictionary. And in the application the court made to the case under consideration it was held that: "In case of default in pleading there can be no issues to be tried, and no trial can be had, within the meaning of the term as given in the books and as understood by the profession." And so it is held in *Breed v. Hobart*, 187 Mo. 140, 86 S. W. 108, and other cases. In this case there was no issue to be tried. The judgment was rendered by consent, or by agreement, as provided in the written stipulations.

Reversed and remanded. All concur.

ELLETT-KENDALL SHOE CO. v. WESTERN STORES CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

CORPORATIONS—ULTRA VIRES CONTRACT—CONSIDERATION.

Defendant corporation, formed, according to its articles, for buying and selling merchandise, guaranteed, merely as an accommodation to a customer indebted to it, payment for any merchandise plaintiff might sell such customer. *Held*, that the contract, ultra vires under Rev. St. 1889, § 2508, providing that no corporation shall engage in business other than expressly authorized in its charter, or the laws under which it was organized, was without consideration, and so unenforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1815.]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by the Ellett-Kendall Shoe Company against the Western Stores Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

E. E. Aleshire, R. T. Herrick, and S. S. Gundlach, for appellant. Gage, Ladd & Small, for respondent.

JOHNSON, J. Action brought before a justice of the peace on a contract of guaranty signed by defendant, a business corporation, incorporated in 1897, under article 8, c. 42, Rev. St. 1889. A jury was waived in the circuit court where the case was taken by appeal and judgment was entered for defendant. Plaintiff appealed.

There is no serious controversy over the facts. Plaintiff, a corporation, is a wholesale merchant in Kansas City. The Joplin Co-operative Stores Company, another corporation, was a retail merchant at Joplin, and in May, 1906, applied to plaintiff for credit on a bill of merchandise it desired to purchase. Plaintiff required security, and the Joplin Company offered defendant as guarantor. Plaintiff's credit man then telephoned Mr. Shelley, the president of defendant company, and was informed that defendant was willing to guaranty the payment of the account. Thereupon, the following written instrument was executed and delivered by defendant to plaintiff: "Dated this 18th day of May, 1906. Ellett-Kendall Shoe Company, Kansas City, Missouri: For and in consideration of the sum of one (\$1.00) dollar to me in hand paid, the receipt of which is hereby acknowledged, and in consideration of my desire to give Joplin Co-op. Store Co. credit with you, I hereby authorize you to give them credit for all bills of goods which they may purchase of you until I notify you in writing to the contrary, limit of \$1,000.00. I hereby agree to pay said bills at such time after maturity thereof as you may notify me of any failure on their part to pay same. I waive notice of your acceptance of this guaranty, and of any and all sales and shipments made by you to said Joplin Co-op. Store Co., and you may, without notice to me, extend time of payment from time to time and take time notes therefor. Western Stores Co. By Geo. M. Shelley, Pt."

Plaintiff then sold and delivered the merchandise to the Joplin Company, and, being unable to collect the account (of \$289.07) from that company when it matured, demanded payment of defendant, and followed the refusal of the demand with the bringing of this suit. No formal answer was filed, but the defense urged in the circuit court and here is that the attempt of defendant to guaranty the account was ultra vires and void. As before stated, defendant was incorporated under the statutes relating to manufacturing and business companies. Its articles of incorporation state: "This corporation is formed for the purpose of buying, selling and exchanging goods, wares and merchandise of every description." Its capital stock is \$100,000, divided into 1,000 shares of the par value

of \$100 each, all except two of the shares being owned by Geo. M. Shelley, its president. Its board of directors is composed of three members, and it appears that the execution of the contract under consideration was not authorized or ratified by the board in any manner. At the time of the transaction with plaintiff, the Joplin Company was a customer of defendant, and was indebted to it in a large amount. Defendant received no consideration for the guaranty, but gave it as an accommodation to its customer.

If this were a case where the defendant corporation had entered into an ultra vires contract which had for its object the conferring of some benefit on the corporation and the contract had been executed by the other party, the decisions in this state relied on by plaintiff would be in point. In such cases it has been said on a number of occasions that "the defense of ultra vires is not open to a corporation where the contract has been fully executed on the part of the other contracting party, and is not expressly prohibited by law." *Grohmann v. Brown*, 68 Mo. App. 630; *City of Goodland v. Bank*, 74 Mo. App. 365; *Winscott v. Investment Co.*, 63 Mo. App. 367. The case in hand belongs to a different class, and is controlled by a different rule. Here the contract was in no sense for the benefit of defendant, and was executed solely for the benefit of another. No charge of fraud or mala fides is lodged against defendant, nor is any shown in the evidence. Consequently, while the fact that the Joplin Company was a customer and debtor of defendant doubtless influenced Mr. Shelley to sign the contract, it did not constitute a consideration, in the legal meaning of that term, for the execution of the contract by the corporation.

That the contract is ultra vires is manifest. Section 2508, Rev. St. 1880, expressly provides "that no corporation shall engage in business other than that expressly authorized in its charter or the laws under which it may have been or may hereafter be organized." Defendant had no authority under its charter, either express or implied, to sign accommodation paper, or to become surety or guarantor for another. "A contract of a corporation which is ultra vires in the proper sense—that is to say, outside the objects of its creation as defined in the law of its organization and, therefore, beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action up-

on it." *Central Trans. Co. v. Pullman Palace Car Co.*, 139 U. S. 59-60, 11 Sup. Ct. 478, 488, 35 L. Ed. 55.

There is no consideration of equity which may be invoked successfully by plaintiff to relieve it from the operation of the principle quoted. Not only was the contract devoid of any benefit to defendant, and therefore clearly extrinsic to the purposes of its creation, but plaintiff must be presumed to have known of the limitations of the powers defendant might exercise under its charter, and therefore must be said to have entered knowingly into an ultra vires contract. We find in *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817, a statement of the doctrine of ultra vires very pertinent to the situation before us: "The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The last of these reasons by far is the strongest. Considerations of public safety imperatively demand that corporations of all classes be held strictly within the limits of their charter rights and powers, and that their unlawful contracts be pronounced void in all cases except those falling within the principle that "A man who enjoys a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it." *City of Goodland v. Bank*, supra. The contract under consideration is void and cannot serve as the foundation of a cause of action. The views expressed and conclusion reached are supported abundantly by authority. *Lafayette Bank v. Stoneware Co.*, 2 Mo. App. 299; *First National Bank of Moscow v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *The Newland Hotel Co. v. Furniture Co.*, 73 Mo. App. 135; *State ex rel. v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593; *Kansas City v. O'Connor*, 82 Mo. App. 655; *Anglo-American Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89; *Scott v. Banker's Union*, 73 Kan. 575, 85 Pac. 604; *Nat. Park Bank v. German-American Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; *Nat. Bank of Newport v. Snyder*, 117 App. Div. 370, 102 N. Y. Supp. 478; *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *N. Y. Firemen's Insurance Co. v. Eby*, 5 Conn. 560, 13 Am. Dec. 100.

The judgment is affirmed. All concur.

TUCKER v. MISSOURI & K. TELEPHONE CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. PLEADING—PETITION—CONSTRUCTION.

The averments of a petition must be liberally construed in aid of the cause of action alleged, where defendant has not demurred, but has answered to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 66-75.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—INCOMPETENCY—PETITION—PROXIMATE CAUSE.

Plaintiff, a stripper in a telephone pole yard, was injured by a pole being carelessly rolled from a pile against him by a fellow servant known as a "knotter." Plaintiff's petition charged that the knotter was habitually careless, negligent, and grossly incompetent; that his unfitness for the position was known to defendant, but his employment was continued; that he negligently and carelessly rolled the pole which struck and injured plaintiff; that plaintiff was required to work in an unsafe place, and that the injury was the result "of the wrongful acts of defendant aforesaid." Held, that the petition sufficiently charged that plaintiff's injury was caused by defendant's negligence not only in furnishing plaintiff an unsafe place in which to work, but also in requiring plaintiff to work with an incompetent fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

3. SAME—CAUSE OF ACTION—ELEMENTS.

Where plaintiff was injured by the negligence of a fellow servant, he must prove, in order to establish a cause of action against the master, that the servant whose negligence caused the injury was incompetent; that the injury was caused by such incompetency; that the incompetency was known, or by the exercise of reasonable care could have been known, to the master, and that the master, after actual or constructive notice of such fact, negligently retained the servant in his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 334-351.]

4. SAME—EVIDENCE.

That plaintiff's fellow servant was negligent in one instance does not even tend to prove his incompetency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 930, 935.]

5. SAME.

The alleged incompetency of plaintiff's fellow servant by whose alleged negligence plaintiff was injured cannot be proved by the injurious act of which complaint is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 930, 935.]

6. SAME—"INCOMPETENCY."

Incompetency of a servant for whose negligence the master may be liable is a state or condition the existence of which must be shown by other facts and circumstances, and a servant may be regarded as incompetent when he is incapacitated either by physical or intellectual deficiencies from properly performing the duties of his position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 934-951.]

For other definitions, see Words and Phrases, vol. 4, pp. 3507-3510.]

7. SAME—EVIDENCE—PRIOR SPECIFIC ACTS.

Prior specific acts of negligence are admissible to show the incompetency of plaintiff's fellow servant, by whose alleged negligence plaintiff was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 930, 935.]

8. SAME—DISEASE.

Evidence that plaintiff's fellow servant in a telephone pole yard was subject to epileptic fits which had affected his mental capacity was admissible to show his incompetency to perform the work required of him, though there was no evidence, that he was suffering from a paroxysm at the time plaintiff was injured by his alleged negligence.

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by George W. Tucker against the Missouri & Kansas Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Battle McArdle and Gleed, Hunt, Palmer & Gleed, for appellant. Burnham & Brewster, for respondent.

JOHNSON, J. Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant in the employment and retention in service of an incompetent servant whose negligence was the immediate cause of the injury. Verdict and judgment were for plaintiff in the sum of \$3,000, and defendant appealed.

Defendant is engaged in the telephone business in Kansas City, and at the time of the injury, June 1, 1905, maintained a "pole yard," where it prepared poles for installation in its telephone lines. A gang of laborers, among them plaintiff, was employed in this work. Poles received in the yard were piled horizontally and afterwards were dressed near the pile in which they had been placed. First, a workman called a "knotter" would roll one from the pile, using a canthook for that purpose, and would chop off the knots with an axe. Then the pole would be laid on trestles where other workmen, called "shavers" would strip off the bark and make the pole smooth. Plaintiff was employed in the latter capacity, and was at work near a lot of long, heavy poles which had been laid against a fence in a pile 10 or 12 feet high and 15 or 16 feet deep at its base line. His position (directed by the foreman) placed him with his back towards the pile and where he might be struck by the rolling of a pole pulled down therefrom. To guard against injury from such cause to the men shaving the poles, it was made the duty of the "knotter" to call out a warning before he started to bring down a pole in order that they might leave their positions for places of safety. The evidence of plaintiff tends to show that he was injured by being struck on the leg by a rolling pole which the "knotter" negligently started without giving any warning. It is alleged in the petition that the "knotter" was a "careless, negligent, reckless, and grossly incompetent man," that his habitual carelessness and incompetency had been known to defendant; that on a number of prior occasions he had rolled down poles without warning the men, and thereby had threatened them with great injury; that the men had complained repeatedly to de-

defendant of his carelessness, but that "defendant negligently kept the said Charles Tyner in its employ and engaged in the above-described work after it knew, or by the exercise of ordinary care should have known, that he was careless, negligent, reckless, and grossly incompetent, and of the careless and negligent manner in which he performed his duties in and about said work; and that he was not a safe and suitable person to work in said position, and that he was liable to injure some of his fellow workmen by the careless and negligent manner in which he handled said poles." Further, it is alleged "that, while plaintiff and his companions were engaged in said work at said place at the foot of said pile of poles, said Charles Tyner carelessly, negligently, and recklessly rolled a pole from the top of said pile without first giving any warning to the men below, including the plaintiff; that said pole struck plaintiff, and plaintiff's right leg was thereby broken and dislocated, * * * that the defendant carelessly and negligently failed to furnish plaintiff and his companions a reasonably safe place in which to work; that the place furnished plaintiff and his companions in which to work was dangerous and unsafe in this, to wit, it was so close to said pile of poles that persons working at said place were in constant danger of being struck by said poles rolling from the top of said pile, * * * that he has been damaged by the wrongful acts of the defendant aforesaid in the sum of ten thousand dollars," etc.

Several members of the gang of workmen who were introduced as witnesses by plaintiff testified to prior negligent acts of a similar nature committed by the "knotter," and further testified that complaints of his carelessness were made at different times by the men to the foreman who reproved the delinquent and threatened to discharge him. But the greatest effort of plaintiff was directed to showing (over the objections of defendant) that the "knotter" was incompetent because he was subject to fits. The principal grounds of the objections were that no such issue was presented by the pleadings, and that as the injurious act was not committed while the "knotter" was in the throes of an attack, the disease could bear no causal relation to the injury. At the threshold of the investigation of the subject, counsel for plaintiff was asked, "Do you expect to show that Tyner had a fit at the time of this alleged injury to the plaintiff?" To which he replied, "No, sir; we expect to show that on a great many occasions he had fits there in the yards; that he would be engaged in one kind of work and would suddenly go to some other work; that the foreman would go after him and bring him back and talk to him, and see that he started to work again; that he would be digging holes, and he would see a pole gang, a gang of street people shoveling out in the road, that he had no connection with, and he would break away and go down there and

join them; that the foreman would go and get him and bring him back with his eyes rolling; we expect to show that in order to show that he was a man who should not have been put in this position." The objections were overruled, and the evidence admitted. It is to the effect that Tyner, the knotter, was an epileptic and at various times before the injury to plaintiff had been the victim of nervous explosions, some in the form of fits, or convulsions, others in the form of a temporary mental aberration. No expert evidence was offered to show that the disease when not visibly manifest will impair the physical or intellectual vigor of the subject, but facts were adduced from which a reasonable inference might be drawn that Tyner, though strong physically, was weakened mentally. Without going into details, it appears that he acted queerly at times, at other times was absent-minded, and that generally he worked with feverish energy, "like a man fighting fire," as one witness aptly expressed it.

All the facts brought out by plaintiff in support of his contention that Tyner was unfitted to the employment and that defendant continued him in its service after receiving knowledge of his unfitness are denied by the witnesses introduced by defendant, who depict him as industrious, efficient, and careful, and who say that he gave the usual warning when he began to move the pole, and that plaintiff had ample time to leave his position for one of safety had he given proper heed to the warning. The defenses interposed in the answer are a general denial and pleas of contributory negligence and assumed risk. At the close of plaintiff's evidence, and again at the conclusion of all the evidence, defendant requested the court to give an instruction peremptorily directing a verdict in its favor, but these requests were refused and the case was sent to the jury.

One of the propositions urged by defendant for a reversal of the judgment is that the cause of action stated in the petition is fatally defective "because there is no allegation in the petition to show directly or by inference that the alleged negligence of appellant in employing an incompetent servant or the alleged act of that servant caused the injury complained of." In the consideration of the questions involved in this proposition, we shall consider also those relating to the contention that the court erred in permitting plaintiff to put in issue the fact that Tyner was afflicted with epilepsy, since it does not appear, so defendant argues, that there was any causal connection between that fact and the injury, nor that its existence bore any relation to the specific negligence alleged in the petition. In our examination of the question of the sufficiency of the petition to state a cause of action, the principal rule of construction by which we are to be guided is that the averments of the pleading must be liberally interpreted

in aid of the cause alleged. This rule obtains in all cases where the defendant suffers the petition to pass unchallenged by demurrer and answers to the merits. By such conduct, he declares, in effect, that the cause of action is pleaded sufficiently, and thereby waives all objections except the one that the petition omits to state either directly or by reasonable intendment one or more facts elemental to the cause. We find in the petition the allegations that Tyner was habitually careless and reckless and was grossly incompetent; that his unfitness for the position was known to defendant, but nevertheless his employment in that position was continued; that he negligently and carelessly rolled the pole which struck and injured plaintiff, and that the injury was the result "of the wrongful acts of defendant aforesaid." Obviously, the expression just quoted refers to the act of continuing to employ a servant known to be incompetent, as well as to that of being negligent in the performance of the duty to exercise reasonable care to furnish plaintiff a reasonably safe place in which to work, the breach of that duty being averred in the preceding paragraph of the petition. Reasonably interpreted, the allegations to which we have referred should be held to contain the assertion of a right to a recovery, the real foundation of which was the negligence of defendant in requiring plaintiff to work with an incompetent fellow servant.

Facts constitutive of a cause of action of this character are these: First, that the servant whose negligence caused the injury was incompetent; second, that the injury was caused by the servant's incompetency; third, that the fact of incompetency was known, or by the exercise of reasonable care should have been known to the master; and, fourth, that the master, after actual or constructive acquisition of such knowledge, negligently retained the servant. All of these facts are indispensable, and a failure to plead and prove any of them is fatal to the maintenance of the action. It is not enough for the servant to show that he was injured by the negligence of his fellow servant. The master is not liable for such negligence, nor does the fact that the fellow servant was negligent in one instance even tend to prove his incompetency. Competent men may be, and too often are, negligent on some occasions. To permit incompetency to be proved by the injurious act of which complaint is made would be to abrogate the fellow servant doctrine, and, in effect, to raise the fellow servant to the relationship of a vice principal. Incompetency is a state or condition, the existence of which must be shown by other facts and circumstances. A person may be said to be incompetent when he is incapacitated either by physical or intellectual deficiencies from properly performing the duties of his position. He may lack the requisite physical strength, endurance, or handiness. Pos-

sessing these, he may want in knowledge or skill. Or, thoroughly equipped with strength, knowledge, and skill, his mental make-up or fixed habits may disqualify him from conforming to the standard of conduct imposed by the rules of law, because of a predisposition to carelessness, thoughtlessness, or indifference to the rights and safety of others. It is true there is a wide difference between negligence and incompetency. As we observed, a competent man may be negligent on a given occasion, but equally is it true that incompetency may consist solely of habitual negligence. A locomotive engineer who repeatedly runs past signals without heeding them is incompetent to run an engine, no matter how skillful or intelligent he may be, and so a "knotter" who repeatedly and despite the admonitions of his foreman rolls down telephone poles without giving warning to those who stand in danger from them is incompetent to discharge his duties properly, for the simple reason that his habitual negligence betrays a mental condition which incapacitates him from measuring up to the standard of reasonable care.

The authorities are not entirely harmonious on the subject of what will constitute competent evidence of habitual carelessness. In some jurisdictions, it has been held that evidence of prior specific acts of negligence cannot be introduced to show the incompetency of the fellow servant, for the reason that such evidence would present a multiplicity of issues that could not properly be tried together; but the better rule, and the one sustained by the weight of reason and authority, recognizes the competency of such evidence. 12 A. & E. Encyc. of Law (2d Ed.) 1024; *Railway Co. v. Brow*, 65 Fed. 941, 13 C. C. A. 222; *Baulec v. Railway*, 59 N. Y. 356, 17 Am. Rep. 325; *Davis v. Railway*, 20 Mich. 124, 4 Am. Rep. 364; *O'Hare v. Railway*, 95 Mo. 612, 9 S. W. 23. A series of acts of a given character extending over a period of time tend to exhibit and bring to light the peculiar qualities and traits of the man, and indicate his adaptation or want of adaptation to the requirements of his position. They have a pronounced evidentiary value, and should not be rejected out of any fanciful fear of unduly multiplying the issues. Again, incompetency may be proved by evidence tending to show that the fellow servant labored under some physical or mental infirmity that made him unfit for his position. An armless man would not be thought competent to serve as the engineer of a railroad engine, nor would one afflicted by attacks of temporary insanity. Cases are plentiful where it has been held that a defect of mind or character to support a cause of action based on incompetency must be shown to have been the proximate cause of the injury, but we know of no authority which goes to the length of holding that, where the defect is of such a nature that in all reason it should be said to have a con-

tinuous and lasting effect on the capacity of the fellow servant to fill his position properly, its existence may not be proved. If Tyner's capacity to conduct himself in the manner of a reasonably careful and prudent person was affected continuously and seriously by the dreadful disease which held him in its remorseless grip so that he became habitually careless or indifferent to the proper performance of his duties, he was incompetent, and there was a direct causal connection between the disease and the negligent act which resulted in the injury to plaintiff.

We concede defendant is right in saying that neither an insane person nor an epileptic suffering from an attack of his malady can be negligent, but a person belonging to the latter class of unfortunates may be so shattered in mind that, even in periods of freedom from attack, he is incapable of being reasonably careful and prudent and, consequently, is habitually careless and negligent in the sense that he cannot bring his conduct to the standard expected of an ordinarily careful and prudent person in his situation. But defendant argues further that a person may be subject to epileptic fits and still retain his full intellectual vigor. Historical examples are cited, the most notable being that of Julius Caesar, who is said to have been seized by epileptic convulsions in Africa in his campaign against King Juba, in Spain, just before he defeated the army of young Pompeius and again, shortly before his death, when Antony offered him the crown. On the other hand, the Spartans would not suffer epileptics to live, believing them unfitted for the duties of citizenship. Such historical incidents deserve but little consideration as we have no means of testing their accuracy. We may assume that epilepsy does not impair the mental faculties in all cases, but it is a matter of common knowledge that it is an intense nervous disorder, and that one of its common results is the ultimate impairment of intellectual strength. Such knowledge, coupled with the specific facts adduced by plaintiff which go to show that Tyner, in truth, was partially demented from the ravages of the disease, was sufficient to make the evidence competent, and to take to the jury the issue of whether he was an incompetent servant.

Our conclusion is that the petition sufficiently states a cause of action, and that the facts relating to the existence of epilepsy and its effects had a direct evidentiary bearing on the issues tendered. And as it further appears from the evidence that defendant knew of the incompetency of Tyner, and retained him in its employment with knowledge that he was habitually careless, and that plaintiff, because of short acquaintance with his fellow servant, did not know of his peculiarities, all of the constitutive facts of a good cause of action were supported by evidence as well as pleaded in the petition.

It follows that no error was committed in overruling the demurrer to the evidence.

Other points are made by defendant, but what we have said disposes of the real controversy between the parties. A careful inspection of the record convinces us that the case was tried and submitted without substantial error. Claim of excessive verdict is advanced, but in the amount awarded, we find no indication of passion or prejudice on the part of the jury, and therefore have no occasion to interfere with the judgment on that score.

The judgment is affirmed. All concur.

ROSS v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. STREET RAILROADS—COLLISION WITH VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a street railway company for injuries sustained by the driver of a team in a collision with a street car, the evidence of plaintiff, to which defendant demurred, showed that plaintiff, while driving along the street car tracks, on observing the approach of a car, attempted to leave the track, but became hemmed in by other vehicles and was unable to do so, and that the motorman saw, or by reasonable care should have seen, the situation of plaintiff, but failed to stop the car or make any effort to avoid the collision until too late. *Held*, that the demurrer to the evidence was rightfully overruled, since the facts shown by plaintiff established defendant's negligence, without contributory negligence of plaintiff, as matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 190-194.]

2. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DUTY.

In an action for injuries to a driver of a team, sustained in a collision with a street car, an instruction that, although plaintiff was himself guilty of negligence in driving along or across the track of defendant at the time and place of the collision, that alone will not discharge the company or its employees from the observance of reasonable care in the management of its cars, is erroneous, as ignoring the defense of contributory negligence, and in not restricting the application of the principle stated therein to the doctrine of humanitarian duty.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE.

It is the fact that a person is in danger and has perhaps been negligent that calls the humanitarian doctrine into play.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115; vol. 44, Street Railroads, § 219.]

4. SAME—"HUMANITARIAN DOCTRINE."

The foundation of the humanitarian doctrine is the principle that no person has the right knowingly or negligently to injure another, when he knows, or should know if he is reasonably careful, that his fellow is in danger of injury at his hands, and he possesses the means of removing that danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115; vol. 44, Street Railroads, § 219.]

5. TRIAL—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Where the instructions of the successful party state an erroneous rule and those of the

defeated party state the rule correctly, the latter should not be considered as curative of the former, since the only presumption permissible in such cases is that, as the instructions are conflicting, the jury discarded the true for the false.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705-718.]

Appeal from Circuit Court, Jackson County; Henry L. McCune, Judge.

Action by John Ross against the Metropolitan Street Railway Company for injuries sustained in a collision with a street car. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas, F. G. Johnson, and C. O. Madison, for appellant. F. J. Chase and George H. Smith, for respondent.

JOHNSON, J. Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Verdict and judgment were for plaintiff in the sum of \$870. The injury occurred on the morning of September 29, 1903, on Main street, in Kansas City, at a point just north of the north line of Missouri avenue, a cross-street. As a part of its street railway system in Kansas City, defendant operates a single-track line on Main street over which it runs only north-bound cars. Plaintiff was driving a wagon loaded with two tons of coal, and was accompanied by a man to help in unloading. He drove south on Main street, and, as he approached Missouri avenue, his team and wagon were over the west rail of defendant's track. He and his witnesses state that he was compelled to drive along the track by the presence on the street of a large number of other vehicles. Observing a street car coming from the south, he attempted to go over to the west of the track, but was prevented from so doing by the fact that he was hemmed in by other vehicles, and, besides, his team could not be made to move with celerity on account of the heavy load. Plaintiff testified: "Well, I pulled over as near to my side as I could get, and commenced driving, looking for an opening, and, as the car neared me, I seen about a 10 or 12 foot space in front of me, and so I made for that, and commenced whipping the horses and made for that, and beckoned for him [the motorman] to check up because I seen I could not get out of his way unless I did make it with that opening, and I kept whipping up and he kept coming on, so I run my horses in behind that other team there, and that was as far as I could get and I hollered at him as he came closer and he just kept on coming. * * * When he got close enough I says: 'Why don't you stop that car? Don't you see I can't get out of the way?' And he just kept coming. * * * Q. What happened then? A. Why, when he hit the wagon, it knocked me off." The car ran at a speed of three and a half to four miles per hour on a slightly descending grade, and no effort was made by the motor-

man to check speed until about the time of the collision. The facts just stated are taken from the evidence most favorable to plaintiff. On behalf of defendant, the evidence discloses a different state of facts. Witnesses say plaintiff was driving on the east side of the track, that the street was not crowded, and that plaintiff suddenly, and without compulsion, turned his team to the west, attempted to cross in front of the car when it was so close that a collision could not be avoided, and that the motorman, as soon as he discovered the purpose of plaintiff to cross over, made every effort to stop the car and did succeed in greatly reducing its speed.

It is alleged in the petition that the injury was "directly caused by the carelessness and negligence of defendant, its agents, servants, and employees, in this, to wit: that the servants and agents of defendant in charge of said car carelessly, negligently, and unskillfully managed, controlled, and operated said car and caused it to collide with plaintiff's wagon. (2) That the motorman in charge of said car saw, or by the exercise of ordinary care could have seen, plaintiff in a position of peril on said track, and could by the exercise of ordinary care have stopped or slackened the speed of said car in time to have avoided injuring plaintiff, but negligently failed to do so. (8) That the defendant carelessly and negligently operated said car at the time and place of the accident and collision at a high and dangerous rate of speed." The answer contains a general denial and a plea of contributory negligence. Demurrers to the evidence offered by defendant were overruled, and, at the request of plaintiff, the jury were instructed, in part, as follows:

"The jury are instructed that if you believe from the evidence that on or about the 29th day of September, 1903, at about 8:15 a. m., the plaintiff was driving a coal wagon in a southerly direction on Main street, between Missouri avenue and Fifth street, in Kansas City, Mo., and that while so driving the defendant's servants and agents in charge of a north-bound car on said Main street caused and suffered said car to collide with plaintiff's said wagon, thereby throwing plaintiff to the ground, and injuring him; and if you further find from the evidence that the motorman in charge of said car, as it approached said wagon, saw, or by the exercise of ordinary care could have seen, said plaintiff on said wagon, on or near defendant's tracks, and in danger of being injured by said car, and thereafter by using reasonable care to stop said car or slacken its speed, with the means and appliances at hand, and with safety to the passengers, could have prevented said collision and negligently failed to do so—then your verdict should be for the plaintiff."

"The jury are instructed on behalf of plaintiff that neither the defendant nor plaintiff had the exclusive right to use the street, where the accident occurred, and that it was the duty of the motorman in charge of de-

defendant's car to manage it with reasonable care to avoid injuring persons driving along, and upon the street and tracks, and by reasonable care is meant such care as an ordinarily prudent person would use under the same or similar circumstances."

"The jury are instructed that, although you may believe from the evidence that plaintiff was himself guilty of negligence in driving along or across the track of defendant at the time and place of the collision mentioned in evidence, that alone will not discharge the company or its employees from the observance of reasonable care in the management of its cars."

Defendant argues that its request for a peremptory instruction should have been granted, for the reasons, first, "that there was an entire failure of proof of negligence on the part of the motorman as alleged in the petition"; and, second, that "the plaintiff was guilty of continuing negligence concurring with any supposed negligence on the part of defendant."

From the standpoint of facts presented by the evidence of plaintiff, which we must adopt in the consideration of the questions of law arising from the demurrer to the evidence, we think the negligence of the motorman is apparent. He saw, or, had he been exercising reasonable care, should have seen, the team and wagon on the track. The efforts of plaintiff to drive off, and the obstacles in the way in time to have averted the injury by stopping the car. But he made no effort to stop, and ran recklessly into the collision. The course of street cars being confined to the tracks on which they run requires drivers of other vehicles, when meeting a car, to leave the track to permit the car to pass, and motormen are justified (nothing to the contrary appearing) in assuming that reasonable attention will be given to the performance of such duty. But, when it is obvious that a driver is prevented by his surroundings from leaving the track or even is unreasonably dilatory in doing so, it becomes the duty of the motorman to employ all reasonable means to avoid a collision. The principles and dictates of humanity call for nothing less from the operators of such powerful and dangerous instrumentalities as the modern street car. The facts before us are different in essential particulars from those considered in *Bennett v. Railway*, 122 Mo. App. 703, 99 S. W. 480. There we held that, when there was nothing in the appearance of the plaintiff to indicate to a reasonably observant person that he was in peril on account of his inattention to his own safety, the motorman was justified in assuming that he was giving proper heed, and would get out of the way in time. Here appearances combined to warn a reasonably careful and prudent person in the position of the motorman that plaintiff was in a pocket from which he could not escape in time to avoid a collision. Possessed of actual or constructive knowledge of this

situation and having time, space, and means to stop the car, the motorman in failing to make reasonable use of his opportunity was guilty of a negligent violation of humanitarian duty.

And, from the viewpoint we are occupying for the purposes of the demurrer, it likewise is apparent that plaintiff should not be denied recompense for his damage on the ground that he was negligent in law. Either from necessity or choice, he had the right to drive along that part of the street occupied by defendant's track until a car appeared. The streets of a city are for the use of all sorts and classes of people, and no individual or corporation may possess any superior right of way over that which others may exercise. *Cole v. Railway*, 121 Mo. App. 605, 97 S. W. 555. The obligation imposed on plaintiff to leave the track in order that the car might pass did not arise from any superior right of defendant to that part of the street, but sprung from necessity. As we observed before, the course of a street car is restricted to its tracks, while the whole roadway is open to the use of wagons. Certainly in meeting wagons must leave the track; otherwise, they would entirely block the way of cars, and thus themselves assert a paramount right to the use of that part of the street covered by the railway. In being where he had the right to be, plaintiff was not negligent, and, as his evidence shows that immediately on the appearance of the car he did all he could to avoid obstructing its passage, we fail to perceive any reason for pronouncing him negligent in law. The learned trial judge was right in overruling the demurrer to the evidence.

But prejudicial error was committed in the giving of plaintiff's third instruction. In effect, the jury were told that negligence of plaintiff would not bar his right to recover if the jury found that defendant had been negligent. This is not the law. If the perilous position of plaintiff resulted in part from his own negligence and in part from the negligence of defendant, the latter negligence would give him no cause of action. This rule is too well settled to require the citation of authorities. It is only where we find that the operator of a car negligently has failed to obey his humanitarian duty that we eliminate from consideration the negligence of the plaintiff that aided in placing him in the position of danger, and hold that the negligent failure to stop the car after its operator knew or should have known of the presence of the danger "engrosses the entire field of culpability and eliminates contributory negligence as a factor in the production of the injury." *Cole v. Railway*, supra. The instruction under consideration practically ignores in toto the defense of contributory negligence. Thus instructed, the jury, under the pleadings and evidence in the record before us, well might have found as a fact that the motorman was not guilty of any breach of duty to plaintiff, after he knew, or in the

exercise of reasonable care should have known, of the existence of danger, but had been negligent in a way to aid in the production of the danger. The vice of the instruction lies in the omission to restrict the application of the principle stated therein to what we may call humanitarian negligence. So restricted, we think the instruction would have declared a sound rule of law, since logically it would be absurd to say that the consequence to defendant of the negligent failure of the motorman to stop the car after he knew of the presence of the danger should be removed or softened by the fact that plaintiff had been "guilty of continuing negligence concurring with . . . negligence on the part of the defendant." It is the very fact that the person in danger has been and perhaps is negligent that calls the rule of the humanitarian doctrine into play. The foundation of that doctrine is the principle that no person has the right, knowingly or negligently, to injure another, when he knows, or should know if he is reasonably careful, that his fellow is in danger of injury at his hands and he possesses the means of removing that danger. Counsel for plaintiff argue that instructions given at the request of plaintiff, read as a whole, properly restrict the scope of the instruction under consideration, but we do not think so. Further, they say that defendant's instructions declare the correct rule, and thereby cure the error. Where the instructions of the successful party state an erroneous rule and those of the defeated party state the rule correctly, the latter should not be considered as curative of the former. The only presumption permissible in such cases is that, as the instructions are conflicting, the jury discarded the true for the false.

It follows that the judgment must be reversed, and the cause remanded. All concur.

GERHART v METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied July
15, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

An answer in an action against a carrier by a passenger to recover for injuries was treated by the trial court and both parties as pleading contributory negligence, and several instructions bearing on that issue were given on request of defendant. *Held*, that it was not error to instruct that contributory negligence is an affirmative defense to be proven by defendant unless it appears in other evidence, and that, if such defense is not established, the finding should not for that reason be for plaintiff, but it should be that there was no contributory negligence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1326-1337.]

2. DAMAGES—INSTRUCTIONS—CONFORMITY TO PLEADINGS AND EVIDENCE—PARTS INJURED.

In an action by a passenger against a carrier for personal injuries, evidence as to injury to a "thumb" and to a rupture justifies instructions submitting an injury to the "hand" and

to the abdomen, although plaintiff treated injury to the thumb and hand as distinct, and similarly treated injuries to the rupture and abdomen, especially where there was affirmative evidence of injury to both thumb and abdomen.

3. APPEAL AND ERROR—REVIEW—VERDICTS—APPROVAL OF TRIAL COURT.

Where the trial court approves the amount of a verdict, the appellate court will not disturb it if not grossly disproportionate to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Joseph Gerhart against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas and Ben T. Hardin, for appellant. Fred Griffith and Reed, Yates, Mastin & Harvey, for respondent.

ELLISON, J. Plaintiff's action is for personal injury received while in the act of alighting from one of defendant's street cars upon which he was a passenger. He recovered judgment in the trial court. The petition charged that defendant negligently started the car while plaintiff was in the act of alighting; that he was jerked or thrown to the ground on his feet; that in being thus thrown he grabbed hold of the hand rail of the car and fell against the edge of the platform of the car; that, while in this position, defendant's servants carelessly ran the car forward, dragging the plaintiff, he holding onto the railing, until after traversing a little distance his hold loosened and he fell to the street. The answer was a general denial and a plea of contributory negligence. The trial court gave an instruction (No. 3) on contributory negligence, wherein such negligence was asserted to be an affirmative defense to be proven by the defendant, unless it appeared in other evidence in the case, and the jury were told that, unless the defendant had established such defense, the finding would be, not to find for plaintiff, but that there was no contributory negligence in the case. In order to convict the trial court of error in that instruction defendant assumes a position here entirely opposed to that taken at the trial. It now asserts that the foregoing answer was not a plea of contributory negligence, and seeks to have us believe that there is no such theory in the case. Authorities are cited on a question now made by defendant not thought of nor presented in the trial. The answer was treated by the court and by both plaintiff and defendant as pleading contributory negligence. Several instructions submitting issues on that head were asked by defendant and given by the court. It was proper to give the instruction. *Underwood v. Railway Co.*, 125 Mo. App. 490, 102 S. W. 1045. We have gone over the argument of defendant in support of the idea that the instruction is erroneous,

and it has failed to impress us as sound as applied to the record.

Defendant contends that error was committed in submitting to the jury by instructions injury to plaintiff's hand when, as it asserts, there was no evidence of injury to that member. There was abundance of evidence of injury to the thumb, but defendant insists that does not justify an instruction submitting an injury to the hand. At our last sitting we had to decide whether an insurance policy to indemnify one against loss by reason of injury to the leg covered an injury to the heel, and held that it did. *Rodgers v. Modern Woodmen of America*, 111 S. W. 518. And now we are to say what, if any, difference is there between an injury to the hand and to the thumb. An injury to the thumb is an injury to the hand, for the thumb is but a part of the hand. Lexicographers say that the hand is composed, in part, of the fingers. "It consists of the metacarpus or palm and the digits or fingers, and may include the carpus or wrist." So we feel confident that no harm could have resulted to defendant in submitting an injury to the hand, even though the language of the evidence was "thumb." A somewhat similar objection is made concerning the abdomen. There was abundance of evidence to show an injury which greatly aggravated and enlarged a rupture. It was stated in testimony that it was formerly but slight and not noticeable, but the injury had swollen it. This rupture was down at the lower part of the abdomen, and its enlarged condition was shown to the jury by the plaintiff standing and sitting before them. So in showing the aggravated rupture the bruised and swollen abdomen was necessarily shown. An enlarged rupture, as this was shown to be, necessarily disfigured, injured, and swelled the abdomen. The protrusion and soreness were in the abdomen. It would be getting beyond things reasonable to say the jury could have been confused or misled, or that any injury could have resulted to defendant by the instruction.

We have not overlooked defendant's suggestions that plaintiff has himself separated and made distinct an injury to the hand and an injury to the thumb, and an injury to the abdomen and an injury by the rupture. Those suggestions could find proper and effective place in many cases. But, where two results happen from one injury, and in showing one result you are necessarily compelled to show the other—in other words, when one result shows the other—it can make no difference that only one result is spoken of by name in the evidence. So, if proof of a rupture proves also a tender, a lacerated, or a swollen and sore abdomen, it can make no practical difference that rupture is the only thing mentioned. But, aside from the foregoing, there was affirmative evidence of "tenderness and soreness around the abdominal opening." As, also, of the injury to the

hand, the plaintiff testified that "I couldn't use this hand for a long time. It is stiff yet."

In view of the fact that the trial court has approved of the amount of the verdict, we are not prepared to say the verdict was excessive. It is not so disproportionate to the injury as to justify us in disturbing it.

The judgment will be affirmed. All concur.

PEAKE v. WEBB.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied July
15, 1908.)

1. SUBMISSION OF CONTROVERSY — "AGREED CASE."

An "agreed case" stands for a petition, answer, all the evidence, and a verdict returned to the court.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, p. 281.]

2. SAME — SETTING ASIDE—MUTUAL MISTAKE — POWER OF COURT.

While a court has no power to amend an agreed case, under Rev. St. 1899, § 793 (Ann. St. 1906, p. 757), authorizing submission on an agreed case, yet an agreed submission may be set aside in equity when there has been a mutual mistake, and where, in a submission of a controversy, there was a mutual mistake as to the ownership of certain land involved, the court had power to set aside the submission.

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Suit by George Peake, receiver, against E. T. Webb. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. Currey and R. W. Coleman, for appellant. O. W. Pratt and I. N. Watson, for respondent.

BROADDUS, P. J. This is a suit in equity to set aside an agreed case as provided by section 793, Rev. St. 1899 (Ann. St. 1906, p. 757). The plaintiff is the receiver of the assets of the Siegel-Sanders Live Stock Commission Company with authority as such to sue and be sued.

The agreed case was as follows: "First. It was agreed that on May 7, 1901, W. B. Grimes, Jr., entered into a contract in writing wherein he recites that he held the title in his own name for Frank Siegel, who was indebted to the Siegel-Sanders Live Stock Commission Company, to about 1,600 acres of land situated in Clark county, Kan.; that the said Frank Siegel had requested him to deed the same to R. D. Swain, trustee for said company, in consideration of the sum of \$5,000, to be credited on his indebtedness to said company. In said writing the said Grimes agrees to convey to the said Swain all of said lands as soon as a full description of them can be obtained, and that until he does so the writing shall operate as such conveyance. Second. That on the 21st day of May, 1901, the said Grimes conveyed by quitclaim deed a large quantity of land situated in said

county of Clark, to the said Swain, trustee of said company. Third. That on the 20th day of May, 1901, E. T. Webb, the defendant herein, began a suit by attachment in the district court of Kansas sitting in said Clark county against Frank Siegel, which resulted in judgment in his favor, and that in pursuance of an order made in the case a sale of said land was had, and defendant became the purchaser for the sum of \$1,855, which was credited on his judgment, and that he was then entitled to a deed from the sheriff who made the sale. Fourth. That at the time said suit was filed on the 7th day of May, 1901, defendant, Webb, was a creditor of said Siegel to the amount of \$250,000, which debt said suit was brought to collect. Fifth. That at the time of the execution of said contract, said Siegel was indebted to said company in the sum of \$5,000, and was still so indebted at the date of said contract over and above the consideration named therein of more than \$5,000. Sixth. That neither said Siegel nor said Grimes were in possession of said land when defendant's attachment was levied thereon, and that the legal title to said land never was in said Siegel, but stood in the name of said W. B. Grimes, Jr. Seventh. That defendant, at the time he began the attachment suit, and caused said lands to be levied on, at the time he purchased the lands at the sheriff's sale, and at the time he was entitled to a deed under said purchase, had no actual knowledge of said contract of May 9, 1901, and had no knowledge of said quitclaim deed, except that imparted by the record, and that the sheriff's deed was not actually made because of the stipulations mentioned in clause 10 of this agreement. Eighth. That at the time of the execution and delivery of said deed in trust neither the said Siegel-Sanders Company, the said George Peake receiver, nor R. D. Swain, had any knowledge of the attachment proceedings or levy of said attachment on the land, except such constructive notice as was imparted by the record. Ninth. That the said Frank Siegel owned the title to the land described in the said deed at the time of the execution of said contract dated May 7, 1901, and W. B. Grimes at no time had any interest therein, and that said Siegel purchased said land, and the vendors thereof deeded the same to W. B. Grimes, and said Siegel requested said Grimes to deed said land to said Swain, as set out in said instrument. Tenth. That after the levy of said attachment, and after the execution, delivery, and recording of the deed in trust, the plaintiff receiver, as aforesaid, E. T. Webb, and one James H. Thompson entered into an agreement that said Thompson should take possession of the land, that he should deposit in the American National Bank of Kansas City, Mo., the sum of \$1,855, as the value of the land, that defendant should prosecute his aforesaid attachment suit to a final determination, should purchase the land at sheriff's sale thereof, and there-

after quitclaim by deed the same to said Thompson, and that plaintiff receiver should also quitclaim by deed to said Thompson, and that the \$1,855 should stand in lieu of the land, that plaintiff and defendant should submit the question of who had the better title to the land to some court having jurisdiction, and, if said money should be awarded to said plaintiff as receiver, he would under proper order deed said land to said Thompson. Other clauses in the agreed statement are not necessary to be stated for an understanding of the case and are for that reason omitted."

The principal ground relied on for relief, as stated in the petition, is as follows: "That by reason of the making, execution, and acknowledgment and delivery of said deed of conveyance from said Siegel to Swain, trustee, it is not true, as stated in the ninth paragraph of said agreed case for submission of controversy, that the said Frank Siegel owned the title to the land mentioned and described in said agreed case on May 7, 1901, and that the same was not true at the time said agreed case or submission of controversy was entered into, and that the statement that the said Siegel owned said title on May 7, 1901, as aforesaid, was made inadvertently and by mistake, and by reason of the ignorance of both of the parties hereto of the real facts in that respect; that said mistake, inadvertence, and ignorance of the actual facts, as aforesaid, was not due to any carelessness, laches, neglect, or want of care on the part of plaintiff in regard to ascertaining the facts in respect to the title to the land in controversy, and mentioned and described in said agreed case of submission of controversy; that said mistake and inadvertence was wholly due to excusable ignorance of the plaintiff, receiver, as aforesaid." The error mentioned was, soon after the agreement was made, discovered, and plaintiff filed his motion to set the statement aside for the reason stated in his petition, which the court overruled, holding that his remedy was by petition in equity. That thereupon plaintiff brought a suit in equity in the circuit court of Jasper county to have the submission set aside, to which defendant demurred, which was sustained on the ground that the court had no jurisdiction of the cause. Then the suit was brought to Jackson county. The cause was tried, and the court found in favor of the plaintiff and set aside the submission. The defendant appealed.

There was no dispute about the facts in regard to the alleged mistake, and the only question before us is: Was the court authorized upon the allegations of the petition to render the judgment; the same having been sustained by the testimony?

The defendant bases his case upon the theory that an agreed case stands for a petition, answer, all the evidence, and a verdict returned to the court. His theory in that respect is undoubtedly correct. "An agreed case occupies the footing of a special ver-

dict." *Rannells v. Isgrigg*, 99 Mo. 19, 12 S. W. 343; *Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864. His theory also, that, a court has no power to amend an agreed case under the statute, cannot be successfully contradicted; but as to whether one can be set aside in a court of equity upon a proper showing is another and different question. It must be admitted at the beginning of the discussion that a court of equity has the power to set aside contracts, deeds, and even judgments which have been procured either through fraud or mistake. This we presume will not be denied, and we cannot perceive that an agreed submission under the statute has any peculiar characteristic that would render it less subject to be inquired into for fraud or mistake than any other contract of a solemn nature. *State ex rel. Webb v. McCune* (Mo. App.) 107 S. W. 1030. In Massachusetts, it was held that if it appeared "to the satisfaction of the court that, by mistake of parties or a misunderstanding of the inferior court, a question of fact which was essential to the determination of the rights of the parties has not been tried, it is within the power and discretion of that court to suspend the entry of a final judgment and set aside a verdict or discharge a statement of facts in order to afford an opportunity of presenting that question to the court and jury." *West v. Platt*, 124 Mass. 353. In *Levy v. Sheehan*, 3 Wash. 420, 28 Pac. 748, it is held that: "Where the agreed statement was made by the parties under a mistake, it was a proper subject for amendment." While these decisions are not made relative to statutory agreed statements, they show that such statements in general are subject to attack for mistake of parties on questions of fact. Where there is no negligence, and a party is prevented from presenting his case properly on account of a mistake of fact, equity will interfere and afford him relief. *Pomeroy's Equity*, vol. 6, § 659. That a court of equity has the power in all cases to afford relief where there has been a mutual mistake of parties to an agreement we think cannot, in this late day, be successfully questioned. The history of the law shows that such power is exercised by the courts in every state and also by the federal courts, in a variety of instances, and this history is familiar to every judge and lawyer in the land. We believe that the court rightfully exercised its power in setting aside the agreed submission.

Cause affirmed. All concur.

MANGELSDORF BROS. CO. v. HARNDEN SEED CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied July
15, 1908.)

1. ACCOUNT, ACTION ON—PETITION—DEFECTS—AMENDMENTS.

The defect, in a petition in an action on an account for goods sold and delivered arising from the failure to plead an itemized state-

ment of the account or to refer in the petition to a statement of account attached thereto, is not fatal, but may be cured by an amendment of the petition or by the filing of an itemized account, though under Rev. St. 1899, § 630 (Ann. St. 1908, p. 653), the omission precludes the giving of evidence of the account.

2. CONTINUANCE—SURPRISE AT AMENDMENTS TO PLEADINGS—HEARING OF APPLICATION.

The court may, on application of defendant for a continuance after the allowance of an amendment to the petition, call on defendant to show that he is not prepared to meet issues tendered by the amendment, which showing may be made either by affidavit or oral testimony.

3. SAME.

Where it appears reasonably probable that a party is not prepared to go on with a trial because of the allowance of an amendment to the pleading of the adverse party tendering new issues, a continuance should be granted; but, where it appears from the pleadings of the party, his application for a continuance, and his oral testimony on the hearing thereon, that he has prepared himself to meet the issues tendered by the amendment, a continuance should not be granted.

4. APPEAL AND ERROR—HARMLESS ERROR—ERRORS IN INSTRUCTIONS.

Where the verdict in an action on an account for goods sold was for the full amount demanded in the petition, notwithstanding the counterclaim demanding damages for a breach of the contract of sale, errors in instructions on the measure of damages for the breach were not grounds for reversal, for error to constitute ground for reversal of a judgment must appear to have prejudiced some right of the party against whom it was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by the Mangelsdorf Bros. Company against the Harnden Seed Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Reed, Yates, Mastin & Harvey, for appellant. Lathrop, Morrow, Fox & Moore, for respondent.

JOHNSON, J. Plaintiff, a corporation, brought suit on an account alleging that defendant was indebted to plaintiff in the sum of \$507.44 for goods, wares, and merchandise sold and delivered, "all of which items of goods, wares, and merchandise and the said credits are shown by the itemized statement of account herewith filed." By an oversight, no itemized statement was filed with the petition, nor was one on file when the trial began. Defendant demurred to the petition on the ground that it failed to state facts constituting a cause of action, and after the overruling of the demurrer filed answer. Later, in an amended answer, defendant alleged: That plaintiff entered into a contract with defendant in October, 1904, by the terms of which plaintiff sold 600 bushels of onion sets to defendant to be delivered on board cars at Atchison, Kan., between the 1st and 15th days of the following February, for which defendant agreed to pay \$1.35 per bushel; that plaintiff delivered 300 bushels of sets of inferior quality on the 9th day of

the following March, and failed to deliver the remainder of the sets at any time; and that the market value of the goods at the time and place of delivery was \$3 per bushel. Damages resulting from the breach of the contract to deliver were laid at \$600, for which sum defendant prayed judgment. Plaintiff replied admitting the contract as stated in the answer, but alleged: That by a subsequent agreement the parties modified the contract by changing the time and manner of delivery; that plaintiff fully performed the terms of the contract as modified and delivered onion sets of the value of \$566.01, and tendered the remainder, but that defendant refused to receive them. Plaintiff admitted, both in the petition and reply, that defendant was entitled to a credit on the account of \$57.47, and judgment was prayed for the amount of the sets actually delivered and retained by defendant, less the credit. Plaintiff, at the trial, amended the petition by leave of court, changing the amount alleged to be due from \$507.44 to \$507.24. Defendant objected to the introduction of any evidence on the ground "that an itemized statement of the account is not set forth in the petition, and no itemized account has been filed with the petition." The objection was sustained, whereupon plaintiff asked and was granted leave to file an itemized account forthwith. Defendant then presented the following verified application for a continuance: "Now comes the defendant and asks the court that this cause be continued until the next term for the reason that plaintiff has been permitted by the court to amend his petition herein filed by the filing of an itemized statement of account, and for the reason that no itemized statement of the account was filed with the original petition in this cause, and for the further reason that the petition in this cause did not contain a statement of the accounts between plaintiff and defendant herein sued on, and for the reason that defendant could not know from the petition filed herein what items of account the suit was brought upon, and for the further reason that the petition is in form a common-law account for merchandise, and goods sold, and does not describe the particular goods, for the price of which this suit was instituted." Plaintiff objected to the granting of a continuance, and the court heard oral evidence on the merits of the application, from which it appeared that the contract alleged in the answer and admitted in the reply was the only unsettled business transaction between the parties. Defendant's president, while on the witness stand, was asked by the court: "Well, if you are given a copy of this account and are not required to close your case until to-morrow, so that you could check it up to-night, wouldn't that enable you to present all the information necessary?" To which he replied: "Well, as far as—now, I am in the hands of my attorneys, I suppose. The Court: No, you

are in the hands of the court. A. Well, as far as I am concerned, yes." The court then said: "I will overrule the application for a continuance, but, further along, if, during the trial of the case, it appears that the defendant has reasonable grounds for renewing the application, I will permit it to do so." Later, in the course of the trial, defendant unsuccessfully renewed the application for a continuance. Nothing occurred to indicate even faintly that defendant had been caught unprepared in any way by being compelled to go into the trial. The jury returned a verdict for plaintiff for the exact amount demanded in the petition as amended, and the cause is here on the appeal of defendant.

We think the court acted properly in permitting plaintiff, over the objection of defendant, to file the itemized statement of the account. The failure either to plead the items of the account in the petition or to refer therein to a statement of account attached to that pleading is made by statute ground for refusing plaintiff the privilege of giving evidence relating to the account (section 630, Rev. St. 1899 [Ann. St. 1906, p. 653]); but it does not constitute a fatal defect, i. e., one that cannot be remedied either by amendment to the petition or the subsequent filing of an itemized statement, but is a defect which may be cured in either of these ways.

It is urged by defendant that the court erred in overruling its application for a continuance, but we do not find any abuse of discretion in what was done. Defendant was not entitled to a continuance from the mere fact that, in effect, a pleading of its adversary had been amended. The court had the right to call on defendant to show that it was not fully prepared to meet issues tendered for the first time by the amended pleadings. Such showing may be made either by affidavit or oral testimony, and, where it appears reasonably probable that the applicant is not prepared to go on with the trial, a continuance should be granted; but where, as here, it appears from the pleadings of defendant, his application for a continuance, and his oral testimony, that he has prepared himself to meet the issues tendered by the amendment, it would be nothing short of farcical to grant him a continuance solely on the ground that the petition had been amended in a material respect.

Complaint is made of the rulings of the trial court on the subject of the measure of damages applicable to the cause of action alleged in the counterclaim of the defendant. The verdict being for the full amount demanded by plaintiff in the petition demonstrates beyond question that the jury found against defendant on the issue of a breach of contract by plaintiff. This being the case, we cannot perceive any reason for believing that defendant might have been prejudiced by the error, if any, which is the subject of present complaint. The jury had to find that

plaintiff had broken the contract before it could consider the subject of awarding damages to defendant, and this it refused to find. Error, to constitute ground for the reversal of a judgment, must appear to have prejudiced some right of the party against whom it was committed. This has been the statutory rule in this state for some time, and we find this occasion to be a proper one for its application.

Other points are made, but we find them to be without merit.

The judgment is affirmed. All concur.

YOUNG v. LANZNAR.

(St. Louis Court of Appeals. Missouri. June 30, 1908.)

1. ATTORNEY AND CLIENT—CONTRACT OF EMPLOYMENT—ABANDONMENT OF SERVICES.

An attorney employed generally to conduct legal proceedings enters into an entire contract to conduct them to their termination, and cannot abandon the services of his client without justifiable cause, and only on reasonable notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 121.]

2. SAME—COMPENSATION FOR SERVICES RENDERED—FORFEITURE.

If an attorney's compensation is stipulated, and he without just cause abandons his client before the proceeding for which he was employed has been conducted to a termination, he forfeits his right to compensation for services rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 304.]

3. SAME—PAYMENT—RIGHT TO ADVANCES.

If the value of services has not been agreed on, and an attorney is merely retained on an implied understanding that he shall receive what they are reasonably and fairly worth, or if it is agreed that he is to have reasonable compensation therefor, to be paid from time to time as requested, it is proper for him to ask from time to time for advances to pay expenses of litigation and apply on account.

4. SAME—WITHDRAWAL OF SERVICES.

If a client unreasonably refuses to make advances to pay expenses and apply on account in a reasonable amount during the progress of an extended litigation, it may furnish sufficient cause to justify an attorney in withdrawing from his services.

5. SAME—REASONABLE CAUSE FOR WITHDRAWAL—QUESTION FOR JURY.

Whether there was reasonable cause for an attorney withdrawing from the services of his client, because the client unreasonably refused to advance money to pay expenses and apply on account during the progress of an extended litigation, is a proper question for the jury in an action for services rendered.

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence in an action by an attorney for services considered, and held sufficient to sustain a finding that he had reasonable cause for severing his connection with his client's cases.

7. TRIAL—INSTRUCTIONS—CONSTRUING TOGETHER.

No fault can be found with a charge which as a whole correctly instructs the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 703-717.]

8. ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—INSTRUCTIONS.

In an action by an attorney for services rendered in several cases, wherein he had with-

drawn from his client's service, it appeared that, during the cross-examination of plaintiff, defendant's counsel had him identify several contracts, receipts, and papers which were introduced, tending to prove, and had they not been satisfactorily explained to the jury would have established, that there was an express contract for a fixed compensation with respect to certain of the cases he was engaged in and other matters. Held to justify an instruction based on an express agreement as to compensation.

9. SAME—AMOUNT OF COMPENSATION—EXCESSIVENESS OF JUDGMENT.

A judgment for \$1,315 for the services of an attorney in the course of extended litigation in behalf of his client prior to withdrawing his services held not excessive.

Appeal from St. Louis Circuit Court; Danl. D. Fisher, Judge.

Action by Taylor R. Young against David Lanznar. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Rowe & Henry Rowe, for appellant. Frank Haskins, for respondent.

NORTONI, J. The plaintiff, an attorney at law, instituted this suit as of quantum meruit against his former client, the defendant, to recover the reasonable value of services rendered in several suits at law and in equity pending in the courts of this state, and for the sum of \$15 in cash which he had advanced to defendant at his instance and request. Plaintiff recovered in the circuit court, and the defendant prosecutes the appeal.

The causes of action relied upon are stated separately in seven separate counts contained in the petition. The first and second counts of the petition and the causes of action therein stated were withdrawn from the jury, and will therefore not be further noticed here. There is no complaint with respect to the recovery on the seventh count in the petition, which concerns only the item of \$15 advanced by the plaintiff to the defendant at his instance and request. All of the argument advanced for a reversal of the judgment pertain to the plaintiff's recovery on the third, fourth, fifth, and sixth counts of the petition. Those counts only, and the proceedings at the trial thereon, will be noticed in the opinion.

The defendant owned a note and deed of trust on certain real property in Kansas City, which, together with interest and accretions therein provided for, amounted to about \$6,500. Default having been made in the payment thereof, he caused the property to be advertised for sale thereunder. The defendant had acquired the deed of trust by virtue of a trade with a citizen of Kansas City, who, upon the property being advertised for sale, instituted an injunction suit seeking to restrain the sale thereof on several grounds, among which was failure of consideration. The plaintiff in this suit devoted 10 or 15 days in preparing for the trial of the injunction suit at the defendant's request, attended court at Kansas City, and tried the cause. Upon the conclusion of the trial, the court an-

nounced from the bench that the case should be settled. It was not decided by the court. The parties, acting upon the suggestion of the court, settled the matter. The result was such that the present plaintiff obtained for his client, in cash, the entire amount due on the note and deed of trust. The cause of action stated in the third count of plaintiff's petition pertains to and seeks to recover reasonable compensation for his services rendered to the defendant in the injunction suit mentioned. About this time a Kansas City man instituted a suit against the present defendant in which he sought to recover \$40,000 damages against him for alleged slander. Plaintiff in the present action devoted a great deal of time in preparing a defense in that case, appeared in court at Kansas City at the instance and request of defendant, and participated in the trial of the cause, which lasted about two weeks. This trial resulted in a verdict for the defendant. The plaintiff in that case filed a motion for new trial therein, which was afterwards sustained by the court on the ground that the verdict was against the weight of the evidence, and this slander suit was still pending at the time the present plaintiff severed the relation of attorney and client which existed between him and the defendant, and withdrew from the case. The cause of action stated in the fourth count of the plaintiff's petition in this case arises out of his services rendered to defendant in the slander suit mentioned. About this time or shortly thereafter the defendant became involved in two separate suits, wherein two citizens of Kansas City instituted separate actions against him, seeking to recover \$50,000 damages each, on account of alleged malicious prosecutions instituted against them by defendant. In these suits the present plaintiff acted as attorney for defendant, took depositions in the cases at the city of Little Rock, Ark., in St. Louis and Kansas City, Mo., and prepared several motions and demurrers, which he caused to be filed in the court at Kansas City. The demurrers to the petitions were sustained. He investigated the law on the subject, etc., and devoted some 10 or 15 days and portions of the nights to preparing the cases for trial. They had not been disposed of, however, at the time he withdrew as defendant's attorney therefrom, for the reason the defendant refused to compensate him in accordance with his alleged agreement thereabout. The fifth count in the petition stated a cause of action arising out of the services rendered to defendant as attorney in the two cases for malicious prosecution mentioned. About this time the present defendant caused the several Kansas City men mentioned to be indicted in the city of St. Louis on the charge of obtaining a stock of goods from him under and by means of false pretenses. The plaintiff, his attorney, at the instance and request of defendant, aided and assisted the circuit attorney of the city of St. Louis in preparing and presenting

the criminal phases of the litigation mentioned and in drawing the indictments thereunder. There was a large and voluminous record containing the testimony in other litigation to digest in connection with these criminal matters, and the total time which the plaintiff consumed thereabout was a large portion of each of 20 days. The cause of action stated in the sixth count of the petition arises out of services rendered by plaintiff in and about these criminal prosecutions mentioned.

Aside from some evidence introduced by defendant in connection with the cross-examination as to a contract for fixed compensation, the evidence tends to prove that plaintiff was to charge the defendant, and the defendant agreed to pay the plaintiff, reasonable compensation for his services in and about the several matters mentioned. The amount of the fee was to be determined with reference to the amount of services rendered; that is, such an amount as the services were reasonably worth. The defendant agreed to pay the plaintiff on account from time to time as the litigation progressed. It appears the defendant did pay the plaintiff a small amount, and, in keeping with the original agreement, about July, 1905, further agreed to pay him on account of his services theretofore rendered in the slander suit the sum of \$950, on account of the malicious prosecution suits, \$50, on account of the injunction suit, \$75, and on account of the criminal cases, \$250, making a total of \$1,325. These items were not to be in full for his services, but were the amount which the defendant agreed to pay the plaintiff on account within a few days or a few weeks thereafter. In the latter part of July of that year plaintiff received a draft payable to defendant for about \$6,000 covering the amount due him, less some expenses deducted at Kansas City, on the note and deed of trust involved in the injunction suit above referred to. Upon committing this draft to defendant, he sought to persuade the defendant to pay him out of the fund thereby evidenced the several amounts above given, in accordance with his agreement so to do. The defendant insisted, however, that he owed an indebtedness to the Mercantile Trust Company, and had immediate need of all the funds he could raise, and persuaded the plaintiff to forbear with him until about the 20th of August, and gave his promise to the effect that on or about that date he would pay the plaintiff on account the several amounts above stated. Plaintiff granted defendant's request, but defendant failed to comply with his promise. The record discloses that during the summer and fall months of that year plaintiff continually urged the defendant to make him a payment on account, in accordance with the original contract of employment, which was in part to the effect that he was to pay plaintiff on account as the litigation progressed, and according to plaintiff's call upon him for

money, the entire sum of the fee, however, to be reasonable compensation for the services rendered. Defendant continually postponed and declined payment for one reason and another. During the summer and autumn months, plaintiff notified defendant several times that, unless he made a payment in accordance with his requests and the agreement, he would sever his connection with the litigation entirely, as he could not afford to devote so much time and labor without collecting a portion of his compensation at least. Finally, in December, and about six weeks before any of the cases were for trial, plaintiff formally notified the defendant that he would no longer forbear with him in that behalf, but would thereupon sever his connection with the litigation and terminate the former relation of attorney and client which existed between them, withdraw from the several cases, for the alleged reason that defendant had failed to comply with his contract respecting payments on account as the services progressed, and demanded that the defendant pay him a reasonable compensation for the services theretofore rendered. The defendant insisted that plaintiff was not justified in withdrawing from the cases and declined to compensate him for the services theretofore rendered.

The court instructed the jury on each cause of action set up in the several counts of the petition separately, and in substance as follows: That if the jury believed from the evidence the defendant employed the plaintiff to represent him as attorney in the several suits mentioned, and that the plaintiff did represent the defendant as attorney in such suits without an express agreement regarding the amount of compensation for his services or the time for paying the same, then the law would imply an agreement on the part of the defendant to pay the plaintiff reasonable compensation therefor. And the law will also imply an agreement on the part of the plaintiff to continue in charge of the several cases until their final determination, and that the compensation for such services would become due when the plaintiff had performed the services which he had agreed to perform in the particular case or cases. But, if the jury found an express agreement had been entered into between the parties regarding the amount of compensation or the time when the same was to become due, or the services to be rendered, then the express agreement, if any, would govern regarding the amount of compensation and the time when the same is due, and the services to be rendered. The court further instructed on each of the counts mentioned separately substantially to the effect that if they found from the evidence the plaintiff was acting as attorney for the defendant in the several suits mentioned, and, before the termination of the several suits, withdrew as attorney for defendant without reasonable cause, as defined in the instructions, and

abandoned the cases, then the plaintiff could not recover on those counts pertaining to the case or cases from which he had withdrawn during their pendency. On the question of plaintiff's withdrawal from the cases pending at the time he served his relation with the defendant and the matter of reasonable cause for his withdrawal therefrom, the court directed the jury substantially as follows: That the plaintiff admitted he withdrew from the cases in which he was acting as defendant's attorney mentioned in the fourth, fifth, and sixth counts of the amended petition before any of those cases were finally determined, that in such circumstances, in order to justify his withdrawal from those cases, and to entitle him to recover reasonable compensation for services rendered in any one of such cases prior to the date of his withdrawal, the onus was on the plaintiff to satisfy the jury from the evidence that the defendant had agreed to pay him for his services from time to time as the case progressed, or at a time before the final determination of such case or cases, and before the plaintiff had so withdrawn therefrom; and, if the defendant failed to satisfy the jury that such was the contract between the parties, then he was not justified in withdrawing from the case or cases. This instruction was most favorable to defendant; for, if the plaintiff undertook to perform the services of an attorney at the defendant's request, out of which there arose only an implied contract for compensation, this carried with it an implied undertaking to pay reasonable amounts requested on account as the services progressed. The familiar proposition that the laborer is entitled to his hire obtains with respect to services rendered by an attorney at the instance and request of his client identically as it does in like undertakings pertaining to other contracts of employment.

The principal argument advanced in this court for a reversal of the judgment is that the plaintiff is not entitled to recover at all on the fourth, fifth, and sixth counts of the petition, and that the court erred in submitting matters arising on these counts to the jury, for the reason the evidence shows the plaintiff withdrew from the case therein mentioned before their final determination. There is no doubt that an attorney who is employed generally to conduct legal proceedings enters into an entire contract to conduct the proceeding to its termination, and he cannot abandon the services of his client without justifiable cause and only upon reasonable notice. It is the rule, if the attorney's compensation is stipulated, and he, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits his right to payment for services rendered. If, on the other hand, the value of his services has not been agreed upon, but he is merely retained in the case

upon an implied understanding that he shall receive what his services are reasonably and fairly worth, or if the agreement be that he is to have reasonable compensation for his services, to be paid from time to time as requested, as in this case, it is entirely proper for him to ask from time to time for advances with which to pay the expenses of the litigation and to apply upon account for his services. And, if the client unreasonably refuses to advance the money for such purposes in a reasonable amount during the progress of an extended litigation, sufficient cause may be furnished thereby to justify an attorney to withdraw from the services of his client. And in such circumstances it is entirely proper to submit the question of reasonable cause for his withdrawal from the litigation to the jury under proper instructions. This seems to be the law as expounded by the soundest courts of the country. For authority in point, see *Pickard v. Pickard*, 83 Hun (N. Y.) 338, 31 N. Y. Supp. 987; 3 Amer. & Eng. Ency. Law (2d Ed.) 429, 430. For the same principle, see *Cooley v. Doherty*, 5 La. Ann. 163. In so far as plaintiff's services rendered in the injunction suit are concerned, that case was entirely disposed of, and the defendant had collected the amount due on the note and deed of trust. The evidence discloses that the plaintiff had rendered laborious and valuable services in each of the other cases referred to and in accord with the most fundamental principles of natural justice alone, aside from the agreement to that effect, he was entitled to request and to have reasonable payments from the defendant on account thereof. There is no question about the evidence being amply sufficient to sustain the finding of the jury to the effect that he had reasonable cause for severing his connection with the cases. It appears that the defendant, not only rendered valuable services evincing professional capacity and diligence, but that he was most indulgent with defendant as well, and the verdict affirming justifiable cause for quitting the employment and awarding him compensation for the reasonable value of his services theretofore rendered was entirely proper. We find no fault with the charge given by the learned judge to the jury. When read together, the case was well instructed.

An argument is directed against so much of plaintiff's instruction as directs the jury that, in event an express agreement was entered into respecting plaintiff's compensation and when the same became due, then such express agreement would govern as to the amount of compensation and the time when it was due, etc. It is said so much of the instruction was error, for the reason there was no evidence of an express agreement in the case. The instruction referred to was one giving the jury abstract propositions of law for their guidance, and the feature thereof now under consideration was no doubt

incorporated to elucidate the duty of the jury with respect to certain evidence tending to prove an express contract for fixed compensation, sought to be developed by the learned counsel for defendant, with respect to some of the cases. It appears from a careful reading of the record that during the cross-examination of the plaintiff defendant's counsel had him identify several contracts, receipts, and papers which were introduced in the case, tending to prove, and had they not been satisfactorily explained to the jury would no doubt have established at least, that there was an express contract for a fixed compensation with respect to the criminal cases above referred to, and some other matters. In view of this evidence, the court did not err in thus properly directing the jury as to their duty in event they found an express contract with respect to the plaintiff's compensation. Highly respectable members of the St. Louis and Kansas City bar testified to the value of plaintiff's services. The jury returned a verdict awarding him \$465. A remittitur was entered and judgment given thereafter for \$1,315.

That the plaintiff's case was meritorious is evidenced by the unusual fact that the jury returned a verdict for attorney's fees on two of the counts which the trial court declined to approve entirely for the reason he deemed the recovery on these counts excessive. The motion for new trial was overruled upon plaintiff entering a slight remittitur on these counts. The learned trial judge very carefully supervised this matter, and, upon a careful consideration of the evidence, we are persuaded the judgment as it now stands, after remittitur entered, is not excessive, and it will therefore be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

BRUNSWICK-BALKE-COLLENDER CO. v. KRAUS.

(Kansas City Court of Appeals. Missouri. Jan. 6, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—PETITION—SURPLUSAGE.

The allegation in a petition in replevin by a foreign corporation that it is a corporation existing under the laws of Illinois, while the chattel mortgage under which it claims title shows that it is a corporation under the laws of Ohio, does not defeat the action; the place of incorporation being surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2646.]

2. CHATTEL MORTGAGES—RECORDING—REASONABLE TIME.

The failure for five days to record a chattel mortgage executed at the county seat is, in the absence of an excuse for the delay, a failure to use proper diligence to record it within a reasonable time as required by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 161.]

3 SAME—VALIDITY AS TO CREDITORS OF MORTGAGOR.

Under Rev. St. 1899, § 3404 (Ann. St. 1906, p. 1936), providing that a chattel mortgage shall be void as to creditors unless recorded, etc., a mortgage which is recorded before prior creditors obtain a lien on the mortgaged chattels or change their position thereto is valid as to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 241.]

4 SAME—PRIORITY.

A lessor, in a lease stipulating that property described in the leased building shall be subject to a lien for the rent, who makes a verbal agreement with the lessee to substitute chattels for those included in the lease does not thereby obtain a lien on the substituted chattels as against other creditors, or as against a mortgagee in a chattel mortgage not recorded at the time of the verbal agreement, but recorded before the lessor took possession of the chattels.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 230.]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by the Brunswick-Balke-Collender Company against Katherine Kraus. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Growney, for appellant. W. W. Ramsay, B. B. Martin, and W. E. Wiles, for respondent.

BROADDUS, C. J. This is an action of replevin, wherein plaintiff claims possession of certain articles of the value of \$1,250, consisting of five billiard tables and six pool tables and their appurtenances. The plaintiff claimed a special interest in said property by reason of a chattel mortgage thereon executed by one O. W. Wilkie as the conditions in the mortgage had been broken. On the 14th day of September, 1906, the defendant took possession of said property, and had possession thereof at the time of the commencement of this suit. On and prior to September 1, 1905, the defendant was the owner of a certain brick building situated in the town of Maryville, Mo., on which day she leased to said Wilkie and one C. T. Smith a room therein for the period of one year beginning on the 4th day of September, 1905, to be used for a billiard and pool room, on condition that they were to pay as rental for said room \$25 per month payable on the last of each month. It was provided in said lease that all their property situated in said building consisting of five billiard and pool tables and appurtenances should be subject to a lien to secure the payment of all said rents. On the 4th day of December, 1905, the said lessees went into possession of the room in the building, and occupied it to the 14th of September, 1906, when defendant took possession. Between December 29, 1905, and January 3, 1906, the said lessees removed their billiard and pool tables described, and placed therein the property in controversy upon which O. W. Wilkie had placed said mortgage to secure the payment to the plaintiffs the purchase price thereof, which

was executed on the 29th day of December, 1905, and filed for record on the 3d day of January, 1906. The defendant claims that during the interim between the 29th of December, 1905, and January 3, 1906, that she entered into a verbal agreement with O. W. Wilkie whereby she permitted him to move the billiard and pool tables described in her lease from the building, and that whereby the property in controversy was substituted for the same for the purpose of securing her rent. She claims that this agreement was made without knowledge or notice of plaintiff's chattel mortgage, and before the same was placed on record, and that, therefore, the same is invalid as to her. The finding and judgment were for the plaintiff, from which defendant appealed.

The defendant seeks to reverse the cause on two grounds, viz.: First. That the plaintiff's suit was not shown to have been prosecuted in the name of the real party in interest. Second. That under the evidence the finding and judgment should have been for defendant. The petition stated that plaintiff "is a corporation existing under and by virtue of the laws of the state of Illinois. The mortgage read in evidence under which plaintiff claims title is made to the Brunswick-Balke-Collender Company, a corporation existing under and by virtue of the laws of the state of Ohio, of the city of Chicago, state of Illinois." The contention of defendant is that the mortgage shows that the plaintiff was a corporation of the state of Ohio, whereas the plaintiff is a corporation of the state of Illinois. A similar question arose in a recent case in this court, wherein we held that the place of incorporation was an immaterial allegation in the petition and mere surplusage. *Sands v. Marquardt*, 113, Mo. App. 490, 87 S. W. 1011. This point must be ruled against the defendant. At most it is only technical.

The defendant contends that, as she made the agreement mentioned with Wilkie, the mortgagor, within the five days from the date of the mortgage and its filing for record without knowledge of its existence, she had a prior lien upon the property for her rent. This raises the question whether under the circumstances plaintiff filed his mortgage for record within a reasonable time after it was executed. The statute requiring the recording of such instruments does not prescribe any particular time in which it shall be done, but the courts have given it the construction that the time in all such cases must be reasonable. *Way v. Bralcy*, 44 Mo. App. 457, and cases cited. In this instance the mortgage was executed in Maryville the county seat on the 29th day of December, 1905, and not filed for record until five days later. There is no excuse given for the delay. We assume that the office of the recorder was at the county seat, where the mortgage was held by plaintiff's agent, who could have filed the same for record at

any time after its execution and prior to the 3d day of January. It is obvious that the plaintiff did not use proper diligence to have its mortgage recorded. *Bank v. Powers*, 134 Mo. 432, 35 S. W. 1132. Section 3404, Rev. St. 1899 (Ann. St. 1906, p. 1936), providing that such mortgages shall be void as to creditors, unless they be acknowledged and recorded or possession of the mortgaged property be delivered to the mortgagee, has been construed to mean that: "In case of prior creditors, if the mortgage be recorded, or the mortgagee takes possession of the property before such creditors obtain lien thereon, or changes his position in relation thereto, it validates the mortgage as to him." *Landis v. McDonald*, 88 Mo. App. 335; *Dobyns v. Meyer*, 95 Mo. 132, 8 S. W. 251, 6 Am. St. Rep. 32. The defendant by the verbal agreement with Wilkie, the owner, to substitute the property in controversy for that included in her lease, did not thereby obtain a lien thereon as against other creditors, and, as she did not take possession thereof until long after plaintiff's mortgage had been recorded, the same was valid as to her. *Harrison v. Mining Co.*, 106 Mo. App. 32, 79 S. W. 1160.

It follows, therefore, that the judgment of the court should be affirmed, and it is so ordered. All concur.

PER CURIAM. On January 6, 1908, the foregoing opinion was rendered affirming the cause. On motion of appellant a rehearing was granted. The cause was reargued by appellant, and again taken under advisement. After due consideration, the court is convinced that the former opinion should be adhered to. Therefore the cause is affirmed.

ZEILDA FORSEE INV. CO. v. OZENBERGER.

(Kansas City Court of Appeals. Missouri. June 29, 1908.)

1. REFORMATION OF INSTRUMENTS—MISTAKE—PROOF REQUIRED.

A party claiming the right to reformation of an instrument for fraud or mistake must show the fraud or mistake by evidence which is clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 157.]

2. SAME—EVIDENCE.

Evidence of a single witness held insufficient to justify a decree reforming the lease for mistake in omitting a stipulation alleged to have been agreed to, where it was not consistent with all the other facts and circumstances surrounding the execution of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 157-164.]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by the Zeilda Forsee Investment Company against Henry Ozenberger. Judgment for plaintiff, and defendant appeals. Affirmed.

S. S. Shull, for appellant. Eastin, Corby & Eastin, for respondent.

BROADDUS, P. J. The plaintiff corporation sues on two promissory notes for \$200 each executed by defendant November 10, 1901, and payable in 52 months from date, to the order of Zeilda Forsee and assigned to plaintiff. The notes were a part consideration for a lease of Zeilda Forsee's farm situated in Buchanan county, Mo., near One Hundred and Two river, for a term of five years, commencing on the 1st day of March, 1902, and ending on the 28th day of February, 1907. The consideration for the use of the farm was evidenced by ten promissory notes, to wit, two notes for \$150 each, one due March 1, 1902, the other due September 1, 1902; and eight for \$200 each due in their order, viz., March 1, 1902, September 1, 1902, and so on, the last note being due September 1, 1906. The two latter being the notes in suit. The said Zeilda and defendant entered into a writing, in which is recited the terms, conditions, and extent of the lease. The defendant in his answer sets up by a way of cross-bill this writing, and alleges that it did not include the entire contract as made by the parties, and asks that it be reformed. The part alleged to be omitted is as follows quoting the language of the answer: "That preparatory to the drawing of said lease the matter was fully talked over between this defendant and scrivener who was to draw the said lease, and who was representing at the time said Zeilda Forsee, and they agreed and fully understood that said lease should contain a clause which should provide that if the land at the time being leased to said Ozenberger, this defendant, should overflow or be overflowed from or by the One Hundred and Two river, which runs along or by or through said lands, to the extent of two or more overflows during the five years that the lease of said land should run, then in that event one-half of the rent for the years so overflowed should go off, and not be collected from said Ozenberger, and that he should be rebated to that extent from the payment of full rental or the full amount of the notes drawn up for the rentals of said farm, and that the rebating of any amounts to this defendant from or off of any of his said notes should not take place or be allowed to him except at the end of his lease, which was to expire by the terms thereof on the 28th day of February, 1907. Said language and terms were omitted from said lease, and not inserted by reason of a mutual mistake, accident, and oversight of the parties thereto who drew and wrote said lease." The answer then proceeds to state certain overflows which would authorize a rebate if allowed in excess of the two notes in suit, and a judgment is prayed for such excess over and against the plaintiff. James F. Pitt, who wrote the lease and who was the agent of Zeilda Forsee, had died before the

trial. Under the circumstances the defendant was not a competent witness. The only witness who claimed to have been present at the time the lease was written was a man by the name of Henry Tripps. Tripps testified that the writing did not contain all that "was talked"; that he did not himself talk to Mr. Pitt, but that he heard the talk between defendant and Pitt relative to the terms of the lease and what was to be written in it; that defendant "asked Mr. Pitt how it would be if there would be two or more overflows, and they agreed, if there would be two or more overflows in the five years, half of the rent would go off in them years when it overflows"; that deduction or rebate on account of such overflows were to be made at the last part of the term of the lease; and that a reduction of one-half of the rent would be made for each year the land overflowed. The witness was asked if the lease was read over to defendant after it had been written, or if defendant read it himself, to which he answered, "No"; that Mr. Pitt said, "Here is that contract made, just the way we talked it over," to which defendant said nothing in reply. He was asked on cross-examination if he could testify from hearing the conversation between Pitt and defendant, or to all the various terms and conditions that the lease was to contain, to which he answered: "I know they talked about cutting wood, and they talked about fence that would have to be put up; that's about all I heard—and about the water." The defendant claims that he had no knowledge of the alleged omissions from the written lease until after the eighth note became due. There was no other witness as to what transpired at the time the lease was written. Defendant admitted that he had a copy or duplicate of the lease all the time in his possession. The defendant introduced evidence to support his claim for the alleged overflows and destruction of his crops by water from the stream mentioned. The court dismissed the defendant's cross-bill and rendered judgment against him for the notes in suit and interest, from which defendant appealed.

The principal question in the case is whether defendant made out such a case as would authorize a court to reform the lease as asked. It is the contention of defendant that his evidence was clear and positive, that the mistake had occurred which resulted in the omission from the lease the important condition referred to in the answer and the evidence of the witness Tripps. His statement was clear enough in that respect, but it does not necessarily follow that the statement of a single witness, however clear and positive it may be, should control the decision of a chancellor in a matter of such grave responsibility as the reformation of a contract in an important particular. It may be that the circumstances of the case might have convinced the court that owing to the long lapse

of time or for some other cause the witness was mistaken, or that he was willingly stating an untruth. There were circumstances in this case which were well worth consideration by the court before it accepted the uncorroborated statement of the witness Tripps. Among these circumstances is the strangeness of the alleged omission that defendant should not have credit for the years in which he might sustain a loss by the overflow of the land, the time he would most likely be benefited by it, but that it should be deferred until the last payment for rent became due; that it was strange and unusual that the lessor's agent Pitt and defendant should enter into so important an agreement without it having been read over in order to see whether it contained the full understanding of the parties; that it was not probable that Pitt, who wrote the lease, should have omitted the matter when it is found, on inspection of the writing, that it was most carefully and particularly worded and the work of an experienced and skillful scrivener, unless he did so purposely, and relied on the credulity of defendant to accept his work for what it contained without having it read to him; and, when we consider that the witness could only remember that the contract only referred to the cutting of wood, and fencing and the matter in controversy, among so many other provisions of the lease, the court might well have hesitated to have taken the word of the single witness to the transaction which had occurred six years previously. The evidence and the circumstances left the case in doubt, as to the preponderance of proof. The rule, however, is such that "the party seeking to have an instrument in writing reformed for fraud or mistake must show such fraud or mistake by evidence that is clear and convincing; for the written instrument carefully and deliberately prepared and executed is evidence of the highest character and will be presumed to express the intention of the parties to it until the contrary appears in the most satisfactory manner." *Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742. And such is the holding in *Parker v. Vanhoozer*, 142 Mo. 621, 44 S. W. 728; *Clark v. St. Louis Transfer Co.*, 127 Mo. 255, 30 S. W. 121; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108, and in many other cases.

Our attention has been called to an Arkansas case, wherein it is held that a deed will not be reformed on the ground of mistake on the testimony of a single witness, which is contradicted. *Marquette Timber Co. v. Charles T. Abeles & Co.*, 81 Ark. 420, 99 S. W. 685. The inference that appellant seeks to draw from the decision is that the testimony of one witness would be sufficient in such cases if it stood uncontradicted. But there is no such intimation in the opinion; and we are not called upon and do not hold that the testimony of single witness might not be sufficient to support a decree for ref-

ormation of a written instrument. But we do hold that, in an instance of that kind, the court should proceed with great care and caution, and, unless the testimony of the witness be very clear and positive and consistent with all the other facts and circumstances, to refuse reformation. We have called attention to certain facts and circumstances in the case which appear to us and no doubt did to the chancellor who tried it, as inconsistent with the alleged mutual mistake. We believe the court adopted the correct theory of the case and arrived at a just and equitable conclusion.

As the other branch of defendant's defense depended upon the establishment of his cross-bill, what we have said disposes of all the other questions raised on the appeal.

Affirmed. All concur.

ARMSTRONG v. MODERN BROTHERHOOD OF AMERICA.

(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.

The court in construing and declaring the effect of statutes should effectuate the obvious intention of the Legislature; and this doctrine obtains with special force when it appears the intention of the Legislature conserves a wholesome purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-265.]

2. INSURANCE—MUTUAL BENEFIT INSURANCE—FOREIGN FRATERNAL BENEFICIARY ASSOCIATIONS—OPERATION OF GENERAL LAWS—EXEMPTIONS—SUICIDE CLAUSE.

A foreign fraternal beneficiary association, coming in all particulars within the definition, by Rev. St. 1899, § 1408 (Ann. St. 1906, p. 1111), of such associations, and rightfully doing business in the state by virtue of section 1410 (Ann. St. 1906, p. 1113), authorizing non-resident associations coming within the description of section 1408 so to do business, is not taken out of the provisions of section 1408, exempting such associations from the operation of general laws, by the fact that, by the laws of its domicile, its members are authorized to designate as beneficiaries their personal representatives, one class additional to those mentioned in section 1408; and hence a member contracting against suicide, sane or insane, could not recover by virtue of the provisions of Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), governing old-line insurance companies, which render the defense of suicide of no avail unless suicide was contemplated at the time the policy was taken out.

Appeal from Circuit Court, Ralls County; David H. Eby, Judge.

Action by Harriet B. Armstrong against the Modern Brotherhood of America on a benefit certificate. From a judgment for plaintiff, defendant appeals. Reversed and case certified to Supreme Court, as views expressed are conflicting with other decisions of Court of Appeals.

Roy & Hays and Ball & Sparrow, for appellant. E. J. Alford and J. O. Allison, for respondent.

NORTON, J. This is a suit on a certificate of life insurance issued by a fraternal beneficiary association. Plaintiff recovered, and defendant appeals. The question involved for decision is whether the association is one of that character exempted from the general insurance laws of this state, under the provisions of section 1408, Rev. St. 1899 (Ann. St. 1906, p. 1111). The beneficiary certificate sued upon contained a provision exempting the society from liability in event the insured took his own life, whether sane or insane. The insured committed suicide. The defendant invoked the stipulation in the insured's application, and the provisions of its certificate exempting it from liability in case of suicide. The court, nevertheless, gave judgment against it for the amount of the plaintiff's claim, on the theory that the association could not relieve itself from responsibility in that behalf, for the reason it was not such a fraternal association as is exempted from the operation of our suicide statute, which provides, substantially, that suicide shall be no defense to an action on a life insurance policy, unless it be made to appear that the insured contemplated taking his own life at the time the policy was issued. There is no claim whatever in this case that the insured contemplated suicide at the time of entering into the contract in suit. The matter is therefore to be determined by reference to and the construction of our statutes exempting fraternal societies from the operation of the general insurance statutes of the state, among which is the statute of suicide above referred to. The defendant is a beneficiary society, incorporated under the laws of the state of Iowa, and was duly admitted by the commissioner of insurance of this state to prosecute its calling here. The insured became a member of one of its subordinate lodges located at Perry, Mo., in November, 1892; and on the 26th day of that month received his certificate payable to the plaintiff, his wife, whom he designated therein as his beneficiary. The insured paid all of his assessments, and was in good standing at the time of his death, March 1, 1905, on which date he committed suicide. Proofs of death having been properly made and submitted, the defendant declined to pay the amount of the certificate for the reason stated, and the plaintiff, the insured's widow, instituted this suit. Under the law of the state of Iowa, constituting the charter of the defendant association, it is authorized to issue certificates of insurance payable to the same classes of beneficiaries mentioned in the Missouri statute (section 1408, Rev. St. 1899) and one other class of beneficiaries as well; that is to say, the Iowa statute authorizes the defendant to issue certificates of insurance payable to the personal representatives of the insured. Because of this deviation from the Missouri statute, the circuit court gave judgment to the effect that the defendant association was

not exempted from the operation of our statute on suicide.

The Missouri statute dealing with the question of the defense of suicide on life insurance policies is as follows: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Section 7896, Rev. St. 1899 (Ann. St. 1906, p. 3750). This statute, of course, becomes parcel of every life insurance contract entered into within this jurisdiction, unless the institution issuing the contract of insurance or the contract itself is exempted therefrom by other competent provisions of our statute law. It is a well-known fact that fraternal beneficiary associations engaged in the life insurance business are organized and conducted for the purpose, among others, of affording to the members thereof indemnity against death, payable to designated beneficiaries, at a much lower rate of compensation to the insurer than is customary for life insurance in the regular companies. In aid of this idea, the legislative authority of the state has provided that associations complying with our laws and falling within the prescribed designation shall be exempted from the harsher and more rigorous provisions of the statutes respecting life insurance generally, and therefore it is competent for such beneficiary societies to contract with their members, exempting the society from liability in case the insured shall come to his end by self-destruction, as in this case. And therefore the question as to whether the contract of insurance issued by this society is to be determined by reference to the principles of the common law in that behalf and enforced as a common law contract, unincumbered with the suicide statute, is to be ascertained and determined with reference to our statute affording a definition of a fraternal insurance association. That statute (section 1408, Rev. St. 1899) is as follows: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each association shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age, provided the period in life at which payment of physical disability benefits on account of old age commences, shall not be under seventy (70) years, subject to their compliance with

its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed shall be derived from assessments or dues collected from its members. Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member. Such associations shall be governed by this act and shall be exempt from the provisions of the insurance laws of this state, and shall not pay a corporation or other tax, and no law hereafter passed shall apply to them unless they be expressly designated therein. And such fraternal beneficiary association may create, maintain, disburse and apply a reserve or emergency fund in accordance with its constitution or by-laws."

It will be observed that, among other things, the statute provides: "Such association shall be governed by this act and shall be exempt from the provisions of the insurance laws of this state." Section 1410, authorizing nonresident associations to enter the state of Missouri and qualify to conduct their business here, provides, among other things: "Any such association coming within the description as set forth in section 1408 of this article, organized under the laws of any other state," etc., may qualify and conduct its business here by complying with the conditions therein prescribed. Upon so qualifying, such foreign institutions become privileged as domestic concerns. There is no controversy as to the facts with respect to the case now under advisement. It stands conceded that the defendant is a fraternal beneficiary association, organized and chartered under the laws of the state of Iowa; that it conducts its business solely for the benefit of its members, and not for profit; that it obtains its funds by means of dues and assessments, authorized both by the statutes of Missouri and Iowa; that it has a lodge system of government and a ritualistic form of work; that the element of fraternity pervades its entire scope, and it is in all things a fraternal beneficiary association, identically as such are defined by our Missouri statute, except its members are authorized under its charter, the Iowa statute, to designate a beneficiary from another and additional class than those prescribed by the Missouri statute, to wit, the personal representatives of the insured, and the association is authorized to issue certificates payable to such representatives. There are several cases in Missouri announcing the doctrine that, even though associations like this one are fraternal in every respect, they are not exempt from our insurance laws if they are authorized by their charters to issue certificates of insurance to a class of beneficiaries other than those named in the Missouri statute. Those cases proceed upon the theory that the particular classes of beneficiaries enumerated in the Mis-

missouri statute on fraternal societies (section 1408, supra) are parcel of the definition of such fraternal societies as are exempt from the operation of our general insurance laws. In other words, they announce the doctrine that, even though the association may be fraternal in every respect, it is not fraternal in the contemplation of our statute if it is authorized to issue certificates payable to any class of persons other than those given in section 1408, supra. The cases mentioned assert another doctrine to the effect that, even though the association is fraternal and falls within our statute in every respect other than that mentioned, it is nevertheless a regular old-line insurance institution because of this additional charter power to appoint beneficiaries, and therefore comes within the purview of the several statutes provided with respect to regular life insurance, among which is the suicide statute, supra. Among these cases is that of *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967, which is identically in point here. In fact, the suit in that case was against this identical defendant. The insured had taken his own life in that case and the certificate of insurance was payable to his daughters, a class of beneficiaries authorized by both the Missouri and the Iowa statutes, identically as in this case, except here the wife, instead of the daughters, is beneficiary. The wife is an authorized beneficiary in both the Missouri and Iowa statutes, identically as the daughters were in that case. The Kansas City Court of Appeals adjudged that, because the defendant was authorized under its Iowa charter to issue certificates of insurance payable to the personal representatives of the insured, a class unauthorized by the Missouri statute, the association was not exempt from the insurance laws of this state, and therefore the plaintiffs were permitted to recover on the theory that our suicide statute obtained with respect to the matter in judgment, identically as if the institution were a regular old-line life insurance company. Other cases to the same effect decided by that court are *Baltzell v. Modern Woodmen*, 98 Mo. App. 153, 71 S. W. 1071; *Herzberg v. Modern Brotherhood of America*, 110 Mo. App. 328, 85 S. W. 986. This court is not impressed with the reasoning of those cases. We are persuaded that a reading of the statute above referred to manifests an obvious intention on the part of the legislative authority to exempt fraternal societies from the operation of our insurance laws. This being true, it is the duty of the court to administer the law in the spirit it was framed. The court, in construing and declaring the effect of statutes, should effectuate the obvious intention of the Legislature; and this doctrine obtains with special force when it appears the intention of the Legislature conserves a wholesome purpose, as here. The manifest intention of those statutes is

to relieve fraternal beneficiary societies so far as practicable from the burdens on regular life insurance companies, and thus aid the purpose of affording insurance at a lower rate. Upon an attentive consideration of section 1408, it appears that the Legislature did not intend that the classes of beneficiaries therein named should be regarded as a portion of the definition of fraternal beneficiary societies in order to exempt them from the operation of the general insurance statutes. It appears the specification of certain classes of beneficiaries therein operates rather as a limitation upon the power of the association than as a test by which the character of the institution is to be determined. The legislative authority saw fit to authorize foreign institutions of this character to enter the state on certain prescribed conditions. Upon complying with these conditions, the foreign institution becomes clothed with the privileges of like domestic concerns. Therefore, in the absence of express stipulation in the statute to that effect, it certainly ought not to be presumed the Legislature intended that those foreign fraternal institutions whose charters authorize beneficiaries in the parent jurisdiction other and distinct from the domestic statute were not to be immune from the general insurance laws, as well as those whose charter provisions were in precise accord with our own. It is a fact well known that the charters of those concerns vary, as they essentially must, with the laws of the several states. It is indeed unjust, because of this fact over which they have no control, to deny them the privilege accorded other concerns organized in states whose statutes in this respect conform to those of Missouri. It is quite manifest no such result was contemplated. As we understand it, the test of a fraternal beneficiary association within the meaning of the Missouri statute (section 1408) is that the association must be organized for the sole benefit of its members, and not for profit. It should possess a lodge system and representative form of government with a ritualistic form of work, and confine the issue of its benefit certificates to its members in favor of such beneficiaries as they may, from time to time, designate, thus placing the benefit within the control of the member and precluding a vested interest of the beneficiary, which obtains with respect to regular life insurance. This seems to be the opinion of our Supreme Court on the subject as given in the recent case of *Westerman v. Knights of Pythias*, 196 Mo. 670-701, 94 S. W. 470-477, 5 L. R. A. (N. S.) 1114, in which it is said: "It is only essential to constitute the defendant a fraternal beneficiary association that it be organized for the benefit of its members, and not for gain or profit. It must have a representative form of government and ritualistic form of work. Having these essential requirements, such association is authorized to issue benefit cer-

tificates to any of its members, and it is by no means a condition precedent to make it a fraternal beneficiary association as contemplated by the statute that it shall issue such benefit certificates to each and every one of the members of the association. The true test as to whether this is a fraternal beneficiary association is: Is it formed or organized, and is it to be carried on for the sole benefit of its members and their beneficiaries and not for profit? Has it a lodge system with a ritualistic form of work and a representative form of government?" To the same effect is *Tice v. Knights of Pythias*, 123 Mo. App. 85-104, 100 S. W. 519, affirmed by the Supreme Court and reported, *Tice v. Knights of Pythias*, 204 Mo. 349, 102 S. W. 1013.

Entertaining these views, we are of opinion that the present defendant is a fraternal beneficiary association, notwithstanding the fact that it has authority under its Iowa charter to issue certificates to classes of beneficiaries other than and distinct from those named in the Missouri statute. Of course, a certificate issued by this defendant to a personal representative, as in the case of *Herzberg v. Modern Brotherhood of America*, 110 Mo. App. 328, 85 S. W. 986, would be ultra vires in Missouri as without our law, and the rights of parties under such a Missouri contract, payable to a beneficiary unauthorized by the Missouri statute, would no doubt be determined by reference to the modern doctrine respecting ultra vires contracts of fraternal beneficiary associations, as pointed out by Mr. Bacon in his valuable work on *Benefit Societies* (3d Ed.) § 263. Where the charter of a foreign corporation contains a grant of power not afforded by our law, it is the rule to treat the extra grant in that behalf as nonexistent, and determine the rights of the parties arising from its unauthorized exercise, with reference to the domestic statute. *State ex rel. v. Cook*, 171 Mo. 362, 71 S. W. 829. And in our opinion sound judgments have been given to the effect that this doctrine obtains with respect to the exercise of an extra grant of power to foreign fraternal associations authorizing the issue of certificates to beneficiaries and thus creating contracts ultra vires under our statute. *Hysinger v. Sup. Lodge Knights & Ladies of Honor*, 42 Mo. App. 627. See, also, *Loyd v. Modern Woodmen*, 113 Mo. App. 19, 87 S. W. 530; *Pauley v. Modern Woodmen*, 113 Mo. App. 473-480, 87 S. W. 990; *Bacon on Benefit Societies* (3d Ed.) § 265. The principal question in judgment here was recently before this court in the case of *Loyd v. Modern Woodmen*, 113 Mo. App. 19, 87 S. W. 530, and the opinion given by the court was to the same effect as above expressed. It seems, also, the Kansas City Court of Appeals gave judgment to the same effect in the case of *Pauley v. Modern Woodmen*, 113 Mo. App. 473, 87 S. W. 990, which judgment, although inconsistent with the more recent cases cited

from that court, seems not to have been expressly impeached or overruled. Now, in the case at bar, the insured stipulated in his application for insurance that, in event he took his own life, the certificate and all rights of insurance thereunder should become forfeited. The certificate of insurance also contained a pointed stipulation to the same effect. This contract was entirely competent under the common law when considered apart from our statute on suicide, supra. In view of these facts and the character of the defendant association, plaintiff was not entitled to recover. The judgment will be reversed.

The views herein expressed are in conflict, however, with the judgment of the Kansas City Court of Appeals given on a like question in the case of *Dennls v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967, and other cases above cited. Therefore the case will be certified to the Supreme Court for final determination. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

VOGEL v. STARR.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. BILLS AND NOTES—SUFFICIENCY OF NOTICE OF DISHONOR.

The owner of a note who had placed it with another for collection, assuming that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment, was not charged with the further duty either to himself notify the indorser of dishonor of the note, or to make inquiries as to where the indorser received his mail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1141.]

2. SAME—DILIGENCE—QUESTIONS OF LAW OR FACT.

Whether a notary exercised reasonable diligence in giving notice of dishonor to an indorser is a question of law, not of fact, where there is no controversy over material facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1883.]

3. SAME—PERSONAL SERVICE—NOTICE OF DISHONOR—SUFFICIENCY.

Personal service on an indorser of notice of dishonor is not required, but constructive service will suffice where reasonable diligence is exercised to make it in the manner best adapted to convey actual notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1138.]

4. SAME.

Where a notary made inquiries of several persons as to the post-office address of an indorser, all of whom appeared to possess some information on the subject and expressed the belief that a certain town was the proper address of the indorser, and that town was the nearest town to the indorser's farm, and was a much larger town than the town at which the indorser in fact received his mail, and the notary acted in good faith, a notice of dishonor sent to such town was sufficient, though because the indorser

did not receive his mail there, but in such other town, it was not received within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1186, 1187.]

Appeal from Circuit Court, Grundy County; G. W. Wannamaker, Judge.

Action by John Vogel against O. J. Starr. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

P. C. Stepp, W. D. Stepp, and O. N. Gibson, for appellant. A. G. Knight and W. G. Colli-son, for respondent.

JOHNSON, J. Action against the indorser of a negotiable promissory note. The failure of the holder to give proper notice of dishonor is the defense interposed. Trial was before the court without the aid of a jury. Judgment was entered for defendant, and plaintiff appealed.

The note in question is as follows: "\$45. Trenton, Mo., Oct. 7, 1895. One year after date, I promise to pay to the order of O. J. Starr, forty-five dollars, for value received with interest at the rate of eight per cent. per annum from date, until paid, and if not paid annually, the same to become a part of the principal and bear the same rate of interest as the principal debt. Payable at the First National Bank, Trenton, Mo. C. Millard." A few days after the execution of the note, and long before its maturity, Starr, the payee, sold it to plaintiff for value, and indorsed it in blank. Later plaintiff deposited it with the Trenton National Bank for collection. On the last day of grace, October 10, 1896, and within proper hours, the bank handed the note to a notary public for demand and protest. Millard, the maker, had moved to Wisconsin, and Starr, the indorser, lived in the country about 12 miles from Trenton. The notary testified: "Well, it was done on the date that appears on the protest and on the face of the note, which is the 10th day of October, 1896. This note was given to me to protest by the Trenton National Bank of Trenton, Mo. I didn't know at that time the indorser on the back, Mr. Starr, or I didn't know C. Millard, and don't know him now. The bank told me to protest the note, and they gave me information as to where Millard lived; and, according to that information, I mailed the notice of protest to him at Hanover, Rock county, Wis., and my impression is that in regard to Mr. Starr's address the bank's best information; that is, they told me they were not certain about it. That's the way I remember it; that it was Spickards, Mo. And I took the note. It was payable at the First National Bank, Trenton, Mo., and I took this note to the building that had been occupied by the First National Bank. The First National Bank at that time had gone into liquidation in connection with the old Grundy County National Bank. It had its first banking room at the five corners; and the First National and the old Grundy County

National consolidated and liquidated through the Trenton National Bank. * * * This protest shows that I took it to that building and presented it there, and found no one there to pay the note. And, after that, out of an abundance of precaution, I went over to the Citizens' State Bank, which was diagonally across the street from the building formerly occupied by the First National, and I presented the note there, to the cashier of that bank, as the protest shows, and demanded payment there. I think Walter P. Fulkerson was cashier at that time, and there was nobody there that would pay the note; so from there I went to the Trenton National, or might be probable I made the demand there before I went to the other place, at any rate, I presented the note as the protest shows to the cashier of the Trenton National Bank, Mr. R. M. Cook, and demanded payment of the note. R. M. Cook had already been the cashier of the First National Bank at which this note was payable, and he was winding up the affairs of the old First National at the time, and also cashier of the Trenton National. Then I made inquiry as to where Mr. Starr lived, and made a diligent search, as I thought. * * * They thought Mr. Starr lived near or got his mail at Spickards, Mo., and so I made some other inquiries as to where Starr lived, at the banks, Mr. Cook and the Citizens' bank also, and I wouldn't say positively as to who else I did inquire of. * * * I mailed the notice to Starr at Spickards, Mo. Q. Your information was that that was his post office? A. From information I got from inquiring of Cook and Fulkerson and the clerks in each bank, and I wouldn't say positive but I was in Knight & Harber's office at the time and Dale Stepp took my affidavit to the notice; and my impression is I made inquiry among them as to where Mr. Starr lived, but I may be wrong about that. I wouldn't state positively; and I mailed the notice. I have stated in a general way what had been done; that is, in regard to protesting of this note. And it was signed and sealed by me and I put that in an envelope and mailed it to Mr. Starr at Spickards, Mo. Put a two-cent stamp on it and put it in the post office; in the same way to Millard, except his was addressed to Hanover, Rock county, Wis." Starr did not receive the notice until some three months after it was mailed, for the reason that Tindall, and not Spickards, was his post office. The farm he occupied as a tenant was about one mile nearer Spickards than Tindall, either by wagon road or as the crow flies, and Spickards, though a small town, was much larger than Tindall. But Starr had made the latter place his post-office address while living on a farm nearer to it than to Spickards, and continued to get his mail there. No doubt is suggested in the evidence of the good faith of the notary and of plaintiff's collection agent in mailing the notice to Starr's nearest post office, nor do we find any-

thing indicative of bad faith on the part of plaintiff, the owner of the note. He was not in Trenton on the date of the protest, nor had he imparted to his collection agent the information he possessed respecting Starr's post-office address. Had he done this, we perceive nothing in the facts known to him to support the conclusion that his collection agent and the notary might have acted differently. The farm where plaintiff lived was, perhaps, two miles from that occupied by Starr. While the note was maturing, they met occasionally and casually on the public road, at Tindall, or at a neighborhood church, but plaintiff did not know that Starr received his mail at Tindall, and it appears that he and Starr were acquainted only slightly.

While it is true that the holder of commercial paper for collection must be regarded as a separate and independent holder for the purposes of presentment, demand, protest, and notice of dishonor (*Renshaw v. Triplett*, 23 Mo. 213; *Griffith v. Assmann*, 48 Mo. 66; *Ivory v. Bank*, 36 Mo. 475, 88 Am. Dec. 150; *Bank v. Briedow*, 31 Mo. 523; *Young v. Hudson*, 99 Mo. 102, 12 S. E. 632), we are willing to concede for argument that it was the duty of plaintiff to communicate to his collection agent the facts in his knowledge relating to the post-office address of the indorser, but we do not sanction the contention that he was charged by law with the further duty either to notify the indorser personally of the dishonor of the note or to make inquiries in the neighborhood to ascertain the place where the indorser received his mail. The note, by its terms, being payable at Trenton, it was very natural that plaintiff should employ an agent at that place to look after its collection, and that he should rely on his agent to take the necessary steps to hold the indorser. We are going far enough when we assume that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment. It was not his duty to perform personally the very duties he had delegated to his agent. When a person employs an agent to do a thing, he should not be held to be remiss for relying on his agent and only may be held liable for the negligent or wrongful acts of the agent in the performance of the delegated duty under the principle that what one does by the hand of another he does himself. Imputing to the collection agent and the notary knowledge of the facts known to plaintiff, our chief concern is with the question of whether the notary exercised reasonable diligence in the giving of notice to the indorser. Since we find in the record no controversy over material facts, the question is one of law, not of fact. As early as the case of *Linville v. Welch*, 29 Mo. 203, it was decided by the Supreme Court that what is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are undisputed, and, when they

are in dispute, the court should give hypothetical instructions, leaving the facts to be determined by the jury. *Sanderson's Adm'r v. Reinstadler*, 31 Mo. 483; *Fugitt v. Nixon*, 44 Mo. 295.

Considering the case, then, from the standpoint presented by the facts known to plaintiff, knowledge of which we ascribe to the notary, and by the facts acquired by the notary from his own inquiries, and treating the question of due diligence as a question of law, we next turn to consider the principles and rules by which the holder of a bill of exchange must be controlled in giving to an indorser notice of dishonor. The liability of the indorser is conditioned upon the existence of two facts, viz.: (1) That the maker has made default in the payment of the bill at maturity; (2) that due notice of that fact be given the indorser. As to what will constitute sufficient notice, it is well settled that personal service of the notice is not required. Constructive service will suffice if reasonable diligence be exercised to make it in the manner best adapted to convey actual notice. "Where the party to be served is a resident of the city or town where the protest is made, the course required is to give him personal notice or to leave it at his dwelling or place of business. But, if he lives in the country, then a notice by mail to his post office will be sufficient." *Barrett v. Evans*, 28 Mo. 331; *Sanderson's Adm'r v. Reinstadler*, supra. When the indorser lives in the country and his post-office address is not known to the holder, it is the duty of the latter to make reasonable inquiries in the town or city where the bill is payable, and, in default of more specific information, to address the notice to the post office nearest the residence of the indorser. But the holder is not justified, in all cases, in sending the notice to the nearest post office. He must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and, learning it, must send the notice there, regardless of whether it be the nearest post office. With these principles before us, we do not hesitate to declare as a matter of law that the notary, whose good faith is not questioned, exercised reasonable diligence and acted on the information he received in a way which would have commended itself to any reasonably careful and prudent person in his situation. He made inquiries of several persons, all of whom appeared to possess some information on the subject and all expressed the belief that Spickards was the proper address of the indorser. Taking these opinions, in connection with the facts that Spickards was the nearest town to the indorser's farm and was a much larger place than Tindall, we think any person in the situation of the notary would have come to the conclusion, as he did, that the notice should be sent there. Finding, as we do, that the notary acted properly, it is immaterial that the indorser

failed to receive the notice within a reasonable time. That was his misfortune for which, in a sense, he was responsible. He was justified in standing strictly on his right to legal notice, but presumably he knew of the fact of the maturing of the note, and from all the circumstances must have anticipated that notice of dishonor likely would be addressed to him at Spickards. The notice was sufficient.

The case was not tried in accordance with the views expressed, and it follows that the judgment must be reversed and the cause remanded. All concur.

HESSNER v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1903. Rehearing Denied
July 15, 1903.)

1. TRIAL—INSTRUCTIONS—ASSUMING FACTS.

In an action for injuries caused by a collision between a wagon and a street car, a portion of one of plaintiff's instructions read: "And that said injuries to the plaintiff, if any, were caused by the carelessness and negligence of the defendant either by failure of the motorman in charge of said car to keep said car under such control that it would not run into and upon the said wagon in which plaintiff was seated, or by the failure of the motorman in charge of said car to check the speed of or stop said car, and thereby avoid running into the wagon in which plaintiff was seated, when he saw, or by the exercise of ordinary care ought to have seen, that said wagon was in a situation where it was liable to be run into by said car, unless the speed of said car was checked, or it was stopped before it collided with said wagon." *Held* erroneous as assuming that defendant was negligent either in failing to control the car, or check its speed or stop it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

2. APPEAL AND ERROR — RECORD — MATTERS NOT APPARENT OF RECORD—EVIDENCE—JUDICIAL NOTICE—WIDTH OF LOT.

Judicial notice cannot be taken by the court on appeal of the width of a lot in support of an instruction not based on any certain evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3751.]

3. STREET RAILROADS—COLLISION WITH VEHICLE—ACTION FOR INJURIES—MISLEADING INSTRUCTIONS.

In an action for injuries in colliding with a street car, an instruction for plaintiff stated that, if plaintiff was negligent in driving along defendant's west-bound track, "then he cannot recover herein, and your verdict should be for the defendant." In the next sentence it proceeded: "But if you further find and believe from the evidence that plaintiff was in a position of peril," and that defendant's servants saw him and could have stopped, etc., "and carelessly and negligently failed to do so, then you will find for the plaintiff, and not for the defendant, notwithstanding the said negligence of the plaintiff in driving along the west-bound track of the defendant." *Held* contradictory and misleading.

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by C. E. Gessner against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas and Frank G. Johnson, for appellant. Bird & Pope, for respondent.

ELLISON, J. Plaintiff's action was brought to recover damages for personal injuries received by a collision between a wagon he was driving and one of defendant's street cars. The judgment was for the plaintiff.

The petition alleges that plaintiff was seated in a one-horse wagon which he was driving east on Ninth street (a street running east and west), in Kansas City, along and upon the north track of defendant's street railway about 200 feet west of Mulberry street, when one of defendant's cars was so carelessly managed and controlled that it was run into the wagon and plaintiff thrown to the street, whereby he was hurt. The negligence charged is in the conductor and motorman failing to keep a proper lookout for persons on said street, and in failing to keep the car under such control that it would not be run into and upon persons and wagons, and in running the car at too great a rate of speed and in a careless and negligent manner, and in failing to check the speed or stop the car, and thereby avoid running into the wagon in which plaintiff was seated after seeing plaintiff or by ordinary care could have seen him. The answer was a general denial and contributory negligence on part of the plaintiff. There was evidence tending to support the petition, and also that defendant was not guilty of negligence, and that plaintiff himself was guilty of contributory negligence.

Complaint is made of plaintiff's instruction No. 1, in that it assumes that defendant was guilty of negligence either in failing to keep the car in control, or by failure to check the speed or stop the car. We think the complaint well founded. That portion of the instruction reads: "And that said injuries to the plaintiff, if any, were caused by the carelessness and negligence of the defendant either by the failure of the motorman in charge of said car to keep said car under such control that it would not be run into and upon the said wagon in which plaintiff was seated, or by the failure of the motorman in charge of said car to check the speed of or stop said car and thereby avoid running into the wagon in which plaintiff was seated, when he saw, or by the exercise of ordinary care ought to have seen, that said wagon was in a situation where it was liable to be run into by said car, unless the speed of said car was checked, or it was stopped before it collided with said wagon." It does not submit to the jury the hypothesis whether a failure to keep the car under control, or a failure to check the speed of the car, was negligence. It submits to the jury whether such failures caused the injury, but assumes that either of the failures was negligence. As negligence is the vital part of the cause of action, it is readily seen the instruction was erroneous.

Again, the instruction places the plaintiff, when struck, as "driving along on the west-bound track of the defendant, near and about 200 feet west of Mulberry street." There was no evidence of the distance from Mulberry street, but plaintiff states that, assuming the width of a lot to be 25 feet and taking the number of the house in front of which plaintiff was, it can be seen that the place was about 200 feet west of Mulberry street. We cannot take judicial notice of the width of a lot, and therefore must require proof. The only evidence concerning a distance of 200 feet was, not as to the point of collision, but was in regard to where the wagon was found the next day.

Instruction No. 2 for plaintiff seems to present a point blank contradiction. The first sentence expressly directs a verdict for the defendant if the jury believed plaintiff was guilty of negligence in driving along the defendant's west-bound track. It states in affirmative words that, if he was negligent in so doing, "then he cannot recover herein and your verdict should be for the defendant." Wholly ignoring this unqualified direction, it proceeds in the next sentence to direct: "But if you further find and believe from the evidence that plaintiff was in a position of peril," and that defendant's servants saw him and could have stopped," etc., "and carelessly and negligently failed to do so, then you will find for the plaintiff, and not for the defendant, notwithstanding the said negligence of the plaintiff in driving along the west-bound track of the defendant." It would be difficult to frame an instruction more confusing. The first sentence unqualifiedly cuts out the humanitarian theory and the second as emphatically permits a verdict under that rule. It may be said that the first sentence was a mistake against plaintiff; but, as a whole, it seems to us liable to lead to any sort of verdict.

The judgment will be reversed, and the cause remanded. All concur.

ÆTNA INS. CO. OF HARTFORD, CONN., et al. v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals, Missouri.
June 29, 1908. Rehearing Denied
July 16, 1908.)

APPEAL AND ERROR—MANDATE AND PROCEEDINGS IN LOWER COURT.

Where a cause was remanded with directions to enter judgment on the verdict theretofore rendered for plaintiffs, all that the lower court could do was to obey directions, and it had no power to consider questions thereafter raised by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 4668.]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by the Ætna Insurance Company of Hartford, Conn., and others, against the Missouri Pacific Railway Company. In obedience to a mandate of the Court of Appeals

on a former appeal in the same case (123 Mo. App. 513, 100 S. W. 569), the court entered a judgment as directed on the verdict theretofore rendered for plaintiffs, and defendant appeals. Affirmed.

Elijah Robinson, for appellant. Ed E. Yates and M. A. Fyke, for respondents.

BROADDUS, P. J. This case was before this court once before on appeal. At the former trial the plaintiff recovered a verdict for \$2,500. The defendant in due time filed a motion for a new trial and a motion in arrest of judgment. Both motions were submitted to the court, and the motion for new trial was sustained. On the motion in arrest the court made the following order: "And the court further finds that the motion in arrest of judgment filed herein by the Missouri Pacific Railway Company was taken up for argument and submission at the same time as said motion for new trial, but that, although requested by the court, by statement or argument in favor thereof, to give the reasons upon which said motion was founded, the said defendant failed to do so, whereupon the court finds that said motion was abandoned by said defendant, and thereupon the court of its own motion strikes said motion from the files of this court as so abandoned, to which ruling of the court the defendant excepts." The plaintiff appealed from the action of the court setting aside the verdict of the jury. The cause was heard and determined by the court and the action of the circuit court in setting aside said verdict was reversed, and the cause was remanded, "with directions to enter judgment for the plaintiff on the verdict as rendered." See *Insurance Co. v. Railway Co.*, 123 Mo. App. 513, 100 S. W. 569. In obedience to the mandate of this court the circuit court entered a judgment as directed on the verdict theretofore rendered; and the defendant appealed.

In this suit as originally instituted a firm composed of Strohm & Jones was made co-defendant with the appellant. During the trial and before the submission of the case to the jury the plaintiff dismissed the suit as to the said Strohm & Jones, and all the subsequent proceedings in the case were conducted against the appellant which resulted in the verdict in plaintiff's favor, the order of the court setting it aside, the appeal by the plaintiff, the judgment and mandate directing the circuit court to enter judgment on said verdict, and the final judgment rendered in obedience to said judgment and mandate. The defendant claims that the said Strohm & Jones had an interest in the subject-matter of the suit and were necessary parties thereto; and that there was but a single cause of action, which could not be properly determined unless the interest of all the parties were litigated in the same proceeding. It has been held by this court and the Supreme Court that: "When a cause has been remanded with special directions, it is out of the power

of the court receiving such directions to open the cause and have a new trial. The mandate in such case is in the nature of a special power of attorney. By its authority and jurisdiction are granted to the lower court to take such steps as are ordered and such incidental steps as are necessary to carry the mandate into execution. It has no power to enter any other judgment or to consider or determine other matters not included in the duty of entering the judgment as directed." State ex rel. v. Anthony, 65 Mo. App. 543; Scullin v. Railroad, 192 Mo. 1, 90 S. W. 1026. Under the foregoing ruling, the circuit court only obeyed the mandate and directions of this court which was all it could do. Consequently the point that appellant seeks to raise on the appeal has already been determined finally and by which appellant is forever concluded.

Affirmed. All concur.

SMITH v. ST. LOUIS, I. M. & S. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 28, 1908. Rehearing Denied
July 15, 1908.)

1. RAILROADS—INJURIES TO ANIMALS—PRIVATE CROSSINGS—GATES.

In an action against a railroad for injuries to plaintiff's horse through the alleged failure of defendant to maintain a gate with secure fastenings at a necessary farm crossing, evidence held sufficient to support a judgment for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1608-1620.]

2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

An instruction assuming as a fact a matter not in controversy is harmless error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219, 4220.]

3. RAILROADS—INJURIES TO ANIMALS—PRIVATE CROSSINGS—GATES.

Where land was divided by a railroad track in such a manner that the owner or his tenant could not go from one portion to the other unless a crossing was provided, the legal implication arose that one was necessary.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Samuel E. Smith against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin L. Clardy and Edw. J. White, for appellant. Thomas & Hackney, for respondent.

BROADDUS, P. J. This action was commenced before a justice of the peace for double damages for the alleged killing of plaintiff's mare by the engine and cars of defendant at a place where it was claimed the defendant had failed to construct and maintain a gate with secure fastenings at a necessary farm crossing of its road on the farm of A. L. Thomas which plaintiff had in his possession as tenant. Plaintiff's testimony tended to show that he was living on the farm men-

tioned, it all being inclosed land; that the road runs nearly east and west through the farm; that the house and pasture is on the south side of the railroad and about 180 acres lies on the north side of it; that the defendant company had constructed a farm crossing near the east line of the farm so as to afford access from one part of the farm to the other; that the gates were constructed in two panels, each fastened by hinges on posts and opening from the center; that the two sections did not come together, but there was a space between of about two inches; that there were no hooks or latches, but that the gate was fastened when closed by a pine board about an inch thick, about five inches wide, and about two feet long, which was inserted in one panel of the gate to be shoved through the other panel; that there was a stob of wood driven into the ground for the sections of the gate to rest against; that some six or eight weeks before plaintiff's mare was killed this stob became loose, and in some way worked out of the ground, which left the gate insecurely fastened; that plaintiff notified defendant's section foreman of the condition of the gate, and that he made some repairs on it, but did not replace the stob; that it was shown that persons who had occasion to pass through the gate that the wind would work it open when the stob was absent; that on the afternoon before the mare was killed the gate was closed with the pine board to secure it; that there was wind on the night the mare was killed; that the mare was turned into the pasture at the close of the day; that in the morning she was missing; that the gate was found open; that there were marks on the track and other evidence that she had been struck by defendant's engine and killed at a trestle; and that she was of the value of \$135. And there was no evidence that persons were in the habit of passing through and leaving the gate open, but, on the contrary, plaintiff endeavored to keep it closed. The defendant's witnesses testified that they had tried the gate when the board was in place, that it acted as a brace, and that the wind could not open it by working the panels back and forth. At the close of the plaintiff's testimony and at the close of all the testimony, the defendant asked the court to direct the jury to return a verdict in its favor, which the court refused. The judgment was for the plaintiff, and defendant appealed.

The principal point relied upon for a reversal is that, under the evidence, the plaintiff was not entitled to recover. Defendant likens the case to that of Francis v. Railroad, 118 Mo. App. 436, 93 S. W. 876. The evidence in that case was that the gate was fastened by a wire which the plaintiff concluded was not sufficient for the purpose and put one on himself that he thought would answer the purpose. The gate was closed at noon, but later in the day it was seen by a neighbor to be open, but he did not shut it. On the same

night plaintiff's mare passed through. The court held that there was no evidence that defendant's servants knew the gate was open; and it could not be said as a matter of course that the gate being open at the hour of 5 o'clock was long enough before the killing that night for the law to imply notice to the defendant that it was open. The cases are entirely different and the principle of law in the one has no application to the other. The case of *Rowen v. Railroad*, 198 Mo. 654, 90 S. W. 1009, which was certified from this court, holds that in such cases the plaintiff is not entitled to recover unless he shows that the railroad was not only negligent in failing to erect and maintain a gate such as the law required, but also that the injury to his stock was the result of such failure. In other words, that the result was the proximate cause of the injury. We do not think the case has any application as there was evidence not only that the gate was not such as the law required, but that it came open because it was not secure and the injury resulted from the neglect of the defendant in that particular. *McMillan v. Railroad*, 70 Mo. App. 568.

Defendant assigns as error the assumption by the court in the instruction given for plaintiff that the crossing was a necessary farm crossing. As there was no controversy as to that matter and it seemed to be so conceded, there was no error in the instructions. The undisputed evidence was that there was no other crossing. That the land in question being divided by defendant's track in such a manner that the owner or his tenant could not go from one portion to the other without such crossing was provided, the legal implication arose that one was necessary. Other objections are raised to the instruction, but we do not believe that they are well taken.

Upon the whole the case was well tried, and, the judgment being supported by sufficient evidence, it is affirmed. All concur.

STARBUCK v. AVERY.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. USE AND OCCUPATION—GROUNDS OF ACTION—RELATION OF LANDLORD AND TENANT.

To succeed in an action for use and occupation, the relation of landlord and tenant must be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Use and Occupation, §§ 2, 3.]

2. LANDLORD AND TENANT—CREATION OF RELATION—IMPLIED CONTRACT—EVIDENCE.

The relation of landlord and tenant may be brought about by express contract, or it may arise from an implied contract, which may be implied from slight evidence, as from a permissive holding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 3-40, 45-48.]

3. SAME—CONVEYANCE BY LANDLORD.

Where a landlord conveys land in possession of a tenant to a grantee who knows of the tenancy and the possession of the tenant, and

the tenant, knowing of the sale, continues to occupy the premises under the tenancy, the relation of landlord and tenant is created between the grantee and the tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 29.]

4. SAME—PRESUMPTION OF OCCUPANCY AS TENANT.

Unless a tenant in possession repudiates the tenancy under a grantee of his landlord, his continued occupancy after the sale of the premises raises the presumption that it is under the tenancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 48.]

5. SAME—OPERATION OF LANDLORD'S DEED—RIGHT TO SUE FOR RENT.

A landlord's warranty deed operates as an assignment of whatever rights he has as landlord in the letting of the premises to a tenant in possession, and, if the tenant continues to occupy under the tenancy, the grantee may sue for the rent under the original letting by the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 808, 896.]

6. SAME—ACTION FOR RENT—EXHIBITION OF DEED BY PURCHASER.

Rev. St. 1899, § 4137 (Ann. St. 1906, p. 2246), requiring the exhibition of the deed, under which title is claimed, on demand of rent by the purchaser of leased premises, applies to actions for possession, and such exhibition of deed is not necessary in a mere action for rent.

7. SAME—NECESSITY OF ATTORNEYS.

A formal attornment in affirmative words is not necessary to an action for rent by a grantee of the landlord against a tenant continuing to occupy under the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 14.]

8. SAME—RECOGNITION OF PURCHASER AS LANDLORD.

A tenant's continued occupancy of premises under the tenancy with notice of a sale of the premises amounts to a recognition of the purchaser as his landlord.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 182.]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Evangeline Starbuck against B. C. Avery. From a judgment for plaintiff, defendant appeals. Affirmed.

Halbert H. McCluer, for appellant. Cook & Gossett, for respondent.

ELLISON, J. This action is for rent for use and occupation of a house and lot in Kansas City. The plaintiff recovered in the trial court. It appears that one Hoffman owned the property, and that defendant in the year 1902 was occupying it as his tenant from month to month at a rental of \$27.50 per month. In September of that year Hoffman sold and conveyed the property to plaintiff by a general warranty deed. Defendant had paid the rent up to the 1st of November and of this plaintiff was advised when she purchased the property. Defendant continued to occupy the property until April, 1903, without paying rent to any one. The case was submitted to the trial court on three characters of proof. One was a written agreed statement of facts, one was the

oral statements of the attorneys, agreed to be correct, and the other was evidence supplementing the facts agreed. The evidence, in view of admissions and concessions, was perhaps unnecessary.

Defendant's defense may be said to consist in his claim that the relation of landlord and tenant never existed between him and plaintiff, and that hence there could be no recovery for use and occupation. It is true that, in order to succeed in an action for use and occupation, you must show that the relation of landlord and tenant existed (*Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Edmonson v. Kite*, 43 Mo. 176; *Cohen v. Kyler*, 27 Mo. 122; *Doyle v. O'Neil*, 7 Mo. App. 138), but that relation may be brought about by express contract, or it may arise from an implied contract, and the contract may be implied from slight evidence, as from a permissive holding. If a landlord rents or leases his real estate to a tenant who goes into possession under the terms of the letting, and afterwards the landlord conveys the land, the grantee knowing of the tenancy and the possession of the tenant, and the latter, knowing of the sale, continues to occupy the premises under the tenancy, the relation of landlord and tenant is thereby continued between the grantee and the tenant; and, unless the facts of the case show that such tenant repudiated the tenancy under the grantee, his continued occupancy will raise the presumption that it is under the tenancy. The grantee's warranty deed received from his grantor operated as an assignment of whatever right the grantor had as landlord in the letting, and, if the tenant continues to occupy under the tenancy, the grantee may maintain his action for the rent under the original letting by the grantor. The statute as to exhibition of deed (section 4137, Rev. St. 1899 [Ann. St. 1906, p. 2246]) applies to actions for possession. It is not necessary in a mere action for rent. Neither is it necessary to such action that there be a formal attornment in affirmative words. Applying the foregoing statements of the law to the facts of the case, we find it results in affirming the judgment. It is conceded that defendant knew of plaintiff's purchase of the property while he was occupying it as tenant, and it was distinctly stated to the trial court, and agreed to, that, "under that tenancy, Avery, the defendant, continued to reside on the premises until April, 1903." Then it was further stated to the trial court that "there was no recognition of any tenancy between plaintiff and defendant, nor any attornment nor any payment of rent." This was repeated in the written statement of facts.

The only interpretation which can be given to these statements is that defendant, with knowledge of plaintiff's purchase, continued to occupy as tenant under the original letting. It is a part of the admitted history of the case that he actually continued to occupy the

property from November to April with knowledge of plaintiff's purchase, and it was agreed at the trial that such occupancy was under the tenancy. That being true, his statement that he never recognized plaintiff as his landlord counts for nothing. She having purchased the property with his knowledge, and he continuing to occupy under the tenancy, was itself a recognition. He never repudiated the tenancy, nor did he repudiate the source from which he obtained his right to occupy. It is merely said that he never "recognized" plaintiff as his landlord.

The record presents a case for defendant which is clearly without merit. He has never paid rent for the premises. He knows, and has known, that plaintiff is the owner, and, so far as the record discloses, he has put her to the annoyance of this action without excuse or legal justification. But, as the judgment appears to be for \$16.50 in excess of the sum prayed for in the petition, and plaintiff offering to remit that sum, the judgment will be affirmed, less the remittitur, the cost of the appeal against the plaintiff. All concur.

HEBELER v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. NEGLIGENCE—ISSUES—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's want of care appeared in making out his own case, contributory negligence was in issue, though it was not set up in defendant's answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 202.]

2. STREET RAILROADS — COLLISION — NEGLIGENCE OF MOTORMAN.

In an action for damage to plaintiff's team by colliding with defendant's car, it appeared that plaintiff's driver was driving between defendant's tracks, and that the car and wagon were in plain view of each other for several blocks; that plaintiff's driver actually saw the car coming for a block or two, and attempted to get off the track within sufficient time to have done so, but for the unexpected sliding of the wheel along the track. *Held*, that the motorman's conduct should only be judged by the standard of an ordinarily prudent man, and he was not required to foresee that the wheel would slide on the rail, and he was therefore not guilty of negligence.

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by W. F. Hebelier against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John H. Lucas, Ben T. Hardin, and C. S. Palmer, for appellant. Kelly, Brewster & Buchholz, for respondent.

ELLISON, J. This is an action for damages done to plaintiff's wagon and team of horses by coming into collision with one of

defendant's street cars. The judgment was for the plaintiff in the trial court.

It appears that defendant operates a double-track street railway on Woodland avenue, a street running north and south in Kansas City; that plaintiff's servant, with his team and empty wagon, entered upon the west track at Forty-Third street and drove north, thus being in position to meet south-bound cars. He drove on the track to a point between Thirty-Eighth and Thirty-Ninth, when the wagon and team were struck by a south-bound car and badly damaged. The verdict was obtained alone upon the theory of the last chance doctrine. Defendant makes two contentions which we care to notice. One is that plaintiff was guilty of contributory negligence which it is argued should have given the case to the defendant. Plaintiff insists that the answer did not make a proper plea of contributory negligence, and therefore such defense is not in the case. Conceding, but not deciding, that the answer did not set up such plea, contributory negligence would still be in the case for the reason that plaintiff's want of care appeared in making out his own case. *Milburn v. Railway Co.*, 86 Mo. 104.

But we will pass that by, for defendant's second contention is the decisive point in the case; that is, that there is no ground of recovery under the last chance rule, for the reason that there was no justifiable ground for holding that the motorman was negligent after becoming aware or after he should have become aware of the negligence of plaintiff's servant. We have so concluded. Plaintiff's servant, testifying for plaintiff, stated: That, had he been observing, he could have seen the car coming meeting him on the same track for a half mile or more, and that he actually did see it for a block or two, which at that part of the city would be between 600 and 1200 feet distant. That, when he saw it, his wagon was running with two wheels between the rails of the west track and the other two in the space between the two tracks. In other words, half his wagon and one horse was between the rails of the west track, and half his wagon and the other horse was on the space between the two tracks. That, on observing the car thus coming meeting him, he turned his horses towards the other track, so as to draw his wagon clear of the west track and let the car by without stopping it or endangering himself and team by a collision; but it seems his wagon would not immediately leave the west track by reason of the wheel sliding along the rail. It slid for some distance. He would not say it was not as far as 100 feet. The face of the case shows incontrovertibly that but for the circumstance of the wheel thus sliding along the rail the wagon would have cleared the track and no collision have happened. He so stated in giving his evidence. Now, what was the situation as viewed by the motorman, taking him, as we must, to have been a man of ordinary sense and prudence? If, as plaintiff contends, he should have observed the man

and team sooner than he did, he would merely have seen the ordinary thing of a man driving on the track. He would, of course, suppose that the man would get off. He would not have seen an inattentive man oblivious to danger. He would have seen a man who was aware of the danger if he remained on, and who himself in point of fact was intending to get off, and only failed by reason of the unexpected accident of the wheel sliding on the rail. Allowing that the driver, under the circumstances, was not guilty of negligence in being on the track, he was not negligent in not attempting to get off sooner, for he made the attempt in time but for the unexpected sliding of the wheel. And so of the motorman. If he had the driver in view for a full half mile as plaintiff contends he did have or should have had, he would only have observed a man who had ample time to get off the track. The motorman's conduct should only be judged by the standard of an ordinarily prudent man. That standard would not require that he should have foreseen, had he observed the wagon, that it would slide on the rail, any more than that the harness would suddenly break or that one of the horses would fall down. It would clearly be unfair and unreasonable to say that the motorman should have begun his effort to stop the car sooner than he did. There was nothing in the situation to suggest to him that he should. Plaintiff's case must rest upon the ground that the motorman is to be charged with negligence in not foreseeing that the wagon, without a load, would slide along the rail, and this we have already said would be unwarranted.

The judgment must be reversed. All concur.

STEVENS v. STEVENS.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. DEEDS — CONSTRUCTION—CONSIDERATION— SPECIAL DEPOSIT.

Plaintiff made a special deposit with his brother of \$1,000, which was put in an envelope, on which was written "Property of" plaintiff, and placed in a safe. Plaintiff worked for his brother several years before the latter's death, and the brother and his wife executed a deed to plaintiff reciting that the consideration was "one dollar, love and affection, and a receipt in full for all labor claims and demands whatsoever." *Held*, that the receipt expressed in the statement of consideration did not cover the deposit.

2. BAILMENT — GRATUITOUS BAILMENT— DEPOSIT OF MONEY.

A deposit of \$1,000, made by plaintiff with his brother, placed in an envelope marked as plaintiff's property and put in a safe, is a gratuitous bailment, entailing no liability except for gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 37, 38.]

3. SAME—CONVERSION—DEMAND.

In the absence of a demand made on a bailee during his lifetime to return a special deposit of money made with him and a refusal to

surrender the deposit, there is no conversion by the bailee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 69.]

4. EXECUTORS AND ADMINISTRATORS—ACTIONS—CONVERSION.

Where the bailee of a special deposit of money dies without returning it, and the money cannot be identified, an action in the nature of conversion is the only remedy available against the executrix on her refusal to recognize the claim.

5. TRIAL—DIRECTION OF VERDICT—EVIDENCE FOR PLAINTIFF.

Where there is evidence tending to support plaintiff's claim, it is error to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381-389.]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by William L. Stevens against Ellen S. Stevens, executrix of Edward A. Stevens, deceased. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

James A. Plotner, for appellant. Lathrop, Morrow, Fox & Moore, for respondent.

BROADDUS, P. J. This suit is against the executrix of the estate of E. A. Stevens, deceased. The proceeding was commenced in the probate court, and plaintiff's statement as to the nature of his claim is as follows: "To cash had and received by the said E. A. Stevens in his lifetime, for and on account of a special deposit made by the said William L. Stevens with the said E. A. Stevens * * * \$1,000.00." The plaintiff established by his own evidence that prior to July, 1901, he had in his possession money of his own to the amount of \$1,000. He stated that he kept some of it with O. H. Stevens in his safe, and that afterwards he took from that safe the money, and put it in Miller Stevens' safe, who was also dead at the time of the trial. He stated that his brother died some time about the 15th or 25th of August, 1902, and that the demand he made of the executrix was some time thereafter in the month of September. At this time he received a deed executed by E. A. Stevens and his wife, the executrix, conveying certain lots of ground situated in Kansas City, Mo. He stated that this deed had been delivered by the deceased to George Stevens as an escrow, who delivered it to him. The deed is dated June 7, 1901, and the consideration is expressed in the following language: "That said parties of the first part, in consideration of the sum of one dollar, love, and affection and receipt in full for all labor claims and demands whatsoever," etc. It was acknowledged on the 6th day of August, 1901.

Henry L. Metzger testified that: On May 13, 1902, he went into the office of the deceased to get change for a \$20 bill. That deceased said he had no change; but, when witness started to leave, said: "Wait a minute. I think I have an envelope with some money for W. L. Stevens. I think it is probable that

he has some change in that." That he then sent Burns L. Stevens, plaintiff's son, to the safe and had him bring an envelope on which was written, "Property of W. L. Stevens"; and that he took the change out of that envelope, and put a \$20 bill in it. Witness did not count the money in the envelope, but he thinks there were several hundred dollars in it. Burns L. Stevens testified that he was present on the occasion mentioned by Metzger, and that E. A. Stevens sent him to the safe and said to him: "Get that package of your father's out of the safe." He also testified as Metzger did as to the writing on the envelope, and that he did not know how much money was in the envelope, but that there were several hundred dollars in it. The inventory of the deceased's personalty is as follows: "One thousand dollars in cash. One gold watch and chain. Diamond stone spiral, together with one suit of clothes and one overcoat." It was not disclosed where the \$1,000 was found, whether in deceased's possession or on deposit in a bank. It was also shown that plaintiff worked for the deceased five or six years before his death at a low rate of wages. At the conclusion of plaintiff's testimony, the jury by the direction of the court returned a verdict for defendant, upon which judgment was rendered, and plaintiff appealed.

We conclude from the briefs and argument of counsel on the respective sides of the cause that the court was induced to direct the verdict by reason of the recitations of the said deed; that the recitations of the deed were intended to include an acquittance of all demand whatsoever the plaintiff might have against the said E. A. Stevens, the deceased. If the demand in question was one of indebtedness, it would be necessary for us to determine the controversy in relation to effect of the recitation in said deed. But we believe it has nothing to do with the merits of the case. The receipt injected into the consideration clause of the deed of "one dollar, love and affection, and a receipt in full for all labor claims and demands whatsoever," was intended to express some obligation in the nature of indebtedness or claim of some kind which the plaintiff might have or might assert against the deceased. The deposit in question inclosed within an envelope upon which was written the words, "Property of W. L. Stevens," was not an indebtedness of any kind, and was in no sense a demand against the deceased. It was a gratuitous bailment, without any liability resting upon the bailee except for gross negligence. *Lawson on Bailments*, § 33. The deposit under the circumstances did not differ from any ordinary deposit of personal property as for instance a watch. And it was no less specific personal property as long as it remained in the envelope than it would have been if it had been a watch. And, as there was no demand made upon the deceased during his life and a refusal to surrender the deposit,

there was no conversion. If there was a conversion, it was by the executrix.

The plaintiff's demand as set out in his statement is a claim for \$1,000 on account of a special deposit, made by plaintiff with E. A. Stevens. As the money could not be identified, the plaintiff adopted the only remedy available to him, which is in the nature of an action for conversion. As there was evidence tending to sustain plaintiff's claim, we hold that the court committed error in directing a verdict in favor of the defendant, for which error the cause is reversed and remanded. All concur.

BRIDGES et al. v. MISSOURI, K. & T. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. RAILROADS—FENCING TRACK—COMPANY'S DUTY.

Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring a railway company to fence its track, a company cannot be required nor permitted to fence streets, but they may be required to fence the track along places in towns, etc., not laid off into streets, unless it be essential to the company's transaction of business with the public that the track be unfenced, and no fence is required at a station, whether in a town, etc., or not.

2 SAME—"BUSINESS."

Under the rule, as affected by the express terms of Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), that a railroad company need not fence its track at a station where it transacts business with the public, the "business" to be considered is the company's business with the public generally and with itself, connected with the station: but the maintenance of a passing track merely does not have any connection with a station within the rule, since it belongs to the general operation of the road, and it must be fenced when lying outside the limits of cities, etc., or outside necessary grounds of stations not located in towns, etc., though inconvenience result to the company through being required to maintain an additional telegraph office.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 915-923; vol. 8, pp. 753-7594.]

Appeal from Circuit Court, Cooper County;
Wm. H. Martin, Judge.

Action by O. T. Bridges and others against the Missouri, Kansas & Texas Railway Company. From a judgment for defendant, plaintiffs appeal Reversed and remanded.

W. V. Draffen and Harlan, Jeffries, Wagner & Corum, for appellants. Geo. P. B. Jackson, for respondent.

ELLISON, J. Plaintiff had two animals so badly injured by one of defendant's trains as to be worthless. They were afterwards killed. The trial court rendered judgment for the defendant. A finding of facts was made, in which, after finding the value of the animals, the court proceeded as follows: "The court further finds from the evidence that the point of the railroad track of the defendant at which said animals went upon said

track was not inclosed by a fence, and was at a point where said railroad track passes through and along uninclosed lands, and that said point was at least 1,700 feet east of the depot of the defendant, located at Clifton City, in Cooper county, Mo., and not near any other station or depot belonging to defendant; that said point is not within the limits of any incorporated or platted town or village, and not at a point where the track of defendant was crossed by any public or private road; and that said point where said animals went upon said track was 1,600 feet east of the east boundary line of the village of Clifton City. The court further finds that the defendant's track at the point where said animals entered thereon was not used by the defendant for the reception or discharge of either freight or passengers, nor for the purpose of transacting any business of any kind with the public, other than the passing and switching of its trains. The court also finds from the evidence that the switch at Clifton City is 3,250 feet long. The court further finds from the evidence that to fence the track at the point where plaintiff's animals entered thereon would interfere with defendant's business of passing its trains by each other, and to fence the track at said point would endanger the safety of defendant's employes in passing its trains by each other and render it inconvenient for defendant to pass its trains by each other at said station. The court finds that the only purpose for which the defendant's track at the point where plaintiff's animals entered thereon is used by the defendant is for the passing of its trains by each other, and that the track at this point is not used by the defendant for any other purpose, and is not used by the public for any purpose. In other words, the court finds that the length of siding at this station is not necessary for the transaction of the local business of the station, but is necessary for the passing of trains at the station."

The statute (section 1105, Rev. St. 1899 [Ann. St. 1906, p. 945]) requires a railway company to inclose its track by erecting and maintaining fences and cattle guards where the road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. On this subject generally, see two interesting and able discussions by the St. Louis Court of Appeals: Duncan v. Railway Co., 111 Mo. App. 193, 85 S. W. 661, and Smith v. Railway Co., 111 Mo. App. 410, 85 S. W. 972. In default of a compliance with the statute, the owner may recover double damages for injury to his animals. The courts have held this statute not applicable to cities, towns, or villages, first, for the reason that it shows on its face it was intended to apply to lands outside of such places; and, second, it would be requiring an unlawful act in requiring that the streets and alleys of towns and villages be fenced. So it is settled that in no event can a railway company be required, nor would it be

permitted, to fence up streets. But it frequently happens that there are parts of the town through which the road runs which are not laid off into streets, and therefore to fence the track at such place would not be blocking a street. Still the railway company need not fence at such place if it be necessary to the transaction of its business with the public that it should be left open. Nor is such a fence required at a station, though it may not be in a town or village. The courts themselves have attached an exemption from this statutory duty by ruling that it was not meant to require fences and cattle guards where their maintenance would endanger the lives of the operatives in handling the trains at switches at stations, whether such station be inside or outside the limits of a town or village. *Gilpin v. Railway Co.*, 197 Mo. 319, 94 S. W. 869; *Pearson v. Railway Co.*, 33 Mo. App. 543.

A railroad not being required to fence at a station where it transacts business with the public when such fencing would interrupt such business, the question has been presented whether the word "business" means the road's business with the public, such as receiving and delivering freight, or whether it includes the road's business with itself, such as the passing of trains. Expressions have been used which have been interpreted so as to have the courts to say that the business which will excuse the road from fencing is the business of the public at that particular depot or station. The cases of *Russell v. Railway Co.*, 26 Mo. App. 368, *Chouteau v. Railway Co.*, 28 Mo. App. 556, and *Morris v. Railway Co.*, 58 Mo. 78, are cited as sustaining such view. In the case last cited it is held that the road should not be required to fence such grounds as are necessary "to remain open for the use of the public and the necessary transaction of business at the depot or station." That expression does not justify the conclusion that the court meant only the public's business; on the contrary, it means, in addition, any proper business of the road at that station which is connected with the operation of the road at the station. And it means to excuse a road from fencing when to fence would endanger the lives of the employés in operating the road generally at that station. That case is cited to sustain such meaning in *Gilpin v. Railway Co.*, 197 Mo. 319, 94 S. W. 869, and *Railway v. Clark*, 121 Mo. 169, 183, 25 S. W. 192, 195, 26 L. R. A. 751. In the latter case it is said the fencing law will not apply "where it will interfere with the use of the public or operation of the road." Therefore, while we hold that the business to be considered is the company's business with its patrons—the public generally—and also its business, so to speak, with itself, yet it must be such business as is connected with the station. The railway company will be exempt from the requirement to fence within the limits of cities, towns, and villages where there are laid out streets; and

it will be exempt from fencing at stations outside of towns and villages to the extent of permitting it safely to transact business with the public at that station and to operate its own business connected with that station.

The maintenance of a passing track merely does not have any necessary connection with a station. It belongs to the general operation of the road, and the Legislature has not intended that it may go unfenced when it lies outside the limits of cities, towns, or villages, or outside the necessary station grounds of stations which are not located in towns or villages. It is true that that portion of a passing track which may be within the limits herein referred to would go unfenced as an incident to its lying along with switches and tracks not required to be fenced as herein stated. But when, as here, it goes beyond such limits, the statute applies and it should be fenced. In this case, as shown in the court's finding of facts, the passing track in controversy is 3,250 feet long and extends 1,600 feet, or nearly one-third of a mile, beyond the village limits. It further appears that it was not needed for the business connected with the station, and that it runs along uninclosed lands. That portion (1,600 feet) thus lying outside the limits should have been fenced. If a switch is not needed at a station for the public's or the company's business at such station, its location there does not aid the company in defending against its duty to fence. But the trial court found that even that part of the switch outside the village limits could not have been fenced without endangering the life and limb of the defendant's servants; and that, no doubt, was one of the chief grounds for its decision of the case in defendant's favor. But in this case the evidence showed that there was no necessity for maintaining this passing switch at this station for any business connected with the station, especially extending as it does 1,600 feet outside the village limits. It was shown that such a switch, for such purpose, could be built wholly on the inside of fences away from towns or villages or stations, and that such places would be wholly free from the objection of endangering employés in their work. The objection, however, to this phase of the case, as testified to at the trial, was that, while that could be done, it would make it necessary for employés to stop trains at such passing track and walk to the nearest station for telegraphic orders. That, it was said, would be a great inconvenience, if not impracticable, even though a station was near by. But, when witnesses for defendant were questioned by plaintiff's counsel, they stated that a telegraph office could be maintained at such passing track on inside of fences, and thus avoid the inconvenience just suggested; but that it would involve trouble and expense of an operator. We do not think that a sufficient excuse. The

want of fences at points near and outside of small stations and villages is a greater inconvenience to the people owning stock in the vicinity than is the keeping of a telegraph operator at passing tracks which could be fenced outside of stations. The exception permitting switches to remain unfenced when such fencing would endanger the lives of employes, having been ingrafted upon the statute by the courts, to the end that it might receive a reasonable construction, should not be extended beyond reasonably necessary requirements for the operation of the railroad. And when, as was made to appear here, the switch claimed to be exempt from fencing could reasonably be placed at a point where it would be wholly within the railway fences, the railway has no right to claim privilege of having it at a station or village where it extends at great distances beyond such station, thereby leaving unfenced tracts of land which would otherwise be inclosed. By such view of the law we still give force and effect to the case of *Morris v. Railway Co.*, supra, which requires the fencing of switches outside of villages, towns, and cities, and yet at the same time we recognize the exception just referred to as exempting the road from fencing where it would endanger employes.

Some of the evidence from railway experts in defendant's behalf has impressed us with the soundness of the foregoing view. They testified that, in view of increased length of trains and increased power of engines, passing track switches were now being built and extended to 4,000 feet or more in length. When these can be put within the inclosures which the law requires railroads to maintain, it should be done; and the mere inconvenience in the way of extra expense of a telegraph operator to receive and give orders should not stand in the way. The necessity, upon the other hand, is too great to allow that to be a reasonable excuse.

The judgment is reversed, and the cause remanded. All concur.

SHELL v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. RAILROADS—KILLING STOCK—NATURE AND FORM OF ACTION—STATUTORY PROVISIONS.

Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), provides that railroad companies shall be liable in double damages for the killing of stock resulting from failure to construct cattle guards and fences, where they are required sufficient to prevent horses and other animals from getting on the railroad. Section 1106 (Ann. St. 1906, p. 950) provides that whenever live stock shall go upon any railroad or railroad right of way, and the railroad is not inclosed at the place of the injury, by a good fence on both sides, as required by law, and such stock, being frightened by any passing locomotive or train, is injured or killed by running against the fence, the railroad company shall be liable for the damage thereby sustained. Section 1107 (Ann. St. 1906, p. 960) provides for the allowance of an attorney's fee

when the action is founded on section 1106. In an action against a railroad company for the killing of a mare, the petition alleged that the mare was frightened by the noise of a hand car and the acts of the sectionmen in attempting to drive the mare from the track, and ran into a wire fence inclosing the right of way, and was so injured that it died, and that the death of such animal was occasioned by defendant's neglect to construct and maintain, according to its duty, a cattle guard sufficient to prevent animals from getting on the track, and prayed for judgment for double damages, "under the statute in such cases made and provided," and interest and an attorney's fee. *Held*, that the facts alleged in the petition did not set forth a cause of action under either section 1105 or section 1106, and, though the petition asked for double damages and attorney's fees, it must be regarded as setting up a cause of action at common law.

2. SAME.

The fact that the right of action against a railroad company for killing stock arose from the violation of Rev. St. 1899, §§ 1105, 1106 (Ann. St. 1906, pp. 945, 959), requiring the construction and maintenance of fences and cattle guards, does not necessarily render an action for the injury a statutory one; but such an injury from failure to perform a statutory duty, will support an action at common law.

3. COURTS—COURTS OF APPELLATE JURISDICTION—MISSOURI—CONSTITUTIONAL QUESTION.

Where an action against a railroad company for killing stock was taken by appeal to the Court of Appeals, and was by such court transferred to the Supreme Court on the ground that the constitutionality of Rev. St. 1899, §§ 1105, 1106 (Ann. St. 1906, pp. 945, 959), on which the action was based, was involved, the fact that the Supreme Court sent the case back to the Court of Appeals, on the ground that the constitutional question was not in the case, since it had not been presented to the trial court, did not prevent the Court of Appeals from holding that the action was a common-law action, based on the violation of such sections of the statute.

4. RAILROADS—KILLING STOCK—VIOLATION OF STATUTE—LIABILITY AT COMMON LAW.

Where a railroad company fails to maintain a proper cattle guard, and an animal passes over the same into a pocket or trap formed by the right of way fences and a culvert with the wing fences connected therewith, and is there frightened by the approach of a hand car and the efforts of sectionmen to drive the animal from the track, and runs into a wire fence and is injured, the company is liable at common law, irrespective of Rev. St. 1899, §§ 1105, 1106 (Ann. St. 1906, pp. 945, 959), relating to the construction of fences and cattle guards for railroad tracks.

[Ed. Note—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1451-1457, 1530.]

Appeal from Circuit Court, Barton County; H. C. Timmonds, Judge.

Action by P. V. Shell against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 100 S. W. 617.

Jno. A. Davis and R. T. Railey, for appellant. Cole, Burnett & Moore, for respondent.

ELLISON, J. This is an action for damages arising from the death of plaintiff's mare, and he obtained judgment in the circuit court for \$125. Defendant appealed to this court; but, on account of it having set up in its answer that sections 1105 and 1106, Rev. St. 1899 (Ann. St. 1906, pp. 945, 959), were unconstitutional, we transferred the

case to the Supreme Court. The case was argued in that court; but it came to the conclusion that the constitutionality of those sections was not involved, since defendant had not presented such question to the trial court, and the latter court had not made any ruling thereon (202 Mo. 339, 100 S. W. 617), and returned the case to this court for determination.

The facts necessary to state are these: Defendant's road at and near the place where the animal was killed was fenced on each side with a lawful fence of barbed wire. That where the road crossed a highway there was a cattle guard so negligently and defectively constructed and so negligently maintained that animals could pass over it onto defendant's right of way so inclosed by the barbed-wire fence. That further on there was a culvert over which the defendant's track was laid, and where fences, or "wings," connected with said parallel fences inclosing the right of way; the result of this condition being that an animal getting onto the right of way over the cattle guard could not proceed further up the track or right of way between the fences than the culvert. Plaintiff's mare escaped from his inclosure and was at large. She came upon the highway and passed through the defective cattle guard onto the right of way, and while there defendant's sectionmen propelling a hand car came up from below the cattle guard, thus being behind the mare. They saw her and stopped the car, when two of them got off and endeavored to get ahead of her so as to drive her back through the cattle guard off of the right of way. We are satisfied there was evidence tending to show that she was frightened by the noise made by the hand car before it stopped, and ran into the barbed-wire fence, where she was so badly cut that she soon died. The petition charges: That the sectionmen were operating the hand car, and by reason of the appearance or noise ordinarily made by running the car and the exertions and noise intentionally made by the men for the purpose of scaring the mare so frightened her as to cause her, in her effort to escape, to throw herself upon the wire fence near the culvert, whereby she was killed; "that her death was so occasioned by defendant's neglect to construct and maintain, according to its duty in the premises, at the point where the pretended cattle guard above mentioned was situated, cattle guard sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad, and by the act and conduct of defendant's servants as aforesaid." The petition then alleged the value of the mare to be \$125, and proceeded to state: "That under the statute in such cases made and provided plaintiff is entitled to damages in a sum double the value of the mare, to wit, \$250. That plaintiff, after his said mare was killed, and on and before the ——— day of April, 1902, demanded of defendant

payment of the value of said mare. That defendant has failed, neglected, and refused to pay. Wherefore plaintiff asks judgment for the sum of \$250, double the value of said mare killed, and that he recover of the said defendant interest thereon at the rate of 6 per cent. per annum from the date of filing this petition, and that an attorney's fee be fixed by the court and taxed as costs herein against the defendant, at such sum as may be a reasonable compensation for all legal services herein rendered for the plaintiff, and for the costs generally in this action by plaintiff expended."

The defendant did not offer any evidence. The trial court held that there was no negligence in operating the hand car, nor in the act of the men in endeavoring to drive the mare. That court likewise held that plaintiff was not entitled to double damages, nor to attorney's fees, and gave the following instruction for plaintiff: "If you shall believe from the evidence that the cattle guard referred to in the testimony was not reasonably or ordinarily sufficient to prevent horses from passing over or through the same onto defendant's railroad and right of way, and that by reason thereof plaintiff's mare did pass over or through the same onto defendant's railroad and right of way, and that said railroad and right of way were then inclosed with wire fences so that said mare could not safely escape therefrom except by returning to and over said cattle guard, and that, while said mare was so inclosed on said railroad and right of way, she became frightened at the appearance of, and the noise ordinarily made by, the defendant's hand car while the same was being operated and run by defendant's section hands on said railroad, and that while so frightened, and by reason thereof, said mare threw herself upon or against one of defendant's said wire fences, and that she was thereby killed, then you should return a verdict in favor of the plaintiff. Unless you do so believe you should return a verdict in favor of the defendant."

Defendant has filed an exhaustive brief in support of the different points of objection made to the views of the trial court resulting in the judgment for plaintiff. The view of the law which we will here state will embrace those points, or by inference necessarily include them. Of the sections of the statute claimed to be unconstitutional, section 1105 provides for the construction of "cattle guards where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad; and until * * * cattle guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages," etc. Section 1106 reads as follows: "Whenever any live stock shall go in upon any railroad or its right of way, in this state, and the said railroad is not at such place or places inclosed by a good fence on both sides of said railroad, such as is by

law required, and such stock, by being frightened or run by any passing locomotive or train on said railroad, shall be injured or killed by or because of having run against the fence on either side, or into any culvert, bridge, slough or mire, or other object along the line of said road, the railroad company shall pay the owner of any such stock so injured or killed the damage sustained." The fact that the petition alleges defendant's failure to maintain a proper cattle guard which section 1105 requires, and asks for double damages which that section authorizes, and the fact that the petition makes claim for an attorney's fee provided for (section 1107 [Ann. St. 1906, p. 960]), when the action is founded on section 1106, has caused defendant to inquire whether the action was intended to be founded upon one or the other of those sections; but it will be seen from the face of the petition that the case is not stated under either section. Under section 1105, it would have been necessary that there be a collision with one of defendant's cars (Lafferty v. Railway Co., 44 Mo. 291, Foster v. Railway Co., 90 Mo. 119, 2 S. W. 138), and such state of case the petition shows did not exist. And under section 1106, it is necessary to show that the animal was frightened by "a passing locomotive or train." Henson v. Railway Co., 110 Mo. App. 595, 85 S. W. 597. That sort of case is also shown by the petition not to exist. The fact that the petition asked for double damages and for an attorney's fee does not necessarily make the case a statutory action. It has been so decided. The nature of the action is judged by the cause stated, and not the relief prayed. The court may render judgment as determined by the body of the petition. State ex rel. v. Horton, 161 Mo. 664, 671, 61 S. W. 869. It has been so held where the prayer was for double damages. Comings v. Railway Co., 48 Mo. 512; Garner v. Railway Co., 84 Mo. 235; Iba v. Railway Co., 45 Mo. 469.

We conclude therefore that the action is at common law. But in this connection defendant insists that, if the action is at common law, it must depend on that character of dereliction which would be negligence at common law, and that, as a cattle guard was not required at common law, defendant was not guilty of a wrongful act, at common law, in failing to provide or maintain a cattle guard. But we think defendant does not correctly interpret the law in this respect. The law is that, though the act is made a duty only by force of the statute, yet the failure to perform a statutory duty—a requirement made only by the statute—is evidence which will sustain an action at common law. Goodwin v. Railway Co., 75 Mo. 73; Schneider v. Railway Co., 75 Mo. 295; Isabel v. Railway Co., 60 Mo. 475; Boggs v. Railway Co., 18 Mo. App. 274; Mapes v. Railway Co., 76 Mo. 367; Minter v. Railway Co., 82 Mo. 128; Braxton v. Railway Co., 77 Mo. 455. And this is true as to a municipal ordinance.

Robertson v. Railway Co., 84 Mo. 119; Nutter v. Railway Co., 22 Mo. App. 328; Riley v. Railway Co., 18 Mo. App. 385. It follows that proof of neglect to maintain a proper cattle guard as required by the statute is evidence sufficient to sustain the present common-law action.

It is a part of defendant's insistence that the statute ought not to figure in a consideration of the case as a common-law action, for the reason that it sets up that the sections were violative of the Constitution, but that the Supreme Court had ruled that the statutes had no place in the case. 202 Mo. 330, 100 S. W. 617. The Supreme Court did not say that. That court ruled that the question whether the sections violated the Constitution was not in the case, since it had not been presented to the trial court; nor was a ruling thereon made by that court. It is clear that the Supreme Court has not taken the application of the statute out of the case. It merely ruled that a question involving the Constitution had not been raised, so as to confer jurisdiction on that court. But aside from the foregoing considerations, the conditions which the evidence shows defendant permitted at the place in question may well be found to be negligence at common law and to justify the instruction for plaintiff which we have set out. We may leave the statute entirely out of view, and yet find the situation: Defendant's fences inclosing its right of way made a lane closed at one end by the culvert and wing fences, and open at the other, so that a horse getting into such place through this opening would probably take fright at a hand car coming up, though there was no negligence in handling the car. The jury could well find it to be negligence to expose such place by having an entrance to it at one end, through which horses could stray. The place could well be likened to a trap, and it could well be said to be negligence, as alleged by plaintiff, to fail to construct and maintain such a cattle guard at the open end as would be sufficient to prevent horses and cattle from entering.

An examination of the entire record discloses that we have no ground to interfere, and hence affirm the judgment. All concur.

FALL v. HORNBECK et al.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. APPEAL AND ERROR — RECORD — NECESSITY OF BILL OF EXCEPTIONS.

When a demurrer to a petition is sustained, and the suit dismissed, a bill of exceptions is unnecessary to an appeal.

2. FRAUD—FRAUDULENT REPRESENTATIONS—VALUE OF PROPERTY — MEANS OF KNOWLEDGE OF PARTIES.

The rule that mere false assertions as to the value of property, where no warranty is intended, does not constitute actionable fraud, does not apply where the parties have not equal

opportunities to form and exercise their own judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 9, 10.]

3. SAME—VALUE OF CORPORATE STOCK—ACTIONS—PLEADING.

A petition alleged that defendants were associated in forming and were the directors of a corporation, all the stock of which was subscribed for by and issued to them; that they made representations to plaintiff that the stock had been fully paid up by turning in property of a value equal to the par value of the stock, and further representations as to the value of such property and of the entire capital and the market value of the shares, and as to the purposes for which they were selling the stock; that such representations were false, which was known to defendants, and were made to defraud plaintiff, intending him to rely thereon and be induced thereby to purchase stock; that he relied thereon, and was not otherwise informed, and was thereby induced to purchase certain shares of the stock; and that such shares were wholly worthless and the corporation was insolvent. *Held*, that the petition stated a good cause of action as against a demurrer, as it showed that the opportunities of the parties to form and exercise their own judgment in respect to the condition and value of the property were not equal, and plaintiff had a right to rely on the representations of the officers of the corporation as to the value of its property and its solvency.

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by J. P. Fall against F. A. Hornbeck and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Wm. T. Jamison, for appellant. W. R. Thurmond, for respondents.

BROADDUS, P. J. The defendants suggest that the appeal be dismissed because the abstract fails to show an affidavit for appeal and filing of a bill of exceptions. As the court sustained a demurrer to plaintiff's second amended petition and dismissed the suit, a bill of exceptions was not necessary. 1 McQuillan's Pleading & Practice, § 942; 3 Ency. Pleading and Practice, p. 407. The certified record shows that plaintiff filed affidavit for appeal and appeal was granted.

The suit is based upon certain alleged fraudulent acts of defendants and contains four counts, and, as the allegations of fraud are the same in all the counts, it is only necessary to call attention to one of them specially. Said count reads as follows: "Comes now the plaintiff, and for the first count of his second amended petition states that on or about the 1st day of November, A. D. 1899, F. A. Hornbeck, J. U. Bruner, E. O. Haight, A. L. Howe, Neal S. Doran, and J. D. Eubank did associate themselves together for the purpose of forming a corporation, to be known as the 'Juggernaut Zinc Mining Company,' and that thereafter, on the 2d day of November, A. D. 1899, a certificate of incorporation was, by the said persons, caused to be issued by the state of Missouri to the said Juggernaut Zinc Mining Company, and that the said F. A. Hornbeck, J. U. Bruner, E. O. Haight, A. L. Howe, and Neal S. Doran were, by the said incorporators, agreed upon as the first board

of directors. Plaintiff states that the said incorporators fixed the capital stock of said corporation at the sum of sixty thousand dollars (\$60,000), divided into six hundred (600) shares, of the par value of one hundred dollars (\$100) each, and that all of the said shares were subscribed for and issued to said incorporators. Plaintiff further states that thereafter, on or about the 13th day of November, A. D. 1899, at the instance and request of defendants, he did purchase from the said J. U. Bruner twenty-five (25) shares of said stock, for which, at their instance and request, he paid said company the sum of eight hundred thirty-three and $\frac{22}{100}$ dollars (\$833.33), and plaintiff further states that at the time of the purchase of the aforesaid 25 shares of said stock by him, and at all the times herein mentioned, prior thereto, defendants represented to him that the said capital stock had been fully paid up by turning in property to constitute the same, which property was of the reasonable value of sixty thousand dollars (\$60,000) in lawful money of the United States, and that said property was then in the possession of said board of directors; that the entire capital of said company, consisting of mining leases, mining machinery, and equipment, was of the reasonable value of more than sixty thousand dollars (\$60,000), the exact amount not being stated; that the said company was wholly solvent, and that the said twenty-five (25) shares of stock, and all the stock of said company was, at the time of such purchase, of the reasonable market value of thirty-three and one-third cents ($33\frac{1}{3}$) on the dollar, and that the stock so purchased by this plaintiff was being sold by the said directors for the purpose of prosecuting mining operations upon the said mining leases. Plaintiff further avers that all of the aforementioned representations were false when so made to him, which fact was well known to each of defendants, but that they fraudulently planned and connived together prior to and at the time of the purchase of the said twenty-five shares by plaintiff to cheat, wrong, and defraud this plaintiff, and did, for that purpose, make the aforesaid false representations, knowing at the time they were false, and knowing, believing, and intending that plaintiff would rely thereon and be induced thereby to purchase the said twenty-five shares of said stock. Plaintiff further states that he was wholly unfamiliar with and uninformed in respect to the value of mining leases, mining machinery, and equipment of the character above referred to, and of the mining leases, mining machinery, and equipment comprising the capital of said company, as above stated. Plaintiff further avers that he did rely upon the aforesaid representations made as aforesaid, and was not otherwise informed, and was thereby induced by defendants to purchase the said 25 shares of said stock, and that he would not have done so save and except upon the strength of said representations. Plaintiff further states that the said

25 shares of stock were at the time of purchase by him, and at all times thereafter, and now are, wholly worthless and of no value whatever; that said capital stock was never, in whole or part, paid in manner stated or otherwise; that the said assets of said company were never of the value of sixty thousand dollars (\$60,000), or of any sum whatsoever, but that such pretended capital at all the times herein mentioned was, and now is, wholly valueless, and that at all of the times herein mentioned the said company has been and now is wholly insolvent."

It is said in *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, that: "When a corporation is sent forth into the commercial world, accredited by the stockholders as possessed, in money or its equivalent in property, of a value equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to assume that such stock has been fully paid, and to extend credit to it in the belief that the money or its equivalent in property will be forthcoming to meet his legitimate demands." In a later case, however, the court said in reference to the matter as follows: "But statements made in the articles of association by them (stockholders) were addressed to the Secretary of State, and not to a subsequent creditor of the corporation, and, if he had no knowledge that such statements were false at the time he extended it credit, and did not extend it credit in reliance upon their being true, he cannot maintain an action against the incorporators for fraud and deceit." *Webb v. Rockefeller*, 195 Mo. 59, 93 S. W. 772, 6 L. R. A. (N. S.) 872. We cannot see that there is any conflict in these two opinions, although plaintiff relies on the former to support his petition, and defendants rely on the latter to sustain their demurrer. It is fairly deducible from either that if credit is extended to a corporation on the faith of such statements, and the creditor had no knowledge at the time of their falsity, he could maintain an action for fraud. The allegations of the petition are that the fraudulent representations were made to the plaintiff by the defendant, who knew at the time that they were false, and that it was such representations that induced him to buy the stock, and that he did not know at the time that they were false.

The defendants, however, insist that the statements in question come within the rule that: "Mere false assertions as to the value of property, where no warranty is intended, do not constitute actionable fraud. * * *" This rule applies where the parties have equal opportunity to form and exercise their own judgment. *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377, 51 S. W. 736; *Wilson v. Jackson*, 167 Mo. 135, 66 S. W. 972. But the rule has no application here, as the opportunities of the parties were not equal in respect to condition and value of the property of the corporation. And, as was said in *Van*

Cleve v. Berkey, supra, the plaintiff had a right to rely on the representations of the officers of the corporation as to the value of its property and its solvency. See, also, *Webb v. Rockefeller*, supra.

The petition in our opinion stated a good cause of action. Reversed and remanded. All concur.

McMAHON v. WELSH.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. TRIAL — INSTRUCTIONS — CONFORMITY TO EVIDENCE.

The mere indorsement on a note, directing payment to the payee's husband, was not sufficient evidence that she made it; and, where the uncontradicted evidence was that she did not make or authorize the indorsement, the court should have assumed the fact as so proven in charging the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

2. ESTOPPEL.

In a suit for the conversion of a note, payable to plaintiff, it appeared that plaintiff's husband had transferred the note without her authority and on an indorsement not made or authorized by her. It did not appear that plaintiff had any knowledge that her husband had transferred the note, or that he had it in his possession until some time after the transfer, and nothing was shown in the way of an estoppel as between plaintiff and the first transferee, but, after discovering such fact, she failed to take any proceedings until the note had passed to defendant, who, it appeared, took the note on the faith of the indorsements on its back. Thereafter the makers of the note, with plaintiff's consent, paid to defendant's agent interest thereon. Held, that plaintiff was not estopped to claim the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 183-187.]

Appeal from Circuit Court, Jackson County.

Action by Mary W. McMahon against James B. Welsh. From a judgment for plaintiff, defendant appeals. Affirmed.

Johnson & Lucas, for appellant. Frederick J. Chase, for respondent.

BROADDUS, P. J. The respondent's statement of the case is fair and complete, with the exception as to the testimony of defendant. It is as follows: "This suit was brought for the conversion of a promissory note of the face value of \$1,700, secured by a deed of trust on Kansas City real estate, dated March 9, 1902, and made by Zelina Florence Ahern and John E. Ahern in favor of Mary W. McMahon, plaintiff. This note was given to renew a former loan between the same parties, made in the year 1897, to this plaintiff from money received from her father's estate. After the extension of the note in suit in November, 1902, the plaintiff placed it, with the deed of trust securing the same, in her trunk with her other valuable papers, and kept the trunk securely locked. At this time plaintiff was living with her husband, John A. McMahon, and continued to live with him

until January, 1904, when they were separated, and in May, 1907, she obtained from him a decree of divorce. Before they separated and shortly prior to November 29, 1903, plaintiff's husband, without her knowledge or consent, took the note in suit from the plaintiff's trunk where she kept it under lock and key, and pledged the same to one George F. Winter to secure his individual loan. Plaintiff knew nothing about this transaction until about Christmas, 1903, while searching for some papers, she discovered that the note was gone. She immediately accused her husband of taking the note, and he admitted that he had done so and lost the money he had raised on it in a bucket shop, and threatened plaintiff, if she accused him, 'he would commit suicide, and would not go alone.' The evidence showed that he had frequently threatened the life of the plaintiff and her daughter, and that plaintiff had lived in terror of the man for many years, and that she was afraid to notify Mr. Winter in what manner the note had been taken from her. In about a month after plaintiff discovered the loss of the note she left her husband, and went to the home of her relative in Dundas, Canada, where she remained, except for part of one year when she was in Hartford, Conn., until the early part of 1907, at which time plaintiff came to Kansas City and instituted her suit for divorce and this suit for conversion. On April 28, 1904, while plaintiff was in Canada, the defendant, James B. Welsh, who was in the real estate, loan, and insurance business in Kansas City, made a loan to plaintiff's husband, John A. McMahon, of \$1,500, and took as collateral security the note in suit which was brought to him by Mr. McMahon. At that time there appeared to be on the back of the note certain interest credits and words: 'Pay to Jno. A. McMahon or order. Mary W. McMahon.' 'Pay to Geo. F. Winter or order. Jno. A. McMahon.' 'Without recourse. Geo. F. Winter.' On May 28th, one month after defendant received the note, the makers thereof paid with the consent of plaintiff the interest on the note in suit of \$51 to Crutcher & Welsh, the defendant's agents, and continued to pay to the defendant or his agents the interest on the note in suit up to May 27, 1906. On October 27, 1904, the defendant let McMahon have \$200 more on his note, and retained the note in suit as collateral security for \$1,700. Before loaning this money, the defendant, although well acquainted with the plaintiff and her husband, and well knowing that they were husband and wife, never communicated with her about the matter, nor did he go to see the makers of the note or Mr. Winter, who had previously held the same, but took the security because he thought it a safe loan on good property, and worth its face value. The defendant testified that he had never seen any of the letters prior to the time he paid out the last money which he loaned to plaintiff's husband; and that he knew nothing of plaintiff's claim

until something like a year after he made the loan to plaintiff's husband. The plaintiff's evidence was that her signature was a forgery, though very like hers; that it was not on the note when she put her papers in her trunk, which she kept securely locked; that the words, 'Pay to Jno. A. McMahon or order,' was plainly in the handwriting of her husband as were the words, 'Pay to Geo. F. Winter or order'; that she never gave her husband consent to have the note or take it, and that she was 'Mortally afraid of her husband.' On March 1, 1907, the plaintiff, through her agent and attorney, demanded of the defendant the return of her note, and, upon his refusing to do so, brought this suit for conversion. The defense was that the note was duly indorsed and delivered to the defendant as collateral security for John A. McMahon's note; that for more than 10 years plaintiff had permitted her husband to deal with the note as his own; that plaintiff had directed the makers to pay interest to defendant's agents, and was thereby estopped to claim ownership in the note. A trial on these issues was had in the circuit court, the cause submitted to a jury, and a verdict returned for \$1,776.50, from which this appeal is taken."

At the close of the testimony the court of its own motion gave the following instruction: "The jury are instructed that if they shall find from the greater weight of the evidence with respect to its credibility that the plaintiff herein made a loan to Zellina F. Ahern and John E. Ahern of \$1,700 of her own money, and that the note sued for introduced in evidence was given for said loan, and that the defendant was on the 1st day of March, 1907, in possession of the same, and that his only claim of right of possession thereto was to hold the same as collateral security for the note of John A. McMahon, and that defendant on said 1st day of March, 1907, refused to deliver the same up to the said plaintiff, then they must find for the plaintiff against the defendant for the value of said note on the 1st day of March, 1907, and that to said value they may add interest on such value from said 1st day of March, 1907, at 6 per cent. per annum; but their finding for the plaintiff, if they shall find for the plaintiff shall not exceed the sum of \$1,700, with interest thereon from the 1st day of March, 1907, at 6 per cent. per annum. The jury are further instructed that the written indorsement on the back of the note of Ahern, signed by Mary McMahon, is not a defense to this suit, and cannot be relied upon by defendant to defeat the plaintiff's right." For all practical purposes, the instruction was a direction to return a verdict for the plaintiff leaving to the jury to fix the amount. The instruction is predicated upon the decision of this court in *Hurt v. Cook*, which was certified to the Supreme Court, and is reported in 151 Mo. 416, 52 S. W. 396, and other cases to the same effect. The holding in those

cases is to the effect that a blank indorsement on a note payable to the wife is not such an express consent to the wife as to authorize the husband to dispose of the same to his own use, as required by section 4340, Rev. St. 1899 (Ann. St. 1906, p. 2382). The instruction of the court assumes that the wife made the indorsement in blank. The other assumed facts are not denied or admitted by the parties.

If the assumption of the court that the indorsement of the wife was a blank indorsement, and the words, "pay to Jno. A. McMahon or order," were not written by or authorized by plaintiff, was not justified under the evidence in the case, defendant claims the giving of the instruction was error. It was held by the St. Louis Court of Appeals that a similar indorsement evidenced the purpose and intention of the wife to give full possession and dominion over the notes to her husband, and filled the requirements of the statute. To this opinion we cannot accede. The words, "pay to Jno. A. McMahon or order," was a limited indorsement; whereas, an indorsement in blank is without any restrictions whatever. There is as good or better reason for holding the limited indorsement would give to the husband less control or dominion over a note than if it were in blank. It seems to us that the former should be construed as mere authority from the wife to the husband to collect as her agent. At least such seems to be a reasonable construction. And, such being the case, it was not such an assent in writing given to the husband to dispose of the note to his own use and benefit. However, we do not base our decision on such view of the case. But, as we view the case, there was no evidence that the indorsement was in the handwriting of the wife, or that she authorized it. The mere indorsement on the note was not sufficient evidence that she made it. *Nat. Bank of Commerce v. Pennington*, 42 Mo. App. 355; *Mayer v. Old*, 51 Mo. App. 214. The plaintiff's uncontradicted evidence was that she did not make or authorize the indorsement. This was sufficient to authorize the court to assume the fact as proven. *Bank v. Hainline*, 67 Mo. App. 483; *First Nat. Bank v. Bennett*, 114 Mo. App. 691, 90 S. W. 417; *Alexander v. McNally*, 112 Mo. App. 563, 87 S. W. 1.

The defendant pleads an estoppel, in that plaintiff by her conduct permitted her husband to deal with said note as if it was his own, thereby obtaining a fictitious credit, whereby the City Lot Company, the assignor of defendant, and defendant, were induced to accept the note as collateral security and to advance the said sum of \$1,700. But it does not appear that plaintiff had any knowledge whatever at the time her husband pledged the note as collateral security to Winter that he had it in his possession, but that she first discovered that it was gone from her possession, and that her husband had taken it, in December, 1903. As to the assignor Win-

ter, there was nothing shown in the way of an estoppel as plaintiff at that time had said and done nothing that was calculated to induce him to believe that she was permitting her husband to deal with the note as his own. While plaintiff was in Canada on April 28, 1904, the defendant received the note from Winter at which time there was certain interest credits indorsed on the back and the words: "Pay to Jno. A. McMahon or order. Mary W. McMahon." "Pay to Geo. F. Winter or order. Jno. A. McMahon." "Without recourse. Geo. F. Winter." It was not shown that defendant took the note other than on the faith of the indorsements on its back. It is true that thereafter the makers of the note with plaintiff's consent paid to defendant's agents interest thereon to the amount of \$57. The defendant did not testify to any fact that would go to sustain the plea. On the contrary, he stated substantially that he received the note on the credit of the indorsements alone. There was no error therefore in the refusal of the court to instruct the jury on that question as requested by defendant.

Affirmed. All concur.

TRACY v. BITTLE.

(Supreme Court of Missouri, Division No. 1.
May 30, 1908.)

1. DEDICATION—ACCEPTANCE—CEMETERY.

The owner of a farm in 1860 staked off about a half acre adjoining a public road for a burying ground. The outside fence of the farm formed a fence on one side. A year or two afterwards the other three sides were fenced, and a gate was made leading to the road. By 1879 about 10 members of the family were buried there. The general public also were allowed to bury there, so that there were 18 or 20 graves in the tract. In 1865 the farm was deeded to one H., who in 1868 deeded it to B., "except one-half acre reserved for a public burying ground." By other conveyances without any reservation the land came to defendant. In 1889 the fences, though out of repair, were yet around the tract, and remained for three or four years thereafter. *Held*, that there was a common-law dedication of the tract to the public as a public burying ground, and it was accepted and used by the public.

2. SAME — PURPOSES OF DEDICATION — LAND FOR CEMETERY—COMMON-LAW DEDICATION.

Land may be dedicated to the public for a cemetery, and a common-law dedication is sufficient, which upon acceptance precludes the owner from his former rights over the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 1.]

3. LIMITATION OF ACTIONS—CONSTRUCTION OF LAW—LAND DEDICATED AS PUBLIC CEMETERY.

Land dedicated to the public for use as a cemetery is dedicated for a public or charitable use and is within Rev. St. 1899, § 4270 (Ann. St. 1906, p. 2344), providing that nothing contained in any statute of limitations shall extend to lands given to any public, pious, or charitable use.

4. DEDICATION — GRAVEYARD—DESECRATION—REMEDIES—PARTIES.

A person having near relatives buried in a graveyard dedicated to the public for burial purposes has a peculiar right in its maintenance for

the public use and in preventing an obstruction to the use, and may maintain a suit to enjoin an unwarranted interference with it.

5. SAME—ABANDONMENT.

A cemetery was not abandoned where most of the bodies buried there had not been removed, and it was still known as a burying ground, though no further interments were made, and the place had been allowed to remain uncared for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 103.]

6. SAME—EFFECT—REVERSION.

Where land has been dedicated to the public for cemetery purposes, if there be an abandonment of the graveyard, the right of the public, which is in the nature of an easement, ceases, and the land reverts to the original owner or his grantees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 103.]

Appeal from Circuit Court, Grundy County; G. W. Wanamaker, Judge.

Petition by Nathan R. Tracy against Walter Bittle to enjoin the desecration of a public graveyard. Decree for plaintiff, and defendant appeals. Modified and affirmed.

Hall & Hall, for appellant. S. S. Kelso, Harber & Knight, and O. N. Gibson, for respondent.

GRAVES, J. The petition in this cause, which is one for injunctive relief, is quite long, but the purport of the action is to enjoin and restrain the defendant from the desecration of a public graveyard and the graves therein. The plaintiff has a number of immediate relatives buried in the graveyard in dispute, and in 1905 went to the premises with material to replace the fences around it, when he was prevented from so doing by the defendant, who owns the body of land from which the graveyard was originally carved and taken. For some time the defendant had been pasturing his stock on this graveyard, along with the other land owned by him. The evidence tends strongly to show the following facts: That in 1860 one James B. Tracy, the father of the present plaintiff, was the owner of the N. $\frac{1}{2}$ of section 10, township 62, range 24, Grundy county, Mo. In the spring of 1860 Jas. B. Tracy and his son staked off about one-half acre of this land for a burying ground or graveyard. The spot selected adjoined a public road. The outside fences of farm, which had been previously built in 1859, formed the fence on one side, and a gateway was made for the public to enter. In a year or two thereafter, the other three sides were fenced, so that it was entirely cut off from the remainder of the farm. The first interment was the child of plaintiff's brother in February, 1860. From that time on some 10 members of the Jas. B. Tracy family were buried there; the last being a daughter in 1878 or 1879. These bodies, including that of Jas. B. Tracy, who died in 1868, are yet on this spot of ground. Anybody who desired used this graveyard. Others buried there until some 18 to 20 graves appeared. One outside of the Tracy family

was buried there shortly after the Tracy girl in 1878 or 1879. The evidence shows that the public had the privilege to bury there, and did bury there until about this last mentioned date. About this time a new cemetery was laid out in the neighborhood known as the "Martin Graveyard." This one was called the "Tracy Graveyard." Several of the bodies buried in the Tracy grounds were removed to the Martin grounds. In 1865 Tracy and wife deeded the farm by warranty deed to one Haglespaugh. In 1868 Haglespaugh and wife conveyed the farm by warranty deed to Adam Briegle, but the deed contained these words, "except one-half acre reserved for a public burying ground." In 1875 Adam Briegle and wife deeded, without reservation, to their son, Valentine Briegle. In 1888 Valentine Briegle reconveyed to Haglespaugh, and in 1889 Haglespaugh conveyed to Henry Bittle, father of the present defendant. In 1896 Bittle conveyed to his two sons Walter and Alexander, and in 1899 Alexander conveyed his half interest to Walter. No reservations appear in any of the deeds except the one mentioned herein above. Defendant, by answer, claims title to this half acre of ground, not only by this chain of title, but further pleads the 10-year statute of limitations. The evidence tends strongly to show that at the time the elder Bittle purchased the land, the fences, although out of repair to a considerable extent, were yet around this ground; that they remained there for some three or four years thereafter. Defendant's evidence tended to show that the graveyard had been in his inclosure, unfenced, and used by him, under claim of title thereto for more than 10 years. It also tended to prove that no work had been done on the graveyard by the Tracys or the public for 12 or more years. Trial was had before the court. Defendant asked a number of declarations of law, some of which were given and some refused, but, this being an equity case, we shall not burden this opinion with the same. The trial court, after hearing all the evidence, found that in January, 1860, James B. Tracy, father of plaintiff, set apart and dedicated to public use the half acre (fully describing it in the judgment and finding) for a public burying ground. The finding and judgment then proceeds in this language: "That the same had ever since been used for a burying ground and several bodies, including a number of plaintiff's relations, buried therein until about the — day of April, 1905, at which time plaintiff and others entered upon said land with material and were proceeding to inclose same with a fence, at which time the defendant, who owned the lands of which said tract of land so dedicated had formed a part, forbid and prohibited the plaintiff and said others from fencing the same, claiming the same as his own, and denying the right of plaintiff and the public to use the same as a burying ground. It is therefore ordered, adjudged, and decreed by

the court that said ground is a public burying ground, and that defendant has no right thereto, and that he and all persons claiming under or through him be, and they are, forever enjoined and prohibited from preventing the improvement or use of said land by plaintiff or the public as a burying ground. It is further ordered and adjudged that the plaintiff have and recover of the defendant his costs in this suit expended, taxed at — dollars, and that he have therefor execution." From this judgment, being unsuccessful in his motion for new trial, the defendant appealed. Points made and the contentions of parties, so far as may be required, will be noted in the course of the opinion. This sufficiently states the case for the present.

1. To our mind the gist of this action is to restrain a desecration of a graveyard and the graves therein, and incidentally the title to the property is involved. The case may be shortened by determining the interests of the parties in and to this plot of ground first, and, with that end in view, we discuss that question first. That old man Tracy staked off this tract of land for public use as a burying ground in 1860 is abundantly shown. That the public, outside of the Tracy family, did so use it from 1860 to 1878, is thoroughly established. That it was fenced off to itself in 1889, when the elder Bittle bought the place, and for several years thereafter, is well established. That the remains of the old fence, marking the line, existed at the date of trial, is shown, notwithstanding the fact that defendant had pastured his stock over the ground and cleared the brush therefrom. That every owner of the premises up to the time of the Bittles recognized that this ground in dispute was a public burying ground is thoroughly shown. The evidence does not stop by showing that Tracy merely permitted certain members of the public to bury there, but it goes further, and to the extent of showing that the ground was and could be used by the public generally, and to this end was fenced to itself, with a gateway from the public highway into the graveyard. There is ample evidence in this record to show a common-law dedication of this tract of ground to the public as a public burying ground, and that it was accepted and used by the public. The leading questions then are: Can a public graveyard be established by a common-law dedication; and, if so, can adverse title thereto be acquired under the statute of limitations, so long as the remains of the dead are there? Incidentally, and along with these, are the questions as to whether or not this is a proper action, and whether or not the evidence shows an abandonment of the ground used as a graveyard. Of these in their order.

2. That the use of grounds for burial purposes is and may be a public use we take it is unquestioned. In 5 Am. & Eng. Ency. of Law (2d Ed.) p. 784, it is said: "Cemeteries

are recognized in the United States as among the purposes for which lands may be dedicated to the public. And it is held that upon dedication the owner is precluded from exercising his former rights over the land, and the public right of exclusive enjoyment continues until the place loses its identity as a burying ground." Can there be a common-law dedication of lands to such use in this state? We think so. The general rule is stated in 6 Cyc. p. 714, thus: "Land may be dedicated to the public for use as a cemetery. And one who has dedicated land as a public cemetery, the dedication having been accepted, is estopped from denying it. To constitute a dedication of land for a cemetery, it is not necessary that any conveyance be made, or that there be any person capable of taking a conveyance otherwise than in trust. A dedication may arise out of the conduct of the owner and the acts of those who rely thereon." In this state in case of *Campbell v. Kansas City*, 102 Mo. 339, 13 S. W. 898, 10 L. R. A. 593, Martin, Special Judge, uses this language: "It is clear from the testimony in the record that the original proprietors never devoted this land to the use of a graveyard by any instrument of writing, in the form of deed or plat, sufficient to comply with the requirements of the law relating to the transfer of interests in real estate. It therefore follows that the legal fee must remain still in the original proprietors or their legal representatives. But the actual use of land may be devoted to public purposes without deed or writing of any character. Proof of such devotion may consist of acts in pais going to show that the owners intend to donate the use for a public purpose, and that the public has accepted and used it for that purpose. The estate thus parted with does not extend beyond the use of the land, leaving the technical legal fee in the donors, which, however, must be held by them for the donated use as long as that use continues. While the plat of 1874 could not operate to pass the fee simple of this land to the public, or to any trustee of the public, it constitutes an important and controlling fact in the evidence to establish a dedication of the use of the land as claimed by the defendant. The donation of the land was marked on the original plat of 1847, which was made by one of the proprietors, and was used by him at the public sale which took place soon thereafter. The public accepted the use thus indicated by burying their dead on the land for about 10 years. The plat and the use of the land, as indicated by the plat, were acquiesced in by all the proprietors. The facts constitute the best evidence possible of a dedication in pais to the public, which dispenses with the necessity of written instruments, as well as the existence of a grantee or trustee. Such I understand to be the established law of the state on the subject of dedications of land to public use. *Becker v. St. Charles*, 37 Mo. 13; *Putnam*

v. Walker, 37 Mo. 600; Rutherford v. Taylor, 38 Mo. 313; Price v. Thompson, 48 Mo. 363; Reid v. Board of Ed., 73 Mo. 304." In the case at bar we do not have the plat, but we do have the proprietor staking off and fencing the ground, and putting in a gate on that side which adjoined a public road. This tends to show that it was open to the public. Had he intended it for a private graveyard, he most likely would have placed the gate within his general inclosure. A very similar case to the one at bar, although not so strong in facts, is the case of Davidson v. Reed et al., 111 Ill., loc. cit. 170, 53 Am. Rep. 613, where the court said: "James McKnight originally owned the S. W. $\frac{1}{4}$ of section 21, township 10, range 10 E., in Cumberland county. The burying ground is located near the southeast corner of the land. As early as 1844 McKnight buried a child on the land in question, and since that time it has been known as the 'McKnight Graveyard,' and has been used by the neighborhood as a burying ground. While McKnight owned the land, he buried a wife and two children there. Reed testified that McKnight told him 'he expected the neighbors would want to bury there, as we had commenced it.' He also testified that he and McKnight talked of staking off and fencing the ground, but they neglected to do it. McKnight sold the land to Rhodes, and while Rhodes owned the land the dead were buried there, as before. He sold to Scott, and Scott to Collins, and Collins sold to the defendant. Collins, while he owned the land, buried a child in the graveyard. Indeed, from 1844 the land in question has been known, used, and recognized by the different owners and the public as a public burying ground. While Collins owned the land, he said, if the people in the neighborhood would clear and fence it, he would give them a half acre. Rhodes also, as he testified, offered to give the graveyard if the people would fence it. It was also proven that the defendant offered to give the land occupied by the graves if the people would fence it. The only conclusion to be reached from all the evidence is that McKnight, when he owned the land, established a graveyard, and intended to dedicate to the public the particular tract in question, to be used as a place for the burial of the dead. It is true that, when he sold the land, no reservation was made in the deed, but the subsequent purchasers all had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in and to the property. In the case of City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 8 L. Ed. 452, it is said that all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. The assent of the owner, McKnight, that the land should be appropriated for the burial of the dead, is clear and manifest. That the public accepted and

used the land for the public purpose for which it was designated by the owner is also beyond dispute." In the case at bar one of the deeds of record in defendant's chain of title contained a reservation, so that neither he nor his grantor, the father, can well disclaim such a notice as would have at least put them upon inquiry. Fully as strong and pointed as the foregoing cases are the following: Baker v. Vanderburg, 99 Mo., loc. cit. 393, 12 S. W. 462; Boyce et al. v. Kalbaugh et al., 47 Md. 334, 28 Am. Rep. 464; Hayes v. Houke et al., 45 Kan. 466, 25 Pac. 860; Redwood Cemetery Ass'n v. Bandy et al., 93 Ind. 246; Pierce v. Spafford, 53 Vt. 394; Hunter v. Trustees, etc., 6 Hill (N. Y.) 407. In the present case we conclude that there can be a valid common-law dedication, and that the facts amply show that Tracy and all of his successors in the title, until the title reached the Bittles in 1889, consented to and acquiesced in the use of the ground by the public as and for a public burying ground, and that the same was accepted and used by the public as such, which acts make a good common-law dedication. Baker v. Vanderburg, and other cases, supra.

3. The evidence is not so clear upon the question of adverse possession of 10 years by defendant. Certain admissions of his were proven tending to show that the adverse possession might not have extended back more than two years. But, conceding that defendant three or four years after the elder Bittle purchased in 1889 did remove the remains of the old fences and cleared off the brush and thereafter used the ground in question as he used his other ground, and claimed title thereto, yet this does not deprive the public of the beneficial use thereof for a public purpose consistent with the dedication. In other words, the dedication of the land was for a public or charitable use, and the statute of limitations will not assist the defendant. Our statute (Rev. St. 1899, § 4270 [Ann. St. 1906, p. 2344]) reads: "Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this state." This property falls within the purview of that statute. In discussing this question in the Campbell Case, supra, we said: "Land may be dedicated to pious and charitable purposes, as well as for public ways, commons, and other easements in the nature of ways. Pearsoll v. Post, 20 Wend. (N. Y.) 111. Now, it seems to us that the dedication in this case falls fairly enough within the general definition of charitable and pious purposes. Commissioners v. Church, 30 Kan. 620, 1 Pac. 109." That such lands are of that character is fully recognized by section 6, art. 10, Const., where they are exempted from taxation. We conclude, therefore, that the defendant's plea of the statute of limitations cannot avail him in this case. See Williams v. City of St. Louis, 120 Mo.

403, 25 S. W. 561; *Brown v. City of Carthage*, 128 Mo. 10, 30 S. W. 312; *Railway Co. v. Baker*, 183 Mo. 312, 82 S. W. 85; *City of Columbia v. Bright*, 179 Mo. 441, 79 S. W. 151.

4. Is this the proper action? Is the plaintiff a proper party to maintain it? These questions are both pressed for our consideration. The general rule supported by a long list of adjudicated cases is thus stated in 6 Cyc. p. 720: "While there is no right of property in a dead body in the ordinary sense of the term, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and wanton violation or invasion of its place of burial. * * * Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial ground or the graves therein." In the *Davidson Case*, supra, which was an injunction as this, the Illinois court said: "It has been suggested that the bill cannot be maintained in the names of the two complainants. The complainants were residents of the neighborhood. They had friends buried in the burying ground, and were thus interested in preserving, for themselves and the public, the burying ground as it had been established, and we are of opinion that they had the right to sue in behalf of themselves and others having a like interest. *Beatty & Ritchie v. Kurtz*, 2 Pet. (U. S.) 585, 7 L. Ed. 521. The bill was brought, and in our judgment properly, for the protection of the rights of the people in that particular locality, and we perceive no reason why it may not be maintained in the names of a part for the benefit of all, as well as if all directly interested had joined in the bill." In the *Boyce Case*, supra, the Supreme Court of Maryland has well said: "The complainants, who are relatives of the dead deposited therein, may invoke the remedial power of the court to prevent the desecration of the ground where repose the ashes of their kindred. The material facts of this case, both as to the subject-matter and the competency of the complainants to maintain their suit, are analogous to the case of *Beatty & Ritchie v. Kurtz and Others*, 2 Pet. (U. S.) 586, 7 L. Ed. 521, decided by the Supreme Court of the United States. It was there held not to be a case for the redress of a mere private trespass. The property dedicated to public and pious uses threatened with desecration, the sepulchres of the dead with violation, the sentiments of natural affection of the surviving kindred and friends of the deceased to be wounded, the memorials erected by piety and love removed, so as to leave no traces of the last home of their ancestors to those visiting the spot in future generations, were acts that could not be redressed by the ordinary process of law. The remedy must be sought in the protecting power of a court of equity, operating by injunction to preserve the asylum of the dead, and quiet the just and natural sensibilities of the living."

The plaintiff, having near relatives buried in this graveyard, has a peculiar right in the maintenance of this public use and in preventing an obstruction to the public use. In such case he can maintain the action, and injunction is the remedy. *Longworth et al. v. Sedevic*, 165 Mo. 221, 65 S. W. 200. That citizens having an interest in the maintenance of a public use can maintain a suit to enforce their rights is fully recognized in the recent case of *State ex rel. Titus v. Wabash Ry. Co.*, 206 Mo., loc. cit. 258, 108 S. W. 1137, and cases cited.

5. Has there been an abandonment of this graveyard? We think not. The idea of abandonment has been most elegantly expressed by Beardsley, J., in *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) loc. cit. 414, wherein he says: "What right, if any, may hereafter arise in favor of those who can make title from the original owners it is not necessary now to inquire. The land is still a public graveyard, inclosed, known, and recognized as such. When these graves shall have worn away, when they who now weep over them shall have found kindred resting places for themselves, when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a graveyard, it may be that some one who can establish a good 'paper title' will have a right to its possession; for it will then have lost its identity as a burial ground, and with that all right founded on the dedication must necessarily become extinct." In *Kansas City v. Scarritt*, 169 Mo., loc. cit. 484, 485, 60 S. W. 283, 286, a case wherein the city had passed an ordinance forbidding further interments in a burying ground on the question of abandonment, *Sherwood, J.*, tersely said: "This contention, as will be observed, assumes that the mere prohibition of future burials in itself worked an abandonment, but there can be no such magic in the simple declaration of a legislative intent, especially when it is not accompanied by any act of performance, or any other act of notification, as above indicated, to the reversionary owners. A cemetery is none the less a graveyard because further interments in it become impossible. It only loses its character as a resting place of the dead when those already interred are exhumed and removed. Notwithstanding the ordinance of 1857, the graves were undisturbed until 1866, and not until 1878 were all of the bodies removed from the premises." In the case at bar most of those buried there are yet there. It is true that for some years no new interments have been made, but it is still the resting place of the dead. To this plaintiff and others sacred memories are awakened in viewing the spot. They cluster around the little half worn mounds there. It is true that for some years this ground has not been kept in a condition commensurate with these memories. The vicissitudes of life sometimes may have been such as for

awhile to make them forget these sacred memories, but such forgetfulness does not authorize the desecration of the graves of their loved ones by strange hands. They have a right to return to the spot, and, as it were, bury their forgetfulness, and do homage to their sacred memories, by placing these resting places in proper and appropriate condition, and if there is a public burying ground, as in this case, no strange hand can forbid them. Under the facts and the law this graveyard has not as yet been abandoned.

6. Although this is a public burying ground, and although it has not been abandoned, yet the decree in this case is too broad. This decree says "that the defendant has no right thereto," and in this the chancellor went a step too far. The public use was created by common-law dedication, and not by deed. In such case the right of reverter must be considered. In 5 Am. & Eng. Ency. of Law (2d Ed.) p. 797, the text-writer says: "Where land has been dedicated to cemetery purposes, and there has been a lawful and effectual abandonment of the cemetery as such, the land will revert to the original owner. But, where lands are conveyed absolutely, and in fee simple, there will be no resulting claims abandoned for cemetery purposes." There is thus drawn a distinction between lands conveyed by deed for a valuable consideration and lands merely dedicated to a public use. In the latter class of cases, if there comes a time when the bodies are all removed, or when by other conditions a clear abandonment of the graveyard is made apparent, then the right of the public, which is somewhat in the nature of an easement, ceases, and the land reverts to the original owner or his grantees. By mere ceasing to make further interments does not abandon the graveyard, as we have seen, so long as it is kept in condition to be known and is known as a burying ground. The defendant in this case has no right to the possession of these grounds so long as they are kept and maintained as a burying ground. The public has the beneficial use thereof. The plaintiff has a reversionary interest. He holds the fee subject to the use aforesaid. The finding and decree should be modified in accordance with these views, and we will and do so modify said judgment here, in accordance with the views herein expressed.

The judgment, so modified, is affirmed. All concur, except VALLIANT, P. J., absent.

HOWELL et al. v. SHERWOOD et al.
(Supreme Court of Missouri. Division No. 1.
July 3, 1908.)

1. GARNISHMENT—JURISDICTION OF COURT—SUMMONING OF GARNISHEE—STATUTES.

Under Rev. St. 1835, c. 63, § 6, authorizing the summoning of garnishees in specified cases, and chapter 12, § 22, providing that garnishees

shall be summoned by the sheriff declaring to them that he summons them to appear at the return term of the writ to answer interrogatories which may be exhibited by plaintiff, and by declaring that he attaches the moneys and debts owing by them to defendants, the omission of the sheriff summoning a garnishee to inform him when and where he shall appear to answer interrogatories filed in the garnishment suit, and to declare to the garnishee that he attaches the moneys and debts owing by him to defendant, is fatal, and the court acquires no jurisdiction over the garnishee or the subject-matter of the suit.

2. JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION.

A judgment rendered against a garnishee by a court having no jurisdiction over him or the subject-matter of the suit, because of the insufficiency of the service of process on the garnishee, is a nullity, and is subject to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 928-929.]

3. EXECUTION—SALE—VOID JUDGMENT.

An execution and sale under a void judgment are void, and are inoperative to transfer title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 16.]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by H. E. Howell and others against Thomas A. Sherwood and another. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

This is a suit in ejectment, for the possession of a tract of some 10 acres of land, situate in the city of Springfield, Greene county. The petition was in the usual form, and the answer of defendant Sherwood was a general denial of all the allegations of the petition, except the one of possession, and that defendant Blakey was a disclaimer of all interest in the premises, except as a tenant of his codefendant. The cause was tried by the court without the intervention of a jury, which resulted in a judgment for the plaintiff, and defendant duly appealed to this court.

Charles Carlton was the common source of title; and after the introduction of all the evidence, the defendant requested, and the court made, a special finding of facts, which, omitting formal parts, is as follows:

"Comes now the defendant in the above-entitled cause, and requests the court to make the following finding of facts herein, to wit:

"(1) The court finds that the testimony of the defendant, Thomas A. Sherwood, given in this case, is true, and that the facts concerning which he testified are as they were by him stated. (2) The court finds that on the 30th day of January, 1861, a judgment was rendered in the circuit court of Greene county, Mo., in favor of Peter Hayden and Pollock Wilson as plaintiffs against George A. Taylor as defendant, for the sum of \$922.81 debt and \$64.35. That upon this judgment an execution was issued on the 14th day of February, 1861, and that the clerk's execution docket, upon which the issue of

this execution is noted, and upon which all executions in said cause were required by law to be noted, contains no memorandum of the issue of any other execution in the cause of Hayden & Wilson against George A. Taylor, nor is there any evidence that such other execution was ever issued. That said execution is missing from the files in said cause, and has disappeared from the office of the clerk of the circuit court of Greene county, Mo., and cannot be found by the clerk, after thorough and diligent search therefor, but that, in other respects, the files in said cause of Hayden & Wilson against Taylor appear to be intact. That the only return that was contained or ever appeared upon said execution was as follows: 'Executed the within writ by summoning Charles Carlton as garnishee.' This was, in substance and effect the language of the return, and was signed by Thos. A. Reed as sheriff; but the return did not inform Charles Carlton where and when he was to appear. Nor did said return contain any recital that the sheriff declared to said Carlton that he seized or attached in his hands any debts, moneys, or credits due or owing by said Carlton to said George A. Taylor, defendant in said execution. Nor did said Carlton appear to the action, either personally or otherwise, nor file any answer to the interrogatories filed against him as garnishee. Nor were there any interrogatories filed in said cause, against said garnishee, until the August term, 1862, of said circuit court. Nor was any judgment, purporting to be an interlocutory judgment, entered against said Carlton until the August term, 1862, of the Greene county circuit court. And the court further finds, in this connection, that it was a custom of the sheriff who received the execution in question, and his deputies, to make returns in garnishment proceedings similar to the said return on the execution in the case of Hayden & Wilson against George A. Taylor, without reciting in such returns the fact that such officer declared to the party summoned as garnishee, on account of debts due and owing by him to the execution or attachment defendant, that the officer did attach in his hands all debts due from him to the defendant or so much thereof as should be sufficient to satisfy the debt and interest or damages and costs. That final judgment on the 10th day of February, 1863, was rendered against the garnishee for \$682, but no judgment for costs. That upon this judgment so rendered against said Carlton, execution issued on the 20th day of February, 1863, and was levied upon other property than that in controversy herein, on March 11, 1863, and that, as shown by the sheriff's return, dated August 11, 1863, the land so levied upon was sold for the sum of \$695 under said execution, a part of which was applied on the costs, leaving a balance of only \$661.94 to be credited on the execution, which was credited thereon.

"The court further finds that the return to the above-named execution contains upon its face evidence of alteration and amendment, and that the same was made in pursuance of an order of court, dated September 30, 1863, and contained in Book f, p. 200, of the records of the circuit court of Greene county, Mo., and that the same is the amendment to which reference is made by the court in its said order permitting the sheriff to amend his return upon his execution in said cause, and that said order had no reference to the return on the original execution in the case of Hayden & Wilson v. Taylor, nor did it contemplate an amendment thereof.

"The court further finds that the said Sherwood took possession of the land in controversy in September, 1897, and has remained in possession ever since, and upon taking possession paid all taxes due on said property at that time, and for five years previous thereto, and ever since has paid the taxes on the same, and sold off land for three streets, and conveyed the same to the city of Springfield, and has sold off and conveyed to A. N. Hanson a portion of said land for a lot. That H. E. Howell, nor his coplaintiffs, made no objections to such sales and conveyances, which were made after said Sherwood took possession. That said Sherwood was unaware he had acquired title to said land in question, until informed he had title thereto by Major Mead, whereupon he also bought said land from C. B. Holland, and took and put to record a deed therefor, and immediately took possession of said land, which was then vacant, and paid all taxes then due, as aforesaid. That he had been in possession of said land for over six years, and H. E. Howell and his coplaintiffs never brought suit nor questioned the title of said Sherwood to said land, until statutory proceedings were instituted against them to compel them to do so, by said Sherwood, under the provisions of section 647, Rev. St. 1899 (Ann. St. 1906, p. 665), and then they instituted the present action of ejectment. That said H. E. Howell never took possession of said land, except of small portions thereof, at long intervals apart, and no such possession as would give title, or semblance to title, to said land. That from the time of his purchase of said land in 1882, said H. E. Howell never paid any taxes on said land for 16 years after that date, and not until said Sherwood had taken possession of said land, and paid all taxes due thereon, when said Howell paid taxes for two years on said land, which taxes were no longer due on said land, having run out. Nor did his coplaintiffs pay any taxes on said land. Nor did coplaintiffs of said H. E. Howell ever take possession of said land. Nor did H. E. Howell or his said coplaintiffs, though duly notified thereof, attend to the taking of depositions by said Sherwood touching certain facts in this cause involved, at Jefferson City, Mo., in the year 1900, which

depositions were taken under the provisions of section 4523, Rev. St. 1899 (Ann. St. 1906, p. 2472).

"The court further finds that before H. E. Howell purchased said land at probate sale, he examined the files in the said cause of Hayden & Wilson against Geo. A. Taylor, for the execution aforesaid on which said Carlton was garnished, and could not find the same among said files, nor could the clerk of said circuit court find the same. The said search for said execution was made after said H. E. Howell had bid in said land at probate sale, but before he paid the purchase money. The court further finds that the notes on which David L. Fulbright brought suit against Charles Carlton, in order to foreclose his vendor's lien on the land in question, were dated November 28, 1859. And the court further finds that H. J. Lindenhower had bought, on an execution issued on said judgment against Charles Carlton, a piece of land on Mt. Vernon street, in Springfield, Mo., of about seven acres, and afterwards sold the same to said Sherwood, and made a warranty deed to said Sherwood, and one to his wife, for said land; but, on consultation with said Sherwood, said Lindenhower became satisfied, on examination of said return on said execution of Hayden & Wilson against George A. Taylor, that service of garnishment on said Carlton, on said execution indorsed, was invalid, and thereupon authorized said Sherwood to pay said Carlton, then living in Texas, the sum of \$200 for a deed of release, and said Sherwood did secure a quitclaim deed from said Carlton for said land, and said Lindenhower thereupon gave to said Sherwood a credit on his title bond to said Sherwood for said land, for said sum."

There were no objections made or saved to the finding of facts, and they therefore stand admitted to be true, which obviates the necessity of our wading through the long abstract of the record, consisting of about 200 printed pages, in order to find what the facts are.

T. J. Delaney and Henry C. Young, for appellants. Patterson & Patterson, for respondents.

WOODSON, J. (after stating the facts as above). There are many legal propositions presented for our consideration by learned counsel for both parties; but, under the view we take of the case, it will not be necessary to consider but one of them, as it fully and effectually disposes of the entire case. The finding of facts shows that Charles Carlton was the common source of title, and that the plaintiffs claim through him by virtue of various mesne conveyances. On January 30, 1861, a judgment was rendered in the circuit court of Greene county in favor of Peter Hayden and Pollock Wilson, plaintiffs, against George A. Taylor, defendant, for the sum of

\$922.81 debt and \$64.35 costs. An execution was issued upon that judgment on February 14, 1861, and said Carlton was served as garnishee thereunder. On February 10, 1863, a final judgment by default was rendered against the garnishee for the sum of \$682. An execution was issued upon that judgment, and levied upon the property in controversy, and on February 2, 1864, it was, by the sheriff, sold to George W. Jamison for the sum of \$60; and the sheriff executed and delivered to him a proper statutory deed. Defendant assails the validity of that deed, for the reason that the circuit court of Greene county acquired no jurisdiction of the person of Charles Carlton, nor of the subject-matter of the suit involved in said garnishment proceedings. The basis of this contention is predicated upon the alleged insufficiency of the service of the garnishment upon Carlton. The return of the sheriff was made upon the execution issued on the judgment in favor of Hayden & Wilson against Taylor, and was in the following words: "Executed the within writ by summoning Charles Carlton as garnishee." The sufficiency of that return must be tested by section 6 of chapter 63, entitled "Executions," and the second and fourth subdivisions of section 22, c. 12, Rev. St. 1855, entitled "Attachments," which were in force at the time these proceedings took place, and which governed garnishment proceedings under executions.

Said section 6 reads as follows:

"When a fieri facias shall be issued and placed in the hands of an officer for collection, if no sufficient property can be found in the county whereof to levy the amount due on said writ, it shall be the duty of the officer, when directed by the plaintiff, his agent or attorney, to summons garnishees and with like effect as in case of an original attachment. The service of garnishment in such case, and the subsequent proceedings against and in behalf of the garnishee, shall be the same as in the case of garnishment under attachment."

The second and fourth subdivisions of said section 22 reads as follows:

"Second. Garnishees shall be summoned by the sheriff, or other proper officer, declaring to them that he does summons them to appear at the return term of the writ to answer the interrogatories which may be exhibited by the plaintiff, and by reading the writ to him, if required."

"Fourth. When goods and chattels, money or evidences of debt, are attached, the officer shall take the same and keep them in his custody, if accessible; and, if not accessible, he shall declare to the person in possession thereof that he attaches the same in his hands, and summons such person as garnishee."

By reading the return of the sheriff, as above quoted, it will be seen that it did not, as found by the trial court, and as required by

the statute, inform Carlton when and where he was to appear and answer the interrogatories mentioned in the statute; nor did said return contain a recital that the sheriff declared to Carlton that he seized or attached in his hands all debts, moneys, and credits due or owing by him to said George A. Taylor, the defendant in the execution. Those requirements of the statute are jurisdictional and mandatory, and the omission of the sheriff to inform Carlton when and where he should appear to answer the interrogatories that might be filed in the garnishment suit, and his omission to declare to Carlton that he attached all moneys, debts, and credits due or owing by him to said Taylor, failed to bring him into court, or to give the Greene county circuit court jurisdiction over him or over the subject-matter of the suit. That being true, the judgment of the circuit court rendered against Carlton in the garnishment proceedings was an absolute nullity. This same question has frequently been before this court, and the uniform ruling has been that such a judgment is void, and is subject to collateral attack. *Maulsby v. Farr*, 3 Mo. 439; *Norvell v. Porter*, 62 Mo. 309; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 827; *Feurt v. Caster*, 174 Mo. 289, 73 S. W. 576; *Anderson v. Scott*, 2 Mo. 15; *Cabeen v. Douglas*, 1 Mo. 338.

The judgment being void, the execution and sale thereunder were likewise void, and were inoperative to transfer the title of Carlton to Jamison, and to those who claim under him. And, since plaintiff derails title from Carlton through the sheriff's said deed to Jamison, that constitutes a missing link in their chain of title, which is fatal to their right of recovery in this case.

The judgment of the circuit court is therefore reversed, and the cause remanded.

All concur, except VALLIANT, P. J., absent.

JACKSON et al. v. LITTELL.

(Supreme Court of Missouri. Division No. 2.
July 14, 1908.)

1. WILLS — CONSTRUCTION — CONFLICTING PROVISIONS.

While the cardinal rule in the interpretation of a will is that the intention of the testator as gathered from the whole instrument shall control, it is also the settled law that, when the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised absolutely to the first donee, that estate will not be cut down by subsequent or ambiguous words inferential in their intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 989.]

2. SAME — ESTATES CREATED — FEE SIMPLE — "HEIRS AND ASSIGNS."

While the words "heirs and assigns" are not necessary in Missouri to create a devise of a fee simple, they are necessary at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Wills §§ 1319-1331.]

3. SAME.

Where an estate is devised to one and his heirs and assigns forever, and there is added either by express words or by plain implication an absolute power of alienation, a limitation over is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1340, 1341.]

4. SAME.

By his will testator devised to his wife, her heirs and assigns, forever, all his property, with privilege of selling, and directed that at her death each of his daughters should have a certain sum, also directing that at the death of his wife, or at any time when she might arrange to relinquish her interest in the property, the same should revert to testator's son, after his daughters should have received their portion. *He'd.* that the wife took a fee-simple estate in the property, with full power to sell and convey it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1340, 1341.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Abigail Jackson and others against Archibald V. Littell to construe a will. From the judgment, plaintiffs appeal. Reversed and remanded, with directions.

J. N. & A. C. Southem, for appellants.
John W. Clements, for respondent.

GANTT, J. This is an action begun in the circuit court of Jackson county to construe the last will and testament of Archibald Littell, deceased. The case was tried upon the following agreed state of facts:

"Plaintiffs and defendant by their respective attorneys hereby stipulate and agree as follows:

"(1) That Archibald Littell died on the — day of July, 1903, testate, seized and possessed of the real estate described in the petition, leaving as his heirs and devisees his widow Catharine Littell and his children, the plaintiffs and defendant in the above-entitled cause.

"(2) The said decedent made and executed his last will and testament, which was on the 10th day of August, 1903, duly admitted to probate in the probate court of Jackson county, Mo., at Independence, a true copy of which is as follows:

"Realizing the uncertainty of life, I, Archibald Littell of the county of Jackson, and state of Missouri, make this my last will and testament while in possession of sound mind and memory, this 6th day of March, in the year of our Lord, one thousand eight hundred and eighty-first. I give, devise and bequeath to my beloved wife, Catharine Littell, her heirs and assigns, forever, all of my property, real and personal of what nature and kind soever and wherever the same shall be at the time of my death, with privilege of selling or conveying by deed.

"Second. I bequeath that at the death of my wife, Catharine, my four daughters, Sarah E. Long, Abigail Jackson, Martha King, and Mary E. Mulford shall each have five dollars and my three daughters, Rebec-

ca Chiddix, Rachel Chiddix and Lucinda Littell each shall have two hundred dollars.

"Third. It is also my will and desire that at the death of my wife or at any time she may arrange to relinquish her interest in said property, the same may revert to my son, Archibald V. Littell, after my daughters shall have received each their portion as stipulated in the second section of my will.

"Fourth. It is my will that my wife shall be executrix of this my last will and testament. My will is also that my said wife shall not be required to give any bonds or security to the judge of the probate court for the faithful execution of the duties of executor.

"[Signed] Archibald Littell. [Seal.]

"Witnesses: John Stonehouser.

"C. C. Latimer."

"(3) That on the 10th day of August, 1903, the widow of decedent, the said Catharine Littell, executed her warranty deed to the plaintiffs and defendant, purporting to convey to them the land in controversy as specified in said deed, a true copy of which is as follows:

"Warranty Deed. This indenture made on the 10th day of August, 1903, by and between Catharine Littell, widow of Archibald Littell, deceased, of the county of Jackson, state of Missouri, party of the first part, and Sarah E. Long, Abigail Jackson, Martha King, Mary E. Mulford, Rebecca Chiddix, Rachel Chiddix, Lucinda Littell, and Archibald V. Littell, of the county of Jackson, state of Missouri, parties of the second part, witnesseth: That the said party of the first part in consideration of one dollar and natural love and affection to her paid by the said parties of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm unto the said parties of the second part, their heirs and assigns, the following described tracts and parcels of land lying being and situated in the county of Jackson, state of Missouri, to wit: All the west (121) one hundred and twenty-one acres of the northeast quarter of section (6) six, township (49) forty-nine, and range (29) twenty-nine, except one acre in the northwest corner thereof grantor reserving a life estate to herself in said property, the remainder in fee in said real estate is to vest in said grantees, the same being children of the grantor, as tenants in common, share and share alike, except that on a partition of the same the following parties shall receive the following amounts respectively, before the remainder is divided equally between said grantees, viz. Lucinda Littell, four hundred dollars, and Rachel Chiddix, Rebecca Chiddix and Archibald Littell, two hundred dollars each. To have and to hold the premises aforesaid, with all and singular rights, privileges, and immunities thereto belonging, or in any wise appertaining unto the said parties of the second part and unto their heirs and as-

signs, forever, the said grantor hereby covenanting that she is lawfully seised of an indefeasible estate in fee in the premises herein conveyed: That she has good right to convey the same; that the said premises are free and clear from any incumbrance done or suffered by her, or those under whom she claims, and that she will warrant and defend the title in the said premises unto the said parties of the second part and unto their heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever. In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

Catharine Littell. [Seal.]

"Deed acknowledged on August 10th, 1903. Recorded August 10th, 1903, in Book 246, at page 246, recorder's office, Independence, Missouri."

"(4) That the personal property of said estate was not more than the widow was entitled to under the statutes, and that none of the real estate will be needed to pay debts of the testator.

"(5) That the real estate described in the petition was all the real estate owned by decedent at the time of his death.

"(6) That Catharine Littell at the time of the execution of the deed and the probate of the will, August 10, 1903, was about 82 years of age and physically in feeble health; that said Catharine Littell and the testator, Archibald Littell, deceased, lived together as husband and wife for about 57 years and raised a family of eight children, the plaintiffs and defendant, the youngest being a daughter, Lucinda, aged about 40 years, living at home and unmarried."

In an instruction given by the court of its own motion, it construed the said will as follows: (1) Under the will of Archibald Littell, deceased, his wife, Catharine Littell, took only a life estate in the real estate in controversy herein coupled with a power of sale of said real estate, and at her death said real estate or proceeds thereof pass under the will of said Archibald Little to the devisees therein named, who, if they survive said Catharine Littell, will at her death take the remainder in said real estate or in the proceeds of sale thereof, if sold by said Catharine Littell in her lifetime in the following proportions, to wit: Sarah E. Long, Abigail Jackson, Martha King, and Mary E. Mulford, \$5, Rebecca Chiddix, Lucinda Littell, and Rachel Chiddix, now Rachel Ashcraft, each the sum of \$200, and Archibald V. Littell the balance of said property, and that the deed of gift of said real estate executed by the said Catharine Littell August 10, 1903, introduced in evidence, is null and void, and on the 20th day of January, 1905, the court gave judgment in accordance with said declaration of law in favor of the defendant Archibald V. Littell. In due time and regular form the plaintiffs filed their motions for new trial and in ar-

rest of judgment, which were heard and overruled and exceptions duly saved.

1. Again, we have the old question of whether the will of Archibald Littell granted a fee-simple title to his wife, or whether he gave her merely a life estate therein with power to sell or convey the same. The canons of construction of wills have been so often iterated and reiterated that it is unnecessary to repeat them. It goes without saying that the cardinal rule in the interpretation of a will is that the intention of the testator as gathered from the whole instrument shall control. But along with this statutory rule in this state it is also the settled law that, when the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised absolutely to the first donee, that estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. Now, the first clause of this will is as follows: "I give, devise and bequeath to my beloved wife, Catharine Littell, her heirs and assigns, forever all my property, real and personal, of what nature and kind soever, and wherever the same shall be at the time of my death with privilege of selling or conveying by deed." It would be difficult, indeed, to find words better adapted to create an absolute fee-simple title in Mrs. Littell than this language indicates. These words carry not only the fee-simple title in the lands, but a perfect title to the testator's personal estate of every kind and character. While the words "heirs and assigns" are not necessary in this state to create a devise of a fee simple, they were words that were necessary at common law, and no more suitable language could have been chosen by the testator to emphasize his intention to give his wife his whole estate absolutely. As said by Judge Black in *Chew v. Keller*, 100 Mo., loc. cit. 370, 13 S. W. 396: "Stronger language could not have been used to show and disclose a purpose and intent to confer upon Leven Baker and the other named person an absolute and unconditional fee. The estate is given to 'them and their heirs forever.' This expression, though unnecessary to create a fee, is an appropriate one for that purpose, and that the word 'heirs' is here used in its ordinary legal sense as one of limitation only cannot be doubted." And when, in addition to these words, is added the provision "with the privilege of selling or conveying by deed," this added power carried with it a full property interest in the estate. It was said in an early date in this state in *Rubey v. Barnett*, 12 Mo. 5, 49 Am. Dec. 112: "It has always been held that an absolute power of disposition over property conferred by will not controlled by any provision or limitation, amounted to an absolute gift of the property and power to dispose of a thing as one pleases, must necessarily carry along with it a full property in it." To the same effect are, *Green v. Sutton*, 50 Mo. 186; *Tremmel v. Kleiboldt*, 75

Mo. 255. In *Yocum v. Siler*, 160 Mo., loc. cit. 289, 61 S. W. 212, it was said: "By the words 'bequeath absolutely' he unquestionably intended to devise to his son his whole estate in said land. These words are ample for that purpose in a will, and it is unnecessary to cite precedents to establish that it has been often so held." But it is strongly insisted by the learned counsel for the defendant Archibald V. Littell that the subsequent provisions of the will clearly indicate, notwithstanding the plain and sufficient words which were used in the first item to create a fee simple, it was the intention of the testator to give his wife only a life estate, and numerous cases have been cited from our own decisions to support this contention. But we understand that it is settled law in this state that where an estate is devised to one and his heirs and assigns forever, and there is added either by express words, or by plain implication, an absolute power of alienation, the limitation over is void. In 2 *Redfield on Wills*, p. 277, it is said: "It is a settled rule of American, as well as English, law, that when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment, among certain specified persons or classes, any estate over is void as being inconsistent with the first gift." And in *Gannon v. Albright*, 183 Mo., loc. cit. 252, 81 S. W. 1164 (67 L. R. A. 97, 105 Am. St. Rep. 471), it was added: "Void as a remainder because of the preceding fee after which a remainder cannot be limited; void as an executory devise because a valid executory devise cannot subsist under an absolute power of disposition in the first taker." Thus Chancellor Kent says (volume 4 [14th Ed.] 270): "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies possessed of the property without leaving issue, the remainder over, or property which he, dying without issue or heirs, should leave, or without selling or devising the same—in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." In support of this proposition the authorities are collated in *Gannon v. Albright*, 183 Mo. 252, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471. By the will in this case, not only did the testator by apt and appropriate words devise to his wife an absolute fee simple estate in the lands in controversy, but super-added thereto an unqualified privilege of selling or conveying by deed. But, moreover, he made no further grant of the estate over to any other person or persons, unless it can be said that the second and third items of the will were intended to cut down to a less estate thereby. But, as we have already seen, it is the settled law of this state that when

the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised, absolutely to the first donee, that estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. Now clearly, we think; there is nothing in the second clause of the will which indicates any such purpose on the part of the testator, and, if we look to the third clause, it is only by inference that such was the intention of the testator, and hence the rule, already adverted to, would prevent the taking effect of such devise over if the language of the third clause can be so construed. That clause is ambiguous in itself, and falls clearly within the prohibition of the general rule, which forbids the cutting down of the estate so clearly and positively granted to the wife in the first item of the will by such subsequent and ambiguous provisions in the will. While as already said, the great purpose of a court in construing the will of a testator is to ascertain his intention, it is of prime importance that well-recognized legal rules of construction should be observed to the end that the titles to real estate should not be left in doubt. If we are to adhere to the rule so often announced by this court that the devisee of an estate generally or indefinitely with a power of disposition over, it carries a fee, and that there is a broad distinction between those cases where there is a devisee generally or indefinitely with a power of disposition and those cases where there is a devise for life with a power of disposition. We see no escape from holding that Mrs. Littell took an absolute fee in the estate of her husband with a superadded power of disposition, and, if the other items of the will are to be construed as an attempt to make a devise or devises over, they were void and of no effect. *Green v. Sutton*, 50 Mo. 186; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Cook v. Couch*, 100 Mo. 34, 13 S. W. 80; *Roth v. Rauschenbusch*, 173 Mo., loc. cit. 582, 73 S. W. 664, 61 L. R. A. 455. In *Small v. Field*, 102 Mo. 127, 14 S. W. 820, it was said by this court: "It is obvious that the absolute estate in fee granted to Mrs. Kate Green could not be impaired, cut down, or qualified except by words as affirmatively strong as those which conveyed the estate to her." And to the same effect is *Roberts v. Crume*, 173 Mo. 572, 73 S. W. 662. Applying the rule announced in *Small v. Field*, supra, which has often been reiterated by this court, we look in vain in this will for any words as affirmatively strong or even approximating those which Archibald Littell used in devising his estate to his wife. It necessarily falls that in our opinion the learned circuit court erred in adjudging that Mrs. Littell only took a life estate in the property of her husband, and should have held that she took a fee-simple estate therein with full power to sell and convey the same, and having an unlimited power to sell or convey, she had the perfect right to make the

deed of conveyance to her children, which the court adjudged void.

Accordingly the judgment of the circuit court of Jackson county is reversed, and the cause remanded, with directions to the circuit court to enter a judgment or decree in accordance with the prayer of the petition.

FOX, P. J., and BURGESS, J., concur.

SIDWELL et al. v. JETT.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. APPEAL AND ERROR—RECORD—AMENDMENT IN TRIAL COURT AFTER JUDGMENT IN INTERMEDIATE COURT.

The Supreme Court will not stay an appeal from the circuit court after an appeal from the county court, to allow mandatory proceedings to compel the county court to correct its record as to time of rendition of its judgment, for if a corrected record were filed it would present matters on which the circuit court had no opportunity to pass, and might present a different case than that on which the circuit court rendered judgment.

2. HIGHWAYS—ESTABLISHMENT—JURISDICTION OF CIRCUIT COURT—STATUTORY PROVISIONS.

In view of Rev. St. 1899, § 1788 (Ann. St. 1906, p. 1248), providing that when any case shall be removed into a court of appellate jurisdiction by appeal from a county court, the appellate court shall be in possession of such cause and shall proceed to hear and determine the same anew in the same manner as if it had originated in that court, and the fact that the county court has original jurisdiction of proceedings to establish public roads, the circuit court has jurisdiction of such proceedings only by appeal from the county court under the provisions cited.

3. COURTS—COUNTY COURTS—APPEALS TO CIRCUIT COURT—TIME TO APPEAL.

Rev. St. 1899, § 1788 (Ann. St. 1906, p. 1248), provides that appeals from final determinations of the county court shall be prosecuted as provided by law for the regulation of appeals from justices of the peace to circuit courts, and section 4060 (page 2208), relating to justices' courts, provides that no appeal shall be allowed unless taken within 10 days after judgment rendered. *Held*, that no appeal will lie from the county court to the circuit court unless taken within 10 days after rendition of judgment.

4. HIGHWAYS—JURISDICTION OF CIRCUIT COURT.

The fact that the petitioners for a public road appeared in the circuit court on an appeal from the county court by an objector will not give the circuit court jurisdiction if the appeal was not taken in legal time, since the circuit court has no jurisdiction of the subject-matter except by duly perfected appeal, and jurisdiction of the person will not suffice.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Proceedings by Albert Sidwell and others to establish a public road, in which George W. Jett and others file objections. From a judgment of the circuit court dismissing the proceedings on an appeal from the county court, petitioners appeal. Reversed.

J. E. Thompson, for appellants. J. H. Blair, for respondent.

GANTT, J. This is an appeal from the judgment of the circuit court of Pike county dismissing a proceeding to establish a public road in said county. The proceeding began by the posting of notices of the presentation of the petition for said road as required by statute. Afterwards, on February 2, 1903, the petition signed by Albert Sidwell, William Baker, and 23 other resident freeholders of Buffalo and Quivvre townships was presented to the county court, and proof of the posting of the notices made. No remonstrance was filed and the county court, after hearing the evidence as to the utility of the road, made its order that the county surveyor and ex officio road commissioner mark out, view, and survey the purposed road and make its report at the next term of court. At the succeeding May term, 1903, the commissioner made his report, from and by which it appeared that he had obtained the right of way for the road from all the landowners except Mrs. Carr and Misses Bailey and Alton Walker, whereupon the court appointed W. T. Farmer, J. R. S. McCune, and John Hendrick, three disinterested freeholders of said county, to view the premises, hear complaints, and assess the damages. At the August term, 1903, the record of the county court recites that: "The commissioners herein, namely, John W. Hendrick, J. R. S. McCune, and R. H. Tinker, appointed to view and assess the damages to property owners over whose land said purposed road will run, made and filed with the clerk of this court a report of their proceedings, and, it further appearing that said report has become lost or misplaced, it is ordered that said commissioners make out and file instantan a duplicate of said report to supply and take the place of said last report, and now comes two of the commissioners, J. R. S. McCune and R. H. Tinker, and file a report, which the court find is a duplicate report of the one filed of said commissioners on the — day of June, 1903, and it is ordered by the court that said duplicate be taken and held and considered as the original report of said commissioners, from which said report it appears that said commissioners assess damages to Maggie Bailey and Lucy Bailey in the sum of \$85, and that no damages were assessed to George W. Jett, Mrs. Carr, and Alton Walker, and now comes the said George W. Jett and Maggie and Lucy Bailey, by their respective attorneys, and leave is given them to file exceptions and objections to said report on or before the third day of the next regular term of the court to which this cause is continued." At the November term, said George W. Jett and Maggie and Lucy Bailey filed their motion to dismiss the cause for the reason that the road as surveyed and located passes over the lands of E. A. Morris and Susan McKinney, that they have not been made parties, the petition not giving them as owners of land over which the road is asked to be established, nor have they relinquished the right of way, and there-

upon the cause was continued until February 15, 1904, at which time said motion was by the court overruled, and the road was ordered opened, and the petitioners given until the first day of the May term, 1904, to pay the damages assessed. The transcript from the county court, certified by the county clerk to the circuit court, recites that the order overruling the motion to dismiss and directing the road to be opened was entered on the 15th of February, 1904, and that afterwards on the 2d day of May, 1904, George W. Jett filed his affidavit in the county court for an appeal to the circuit court, and an appeal was granted to the circuit court on said date. After the case reached the circuit court, the petitioners filed their motion asking the circuit court to dismiss the appeal on the ground: First, that the circuit court had no jurisdiction of said appeal; second, because the statute does not provide for nor authorize the admitted appeal of the said Jett; third, because no remonstrance was ever presented or filed in the Pike county court, and under the law an appeal is only allowed from an order opening a road to remonstrators, who had first filed and presented a legal remonstrance at the legal time; and, fourth, because in this class of cases no right of appeal lies in appellants from the county court—which motion was by the circuit court overruled at the June term, 1904. At the June term, 1904, the cause was heard de novo, and the circuit court dismissed the petition and proceedings. Thereupon petitioners within due time filed a motion for a new trial, which was overruled, and petitioners appealed to this court. Other facts will be noted in the further disposition of the case.

Preliminary to the disposition of the cause, a motion has been filed by the respondent for permission to correct the record of the county court filed in the circuit court, so as to show an error in the date of the judgment of the county court ordering the road opened. In this application it is stated that, while the transcript from the county clerk to the circuit court showed the said order to have been made on February 15, 1904, as a matter of fact the judgment was not entered on that date, and no such entry appears of record in said court as of February 15, 1904, but the entry of said judgment does appear on the records of said county court as of March 15, 1904. Wherefore respondent moves this court that the said transcript may be amended in so far as the date of the rendition of said judgment is concerned. In support of this application, the respondent files in this court a duly certified copy of the record of the county court of Pike county by the present clerk of the said court, showing that said entry does appear on the proceedings of March 15, 1904, and also a certificate from Lem T. Patterson, who was the clerk of the county court of Pike county during the years of 1903 and 1904, in which he states that the recital that said order was

made on February 15, 1904, was a clerical mistake by himself, and that, as a matter of fact, the order was made and entered of record on the 15th of March, 1904. He also certifies that, while the transcript from the county court to the circuit court shows that the respondents took an appeal on May 2, 1904, as a matter of fact, the affidavit for the appeal and the appeal bond were each filed by him as clerk of the county court on the 24th of March, 1904, and that his file mark upon such papers shows they were filed on March 24, 1904. The petitioners object to the correctness of said report, on the ground that the same should have been corrected while the cause was still in the circuit court, if said alleged defect and error in fact existed therein. The significance of this motion to amend the dates on which the final judgment was entered in the county court, and the appeal taken therefrom, appears from the brief of the petitioners filed in this court, in which they ask this court to hold that the circuit court had no jurisdiction of the appeal from the county court, for the reason that the said appeal was not taken in the time prescribed by the statute. As the transcript now appears, the judgment of the county court ordering the road opened was rendered on February 15, 1904, and the appeal was not taken until the 2d day of May, 1904, 72 days after the rendition of the said judgment, and, of course, not within the time, to wit, 10 days, allowed by the statute. Respondent in his application for this amendment shows to the court: That he was not informed of this mistake as to the date of the record entry until appellants' abstract of the record was served on him just before the commencement of this term of court; that, immediately upon learning of the said error in the said dates, he gave the appellants notice of his intention to apply to the county court to amend its record entry *nunc pro tunc* and make the entries of the filing of said affidavit and bond conform to the facts as shown by the endorsement on the same by the clerk of the said court; and that said application in the county court was overruled. While the appellants in this court, the petitioners in the county court, moved the circuit court to dismiss Jett's appeal on the ground that the circuit court had no jurisdiction of the said appeal, they did not specify that the appeal had not been taken within 10 days after the final order of the county court to open the road, but did specify other grounds.

The motion to delay this appeal until mandatory proceedings can be instituted by the respondent against the county court of Pike county to amend its record in the road case, out of which this appeal has grown, we think ought not be sustained. This appeal is from the judgment of the circuit court upon the record that was before that court, and should mandatory steps be taken, and the county court records amended so as to conform to the facts as asserted by respondent, it is

evident that, if such amended record should be filed in this court, it would present matter which was not before the circuit court, and upon which it had no opportunity to pass, and might present a wholly different case from that which appeared to the circuit court when it rendered its judgment. We are not disposed to encourage any such extraordinary practice, and the motion is overruled.

The first proposition presented by the appellants in this court is that the circuit court had no jurisdiction of the appeal in this case, because the said appeal from the county court was not taken in the 10 days allowed by the statute. Section 1788, Rev. St. 1899 (Ann. St. 1906, p. 1248), provides: "In all cases of appeal from the final determination of any case in the county court such appeal should be prosecuted to the appellate court in the same manner as is now provided by law for the regulation of appeals from justices of the peace to circuit courts, and when any case shall be removed into a court of appellate jurisdiction by appeal from a county court, such appellate court shall thereupon be in possession of such cause and shall proceed to hear and determine the same anew, and in the same manner as if such cause had originated in such appellate court without regarding any error, defect or informality in the proceedings of the county court." *Fisher v. Anderson*, 101 Mo. 459, 14 S. W. 629. The county court had original jurisdiction of this proceeding to establish the public road, and the circuit court had jurisdiction of such a proceeding only by appeal from the county court and by the provision above noted. The law governing the taking of appeals from the county court to the circuit court is the same as that provided for appeals from justices. By section 4060, Rev. St. 1899 (Ann. St. 1906, p. 2208): "No appeal shall be allowed in any case unless the following requisites be complied with: First, the appeal must be within ten days after the judgment was rendered." It is apparent on the face of the record before us that this appeal was not taken until May 2, 1904, and even if the judgment was rendered on the 15th of March, as contended by the respondent, it was not taken within the 10 days prescribed by the statute.

The only serious question, under this state of the case, is the effect of the appearance of the petitioners in the circuit court. As said by this court in *Robinson v. Walker*, 45 Mo., loc. cit. 120: "It has often been held that the appearance of a party by joining issue, or by any other action that shall indicate an intention to prosecute or defend the suit upon the merits, shall be deemed a waiver of a defect in the process or notice under which the appearance was had. But in every case of this kind the court had jurisdiction of the subject-matter, and it might with reason be said that a voluntary appearance is well enough. But the circuit court has not jurisdiction of a matter already de-

cided on in another court, and especially in actions of forcible entry and detainer exclusively cognizable before a justice of the peace, unless it is brought into court under the statute and according to its provisions, and, when it has no jurisdiction, the consent of the parties cannot give it. *Bernicker v. Miller*, 37 Mo. 498, and other cases cited." The decision in *Robinson v. Walker*, supra, was cited with approval and followed in *St. Louis v. Gunning Company*, 138 Mo., loc. cit. 353, 39 S. W. 788, in which it was added that the appearance of both parties in the appellate court would not give jurisdiction in such a case, as the court had no jurisdiction of the subject-matter of that case. In *Robinson v. Walker*, supra, both parties appeared in the circuit court, and the case had been twice continued at the instance of the plaintiff before he moved to dismiss the appeal, because it had not been taken within the time prescribed by the law and the transcript filed in the office of the circuit clerk in accordance with the statute. In this case the county court had exclusive original jurisdiction of this proceeding to establish this road, and the circuit court could only acquire jurisdiction of the subject-matter by an appeal taken within the time and in the manner prescribed by the statute. It is not a question of mere failure to give notice and a waiver thereof, but the jurisdiction of the circuit court depended upon the taking of the appeal within the time specified by law. We can discover no distinction on principle between the jurisdiction obtained by the circuit court in this case on appeal from the judgment of the county court, and the jurisdiction obtained by the circuit court on an appeal from the justice of the peace in forcible entry and detainer cases. In each case the original jurisdiction is in the justice or the county court, and the circuit court has no jurisdiction of the subject-matter of the suit, except by appeal in the manner pointed out by the statute. This being so, it seems to us there can be no question that upon the record before us the circuit court had no jurisdiction of this cause.

As the circuit court had no jurisdiction of the appeal, its judgment dismissing the petition and quashing the proceedings in the county court was without authority of law, and must be and is reversed.

FOX, P. J., and BURGESS, J., concur.

W. W. TAYLOR & SONS BRICK CO. v.
KANSAS CITY SOUTHERN RY. CO.
(Supreme Court of Missouri, Division No. 2.
June 16, 1908. Rehearing Denied
July 14, 1908.)

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—THEORY OF TRIAL.

A case will be reviewed by the appellate court on the theory adopted by the parties in the trial of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3402-3434.]

2. SAME—QUESTIONS NOT RAISED BELOW.

Though, in an action against a railroad for destruction of property by fire, plaintiff had under its petition a sufficient basis for testimony that the fire originated from engines used by other railroad companies on defendant's tracks, but tried the case on the theory that the fire was caused by defendant's engine, and requested an instruction based on such theory, it could not on appeal claim that it was entitled to recover on the theory that the fire was caused by engines used by other railroads on defendant's tracks, or complain of counter instructions given at defendant's request limiting the recovery to the issue as pointed out by plaintiff in its instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1053-1069.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by W. W. Taylor & Sons Brick Company against the Kansas City Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This cause is now pending in this court upon appeal on the part of the plaintiff from a judgment of the Jackson county circuit court in favor of the defendant. This is an action to recover damages for the destruction of a brick plant in Kansas City, Mo., owned and operated by the plaintiff, which is alleged to have been caused by fire from one of defendant's engines, being run and operated over defendant's railroad tracks, which passed by and near the brick plant of the plaintiff. The charge in the petition is "that on the 8th day of January, 1903, defendant carelessly, negligently, and wrongfully ran and operated an engine with a large train of cars thereto attached over its tracks aforesaid, in such a manner as to cause said engine to emit a large amount of sparks and cinders therefrom, and defendant carelessly, negligently, and wrongfully operated an engine with a defective smokestack, so that sparks and cinders escaped therefrom, and by means of such careless, negligent, and wrongful acts aforesaid sparks and cinders were emitted from one of defendant's engines and were blown against and upon the engine house and boiler room aforesaid belonging to this plaintiff," etc. After the statement of plaintiff's loss, the petition further charges "that by reason of all of the aforesaid careless, negligent, and wrongful acts of the defendant, sparks and cinders were emitted from said engine and conveyed by the wind," etc. There was also embraced in the petition an itemized statement of the loss by reason of the fire, which in the aggregate amounted to \$12,771.82. The answer of the defendant was a general denial.

We shall not undertake to give in detail all of the testimony developed at the trial. We have read in detail the entire disclosures of the record and find that there was testimony offered by the plaintiff tending to show that the plaintiff on January 8, 1903, was the owner of a brick plant in Kansas City, located at First and Gillis streets. On the northwest corner of said plant was located the engine

room, which was a frame structure, boarded upright with small cracks between the boards. On the east of this engine room, and adjoining thereto, was the boiler room, and east of that were office rooms, and southeast of the engine room were sheds and kilns, and a large barn on the southwest corner of the brick plant. There was other testimony tending to show: That the defendant owned and operated a double-track railway along the north side of plaintiff's brick plant, about 15 feet distant from the engine room and boiler room, as heretofore stated; that coming west on said tracks there was a steep upgrade, and engines had hard work to pull nine or ten loaded cars up that grade. It was further shown that through some sort of an arrangement the Frisco, St. Joe & Grand Island, Quincy, Omaha & Kansas City Railway Company, and the Independent Air Line were permitted to run engines and cars thereto attached over the tracks of the defendant in front of plaintiff's brick plant. One of the witnesses for the plaintiff, Ed Trapp, testified that the fire which destroyed the brick plant, in his opinion, occurred between 10 and 11 o'clock. He further stated that he saw a freight train pass over the defendant's track 10 or 15 minutes before the fire, and he says that after the passing of that freight train he does not think there was any other train that passed between that time and the fire. The freight train of which this witness testified was a freight train with one engine. He did not know how many cars were in the train. He says that he saw emitted from the engine smoke, sparks, and cinders. He said that the cinders looked like they were of pretty good size. He also stated that the sparks were a good size class of sparks. He stated that the engine of the Kansas City Southern ran over the road. He was unable to tell the name of that engine he saw that morning, as he paid no attention to that. Inquiry was made of Mr. Trapp as to his knowledge of other trains passing over the tracks of the defendant. His answer to that inquiry was that he knew nothing about the passing of other trains, and he said: "I noticed the Kansas City Southern, and I don't know of any other trains running over the tracks."

Another witness testified for plaintiff, A. B. McBeth. This witness spoke of the different railroads that operated trains over the tracks of the defendant. He saw the fire consuming this brick plant on this morning, and, while he says that frequently many trains would pass by this brick plant during the day, he says, referring to the morning of the fire: "I can't say whether I saw any freight trains passing, except the Kansas City Southern." This witness further testified that he was unable to call to mind any freight train that morning except the Kansas City Southern.

John W. Taylor, a witness on the part of the plaintiff, testified substantially as follows:

"Q. Are you familiar with what trains run over that track, or did run over that track? A. I was at the time; yes, sir. Q. What trains ran over there? Mr. Crane: I understand you were in Lola when this occurred? The Witness: Yes, sir. Q. I mean, generally, prior to that? A. The Kansas City Southern seemed to have a regular time for transfers at about 10 to 10:15, from the east bottoms to the west bottoms. Q. What kind of a transfer was that? A. Freight. Q. What kind of a grade was that? A. Well, it was a very steep grade and a curve at the same time. Q. Did you ever see any freight trains of any other road running over that line except the Kansas City Southern? A. The first three months I was there the Kansas City Southern did a little switching, and then the Kansas City Suburban Belt, as it is called, did all their own switching on their line. (Objected to by defendant as incompetent, irrelevant, and immaterial.) Q. Come down to the time the Kansas City Southern took charge of the line? A. There was no freight handled by any other road. Q. Their engines handled freight there? A. Yes, sir. Q. How long had that transfer been made there at that point about 10 o'clock prior to that? A. Well, it seemed pretty regular for about a year before that. Q. How large a transfer would they usually bring up there coming west? A. Well, we didn't always count them. I don't remember that I ever counted them myself. I know they have taken some heavy trains. Q. A regular transfer of freight every day? A. Yes, sir."

Robert Campbell, a witness for plaintiff, was the engineer in charge of the engine and boiler room in the brick plant. He stated, in substance, that there was a train passed, and that it was one of the usual trains. He said it was passing upgrade and seemed to be very heavily loaded, and it was necessarily puffing very freely, as usual on a long run. He stated that he was working with Mr. Heltman in the dry room, and where they could hear the train, and there was some remark made about this train; but the witness stated that he forgot what remark it was. He then stated that the first fire he saw was about 10 minutes after the train got by. He further testified as to the extent of the damages by reason of the burning of the plant.

There was testimony offered on the part of the defendant tending to show that the equipment of the freight train engines of defendant were of the most improved character, and in perfect condition, and by reason thereof could not have emitted sparks. There was other testimony tending to show that the fire originated in plaintiff's own engine house. In other words, there was a conflict of evidence between the plaintiff and the defendant as to whether or not this fire originated from sparks or cinders emitted from the engine operated by the defendant.

At the close of the evidence, the following stipulation was filed in this cause: "By agree-

ment of counsel it is stipulated that the jury may find simply for the plaintiff or defendant, without finding any amount, which is to be submitted to a referee."

At the request of the plaintiff, the court gave instruction No. 1, which was as follows: "The court instructs the jury that if they find from the evidence in this case that on January 8, 1903, plaintiff was the owner of the property described in the evidence, and that on said date said property was destroyed by fire communicated from an engine operated by defendant upon its road, in passing said place, provided you find said property was destroyed by a fire communicated from an engine operated by defendant upon its road, in passing the property of plaintiff in controversy, then you are instructed that defendant is liable to plaintiff for the reasonable value of the property destroyed, if any, and your verdict will be for the plaintiff, although you may believe there was no negligence in the management of the engine and train at the time of the fire."

At the request of the defendant, the court gave instructions Nos. 1, 2, and 3, which are as follows: "(1) You are instructed that in this case the plaintiff claims that the brick plant was set on fire by sparks or fire emitted from one of the engines of the Kansas City Southern Railway Company. Therefore, before you can find a verdict in favor of plaintiff, you must find that the fire was started in that way. Even if you should believe that the fire was started from some locomotive, yet, if it was not from one of the engines of the Kansas City Southern, plaintiff is not entitled to recover. (2) You are instructed that it is charged that the fire in this case was started from sparks of fire emitted from a locomotive engine belonging to the Kansas City Southern Railway Company. Before, under any circumstances, the plaintiff is entitled to a verdict at your hands, you must find that the fire was actually so started. If it was started in any other way, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. (3) You are instructed that it is your duty to try this case and to decide it precisely as you would a case between two individuals. The fact that the defendant is a railway company should make no difference whatever with the jury. You should base your finding solely on the testimony of the witnesses, the facts and circumstances in evidence, and the inferences to be drawn therefrom, without regard to who is plaintiff or who is defendant. In arriving at your verdict, all of the instructions, though read to you by opposing counsel, should be considered together, for all of them are the court's instructions, and declare to you the law by which you are to be governed."

With the exception of other formal instructions as to the number of jurors who were authorized to return a verdict and the form of the verdict, the instructions herein were the only ones given by the court. The cause was submitted to the jury upon the evidence

and the instructions of the court, and they returned a verdict finding the issues for the defendant. A timely motion was filed by the plaintiff to set aside the verdict and praying that a new trial might be granted, which was by the court taken up and overruled. From the judgment of the trial court rendered upon the verdict returned by the jury, the plaintiff in due time and proper form prosecuted its appeal to this court, and the record is now before us for consideration.

I. N. Watson, for appellant. Cyrus Crane and S. W. Sawyer, for respondent.

FOX, P. J. (after stating the facts as above). The record in this cause presents but one proposition for our consideration; that is, whether or not, the appellant having tried this cause upon a certain theory, it is in a position to ask for a reversal of this judgment, predicated upon a theory which was never suggested during the progress of the trial.

We have carefully examined the disclosures of the record as to what occurred during the trial of this cause, and it is manifest from such record that this cause was tried by the plaintiff upon the theory that the fire which destroyed its brick plant emanated from sparks emitted from an engine attached to one of the freight trains of the defendant, and at the time was being operated by the employés of the defendant upon its tracks which passed by the brick plant. That this is the theory is made manifest by the testimony introduced by the plaintiff, all of which is emphasized by asking but one instruction predicated upon the theory as herein suggested. The only testimony offered by the plaintiff which reasonably points to the origin of the fire was that of witness Trapp. His testimony was that this fire occurred between 10 and 11 o'clock, that there was a freight train drawn by an engine passed by this plant over the tracks of the Kansas City Southern Railway Company, that he saw sparks and cinders emitted from such engine, and very shortly thereafter the fire broke out in the brick plant of the plaintiff. While this witness was unable to tell the name inscribed upon the engine or the number of the engine, he did say that he noticed the Kansas City Southern and did not know of any other trains running over the tracks. Witness A. B. McBeth testified for the plaintiff that trains frequently passed by this brick plant during the day, but, referring to the morning of this fire he said: "I cannot say whether I saw any freight trains passing except the Kansas City Southern." And he further testified that he was unable to call to mind any freight train passing that morning except the Kansas City Southern. John W. Taylor, a witness for the plaintiff, while he was not there at the time of the fire, was familiar with the operation of the trains passing the brick plant of the plaintiff over the tracks of the defendant's railway, and he says that

the Kansas City Southern seemed to have a regular time for transfer from about 10 to 10:15 from the east bottoms to the west bottoms. Upon inquiry as to what kind of a transfer it was, he answered that it was freight, and, speaking of the time that the Kansas City Southern took charge of the line, he says there was no freight handled by any other road. And he further says that that transfer of freight by the Kansas City Southern was pretty regular about 10 o'clock, and had been pretty regular for about a year before the fire. He further stated that there was a regular transfer of freight every day by the Kansas City Southern. Witness Robert Campbell, who was the engineer in charge of the engine and boiler room in the plant of the plaintiff which was destroyed by fire, testifies about a train passing upgrade puffing very freely, and stated that it was one of the usual trains. He further testified that the first fire he noticed was about 10 minutes after this train passed. His testimony is in keeping with that of Taylor, who speaks of the regular transfer of freight trains passing this plant about 10 or 10:15. It is also in harmony with Trapp's testimony that this was a freight train and passed between 10 and 11 o'clock, and shortly after the passing the fire occurred in the brick plant. There is an entire absence of any testimony showing the emission of any sparks or cinders, except the one drawing this freight train that witness Trapp speaks about. Taylor says that no one except the Kansas City Southern was handling freight, and that they had a regular time for such transfers, and the usual train referred to by witness Campbell evidently referred to the transfer of freight as mentioned by witness Taylor.

But aside from the testimony as offered by the plaintiff tending to show that the plaintiff relied upon a recovery by reason of the showing that the fire emanated from an engine actually operated by the employees of the defendant, the Kansas City Southern, we have such theory emphasized by the instruction requested by the plaintiff. This instruction told the jury substantially that if they found that the plaintiff was the owner of the property described in evidence, and that such property was destroyed by fire communicated from an engine operated by defendant upon its road, in passing said place, provided you find such property was destroyed by a fire communicated from an engine operated by defendant upon its road in passing the property of plaintiff in controversy, then you are instructed that the defendant is liable. We are of the opinion that this instruction settled this proposition beyond all controversy. That this cause was submitted to the jury upon the theory on the part of the plaintiff that, if it was entitled to recover at all, it was by reason of a fire being communicated from an engine which was actually being operated by the defendant upon its tracks, which passed the plaintiff's

plant, there seems to be no room for doubt. Now, while it may be true that under the provisions of section 1060, Rev. St. 1899 (Ann. St. 1906, p. 915), the defendant could be held liable for damages occasioned by the escape of fire from engines being operated by other railroad companies, who were permitted to use the tracks of the defendant, yet we take it that the plaintiff clearly indicated to the court, by the request of this instruction, the grounds upon which it predicated a right to recover, and we are unwilling to say that the plaintiff can convict the court of error when it simply followed the suggestions of the plaintiff and confined the issues to those marked out by the plaintiff's instruction, and limiting the right to recover to the issues thus made and pointed out by the plaintiff. In other words, the plaintiff should not be permitted to say to the court, "we asked a recovery upon the theory that this fire originated from an engine actually operated by the defendant, and procured from the court, in accordance with such request, a declaration of law upon that theory," with not even the slightest suggestion that it predicates a right of recovery upon any other theory, and then, after an adverse finding upon such issue, for the first time suggest in its motion for a new trial that it had a right to recover upon an entirely different theory. Conceding for the purposes of this case that the plaintiff, under its petition, had a sufficient basis to offer testimony that the fire which destroyed the plant of the plaintiff originated from engines being used by other railroad companies upon the tracks of the defendant, yet in our opinion it was incumbent upon the plaintiff to present such theory to the trial court during the progress of the trial, and by appropriate instructions at the close of the evidence.

That learned counsel for plaintiff, from the filing of the petition until the return of the verdict in this cause, never sought a recovery for the damages by reason of this fire upon any other theory than that the fire originated from one of the engines actually operated by defendant, in our opinion is too plain for discussion. If there was sufficient evidence that this fire originated from engines other than those operated by the defendant, however upon defendant's tracks, then it was the plain duty of the plaintiff to request the court to submit that theory to the jury, and having failed to do so, but requesting a declaration of law which defined and limited its right of recovery to one single theory, then in our judgment the plaintiff is in no position to urge that the court committed error in giving the instructions requested by the defendant, which were simply counter instructions limiting the right of recovery to the theory as suggested by the instruction given for the plaintiff.

The proposition confronting us upon this appeal is no longer an open one in this state. It has repeatedly been announced by this

court that the case reviewed by the appellate court will be reviewed upon the theory adopted by the parties in the trial of the cause, and, as was said by this court in *Hill v. Drug Co.*, 140 Mo., loc. cit. 439, 41 S. W. 910: "It can now be announced as the fixed policy of our practice that parties litigant will be confined to the course of action they have adopted throughout the progress of the trial, even though that action be inconsistent with the course to have been pursued as indicated by the pleadings on file." Again, it was said in *Campbell v. St. Louis & Suburban Ry. Co.*, 175 Mo. 161, 75 S. W. 86: "Both parties tried the case on the theory that it was necessary for the plaintiffs to show that the defendant had agreed to be bound by the ordinances of the city governing the running of street cars before it could be held liable for a violation of the same. Therefore, whether that is a correct theory or not, neither party is in a position to question it in this case." The St. Louis Court of Appeals, in *Glaser v. Rothchild*, 106 Mo. App. 418, 80 S. W. 332, thus stated the rule upon this proposition: "Appellant, in his brief on motion for rehearing, contends that, notwithstanding plaintiff was on the premises of respondent as a mere licensee when hurt, yet by virtue of section 6435, Rev. St. 1899 (Ann. St. 1906, p. 3218), it was the duty of respondent to surround the wellhole into which appellant fell with strong guard rails. This statute was not relied on at the trial, but the cause was tried by the appellant on the theory that respondent was guilty of negligence as at common law. Having tried the case on that theory, appellant cannot shift his position on appeal by calling to his aid a statute which he neither specifically pleaded or relied on at the trial." In *Hamilton v. Kansas City Southern Ry. Co.*, 123 Mo. App. 619, 100 S. W. 671, the Kansas City Court of Appeals had in hand a case in which plaintiff charged that he received a fall from the top of a car and claimed that it was caused by the defendant's negligence in furnishing a defective brake. The trial in the lower court proceeded upon that theory. The plaintiff failed of a recovery. However, afterwards it was urged that he had a cause of action under the federal safety appliance act. That court, in treating of that proposition, thus very clearly and correctly stated the law: "It is a part of plaintiff's contention now that he has a case under an act of Congress known as the 'Federal Safety Appliance Act.' He claims that though that statute was not, in terms, pleaded, and that though the petition was not drawn with a view to that act, yet it sets forth facts which fairly put the case within that statute. It is enough to say of this contention that no

case was attempted to be made under that statute, that no issue was submitted to the jury in respect thereto, and, so far as the record shows, there was no thought prior to or at the trial of making a case under that statute. It is familiar practice that the appellate courts of this state refuse to permit the parties to try any other case on appeal than that heard and determined in the trial court."

We see no necessity for pursuing this subject further. The doctrine is firmly settled by the appellate courts of this state that they will simply review the case upon the theory upon which it was tried in the lower court. Emphasizing how closely this court adheres to this rule, we direct attention to the case of *Hill v. The Missouri Pacific Ry. Co.*, 101 Mo. 36, 13 S. W. 946. In that case it was urged in this court that an issue to which the evidence and instructions were directed was not in fact properly made an issue. The court in disposing of that complaint used this language: "The cause having been so tried, both parties, by the evidence and instructions having treated the issue as properly made, both parties having asked its determination and submission to the jury, the objection that there was no such issue, we think, cannot now be made"—citing *Bettes v. Magoon*, 85 Mo. 580; *Thorpe v. Railroad*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Loomis v. Railroad*, 17 Mo. App. 340. If the adjudications as heretofore indicated are to be longer recognized as correct rules for the guidance of the courts of this country, then we see no escape from the conclusion that the plaintiff in the trial court predicated its right of recovery upon the theory that the fire was set out by a Kansas City Southern engine, and that it would be manifestly erroneous, as well as unjust, to sustain plaintiff's contention that this cause should be reversed, and a new trial granted, for the reason that the cause might have been tried upon some other theory in the lower court. There was no error in the instructions complained of given at the request of the defendant. As before stated, they were simply counter instructions to the one requested by the plaintiff, which was given, and confined and limited the recovery to the issue as pointed out by the plaintiff in its instruction. The plaintiff, by its instruction No. 1, plainly marked out the theory upon which it sought a recovery as against this defendant, and by that theory it must stand or fall in this court.

We have given expression to our views upon the only proposition confronting us as disclosed by the record, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

HUDDLESTON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908.)

1. JURY — IMPANELING — CONSTITUTIONALITY OF STATUTE.

The act of the Thirtieth Legislature (Laws 1907, p. 269, c. 139) relating to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of 20,000 inhabitants is constitutional.

2. HOMICIDE — TRIAL — INSTRUCTIONS—SELF-DEFENSE.

In a murder case, where the evidence showed that decedent had made numerous threats against accused, a charge that every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary, is an unwarranted limitation on the right of self-defense, since, if decedent was in the act of making an assault with a deadly weapon following the numerous threats, the law would presume that it was his intention to kill accused, and accused would have the right to use the most effective means at hand to prevent death, or what he believed might end in death, at the hands of decedent by the use of the weapon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

3. SAME — MANSLAUGHTER — PROVOCATION — ADEQUATE CAUSE.

In a murder case, there was evidence that decedent had assaulted accused with an ax handle an hour and a half before the homicide, and that subsequently accused had been warned that decedent was coming with a gun, and while going home he met decedent, who reached for his gun, upon which accused killed him. The court charged, on manslaughter, that an assault and battery by decedent causing pain and bloodshed is deemed adequate cause in law. *Held*, that in view of another charge given, that the provocation must arise at the time of the killing, the charge was confusing, since it selected a single example of adequate cause, and excluded the other facts and circumstances in evidence, which may have been sufficient to constitute adequate cause, and since, in order to constitute the assault adequate cause, either other circumstances should have been included from which it might appear that the assault was brought prominently to accused's mind at the time of the homicide, so as to constitute it former provocation, or a charge upon cooling time should have been given.

4. SAME.

In a murder case, a charge that the law provides that the provocation causing sudden passion must arise at the time of the killing, and that in determining the adequacy of the provocation all the facts and circumstances in evidence should be considered, and if by reason thereof accused's mind at the time of the homicide was incapable of cool reflection, and the facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so the jury should consider the facts and circumstances in evidence in determining the condition of accused's mind at the time of the killing and the adequacy of the cause producing such condition, was confusing, in view of a charge given that an assault and battery causing pain and bloodshed is adequate cause for manslaughter, where the assault claimed as provocation took place an hour and a half before the killing.

5. CRIMINAL LAW — INSTRUCTIONS—SHIFTING BURDEN OF PROOF.

In a murder case, a charge that if the jury believe beyond a reasonable doubt that, a short

time prior to the alleged killing of decedent by accused, decedent had assaulted accused, and that decedent abandoned the assault as far as he could, and accused then, under the immediate influence of sudden passion, which was produced by the assault, killed decedent, and if they find beyond a reasonable doubt that accused was not acting in self-defense, then he would be guilty only of manslaughter, was erroneous, as placing the burden of accused to prove that deceased had attacked him and that he had killed deceased in the heat of sudden passion, and turning the reasonable doubt against accused.

6. HOMICIDE—INSTRUCTIONS.

The charge with reference to the abandonment of the difficulty by decedent was error, as a limitation on the theory of manslaughter, since, whether he abandoned the difficulty or not, the adequate cause would be the same.

7. CRIMINAL LAW—EVIDENCE—PURPOSE AND EFFECT—INSTRUCTIONS.

In a murder case, where the question of self-defense was involved, uncommunicated threats of decedent against accused were admissible to show whether or not decedent began the attack that ended in the homicide, and a charge limiting their effect to an ascertainment of the condition of decedent's mind at the time of the homicide was erroneous.

8. HOMICIDE—COMMUNICATED THREATS.

If threats alleged to have been made by one person against another are communicated to the other, though not true, and he believes them, and that the person made them, he will be justified in acting the same as if they had been in fact made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 160-163.]

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

E. W. Huddleston was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Taylor & Gallagher, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at five years' confinement in the penitentiary.

The first question suggested for revision is the alleged unconstitutionality of the act of the Thirtieth Legislature (Laws 1907, p. 269, c. 139) in regard to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of 20,000 inhabitants. This question was decided adversely to appellant in the case of *Bob Smith v. State* (decided at the present term) 113 S. W. 289.

The facts show: That there had been trouble between appellant and deceased (Thompson) a few days prior to the homicide, and that on the day of, and about 1½ hours prior to, the killing deceased had attacked appellant with an ax handle and inflicted painful chastisement. This was on the west side of the river, in Waco. At the time of the homicide appellant was east of the river, some distance from where the former trouble had occurred. That deceased came over in that part of town in a buggy and was approaching in the direction of appellant, and as he (deceased) came near him, appellant's contention, under his testimony, was that de-

ceased was in the act of procuring his gun and getting it in position to shoot appellant. That before getting it into actual shooting position appellant fired, the wound resulting fatally. Appellant testified that after going to East Waco he met his nephew, Jake Thompson, who told him (appellant) that Bartlett had informed him that deceased and his crowd were armed with a gun on the opposite side of the river, and were coming across, and stated to appellant that he had better go home. Appellant further testified that he started to the wagon yard to go home, and that when he had walked about three steps on Elm street his attention was called to deceased (Thompson), and looking around he "saw Thompson throw the lines to his wife and start for his gun." That deceased (Thompson) got hold of his gun, and got it with the muzzle up nearly to the top of the dashboard, and that he believed, from all the preceding circumstances, which are unnecessary here to repeat, that deceased was getting his gun for the purpose of shooting, and that he shot the deceased to avoid being himself shot.

Upon this state of case the court charged the jury as follows: "Every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary." Error is assigned, in that the charge was an illegal limitation on the right of self-defense, and had a tendency to impress the jury with the belief that the court thought appellant had used more force than was necessary, and that he should have resorted to other means of defense before shooting. If deceased was in the act of making an assault with a deadly weapon, following the numerous threats, testified to, by the deceased, the law would presume that it was the intention of deceased to kill appellant, and the court so charged the jury in another portion of the charge. This being the case, appellant had the right to use the most effective means at hand to prevent death, or what he believed might end in death, at the hands of the deceased by the use of the gun. We are of opinion this was a limitation on the right of self-defense not warranted by the facts. See *Scott v. State*, 46 Tex. Cr. R. 305, 81 S. W. 951; *Crenshaw v. State* (Tex. Cr. App.) 85 S. W. 1148; *Kelley v. State*, 43 Tex. Cr. R. 40, 62 S. W. 917. In *Scott's Case*, supra, the opinion uses this language: "Both parties used guns, which were evidently deadly weapons, from the very beginning, and the question of excessive force is not in the case. We are not prepared to say, this issue not being in the case, that a charge thereon might not have injuriously affected appellant. The jury may have considered that in the opinion of the court there was testimony somewhere, from some of the witnesses, showing that appellant used more

force than was really necessary, although he might have been authorized to use some force for his protection. If, indeed, he was authorized to use any force, in our opinion he was authorized to use all the force which the evidence shows he did use." The Cases of *Crenshaw* and *Kelley* are to the same effect, and not only so, but hold that, where the assault or attempted assault is with a deadly weapon, the assaulted party is entitled, not only to shoot, but to continue to shoot until all danger is past.

This portion of the court's charge on manslaughter is criticised: "The following is deemed adequate cause in law: An assault and battery by deceased, causing pain and bloodshed." This is given in the case with the statutory definition of manslaughter, in regard to adequate cause and sudden passion and provocation, etc. It is contended this charge is erroneous, because it requires the assault and battery shall produce both pain and bloodshed, while the statute limits assault and battery by deceased to one causing pain or bloodshed; and it is further contended that the charge is erroneous in selecting out this single example of adequate cause and giving it to the jury, to the exclusion of other facts and circumstances in evidence, which, singly or collectively, may have been sufficient to constitute adequate cause. As before stated, about an hour and a half prior to the killing deceased (Thompson) made rather a vigorous assault on appellant with an ax handle. The deceased had also assaulted appellant with his fist on Saturday preceding the killing, which occurred on Monday. On Sunday preceding the killing appellant had been informed of threats made by deceased against him. He had a few moments before the homicide been informed that the deceased and his crowd, as the witnesses called them, had a gun with them on the other side of the river, and were coming across, and advised appellant that he had better go home. Appellant was still suffering from the wound inflicted by the ax handle. He (appellant) started to go home, and when his attention was called to the deceased he looked around and saw deceased throw the lines to his wife and start for his gun. Deceased got hold of his gun, and got it with the muzzle nearly up to the top of the dashboard. The wife of deceased was with him in the buggy, and threw herself in front of deceased, and when she got out of the way appellant raised his gun suddenly and fired. Deceased held onto his gun until appellant fired the second shot, which immediately followed the first. Appellant's contention is that he was excited when he saw deceased, and that all the circumstances preceding his last meeting impressed him that when deceased reached for his gun he was going to shoot, and that he shot to prevent deceased from shooting him. This character of charge has been held vicious by the decisions since *Foster v. State*, 8 Tex. App. 248. See, also,

Tickle v. State, 6 Tex. App. 623; *Hill v. State*, 8 Tex. App. 142; *Childers v. State*, 33 Tex. Cr. R. 509, 27 S. W. 133; *Williams v. State*, 15 Tex. App. 617; *High v. State*, 28 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Spivey v. State*, 30 Tex. App. 343, 17 S. W. 546; *Bagley v. State* (Tex. Cr. App.) 103 S. W. 875; *Hardy v. State* (Tex. Cr. App.) 37 S. W. 737; *Cochran v. State*, 28 Tex. App. 429, 13 S. W. 651; *Bracken v. State*, 29 Tex. App. 367, 16 S. W. 192; *Keith v. State* (Tex. Cr. App.) 94 S. W. 1046; *Lundy v. State* (Tex. Cr. App.) 87 S. W. 352.

In order to make adequate cause from the assault with the ax handle, it having occurred 1½ hours before the homicide, either other circumstances should have occurred so as to bring prominently in the mind of appellant said assault, or the charge upon cooling time should have been given. The court selected one particular fact as a basis for manslaughter, and yet charged the jury that the provocation must arise at the time of the killing. This occurred an hour and a half before the homicide. To say the least of it, this charge was very confusing. An assault causing pain or bloodshed an hour and a half before the killing could not have arisen at the time of the killing, and the court charged the jury that the provocation must arise at the time of the killing, and failed to charge the law of cooling time. There were circumstances, viewed in the light of past transactions, at the time of the shooting, calculated to arouse sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind for the time incapable of cool reflection. At least the facts were there, and testified by the witnesses. However, the court charged in a general way that, although the law provides that provocation causing sudden passion must arise at the time of the killing, and it is the duty, in determining the adequacy of the provocation, to consider in connection therewith all the facts and circumstances in evidence in the case, and if by reason thereof the defendant's mind at the time of the homicide was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so they would consider the facts and circumstances in evidence in determining the condition of appellant's mind at the time of the killing, and the adequacy of the cause producing such condition. In view of the previous charge given, and the further fact that the court instructed the jury that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of former provocation, this latter charge was rather confusing than otherwise. Upon another trial a charge should be so framed as not to confine the attack by deceased upon appellant with an ax handle an hour and a half

before the killing as a provocation occurring at the time, and cutting off their consideration of one of the producing causes, which was one of former provocation.

The court gave the following charge: "If you believe from the evidence in this case beyond a reasonable doubt that, a short time prior to the alleged killing of the deceased by the defendant, the deceased had assaulted the defendant, and you further find the deceased abandoned said assault and had quit the combat, as far as he could, and you find that, the defendant then under the immediate influence of sudden passion, which passion was produced by the assault of the deceased upon the defendant a short time prior to the shooting, the defendant fired upon and killed the deceased, and you find beyond a reasonable doubt that the defendant was not acting in self-defense as herein charged, then and in that event the defendant would be guilty only of manslaughter, and if you so find you will so say." We believe this charge is subject to the criticism that it required the jury to find affirmatively beyond a reasonable doubt that a short time prior to the killing deceased had assaulted the defendant, shifting the burden of proof as well as the reasonable doubt. Appellant did not have to prove beyond a reasonable doubt that the deceased had attacked him with the ax handle. The reasonable doubt is resolved in appellant's favor; and they were further required by this charge, in order to mitigate the homicide to manslaughter, to affirmatively find beyond a reasonable doubt that appellant killed deceased under the immediate influence of sudden passion produced by previous assaults. This charge, it occurs to us, placed the burden of proof on appellant, and turned the reasonable doubt against him. The accused is entitled to the reasonable doubt of the existence of criminality in regard to facts, when his life or his liberty is sought at the hands of a jury.

We believe, also, that it was error to charge with reference to abandonment of the difficulty by the deceased. It would make no difference, under the facts of this case in regard to abandonment of the difficulty, as to whether deceased had abandoned the difficulty or not. There had been a difficulty, and it seems to have been brought on and carried to its final result by the deceased. Painful wounds had been inflicted by deceased, and there was testimony tending to show that deceased had not abandoned it or quit his purpose of inflicting serious bodily injury on appellant. He had armed himself with a gun and went in the direction appellant had gone, and the testimony raises the issue that he was following appellant at the time they met. What the previous difficulty had to do with the case on the question of abandonment we do not exactly comprehend. The question of adequate cause and passion turned upon the facts, part of which hinged upon

the previous difficulty and the infliction of the punishment by deceased upon appellant. Whether he abandoned the difficulty or not, the adequate cause would be the same. This was a limitation on manslaughter theory, and in our judgment not warranted by the law. On these different propositions, see *Melton v. State* (Tex. Cr. App.) 83 S. W. 823; *Green v. State* (Tex. Cr. App.) 98 S. W. 1063; *Casey v. State* (Tex. Cr. App.) 90 S. W. 1018; *Halsford v. State* (decided Dallas term, 1908) 108 S. W. 381; *Bracken v. State*, 29 Tex. App. 367, 16 S. W. 192; *Bonner v. State*, 29 Tex. App. 230, 15 S. W. 821; *Hawthorne v. State*, 28 Tex. App. 215, 12 S. W. 603; *Bagley v. State* (Tex. Cr. App.) 103 S. W. 875; *Spivey v. State*, 45 Tex. Cr. R. 496, 77 S. W. 445.

In regard to threats the court charged as follows: "Threats made by a deceased person against the life of a person accused of the murder of such deceased person, while not communicated to defendant, may be considered by the jury in ascertaining the condition of the mind of the deceased at the time of the homicide." This is a charge upon uncommunicated threats. In this connection the witness May testified that deceased came to him just before the killing and tried to get a gun. The witness Barron testified that after the ax-handle assault deceased said he was going to Ambold's and get a gun, and would run those negroes off the face of the earth; that he was getting too old to fight with his fists. Bartlett testified that shortly before the killing he saw a gun in deceased's buggy. Deceased said that they had had a scrap that day, and that he heard that they were ganging up for him on the other side of the river, and that if they showed fight he was going to drop them; that when he advised deceased to wait until the cool of the evening and his passion had subsided, and avoid trouble, deceased said he was going over there. Holt testified that deceased, shortly before the killing, tried to rent a gun from him, and that the witness refused to rent him the gun at first, because deceased wanted the gun to shoot squirrels and wanted buckshot to shoot them; that deceased afterwards got the gun, and later actually got the buckshot shells. Costly testified that after the assault, before the killing, deceased in a conversation with him was very angry; that he referred to the ax-handle trouble, and also a fight before that with appellant, and deceased said he was going to get a shotgun and fix Huddleston (appellant). The constable, Lee Jenkins, testified that a short while before the killing the deceased (Thompson) came by his office in the courthouse and said, as he passed by: "Mr. Lee, I'm going out and you may have to come and get me." There are other witnesses, to wit, Ganor, Riddle, and Thompson, who testified to facts showing that deceased (Thompson) had not seen appellant until at the time of the homi-

cide, when the deceased had his gun drawn in a shooting position. This latter testimony was from the state's witnesses mentioned; the theory of the state being that appellant, therefore, began the difficulty at the time of the killing. Other witnesses testified for appellant, as did appellant himself, substantially, that deceased on sight of appellant threw his lines to his wife, grabbed his gun, and attempted to get it into a shooting position, and succeeded in getting the muzzle as high as the dashboard, at which time appellant shot him.

The charge quoted is the only one given in regard to uncommunicated threats. We think this was error. *Trotter v. State*, 37 Tex. Cr. R. 468, 36 S. W. 280; *Pitts v. State*, 29 Tex. App. 380, 16 S. W. 189; *Levy v. State*, 28 Tex. App. 208, 12 S. W. 596, 19 Am. St. Rep. 826. In *Pitts' Case* it was held that uncommunicated threats are mainly admissible in evidence in cases of doubt as to who commenced the difficulty. In the *Levy Case* it was held that uncommunicated threats were admissible and proper evidence for the purpose of showing that in all probability the deceased made the attack, and his purpose in so doing. In the *Trotter Case* the court charged the jury that uncommunicated threats were to be considered as a circumstance tending to explain the acts of the deceased at the time of the killing, and as further circumstances tending to show whether or not deceased began the difficulty at the time of the killing; and it was further held that the omission of this part of the charge would have been error. It will be observed that the court, in the charge given, limited the effect of uncommunicated threats to an ascertainment of the condition of the mind of the deceased at the time of the homicide. Appellant was on trial, not the deceased. The question of self-defense was in the case, and uncommunicated threats were of decided importance in solving the question as to who began this difficulty. While uncommunicated threats would not justify, because the appellant was not aware of such threats, yet it is a potent circumstance to be considered by the jury as to whether or not deceased began the attack that ended in the homicide. It was a very serious issue in the case as to who began the difficulty resulting in the homicide. This charge should not have been thus limited.

Upon another trial the court should also inform the jury as to the law in regard to communicated threats, to the effect that if they were communicated, although not true, if appellant believed them true and that deceased made them, he would be equally justifiable as if deceased had in fact made the threats. This issue is raised by the testimony, and the jury should have been properly instructed in regard to it; for in passing upon the issues of the case, where there is a contradiction of the testimony, some of which will show that threats were not in

fact made, yet if appellant was so informed, and believed the threats had been made, he was entitled to act the same as if they had been in fact made. The court failed to instruct the jury in regard to this phase of the law.

There are some other assigned errors in the case which we think are hardly of sufficient importance to require discussion.

For those indicated, however, the judgment is reversed, and the cause is remanded.

SANDERS v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908.)

1. HOMICIDE—MURDER BY POISON—STATUTES—CONSTRUCTION.

Under Pen. Code, art. 77, providing that one who by laying poison where it may be taken, and with intent that it shall be taken, causes injury to another, becomes a principal, and articles 647-649, declaring that one causing the death of another by causing the latter, with intent to murder, to take poison, shall be guilty of murder, etc., one inducing another to take carbolic acid under the impression that it is medicine, where death results, is guilty of murder, and one forcing another, against his will to take poison, where death results, is guilty of murder, but one furnishing another with a deadly poison at the request of the latter, with knowledge that the latter intends to take it, and he does take it, and death ensues, is not guilty, where he had no further agency in the transaction, while if he aided the latter in taking the poison, as by placing it in his mouth, he is guilty.

2. SUICIDE—AIDING.

Since it is not a violation of law for a person to commit suicide, one furnishing another the means to the commission of suicide violates no law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Suicide, § 3.]

3. HOMICIDE—INDICTMENT—SUFFICIENCY.

An indictment for murder, alleging that accused administered poison to decedent, who swallowed the same and died as a result thereof, is fatally bad for failing to allege a want of knowledge on the part of decedent of the nature of the poison, or that accused caused decedent in any manner, either by force or threats, or by fraud, to swallow the poison, and for failing to negative the idea that decedent voluntarily and freely took the poison.

4. SAME—INSTRUCTIONS.

An instruction for murder by poison that if accused, intending to kill decedent, administered to her poison, with knowledge that the poison was deadly, and, if the poison administered caused death, accused was guilty, is insufficient, because it omits the essential elements of murder by poison, since it does not negative the idea that decedent voluntarily took the poison with knowledge of its nature.

5. SAME.

Where, on a trial for murder by poison, there was evidence that decedent committed suicide by poison, the failure to give a requested charge that, if decedent took poison with knowledge that it was poison and would result in her death, decedent committed suicide, and a verdict of not guilty must be rendered, though accused was present at the time decedent took the poison and urged her to take it, and even promised to take poison himself if she would take it, was reversible error.

6. WITNESSES—IMPEACHMENT.

Where, on a trial for murder by poison, the defense claimed that decedent committed suicide by poison, and her father testified that she had always been cheerful and happy, the refusal to permit accused, by way of impeachment, to ask him on cross-examination whether decedent had not previously attempted suicide by poison, and whether a physician had not advised him to watch decedent, was reversible error, for his knowledge that she had sought to take her life contradicted his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 935, 936, 1276, 1277.]

7. SAME.

Where, on a trial for murder by poison, the father of decedent testified that on reaching her body shortly after her death, he found that the weeds there had been mashed down, and discovered various spots about her face and body, the refusal to permit accused, by way of impeachment, to show that the father, on the morning following the night decedent was found dead, expressed his opinion that decedent had committed suicide, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1247.]

8. SAME.

Statements made out of court by a witness, contradictory of statements made in court, form a basis for impeachment, and should go to the jury for the purpose of attacking the credibility of the witness and affording a criterion by which the jury may weigh the testimony of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1247.]

9. SAME.

Where, on a trial for murder by poison, the father of decedent testified that he discovered various spots about decedent's face and body, the exclusion of evidence, by way of impeachment, that on the examining trial he testified that he saw no marks on the body of decedent, or evidence of external violence, was reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252-1256.]

10. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where, on a trial for murder by poison, the theory of the state was that accused and decedent had been intimate and that accused desired to be rid of her, evidence of visits made by decedent to the home of accused in his absence was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 321, 323.]

Appeal from District Court, Clay County; J. W. Patterson, Judge.

A. J. Sanders was convicted of murder, and he appeals. Reversed and remanded.

W. E. Forgy, R. E. Taylor, and L. H. Mathis, for appellant. F. J. McCord, Asst. Atty. Gen., Dayton Moses, Dist. Atty. 33d Dist., and P. A. Martin, Dist. Atty. 30th Dist., for the State.

DAVIDSON, P. J. The indictment contains three counts. It is unnecessary to mention the third count, for it was not considered in the charge and passes out of the case. The first count charges homicide by poison, in that the deceased was induced to believe that the carbolic acid administered was only a medicine. The second count charged as follows (omitting formal parts): "Did then and there unlawfully and with his malice aforethought, wickedly contriving and intending to

unlawfully kill one Pearl Baxter with poison, did administer to and cause to be taken by the said Pearl Baxter into her stomach a deadly quantity of a certain deadly poison called 'carbolic acid,' he, the said A. J. Sanders, then and there knowing the same to be a deadly poison in quantity and kind as so administered by him and taken by the said Pearl Baxter, and the said Pearl Baxter did take and swallow down the same into her body, and by means of the taking of which deadly poison into the stomach and body of the said Pearl Baxter, she, the said Pearl Baxter, did, on or about the 20th day of August, A. D. 1906, die in the county and state aforesaid; and the grand jurors aforesaid, upon their oaths aforesaid, do say that the said A. J. Sanders, in the manner and form aforesaid, unlawfully and of his malice aforethought, did kill and murder the said Pearl Baxter, contrary to the law and against the peace and dignity of the state."

It is urged by appellant that this count of the indictment does not sufficiently charge a homicide by poison, because it does not allege that the poison charged to have been administered by the defendant was taken by the deceased without knowledge as to what it was or its deadly effect, and, further, that it fails to charge that it was administered by force, by threats, or by fraud on the part of the defendant, and therefore the count is wholly insufficient to charge any offense against the law. We are of opinion that the criticisms are technically correct. Under our statutes the mere fact of administering poison from which a party dies is not necessarily homicide. All the facts contained in the count quoted could be true, and appellant not guilty of murder. However wicked or malicious may have been the purposes or intent of the accused in administering the poison as charged, yet if the deceased took the poison voluntarily, knowing what the result might be, her death would not constitute culpable homicide. The means and manner by which appellant administered the poison is not charged. If he had induced deceased to take it under the impression on her part that the carbolic acid was a medicine, and death had resulted, the killing would be murder; if he had forced it down her throat, or had caused her to take it against her will, it still would be murder; or if by threats or by fraud, or by any sort of manner, he had induced her to take the poison, and she did not know the probable consequences of taking it, it would be murder; but if she knew at the time she took the acid of its deadly character, or she took it and did it for the purpose of committing suicide and ending her life, and the appellant in no way actually gave it to her, it would not be murder. The indictment, therefore, fails to allege sufficiently a want of knowledge on her part at the time she took it, or that appellant caused her in any manner, either by force or threats or by fraud, to swallow it. Therefore, as stated above, this

count in the indictment as presented could be true, and yet appellant not violate the law. Further, it does not negative the idea that she (deceased) voluntarily and freely took the acid herself.

Article 648 of the Penal Code provides: "If any person shall, with intent to injure, cause another person to inhale or swallow any substance injurious to health, or any of the functions of the body, if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years." Article 649 of the Penal Code is as follows: "If by reason of the commission of the offenses named in the two preceding articles, the death of a person be caused within one year, the offender shall be deemed guilty of murder and be punished accordingly." Looking back to article 647 of the Penal Code, we find it provides: "If any person shall mingle or cause to be mingled any other noxious substance with any drink, food or medicine, with intent to kill or injure any other person, or shall willfully poison or cause to be poisoned any spring, well, cistern or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." An inspection of these articles makes it manifest that, in order for an accused to violate either, there must be an intent to injure in causing another person to inhale or swallow injurious substances, or to administer same with intent to kill, or in mingling or causing to be mingled these poisonous substances with drink, food, or medicine, or poisoning springs, wells, cisterns, or reservoirs of water; and it is further obvious that the administration or the use by the intended victim of the poisonous matters must be unknown to the party so taking or using, or the party administering the poisons or causing the injury must do it by some personal act to the party sought to be injured, and the statutes exclude the idea that the medicines are taken voluntarily by the person sought to be injured. It may be correctly stated, however, at this point, that, if the person in fact by his own hand gave or administered the medicine, even then he might be guilty; but these statutes exclude the idea, as we understand them, that the mere fact that a party, seeking to injure another, gives to the other the poison, with knowledge on the receiver's part of its deadly character, and the receiving party swallows it or takes it designing to have injurious effect upon him or herself, then the party administering or giving would not be guilty, for in that state of case, if death resulted, it would be a suicide.

This is especially fortified when we look to article 77 of the Penal Code, which thus reads: "If any one, by employing a child or other person, who cannot be punished, to commit an offense, or by any means such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing

any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other indirect means, cause another to receive an injury to his person or property, the offender, by the use of such indirect means, becomes a principal." This statute is entirely in harmony and correlates fully with the articles above quoted. An inspection of this article, as well as articles 647, 648, and 649, makes it clear and fully certain that the injury intended to the person against whom the acts of an accused are directed does not apply to cases of suicide. If the party accused of providing the means or administering the poison or other noxious substance places it where his intended victim may secure it, and that victim does obtain and use it, and is thereby killed, the victim being innocent of self-destruction, the accused in that event would be guilty. These statutes do not apply where the facts show the accused may have directly or indirectly furnished such means to a person, where that person takes it voluntarily, so as to become a self-destroyer or suicide. All these statutes are based upon the idea and theory that the victim of the accused is not cognizant of the purpose or intent of such accused in preparing the means for the destruction of the life of such intended victim, or that the poison must be given against the wish of the taker. It is not and has not been a violation of law in Texas for a person to take his or her own life.

Whatever may have been the law in England, or whatever the law may be there now with reference to suicide, or in any of the states of the federal Union, where they have so provided by statute with reference to suicide, the punishment of persons connected with the suicide, by furnishing means or agencies or affording an opportunity to the suicide to take his or her life, has not obtained and does not obtain in Texas. So far as our law is concerned, the suicide is innocent of any criminality. Therefore the party who furnishes the means to the suicide is also innocent of violating the law. It may be a violation of morals and ethics, and reprehensible, that a party may furnish another poison, or pistols, or guns, or any other means or agency for the purpose of the suicide to take his own life, yet our law has not seen proper to punish such persons or such acts. A party may furnish another with a pistol, knowing such party intends to take his own life, yet neither would be guilty of violating any statute of Texas. So it may be said of furnishing poison to the suicide. However, a party would not be justified in taking the life of the party who desires to forfeit his life by shooting the would-be destroyer at his request, for in that case it would be the direct act of the accused, and he would be guilty of homicide, although he fired a shot at the request of the would-be suicide. So it would be with reference to poison. If the suicide obtains the poison through the agency of another,

that other knowing the purpose of the suicide to take his own life, the party furnishing it would not be guilty, yet if the party furnishing it know the purpose of the suicide, and he himself gives the medicine or poison by placing it in the mouth or other portions of the body, which would lead to the destruction of life, then it would be the act of the party giving, and he would not be permitted to defend against the result of such act. If appellant furnished Miss Baxter with the carbolic acid at her request, with full knowledge on his part that she intended to take it, and did take it, and destroyed her life, he, having no further agency in it, would not be guilty; but if, knowing her purpose of destroying her life, at her request he prepared the medicine and himself placed it in her mouth, and she swallowed it, then it would be an administration of this poison, and he would be punished in case of death as a murderer. Tested by these rules, we are of opinion that this count in the indictment is not sufficient.

With reference to the first count, it may be disposed of by stating that there is no evidence in this record to support its allegation. That count is predicated upon a state of facts which charged that the deceased took the carbolic acid under the impression that it was a medicine, being ignorant of its deadly character. There is no evidence in this record, directly or indirectly, immediately or remotely, intimating such condition of things.

The statement of facts is voluminous, and deals much in far-afeld facts, having no connection, or, if any, very slight, with the case; much of it suspicion and vague conjecture. Without attempting to go into anything like a detailed statement of the evidence, the substance of the facts bearing on the appeal may be stated about as follows:

Miss Baxter was a girl fully grown, and was known to have associated with the defendant on several occasions, perhaps oftener than with any other person among her male friends or associates, and on several occasions the opportunity was afforded by which they could have had sexual intercourse, and the result proved that either he or some other one of her male associates had had intercourse with her, for at the time of her death the autopsy discovered that she was seven or eight months advanced in pregnancy. There is some evidence to the effect that she had ample opportunity to have secured this poison, either herself or through others at a drug store which she frequently visited. The witness Hart testified that on Tuesday before the death of the deceased appellant bought an ounce vial of refined carbolic acid, which he labeled "Poison," etc., as they usually do in selling those poisons; and he further testified that appellant bought another ounce of crude carbolic acid on Saturday before the death of the girl. Both bottles were properly labeled, cautioned against poison. Appellant, testifying in this connection, stated that on Tuesday he

bought a four-ounce vial of carbolic acid, which he carried to the ranch over which he had control for the purpose of killing screw worms in animals, and that on Friday, and not Saturday, he bought an ounce of another kind of carbolic acid. The four-ounce vial of carbolic acid was shown to have been on the premises under appellant's charge at the ranch. The other he testified he placed in his saddle pockets and in chasing some cattle around the pasture lost it. Hart went to the place where the girl was found dead, and was in company, it seems, with the officers, when the two vials were found near the body of deceased, one immediately at the body, and the other a few feet away, and some suggestion, perhaps, came from him in regard to appellant having previously purchased two bottles of carbolic acid. These bottles, however, found there had no label on them, though both were ounce vials. This witness finally admitted that the girl had frequently gone to his drug store and engaged in a conversation with him. On the night of the homicide the girl slept in one of the rooms of her father's residence, and some time, perhaps after midnight, along about 1 o'clock, as near as the witnesses could discover, she disappeared from her room in her night apparel. About 1:30 to 2 o'clock her absence from the room was discovered, and an immediate search instituted. The father sought around the place to discover some evidence of her retreat. Finally he discovered her barefoot tracks leading from the house in the direction of a patch of sorghum cane. Following these tracks to within a few feet of her body, he found her upon the ground, practically upon her back, dead; the evidence showing that she had swallowed or taken carbolic acid. One of the vials was found at her body, and the other a few feet away, with the ground saturated under the mouth of the bottle as if the contents had escaped and been absorbed by the earth. There was a commotion raised, parties came in, and the theory was suicide. Bearing upon this, some time prior to the homicide, the girl had undertaken to take her life by means of strychnine; but, being in the little town of Archer, a doctor near at hand, being called in, saved her life. The doctor cautioned her father to watch her; that she might commit suicide at any time.

Four days after the homicide there was an examining trial held; appellant having been arrested in the meantime. The theory, it seems, of the prosecution at that time was that appellant had either furnished deceased the means of taking her life, or that he had obtained the two vials of poison and had had a meeting in accordance with a prearranged agreement at the point where the girl was found dead, and with the understanding that they would meet at this point, each to commit suicide; one taking the contents of one bottle and one the other. This was but a theory, superinduced, perhaps, to some extent, by the fact that at a distance

varying from 80 to 200 yards a track was found which corresponded somewhat, or as the witnesses say "fitted," a shoe that appellant was shown to have owned. Around and about the body itself no evidence of these tracks was found, though there is some testimony showing that a part of a shoe track was seen a short distance away from the dead body. However, some distance away, perhaps from 80 to 200 yards, a track was discovered that could be identified or measured. While this testimony is anything but convincing, still it is stated as a part of the case. The girl's barefoot track, she weighing about 120 pounds, was easily traced to within a few feet of her dead body; but the track of a heavy man, supposed to be wearing high-heel new shoes, could not be identified anywhere closer than from 80 to 200 yards, as we gather from the record. Be that as it may, these matters seem to have afforded the basis for the state's conclusion that appellant had met the girl by appointment and had agreed with her to commit suicide. On this trial, appellant's contention to meet this theory was that, even under that state of facts, it could be no violation of the law, under our statutes and the authority of *Grace v. State*, 44 Tex. Cr. R. 193, 69 S. W. 529.

Another theory relied upon by the state at the final trial was, to wit, that appellant met the girl at the place where she was found dead and by force caused her to take some or all of the poison, and evidence was introduced pro and con with reference to bruises found about her body. A further theory of the state was appellant had been engaged to the girl, and had seduced her or debauched her, and that he had become engaged to another girl and was anxious to get rid of the deceased, in order that he might marry the other woman to whom he was in fact engaged. There is no evidence, however, as we recollect the record, showing he was engaged to the deceased. We deem it unnecessary to discuss this theory, or any further circumstances connected with it. It seems that on the evening before the homicide Miss Baxter, the deceased, called at the residence of the sister of appellant, which also constituted his home. Appellant was not present at the time; but going away from there to her sister's, in the opposite part of town, it seems that she met appellant on the street, and talked with him for a few moments, and they separated. In following the tracks from the dead body some distance to where the party should have crossed a ravine, some part of which was a little soft from previous rains, they discovered one track said to be distinct. From there to the residence of appellant there was no effort, it seems, to follow the tracks, or, if there was, it proved unsuccessful, and as we understand the record there was no attempt made to discover tracks leading from and returning to appellant's residence. It may be perhaps necessary to state that the

ground about the place of the supposed homicide or tragedy, and around it for some distance, was cultivated land. In other words, the whole matter occurred inside a field. The little branch spoken of seems to have been in a pasture adjoining the field.

Appellant denied his presence at the place where the girl was found dead, denied furnishing her any carbolic acid, and fully explained by his testimony his connection with any carbolic acid, and was to some extent sustained by witnesses, one of whom was owner of the ranch under whom appellant was working, in regard to the four-ounce vial of carbolic acid. He was not sustained by any evidence as to the loss of the other carbolic acid. In connection with this, appellant proved an alibi by himself and other witnesses, and there was no attempt, as we understand from the record, to contradict his alibi up to the hour that he was sustained by other witnesses, say until about 11 o'clock at night, or in the neighborhood of that hour. In support of the alibi theory, appellant and his witnesses show that he retired about the hour indicated, and everybody in the house went to sleep. A niece of appellant slept in the adjoining room, a thin partition wall dividing them; and this girl testified that her uncle retired at the time indicated, and did not, so far as she was aware, leave the house during the night, as did other inmates of the house. Appellant himself testified that he did not leave the house; that he went to bed and slept preparatory to getting up early the next morning for an intended trip to Wichita Falls. He had been making preparations for two or three days to make such trip to Wichita Falls. This seems to have been known, and the following morning he and a friend went to Wichita Falls, a distance of some 25 miles. He denies having gone to the place of the homicide, as well as all knowledge of the girl's death, until he subsequently heard of it. The age of the tracks was not attempted to be shown, whether they were recently made or had been there for some time.

The court charged the jury, among other things, as follows: "If you find and believe from the evidence herein, beyond a reasonable doubt, that the defendant, A. J. Sanders, in the county of Archer and state of Texas, at any time before the 2d day of October, 1906, did with malice aforethought, intending and contriving to kill Pearl Baxter with poison, administer to or cause to be taken by the said Pearl Baxter into her stomach a quantity of carbolic acid, and if you believe that said carbolic acid in the quantity so administered was a deadly poison, and if you believe that the defendant knew the said carbolic acid was a deadly poison, and if you believe the said carbolic acid so administered by the defendant then and there caused and produced the death of the said Pearl Baxter in the county of Archer and state

of Texas, you will find the defendant guilty of murder in the first degree as charged in the second count of the indictment." This is part of subdivision 5 of the charge. Subdivision 7 is as follows: "If you believe that Pearl Baxter voluntarily took carbolic acid for the purpose of causing her death, and thereby caused her death, you will find the defendant not guilty, though you should believe that the defendant procured and furnished her, the said Pearl Baxter, with said carbolic acid, and knew at the time that he so furnished the same that she, the said Pearl Baxter, would use the same to take her life; or if you have a reasonable doubt as to whether or not she committed suicide by voluntarily taking her own life you will find the defendant not guilty."

Exceptions are reserved to the first subdivision of the charge quoted, because it is in contradiction of the latter subdivision quoted, and that they are practically the same, in substance, and virtually authorize in the first quotation a conviction on a state of facts which the court in the latter subdivision informed the jury would afford no ground for conviction; that the two charges are therefore directly antagonistic to each other. These charges are not clear. That portion of the charge which authorizes a conviction of murder would justify the jury in acquitting, because everything in the charge can be literally true and appellant innocent of murder by poison, as is stated in the other charge quoted. He may have intended and contrived to kill Pearl Baxter by giving her poison, or advising her to take it, with full knowledge on his part that carbolic acid was a deadly poison and would result in her death if taken, and it may have produced the desired result, yet if he did not in person cause her to take it, under the facts of this case, by the violence sought to be proved by the facts, he would not be guilty, for otherwise she would have taken it voluntarily, although appellant may have induced her to commit suicide. However, we deem it unnecessary to go further into a discussion of this phase of the case, as we have sufficiently discussed it in regard to passing on the motion to quash the second count, and we might say, if it be conceded we are in error in holding the second count insufficient, that the charge would still be insufficient, in that it omits the essential elements which it takes to constitute appellant guilty under the law and facts of this case. The court submitted the first count, also, as a predicate for conviction. As before stated, there is no evidence in the record justifying the jury or the court to arrive at any conclusion that the girl took the poison believing it to be a medicine; for it is evident, if she took it voluntarily, it was for the purpose of committing suicide, or, if appellant forced it down her throat and made her take it, it was then done on his part for the purpose of taking her life, and it was not understood by her to be ad-

ministered either by herself or by the defendant as a medicine. If taken by herself, it was suicide; if given by appellant by means of force, it was murder. The charge, therefore, with reference to giving carbolic acid as a medicine, we are of opinion is not justified by any fact in the record.

Appellant sought, to some extent, at least, to correct the court's charge by asking the following charge, which was refused: "If you believe from the testimony in the case that the deceased, Miss Pearl Baxter, took and swallowed carbolic acid resulting in her death, and that when she swallowed it she knew that it was carbolic acid and would result in her death, then she committed suicide, and you will return a verdict of not guilty against the defendant in this case, even though you might believe from the testimony that the defendant was present at the time the deceased swallowed the acid, and urged her to swallow it, and even promised to take carbolic acid himself if she would take it." This charge should have been given under the facts. If the state's theory is a correct one, and appellant was there at the time of the death of Miss Baxter, and she took the carbolic acid herself, and swallowed it for the purpose of destroying her life, then it was a case of suicide, and no portion of the court's charge called the jury's attention to this particular phase of it, whereas the special charge did.

The father of Miss Baxter was used by the state as a witness, and on his cross-examination appellant asked him if it was not a fact that a month before the death of his daughter, Miss Pearl Baxter, and about the time that Dr. Matthews had treated Miss Pearl for strychnine poisoning, that said Matthews had told him that his daughter Pearl had tried to kill herself, and that she would do it again, and that he had better watch her carefully. The witness would have replied in the affirmative, had the court permitted him to answer. The state's objection to the question and answer was that it was immaterial and not binding on the state. The purpose for which this testimony was sought was to throw light upon the acts and conduct of the witness Baxter occurring on the night of the 19th of August, 1906, when his daughter was found dead, and for the further purpose of affecting the credibility of the said witness Baxter, for it is recited in the bill that he had testified on direct examination that his daughter had always been cheerful and happy. As this bill presents the matter, we are of opinion that the witness should have been permitted to answer this question. By the testimony of this witness on direct examination he had stated to the jury, and left the impression upon their minds, if they believed him, that his daughter had always been cheerful and happy. Now, if he had been informed by the physician who attended his daughter at the time she undertook to take her life by the use of strychnine, and the in-

formation from the doctor that she had undertaken to commit suicide, and would do it again, and cautioned her father to watch her, it might have an important bearing on the weight of this witness' testimony as tending to discredit him; for he, as it seems, stated at the trial the girl had been contented, which was totally at variance with the fact that she had sought to take her life on a previous occasion, which was also known to him. The knowledge of the fact that she had sought to take her life on his part was seriously contradictory of his statement that she had always been cheerful and happy. The jury should have been permitted to weigh this witness' testimony with this fact before them.

This witness was further asked on cross-examination if it was not a fact that on the morning following the night his daughter was found dead, and after daylight and the sheriff and physician had been called, if, up to that time, he had not been of the opinion that his daughter, Miss Pearl Baxter, had simply committed suicide, and that he had so expressed himself to a number of persons throughout that day. The witness would have answered, "Yes," if permitted to do so. The state objected, because what his opinion or suspicion was on the day following the death was immaterial. This was offered for the purpose of impeachment, and affecting the weight to be given this witness' testimony; for he had testified on direct examination that when he first reached his daughter's body, about 2 o'clock in the morning, he found the sorghum, weeds, and vegetation mashed down for several feet around her body, and that when he examined her body he discovered various spots about her face and body—appellant's contention being that if he had really seen said things, as detailed by him on this trial, he could not have had the suspicion and the opinion that his daughter had simply committed suicide. In the attitude in which this record is presented, we are of opinion this testimony should have gone to the jury. If it was a fact, as testified by Baxter, that there were various spots about her face and body indicating violence, he would have hardly been truthful in informing the neighbors, the sheriff, and officers, and physician, that he believed his daughter had committed suicide; at least, it was a matter of impeachment to show that his testimony on the final trial was at variance with his statements at the time of and just after finding the dead body. We have always understood that statements made outside of court by a witness contradictory of statements made on the trial, in regard to the same matter, form a basis for impeachment, and should go to the jury for the purpose of attacking the credibility and affording a criterion by which the jury could weigh the testimony of such witness.

In this same connection, the witness was further asked on cross-examination if on the day following the night of his daughter's

death, or at any time up to Friday thereafter, the date of the examining trial of the defendant, he had had any suspicion that his daughter, prior to her death, had received any external violence of any sort. He would have answered, if permitted to do so, in the negative. The state objected, on same ground as before, that the suspicion or opinion of the witness was immaterial. This testimony was offered for the purpose of impeaching this witness and affecting his credibility before the jury, inasmuch as he had testified on direct examination to various spots and discolorations on the face and neck of his daughter as discovered by him on the morning of her death, and yet admitted that on Friday after her death, while testifying against defendant on the examining trial, he had seen upon the body of his daughter no marks whatever of any external violence inflicted upon her. This testimony should have been admitted for reasons stated above. If on the morning following the death of his daughter he believed and stated that his daughter committed suicide, and on the examining trial on Friday afterward he stated he had seen no such marks on the body of his daughter, or evidence of external violence as he testified to on final trial, certainly it would be admissible to impeach him by showing those statements on his part contradictory of his testimony on such final trial that he saw such marks. Some of these statements were made out of court, and some made under oath on the examining trial, and they were contradictory of his testimony on final trial.

Miss Loel Baxter was permitted to testify that on Sunday evening, the 18th of August, 1908, late in the evening, her sister, Miss Pearl Baxter, went to the house of John Baggett, where the defendant had his home. Mrs. J. L. Baggett also testified that the deceased, Miss Pearl Baxter, frequently came to her house at times when the defendant was not there, and when he had no knowledge of this young lady being there. Appellant objected to the introduction of this evidence, because it did not appear that appellant had any knowledge and notice whatever of these visits, and was not, therefore, bound by any of said visits, and ought not to be affected by any inference or presumption that might be drawn by the jury from said visits, and that said testimony, as well as said improper inference or presumption, was perhaps calculated to injure the rights of appellant and prejudice the jury against him. If this evidence was introduced for a sinister purpose, and it may have had that effect, it was not introducible. Appellant was not bound by any visits or social intercourse that Miss Baxter, the deceased, may have seen proper to have or carry on with her friend or friends, even including the sister of appellant. This may have had the effect, and doubtless did, upon the jury, of inducing them to believe that there was

some ulterior purpose on the part of Miss Baxter in visting Mrs. Baggett, in connection with appellant because it was the home of the appellant. There seems to have been no connection whatever between appellant and deceased's visits, and he was, so far as the matter is shown, not aware of the fact that she was there, he himself being absent. We believe this testimony was inadmissible as presented.

In conclusion, we have examined this record with considerable interest. It is a peculiar case in many respects. Upon another trial we would suggest, as we understand the case, the theories pro and con, much of which is pure speculation and theory, that there are and can be but two issues, if the case should develop again as it did upon this trial, calling for a disposition at the hands of the jury. The state must rely upon the facts that appellant was present and forced the girl to take the medicine, and the defendant's theory is that he was not present, that she took it voluntarily and without his having assisted her in any way, or having forced her to do so and without her knowledge. In other words, his theory is that she voluntarily took it; and, second, that he was not present and had no connection with it whatever; and, third, that he was absolutely innocent of the whole transaction. There are some circumstances in this case that would indicate there might be other parties who are more fully cognizant of the facts in connection with the girl's death than they saw proper to tell or admit.

As presented, the other questions are not discussed.

For the errors indicated, the judgment is reversed, and the cause is remanded.

BURNETT v. STATE.

(Court of Criminal Appeals of Texas. May 20, 1908. Rehearing Denied June 24, 1908.)

1. HOMICIDE — EVIDENCE — MANSLAUGHTER — SELF-DEFENSE.

In a prosecution for homicide, evidence held to raise the issues of manslaughter and self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 569-574.]

2. CRIMINAL LAW — FORMER ACQUITTAL — DEGREE OF OFFENSE — EVIDENCE.

Where accused was acquitted of murder and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of manslaughter, if the evidence showed him to be guilty of murder; the evidence of guilt of a higher grade of the offense under such circumstances being sufficient to sustain a conviction for manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 387.]

3. SAME.

Where a party has been acquitted of a higher degree or grade of the offense, such acquittal does not bar a subsequent prosecution of an inferior degree of such offense, though it precludes a subsequent conviction for the

offense of which he was acquitted, or any higher grade thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 387.]

4. HOMICIDE—DEGREES OF OFFENSE.

Murder in the first degree, murder in the second degree, and manslaughter are merely different grades of the same offense.

5. CRIMINAL LAW—MISCONDUCT OF DISTRICT ATTORNEY.

At the conclusion of the evidence, the district attorney, in the presence of the jury, stated to the court that he was going to read from a reported decision like the case at bar, in which the defendant had been tried and acquitted of murder in the first and second degrees, and convicted of manslaughter, and the case reversed, and that in the case on trial the defendant had been acquitted of murder in the first and second degree, and was then on trial for manslaughter. *Held*, that such statement only by inference informed the jury that defendant had been convicted of manslaughter, and was not, therefore, objectionable as an allusion to defendant's former conviction.

6. HOMICIDE—INSTRUCTIONS—PROVOCATION.

Where the only former provocation testified to in a prosecution for manslaughter occurred and was the subject-matter of discussion between the parties only about two hours before the killing, and was so intimately connected with it, and the state of rage, resentment, and passion of defendant was so continued and unbroken, as to make a consideration of the first quarrel and controversy essential and proper to determine defendant's state of mind at the time of the shooting, the court properly charged that, in determining whether there was adequate cause, the jury might consider any former provocation, if any, and any other facts in evidence, before, after, or at the time of the homicide.

7. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES.

Where accused was indicted on August 14, 1903, and his case was called for trial March 3, 1906, and a witness for whom a continuance was sought was attached September 4, 1907, the continuance was properly denied; it also appearing that the testimony desired from the missing witness was only cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1328-1331.]

8. WITNESSES—CREDIBILITY—HOSTILITY TO ACCUSED.

It is permissible in every case, where it is shown by competent evidence, to make proof of the hostility of any witness with respect to any party or the cause, to affect the witness' credibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1189.]

9. SAME.

Before evidence that certain witnesses who testified against accused were hostile to him should be permitted, it should be shown that the witness offering to give such testimony knew the feeling, attitude, and disposition of the witnesses concerning whom he proposed to testify; his conclusion that such hostile attitude or feeling existed, drawn from other transactions to which he testified, being inadmissible.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Fred Burnett was convicted of manslaughter, and he appeals. Affirmed.

See 100 S. W. 381.

Thurmond & Steger, B. B. Sturgeon, and Mark McMahon, for appellant. F. J. McCord, Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in Fannin county in August, 1903, for the murder of one E. J. Johnson. At a former trial he was convicted of manslaughter, which conviction was subsequently set aside, and in March of this year he was again put on trial in the district court of Fannin county, and was again convicted of manslaughter, and his punishment fixed at confinement in the penitentiary for a period of five years. Both of the parties were negroes. The deceased was a very large man, some 6 feet 3 or 4 inches tall, and weighing more than 200 pounds, and was a man of great physical strength. The appellant was a man weighing some 135 or 140 pounds, and was at the date of the killing 23 years of age. Much of the evidence strongly indicates that the killing of Johnson by appellant was not only without any possible justification, but that it was deliberate and purposeful, and much of the evidence would sustain a conviction for murder in the first degree. Indeed, the weight of the evidence strongly tends to confirm us in the conviction that he was guilty, if guilty at all, of murder in the first or second degree, and, if he had been convicted under appropriate instructions of either of these degrees of murder, we would not have hesitated to have affirmed such verdict.

1. We cannot accede, however, to the suggestion and contention of counsel for appellant that there was no evidence raising the issue of manslaughter. Their contention is that the testimony shows beyond doubt or controversy that the killing was either murder in the first or second degree, or that he was justifiable in having done the killing in self-defense. The issue of self-defense was raised by the testimony, and was submitted by the court to the jury; but there were many circumstances which not only made it proper, but imperatively required the court, to submit the issue of manslaughter. The evidence shows that on the day of the killing, and some two or three hours before the killing, appellant approached deceased with the statement that he had been telling on him that he had carried one Mary Eaton, a negro girl, to a white man, presumably for improper purposes; that during this interview they became engaged in a heated quarrel, and that as a result thereof appellant applied the most abusive and opprobrious epithets to the deceased; that both became very angry, and deceased said he was going and get a gun and kill him. Appellant further states that he did notice and see that deceased went to the store of one Abernathy, near by, and tried to get a gun. It is shown, also, that between this time and the fatal meeting, some two hours later, that appellant was advised by a friend of his that the deceased said he was going to kill him. It appears from the testimony of appellant, as well as others, that when he left town to go to the northern part of Bonham, to what the witnesses call Locksboro, he had in his

delivery wagon some dishes, but he states that he forgot to deliver the dishes; that he was not thinking about them, but was all the time thinking about deceased. He states that when he met the deceased, and before he drew his pistol, and before deceased could have known he had a pistol, he saw in deceased's hands an open pocketknife. It is shown that, before deceased got out of the wagon, appellant threw a bottle at him; that deceased then got out of the vehicle he was in and started around towards the head of his horses. However, it appears from the testimony of appellant and practically all the witnesses that before the shot was fired deceased stopped, and rather turned away, and that at this particular juncture the fatal shot was fired. It is shown, too, by the testimony of several witnesses, notably appellant's wife, that he was at the time greatly excited. Only two hours had elapsed from the first quarrel to the time of the killing. In view of the great disparity of their strength, the fact of the threats of deceased to kill appellant, the fact, as stated by appellant, that he knew that deceased was going to get a gun, the unjust accusation made, as claimed by appellant, the condition of his mind, in that he was thinking, not of his work, but of deceased, taken in connection with the short time intervening between their former quarrel and the fatal difficulty, raise, we think, clearly the issue of manslaughter. It is true the same testimony raises the issue of self-defense; but there is testimony in the record from which the jury might have believed that appellant was not justified, either under the doctrine of actual or apparent danger, in taking the life of deceased, and yet would have been fully justified in holding that his mind was in such condition as to make the killing manslaughter.

On the trial the court submitted to the jury the issue to whether appellant was guilty of manslaughter, or whether he was entitled to be acquitted on the ground of self-defense. The charge of the court is an admirable, clear, and lucid exposition of the law of manslaughter and self-defense as applied to the facts of the case. In addition to the general charge, the court gave a number of special charges requested by counsel, for appellant, in which, among other things, the court instructed them that appellant had a right to seek deceased for the purpose of getting him to stop telling untrue statements concerning him, or for the purpose of denying the truth of any such statements. They were further instructed that the fact that defendant did seek and find deceased for such purpose, if he did do so, would neither cut off nor impair his right of self-defense. The court also gave a special charge elaborating the doctrine of self-defense, in which the jury were instructed that if, at the time appellant shot deceased, he was making preparation for an attack on him, or was about to attack or assault de-

fendant, or if it reasonably so appeared to appellant, viewed from his standpoint, and his alone, then his right of self-defense was complete, and he could act upon such appearance of danger, whether such danger really existed or not; that appellant was not bound to retreat in order to avoid the necessity of killing deceased, but would have the right to shoot deceased, without waiting to see whether or not the danger in fact existed, nor was appellant bound to wait until an actual attack or assault was made by deceased. The jury in this special charge were further instructed that if it reasonably appeared to appellant, from the attitude, words, conduct, or acts of the deceased, or from all of these, or from any other fact or facts or circumstances transpiring at the time of the shooting, together with what had transpired prior to that time between the parties, that deceased at the time of the meeting on the occasion of the killing was making preparation to assault or attack him for the purpose of killing him or inflicting serious bodily injury upon him, viewed from the standpoint of appellant at the time, and no other, that appellant had the right to act upon appearance of danger, whether real or not, at the hands of deceased, and that in passing on the question of danger or apparent danger the jury were authorized to take into consideration the difference in the size and strength of the deceased and appellant, together with all the other facts or circumstances in evidence before them. The court also gave a special charge to the effect that if deceased had threatened to get a gun and kill appellant, and he knew of such threat, and believed or feared deceased would kill him, or inflict serious bodily injury upon him, appellant would have the right to procure a pistol for his protection, and the fact that he did procure a pistol under such circumstances would not cut off or abridge his right of self-defense in this case. The court, at the request of counsel, further charged the jury that, when a man's life had been threatened, the law does not require him to report such threat to an officer of the law and have such person arrested; and the fact that appellant did not so report the alleged threat of deceased to the officers, instead of arming himself for his defense, would not abridge or impair his right of self-defense. The court further instructed the jury, at the request of appellant's counsel, that appellant was not required by law to retreat, or to secrete or to hide himself, to avoid a difficulty with deceased, but would have the right to pursue his course of business without being deprived of his right of self-defense.

These charges, taken in connection with the court's general charge, presented every issue which could be tried and passed upon by the jury in a manner most favorable to appellant, and, so far as the charge of the court is concerned, appellant is absolutely without any cause of complaint, unless it be that the

court erred in refusing to give appellant's eighth special charge. This special charge defined with great particularity and substantial accuracy both murder in the first degree and murder in the second degree, and instructed the jury, with substantial accuracy, what facts would justify and warrant a verdict of murder in the first degree, and on what facts a conviction for murder in the second degree would be justified, applying the law of murder in the first degree and the law of murder in the second degree to the facts and the evidence, substantially conforming in every respect to the law of those degrees of homicide. Having so done in the same charge the following appears: "The defendant in the case now on trial is not being tried for the offense of murder in the first degree or murder in the second degree, but is on trial for the offense of manslaughter, as that term is defined to you in the general charge. Now, bearing in mind the foregoing definitions of murder in the first degree and murder in the second degree, I therefore charge you that if the evidence before you establishes the defendant's guilt of either murder in the first degree or murder in the second degree, as those terms are above defined, and there is no evidence establishing the offense of manslaughter, as that term is defined in the main charge, you will find the defendant not guilty in this case, and so say by your verdict." Having found, as appears above, that the issue of manslaughter was raised by the evidence adduced on the trial, it becomes unnecessary for us to decide whether, if the evidence did not raise the issue of such grade of homicide, a conviction could be had for manslaughter on proof that would only have justified a conviction of either murder in the first degree or murder in the second degree.

There have been, on this question and kindred questions, a number of opinions rendered by this court, which, at least in their language, are not wholly consistent. We think the rule laid down in *Pickett v. State*, 43 Tex. Cr. R. 1, 63 S. W. 325, is supported by the best-considered decisions of this tribunal, and is so intrinsically sound and just as to be a sufficient support for our decision in this case. The rule as there stated by Judge Davidson is: "Where defendant was acquitted of murder, and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of the charge of manslaughter, if the evidence showed him to be guilty of murder." It appeared in that case, as it appears in this, that there was evidence which would have authorized a conviction of either murder or manslaughter, and the appellant requested the court to instruct the jury that, if they believed from the evidence that *Pickett* was guilty of murder in the second degree, they should acquit of manslaughter. The effect, as stated, of that instruction and the contention there

made was that an acquittal of murder would operate as a bar to the conviction of manslaughter under the same indictment, although there was evidence supporting the latter offense. It was there stated, which is undeniably true, that it has been uniformly held that, where a party has been acquitted of the higher degree or grade of offense, he cannot again be convicted of that grade or degree, but that such acquittal does not operate as a bar to the prosecution of the inferior degree of such offense. On that very issue Judge Davidson says: "Appellant's contention is that the jury should offset manslaughter with the acquittal of murder, and therefore acquit if they find from the evidence that defendant is guilty of the higher offense, both of which are but grades of the same offense, and triable under the allegations of the indictment. We cannot assent to this proposition. In *Parker's Case*, 22 Tex. App. 105, 3 S. W. 100, the trial court instructed the jury that they could use the testimony showing murder as a predicate for the conviction of manslaughter, although the party had been previously acquitted of murder; that is, appellant could not be again tried for murder when he had been once acquitted of that offense. That case rests upon that proposition. Other cases are numerous to the effect that, where there is evidence of a higher grade of offense, a conviction will not be disturbed for the inferior degree, though there was no testimony showing the inferior degree. These are expressly recognized and sanctioned in *Parker's Case*. *Fuller's Case*, 30 Tex. App. 550, 17 S. W. 1108, is authority for holding that a conviction for murder in the second degree can be had where the evidence shows murder in the first degree. This seems to be predicated upon the idea that malice is a constituent element of both degrees of murder. The *Fuller Case* was reaffirmed in *Conde's Case*, 35 Tex. Cr. R. 98, 34 S. W. 286, 60 Am. St. Rep. 22."

Our lawmakers seem early to have recognized that just such contentions as that which confronts us now would often occur. In our Code of Criminal Procedure (paragraph 9, art. 817) we find the following provision: "Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as the offense proved." In *Campbell v. State*, 10 Tex. App. 500, Judge Winkler, in passing on a somewhat similar question, said: "If there is any variance between the proof and the finding of the jury, it will be found on a careful examination that the evidence tends rather to establish a higher grade of offense than manslaughter, rather than a lower grade. If this be true, and if by the administration of the law one accused of crime should be convicted of a lower grade of the crime included within the offense charged in the indictment than the proof warrants, cer-

tainly the defendant has no just ground to complain that he has been convicted of a grade of offense lower than the testimony warranted, and one for which a milder punishment is prescribed by law. In this case, however, on account of the fact that on a former trial the defendant had been virtually acquitted of murder, he could not be put on trial for that grade of offense a second time; but this did not prohibit the state from calling upon him to answer for a lower grade of the offense, included within the crime charged in the indictment, and for which he had not been previously tried; and to hold that a conviction for the lower grade of offense could not be sustained on the ground that the proof did not reduce the offense to the lower grade would be to say that the state could not inflict any punishment for the offense whatever, no matter how plain the evidence of his guilt. Such an application of the law would be a monstrous mockery, not to be tolerated."

Murder in the first degree, murder in the second degree, and manslaughter are not, in the strictly legal sense, different offenses, but merely different grades of the same offense. They are all species of unlawful homicide. The provision of our statute, by which in terms it is said that the mere fact that one is convicted of a lesser grade of offense than that which the evidence shows should be no ground for a new trial, was but a legislative declaration that because, in any case, the wrongdoer had not received the punishment to which he was entitled, should be no ground or cause why he should go unwhipped of punishment at all. At best the grades and degrees of an unlawful killing are more or less arbitrary, and the line between them sometimes difficult to be drawn. It was intended, as it should have been intended, to punish every man when he had unlawfully and intentionally taken the life of his fellow man, and to hold that, because a former jury had acquitted the appellant in this case of murder in the first or murder in the second degree, he is of right entitled on a second trial to go free, because another jury might conclude under a charge giving these necessarily technical definitions, that the offense was murder in the second degree, is to absolutely nullify the substantial provision of our Code of Criminal Procedure above quoted. In this case the court defined manslaughter in terms that are substantially beyond criticism, and submitted to the jury the issue or fact as to whether, in the light of the evidence and the instruction so given, the appellant was guilty of this offense. Having been acquitted of murder in the first and murder in the second degree, it was not the right of appellant to have these degrees of murder defined or submitted, or one offset by the other. This we understand to be clearly the rule, and is so in accordance with justice and so supported by the provisions of our

Code above quoted as to require us to follow it. For these reasons we believe that the court did not err in refusing to give the special charge above referred to.

2. Another matter complained of was that on the trial of the case, after the conclusion of the evidence, the district attorney, in the presence of the jury, stated to the court, and while in the act of addressing the court, that he was going to read the Pickett Case in 43 Tex. Cr. R. 1, 63 S. W. 325, a case in which, like the one before the court, the defendant had been tried and acquitted of murder in the first and second degrees and convicted of manslaughter, and the case reversed; that in this case on trial the defendant has been acquitted of murder in the first and second degrees, and is now on trial for manslaughter. In approving this bill the court states that the district attorney "never did say that the defendant in this case was convicted of manslaughter." The statement in question was addressed to the court, and not in any sense addressed to the jury, though it was made, it appears, in their presence. It was only by inference that the jury could have understood, if at all, that appellant had therefore been convicted of the offense of manslaughter. There was no statement to that effect, nor could they, from the statement of the district attorney, have so understood, unless they might have made this inference from the fact of his statement of a former acquittal of murder in the first degree and murder in the second degree. That this would, to the legal mind, have been a fair deduction, would be confessed; but we do not believe it would have of necessity been so understood by the jury, nor is there such an allusion to his former conviction as to justify a reversal of the case.

3. There is another question arising upon the trial which we deem it necessary to discuss, and that is that portion of the court's charge which instructs the jury that, in determining whether or not there was adequate cause, the jury have the right to consider any former provocation, if any, and all other facts and circumstances in evidence before, after, or at the time of the homicide. We think that not only is this charge not erroneous, but that a failure to so charge would have been error. It must be remembered that the only other former provocation occurred, and was the subject-matter of discussion between the parties, only about two hours before the killing, and was so intimately connected with it, and the state of rage, resentment, and passion of the appellant was so continuous and unbroken, as to make a consideration of the first quarrel and controversy essential and proper to determine the state of mind of the appellant at the very time of the shooting. The entire charge of the court on this subject was as follows: "By the expression 'under the immediate influence of sudden passion' is meant

that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by the passion arising from some other provocation, or a provocation given by some other person than the party killed." And then follows the charge complained of: "And, in determining whether or not there was adequate cause, the jury have the right to consider any former provocation, if any, and all other facts and circumstances in evidence before, after, or at the time of the homicide."

4. There was no error in overruling the application for a continuance. As stated, appellant was indicted on the 14th day of August, 1903. The case was called for trial on March 3, 1906. The witness for whom the continuance was sought was attached on the 4th day of September, 1907. The facts expected to be proved by her were, as stated, that she was 30 or 40 feet from the parties at the time of the killing; that she saw deceased get off of his wagon and walk around north of the head of his team and their heads met defendant; that the shooting occurred in front of the door; and that just prior thereto appellant was east of said team and deceased west of the seat of the wagon on which he was riding. This testimony was claimed to be material, in view of the fact that the witnesses for the state would swear that the shooting did not occur in front of the team, but that appellant shot deceased while he was either on the wagon seat or just after he was leaving it. There were, as the record shows, some eight or ten witnesses to the homicide. There is some slight difference, as would naturally occur, in the testimony of the witnesses as to the precise conduct of the parties. The testimony of some of the witnesses corresponds very closely with that which it was desired to obtain from the missing witness. Her testimony, if produced, would have been only cumulative, and is not believed to be of such a substantial character as, in view of the lapse of all these years, would have justified a further continuance of the case.

5. Again, error is assigned to the action of the court in refusing to permit the witnesses Wise and McKee to testify that the state's witnesses were prejudiced and hostile to appellant on account of his having aided the officers in running down criminals among the negroes in that section of the city. It appears from the record that this matter arose in this manner: While the witnesses Wise and McKee were on the stand, they were asked the following question: "Do you know whether or not there was any animosity and ill feeling existing among these negro wit-

nesses out there at Locksboro against the defendant, and, if so, what it was for?" It was stated that appellant expected the answer of the witnesses to be that as an officer of the law he knows all about it, and that these negroes out there, particularly the witnesses, had at the time of the homicide and now have an enmity and animosity against the appellant, and that he expected further to show by said witnesses that the reason for such enmity and animosity was on account of appellant being an assistant of the officers, and that he had incurred the enmity of these witnesses; that this testimony was offered for the purpose of impeaching these witnesses. On the trial there was no question asked to any witness as to their state of feeling towards appellant, nor was any effort made to show any unkindness, animosity, or ill will. It is not shown that the witness named had personal knowledge of the feelings or attitude of any particular witness towards appellant; nor was he interrogated with reference to the feelings, attitude, or disposition of any particular witness towards appellant; nor is it shown that he had personal knowledge, nor are the means of such knowledge, in respect to the attitude of any particular witness, shown. It is rather, we think, an effort upon the part of counsel for appellant to show the conclusion or belief of the witness in respect to this matter, as deduced from the activity of appellant in aiding them in ferreting out crimes in that neighborhood. There can be, we think, no doubt that it is always permissible, in every case where it can be shown by competent evidence, to make proof of the hostile attitude of any witness in respect to any party or any cause before the court. Such evidence is clearly admissible for the purpose of affecting the credibility of witnesses and the weight of their testimony. Enc. of Ev. vol. 2, p. 406; *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816; *Watts v. State*, 18 Tex. App. 381. But before, in any case, such testimony will be permitted, it ought to be shown that the witness in fact knew the feelings, attitude, and disposition of the witness about whom he is testifying, and in no case, under the guise of stating such attitude, should a witness be permitted to testify to other transactions from which he might or would deduce a conclusion of such hostile attitude or feeling. We do not think, as here presented, that the testimony is permissible, and hold that the action of the court complained of, as presented by this record, was not erroneous.

6. We believe, in the light of the entire record, that there was no error of which appellant can complain; and, so believing, it is ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1908.)

1. JURY—SUMMONING—STATUTORY PROVISIONS—VALIDITY.

Acts 30th Leg. p. 269, c. 139, providing for the selection of jurors in counties having cities aggregating 20,000 inhabitants or more, is constitutional.

2. HOMICIDE—MANSLAUGHTER—PROVOCATION.

Where decedent provoked a difficulty with accused by taking a seat on the arm of a chair occupied by accused and placing his arm around him, under circumstances indicating that decedent and a third person, with whom accused had had a difficulty, contemplated an attack on him, decedent was the aggressor, and accused had the right to ask him to desist, and on his failure to do so he might resent such insult and assault, and on decedent then attacking accused, and striking him over the eye, and throwing him on the floor, additional causes of provocation existed, and accused, if incapable of cool reflection, though going too far in shooting decedent, was guilty of manslaughter only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 68.]

3. SAME.

Where decedent provoked a difficulty with accused by taking a seat on the arm of a chair occupied by accused and by placing his arm around him, and accused, exceeding the limits of self-defense, drew a pistol, not with a view of killing decedent, but with a view of forcing decedent from him, and in the struggle accused shot decedent to save his own life or because of severe punishment being inflicted by decedent, accused was guilty of manslaughter only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 78.]

4. SAME.

Where accused, at the time decedent provoked a difficulty with him, believed that decedent provoked the difficulty to the end that decedent and a third person, with whom accused had had a difficulty, might inflict severe punishment on him, and accused anticipated from the beginning and during the difficulty with decedent that the conflict would be between himself and two antagonists, accused had the legal right from the standpoint of manslaughter to defend himself against both, as much as he would have had, from the standpoint of self-defense if his life had been in danger or his body in danger of serious injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 68.]

5. SAME—EVIDENCE—INSTRUCTIONS.

Where, in a homicide case, it appeared that decedent provoked a difficulty with accused under circumstances indicating that decedent and a third person, with whom accused had had a difficulty, contemplated an attack on him with a view of inflicting on him severe chastisement, and that in the struggle between accused and decedent accused killed decedent, an instruction on manslaughter, which ignored the right of accused to resist the anticipated attack by decedent and the third person, was reversible error.

6. SAME—SELF-DEFENSE—MANSLAUGHTER.

Where the question of serious bodily injury is involved, and the issues of self-defense and manslaughter arise, the court must definitely instruct the jury, so that they will understand where one ends and the other begins, and be able to draw the line of demarkation from the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

7. SAME.

Where, in a homicide case, it appeared that decedent provoked a difficulty with accused un-

der circumstances which indicated to accused that decedent and a third person, with whom accused had had a difficulty, contemplated an attack on him with a view of inflicting on him severe chastisement, and that, in the struggle between accused and decedent, decedent struck accused and threw him on the floor, and accused shot decedent, an instruction that the fact that accused was in the wrong in striking the third person could not be considered, in passing on whether or not accused was the aggressor, was reversible error.

8. CRIMINAL LAW—DYING DECLARATIONS—INSTRUCTIONS.

Where dying declarations were properly received in evidence, under proof tending to show that the declarations were voluntary and that decedent made them while sane and conscious of approaching death, but which was not conclusive on those points, the court should charge the jury not to consider the declarations unless they found that the proof established such facts.

9. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where, in a homicide case, accused merely showed that he had had a previous difficulty with a third person, without showing the details and the cause thereof, and stated that he believed that decedent and the third person were contemplating an attack on him with a view of inflicting on him severe chastisement, it was error to receive in evidence the details of the difficulty with the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 290.]

10. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

The safe rule is to limit as far as practicable the evidence to the very matter in hand, and to exclude admissions and testimony of extraneous offenses and controversies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822-824.]

Brooks, J., dissenting. Davidson, P. J., dissenting in part.

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

W. O. Brown was convicted of murder in the second degree, and he appeals. Reversed.

Crane, Gilbert & Crane, Crawford & Lamar, and Muse & Allen, for appellant. F. J. McCord, Asst. Atty. Gen., and Chas. F. Clint, for the State.

DAVIDSON, P. J. The writer respectfully states that he cannot agree with his Brethren in holding the act of the Thirtieth Legislature (Laws 1907, p. 269, c. 139) constitutional which authorizes those counties in which is included a city or cities aggregating 20,000 inhabitants to operate under a different rule with reference to the summoning and impaneling of grand and petit juries from the rule generally in vogue in the state. I have stated my reasons for dissenting at some length in the case of *Bob Smith v. State* (decided at the present term) 113 S. W. 289, and refer to that case for dissenting on that proposition.

The majority of the court thinks the judgment should be reversed for reasons herein stated. Our Brother BROOKS has written an opinion, among other things, holding the charge is sufficient as given by the court in regard to the issue of manslaughter. We cannot concur in these views, and believe the charges given are sufficiently erroneous in

this respect to require a reversal of the judgment. A sufficient summing up of the facts as bearing upon the question of manslaughter will be found in the statement by Judge BROOKS in his opinion herewith filed, and unnecessary here to recapitulate. The charges given are very general, following the statutory definition. Among other things, the court charged that "a provocation must arise at the time of the commission of the offense, and must not be the result of a former provocation, and that the act must be directly caused by the passion arising out of the provocation, and that it is not enough that the mind be merely agitated by the passion arising from some other provocation, or a provocation given by some other person than the party killed, and, further, an assault and battery producing pain or bloodshed, or any condition or circumstance, or combination of conditions or circumstances, which is capable of creating and does create sudden passion, such as anger, etc., which renders the mind incapable of cool reflection, and, further, in a general way, instructs the jury that the provocation causing sudden passion must arise at the time of the killing, and it is the duty of the jury in determining the adequacy of the provocation, to consider in connection therewith all the facts and circumstances in evidence, and if they should find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law. Exception was reserved to these phases of the charge and omissions.

Appellant's contention is that these charges on manslaughter are not sufficient; that as given the charge relegates the adequate cause and sudden passion, first, to an assault producing pain or bloodshed, and, second, a general statement as above indicated. His further contention is that the court should have gone farther, and applied the law to the facts, more particularly to the end that the jury might understand the nature of adequate cause and sudden passion arising out of the immediate facts attending the homicide and as applicable thereto. If the deceased provoked the difficulty by taking a seat upon the arm of the chair occupied by appellant and placing his arm around him under the circumstances detailed by him, then deceased was the aggressor and produced the occasion of the difficulty, and appellant had the right to ask him to desist, and upon his failure to do so to resent such insult and assault, and if Johnson then attacked him, and caught him in the collar with his hand, and struck him over the eye, and followed this up by throwing him upon the floor and choking him, these would be additional causes of provocation, and, although appellant may have gone too far in using his pistol by shooting, it

would still be manslaughter, and this phase of the law should have been given under the facts of this case, and if appellant used more force than was necessary under the law of self-defense, and his mind was incapable of cool reflection, his offense might still be no higher than manslaughter.

Second. Even if appellant went sufficiently far in repelling the act of the deceased in going to the chair to place him beyond the rule of self-defense, and drew his pistol with a view of forcing the deceased to absent himself from the chair and taking his arm from around him (appellant), and this was done, not with a view of killing, but of forcing the deceased from him, and in the struggle he shot and killed, this would be manslaughter. If, however, appellant drew his pistol, conceding that he was in the wrong, and it was drawn for the purpose of taking Johnson's life, then it might be otherwise; but that is not under discussion at this point. And if during the struggle appellant was getting the worst of the difficulty by reason of the athletic power of his antagonist, and was being choked, and he shot to save his life, or because of the severe punishment being inflicted by the deceased, this would be manslaughter.

Third. If appellant believed, at the time that Johnson took a seat by him, that it was done for the purpose of provoking him into a difficulty, to the end that he (Johnson) and Miller might inflict severe punishment on him, and that he anticipated from the beginning and during the difficulty that the conflict would be between himself and two antagonists, this would have a tendency to more strongly agitate his mind, and he would have the legal right from the standpoint of manslaughter to defend against both, as much so as he would have the right to defend against the attack or anticipated attack of both if his life was in danger or his body of serious injury from the standpoint of self-defense. In other words, the right of appellant to resist the attack or anticipated attack by two antagonists, under the circumstances, would be as cogent from the theory of manslaughter as it would be from the standpoint of self-defense, provided, however, that he believed that such attack was made for the purpose of inflicting chastisements causing pain or bloodshed. The court recognized this doctrine as applicable to the law of self-defense, and so charged the jury, coupled with the further proposition that his life must be in danger or his body of serious injury in order to justify the killing.

It is sometimes a little difficult to draw the line where the question of serious bodily injury is involved between self-defense and manslaughter, and, where these propositions are in the case, the court should definitely instruct the jury so that they will understand where one ends and the other begins, and be able to draw the line of demarkation from the facts. So it is clear, as we understand the facts and the law, that if Johnson alone pro-

voked the difficulty with a view of inflicting severe chastisement, as developed by the facts, upon appellant, he would have the legal right to have this phase of the law submitted as bearing upon manslaughter. If appellant, under the circumstances, thought the deceased was bringing on the difficulty, to be joined in by Miller, and that the difficulty was to proceed upon the theory of both of them giving him a beating, he had the right to have the law of manslaughter charged from this standpoint; or if appellant, being in the wrong, but with no intention of killing, was sufficiently pressed to believe that his life was in danger, and shot fatally, he still would be entitled to an application of the law of manslaughter from this standpoint. As before stated, the court recognized the doctrine of self-defense from the attack or anticipated attack of the deceased and Miller, but did not instruct the jury in regard to this phase of the law as applicable to manslaughter. Because of these defects or omissions in the charge, this judgment must be reversed.

There is another charge in the case that it occurs to us is erroneous, which is as follows: "The fact, if it is a fact, that the defendant, Brown, was in the wrong in striking Miller, as that difficulty is before you in the evidence, cannot be considered by you in passing upon whether or not the defendant was the aggressor in the subsequent transaction with the deceased, Johnson, resulting in the death of said Johnson." Now, it will be noticed from the facts that appellant was in the wrong in striking Miller, and that a separation occurred, as well as an abandonment of the difficulty, which was followed by a hurried conversation between Miller and deceased, and followed still further by the approach of deceased on appellant, with an immediate difficulty ending in death of the deceased. This transaction between Miller and appellant seems to permeate this record. It entered into the trial of the case from beginning to end, and gave it a coloring that the facts would not give forth but for the attack on Miller by appellant. If this testimony was legitimate, then what was its office or mission in the case? The state introduced evidence in regard to this difficulty. The defendant testified, also, about it, and appellant makes it clear that he thought and believed, from what he saw occurring between Miller and deceased, that Johnson was to provoke the difficulty and Miller to enter into it. We do not see how these facts can be in this record, and yet not be considered by the jury in passing on the question as to whether or not the defendant was the aggressor. It was the fact that Miller and deceased had a conversation, and that deceased at once approached appellant, which made him believe that Johnson intended him harm; and this, under appellant's testimony, was the moving cause for his repelling the advance of the deceased, and which left the impression upon his mind that the familiarity in sitting on the arm of the

chair and putting his arm around his body and "clinging" him in the peculiar manner testified by appellant was the beginning of a difficulty in which he was to engage with deceased and Miller. This charge of the court eliminates this by informing the jury that they could not consider this matter at all in passing upon the question whether or not appellant brought on the difficulty with deceased. It was a very potent fact under appellant's testimony, and tended to show that Johnson was the aggressor, and, if the aggressor, then, under the circumstances, the jury ought to have considered it, because it put appellant in the legal right. This practically not only withdrew from the jury the testimony and this phase of the case, but turned it cogently against the accused.

Many objections are made to the admissibility of testimony, among others, of Dayton Moses and Dr. Rimmer, as well as a statement in writing, signed by the deceased, all purporting to give certain dying declarations of A. S. Johnson touching the facts of the killing. The record in respect to these matters is very voluminous, but has been carefully considered. We think that this testimony was admissible, and, taken together, made such a case as authorized the court to permit it to go to the jury. We do not believe, however, that the evidence is so conclusive and irrefragable as to have justified the court in refusing to instruct the jury, as requested, to the effect, in substance, that before they should consider such purported dying declarations of deceased they must find and believe from the evidence that, when made, if, indeed, made by him, they were voluntarily uttered, that he was rational, and that at the time he was conscious of impending death. In the case of *Taylor v. State*, 38 Tex. Cr. R. 552, 43 S. W. 1019, this rule is commended by Judge Henderson in this language: "Inasmuch as some controversy was made by appellant as to whether said declarations were freely and voluntarily made, and that the deceased was of sane mind at the time, and conscious of approaching death, the court instructed them that, if said declarations were not made under the safeguards required by law, not to consider same." After quoting the charge given in that case he adds: "In our opinion, it embodies a correct rule on the subject, and was applicable to the testimony."

Again, we believe the court erred in admitting in evidence the details of the prior controversy or difficulty between appellant and one Miller. Appellant had, in his direct testimony given in his own behalf, stated in substance that he had, a short time before this, had some controversy with Bob Miller. The mere fact of such difficulty was stated by him, but none of the details of such difficulty were given, the cause thereof, or what took place between the parties. The mere fact was stated, in connection with his testimony, in substance, to the effect that soon after this he saw Miller and deceased talking

together and looking in his direction, as explanatory of his apprehension and belief that Miller and Johnson meant to do him some harm, and that Johnson's conduct in coming to him soon thereafter was in furtherance of a common design on the part of Miller and Johnson to engage him in a difficulty. In this state of the proof the prosecution was permitted, over the objection of appellant, to prove by A. B. Tabor and Bob Miller the details of the difficulty between Miller and appellant prior to the homicide, and to contradict appellant in respect to his testimony as to such details, and to require him to make admissions and statements in respect thereto, the probable, if not, indeed, the necessary, effect of which was to embarrass and prejudice his case before the jury.

Among other things, the following examination of appellant by counsel for the state was allowed over the objection of his counsel: "Q. Isn't it a fact that, a few minutes before you had the difficulty with Albert Sidney Johnson, you walked up to Bob Miller and said, 'There's the God damndest son of a bitch in Texas?' A. Not exactly that language. Q. Well, what language? A. Bob Miller had been circulating reports that injured my business. Q. Wait a minute; please answer my question. What did you say? A. I said to him, 'You are a God damn lying son of a bitch.' Q. Didn't you stand there and curse him for several minutes? A. No, sir; I didn't. Q. Didn't you stand there with your hand on your pistol? A. No, sir; I didn't. Q. And were cursing him? Did he resent it? Did he say a word? Didn't he stand there while you cursed him without saying a word? A. No, sir; he went out right immediately round the end of the desk, and he says, 'I will be back.' Q. Isn't it a fact that when you got through cursing him you slapped his jaws? A. I slapped him at the same time I made the remark to him. I said just what I repeated a moment ago, and he went out and said he would be back. When I slapped Mr. Miller, he walked immediately over round the end of the desk and says, 'I will be back in a minute.' And Mr. Tabor took me by the arm then and turned round and says, 'Let's don't have any trouble, Brown,' and I told him I didn't want any trouble, but that man had to let me alone."

When it was proposed to go into this matter, and the first inquiry was made in respect thereto, appellant objected to the question, and objected to any inquiry into the details of the difficulty with Miller, or evidence of any of the details of his difficulty with a third party, as not having any connection with the homicide on trial, except in so far as it may have affected appellant's apprehension and fear from the apprehended attack from Miller, and whether appellant was right or wrong in the difficulty with Miller could not be used as a circumstance against him, and the testimony was inadmissible, irrelevant, and immaterial, and contained and related to

extraneous matters hurtful and prejudicial to him. After the cross-examination of appellant, the state introduced both A. B. Tabor and Bob Miller in rebuttal, who testified at great length as to the details of said difficulty between appellant and Miller prior to the homicide, and each of said witnesses was permitted to give his version of what occurred in such controversy. We think that, as presented, these objections should have been sustained. Appellant had gone no further in his testimony than to assert as a fact some prior difficulty with Miller. This was not only admissible, but important, as throwing light on his claim that he believed, when he saw Miller and Johnson in conversation and looking in his direction, that, in view of such former difficulty and conference, their conversation related to him. It would, of course, have been admissible for the state to have shown that in fact no such difficulty or controversy with Miller had taken place, and it might have been proper to have shown that, if in fact there had been such controversy, it was not of such gravity as would fairly have justified Brown in believing that the conversation between the parties named had any reference or relation to him; but it cannot be claimed that the testimony elicited from appellant, or produced from Miller and Tabor, stopped here. On the contrary, the effect of it was probably to place appellant in a bad light before the jury and to prejudice his case. It is always a safe rule to limit, as far as practicable, evidence to the very matter and case in hand, and to exclude admissions and testimony of extraneous offenses, contests, controversies, and difficulties. *Ware v. State*, 36 Tex. Cr. R. 597, 38 S. W. 198; *Brittain v. State*, 36 Tex. Cr. R. 410, 37 S. W. 758; *Morrison v. State* (Tex. Cr. App.) 44 S. W. 511; *Woodard v. State* (Tex. Cr. App.) 51 S. W. 1122; *Barkman v. State* (Tex. Cr. App.) 52 S. W. 69; *Chumley v. State*, 20 Tex. Cr. R. 556.

Our Brother BROOKS has at length written his views and reasons why the judgment should be affirmed. The majority of the court are of opinion, however, that, for the reasons above indicated, the judgment should be reversed; and it is accordingly ordered.

BROOKS, J. (dissenting). Appellant was convicted of murder in the second degree, and his punishment assessed at 30 years' confinement in the penitentiary.

In an altercation occurring in the corridor of the St. George Hotel, in the city of Dallas, a difficulty occurred between the appellant and Albert Sidney Johnson, in the course of which difficulty appellant shot deceased (Johnson), from which wound, a short time after the difficulty, the deceased died. The state's case is epitomized by the dying declaration of the deceased, which is as follows: "I live in Dallas, Tex., and work for the Southern Rock Island Plow Company. Mr. W. O. Brown, Frank Tennant, Joe Strayhorn,

and myself, and two or three other fellows I didn't know, went into the St. George bar and got a drink, after which we stood around for a minute or two, and then most of us went on into the hotel proper in the corridor, and W. O. Brown sat down in an armchair about 30 feet from the Main street entrance, near the office, and I sat down on the arm of the same chair, and he told me to get up from there. I thought he was joking, and asked him if he meant it. He (Brown) then said, 'Yes, by God, I did; get up from there,' and hit me over the head with a pistol. I jumped up and grabbed him, and forced him back into the chair, and he shot me in the abdomen. I took the pistol away from him; that is, I got control of it, and the next shot went into the ceiling. Then somebody else took the revolver away from us. It was about 7 o'clock in the evening, on Tuesday, the 22d of January, A. D. 1907, that we went into the St. George bar, and about 30 minutes later when the shooting occurred. I had no weapon of any kind on, nor with me, and I don't know why he shot me. We were always good friends, and had not ever had an argument in which hot words were used." There is some dispute in the testimony for the state and the defendant as to where the shot was fired, whether on the east or west side of the narrow entrance that leads to the corridor from the front. Some of the testimony indicates that it was on the east side, and some on the west side; but the testimony shows, we take it, that the difficulty terminated on the west side of the narrow entrance.

Appellant's testimony contains, in substance, all the defensive matter suggested by the testimony. After stating he went into the barroom hunting a couple of friends to invite to supper with him, and that they declined to go on account of previous invitation, appellant's testimony is as follows: "They told me that they had promised to take supper with some one else, and wanted me to go with them. I told them that I could not go with them, because I had invited others to go with me. This conversation occurred as we walked out through the vestibule entrance to the lobby. So I left them and went back to the stand or desk, where I promised to meet Mr. Fred Burns. This desk stood right at the office, but just north of the office. It was a low desk, table like, and then there was a standing desk next to it, that came nearly up to the iron post. Bob Miller was just behind the standing desk, on the east side of it, and I was at the end of the desk. Mr. Tabor was in the area behind the desk with Bob Miller. There at that time I had an altercation with Bob Miller. After the altercation, however, I agreed with Mr. Tabor that I would let the matter drop if Bob Miller would, and after that I cooled down some. After I had the altercation with Bob Miller, Mr. Tabor and I walked from the end of the desk over a few feet to a settee, and after talking a few

seconds with Mr. Tabor I sat down on the south end of that settee. I have no recollection of having seen A. S. Johnson (deceased) at any time that afternoon or evening, prior to the time that I went with Mr. Tabor and sat down on the end of the settee near the desk. I have no recollection of having seen Johnson that day, before that time. After having the altercation with Bob Miller, I walked with Mr. Tabor a few steps over and sat down on a settee on the east side of the lobby, and just as I got sat down I glanced across the lobby, and my attention was attracted by seeing Mr. Johnson and Bob Miller in conversation, and both of them looking direct at me. That attracted my attention, and I lost interest in everything else. I could not hear what they were saying, but I believed they were talking about me, because both of them were looking directly towards me. Owing to a remark that Bob Miller made to me when I had the altercation with him, I believed that he would come back and renew the difficulty. Bob Miller and Johnson only talked a very short time—probably a few seconds—and then Johnson walked directly over to me and sat down on the arm of the seat that I was on, placing his right arm around my waist. When he sat down on the arm of the seat, he placed his arm around my waist, leaning over on me somewhat, binding and holding me, and I says, 'Johnson, don't do that.' When I made that remark he clinched me a little tighter, and I began to struggle then to get loose from him. I began to struggle and raise up at the same time. He held onto me, and then says, 'What do you mean, Brown?' And I says, 'I mean just what I say.' And by that time I broke loose from him, and had gotten almost erect on my feet, and about the time I got on my feet he struck me a blow over my left eye, and caught me by the throat, and that got me started to falling, and I never did regain my balance, and we went some distance across the lobby, toward the west side, and I fell and received a blow on the back of the head, and fell down among some chairs. Mr. Johnson continued to hold me by the throat. He was choking me, and I could not get my breath. The blow on the back of the head stunned me. I had gotten this pistol out some time during the struggle, and after I went down, and Johnson on me, and after I had received the blow on the back of the head, he was still choking me, and I fired the shot or shots with a view of getting relief and keeping him from killing me. He was choking me, and I could not get my breath. I could not stand it any longer. No; I do not know from what source that blow on the back of my head was inflicted. I just know that I received a fearful blow on the back of the head. The blow was a great shock, and it dazed me. I was hardly at myself for a couple of hours afterwards. I remember I fell, and I remember I got the

blow on the head and went down with Johnson on top of me, and he still held me by the throat. Prior to that time I had not made any effort to shoot Johnson, and up to the time I shot Johnson I had no purpose in my mind to take Johnson's life. I fired the pistol to save my life. I was severely hurt. The blow on the back of my head gave me an awful shock. The effects of that blow on the back of my head lasted about three weeks, and I was under the treatment of a doctor for about three days. At the time Johnson came over and sat down on the arm of the settee by me, and pinioned me, I believed that he was trying to hold me and put me at a disadvantage, and that Miller was going to return, either to injure me or kill me. I fired two shots during the difficulty. I am not positive as to which shot took effect on Johnson." This, we take it, is in substance appellant's case, as far as necessary now to state same in discussing matters arising in this record.

Appellant's first complaint is that the court erred in overruling appellant's motion to quash the special venire drawn under the law enacted by the Thirtieth Legislature (chapter 131, p. 269, Laws 1907); the ground of said motion being the unconstitutionality of said law. The grounds of said motion are as follows: "(1) Said act of the Thirtieth Legislature under which same was drawn is unconstitutional and void. The grounds of said motion in support of the unconstitutionality of said law being in substance as follows: (2) That said act of the Legislature was a special law, and violative of section 56, art. 3, of the Constitution, which inhibits the enactment of any local or special law touching the summoning or impaneling of grand and petit jurors. (3) That said law is unconstitutional, in that the names of jurors for jury duty are listed for a period of two years, and excludes from jury duty all other qualified jurors who may become of age or acquire citizenship within said two years, and thereby denies to the citizen the right to serve upon the jury, and denies to the litigant the right to select his triors from the qualified jurors of the county, and further exempts from jury duty in capital cases all qualified jurors who have served as much as four days within said two years provided by said law. (4) That said law is further unconstitutional, in that it is discriminatory, and made applicable only to counties having cities aggregating 20,000 in population according to the census of 1900, and thereby limits and restricts the operation of said law to counties of a class and excludes from the operation of said law counties as a class that may hereafter or now have cities aggregating 20,000 in population. Said law limits its operation to said counties possessing said qualifications named, and the census of 1900 excludes all others and applies to them as a different law. • • • (5) Said law is further unconstitutional, in that it repeals the existing jury law

as to such counties having cities aggregating 20,000 population under the census of 1900, and otherwise leaves that law operative in all other counties. That said partial repeal is unconstitutional and void; and, further, said law revives the repealed law under the contingencies provided in said act, and, further, under said act delegates to the judge within said counties where said law is operative the discriminatory power, under the conditions in said law named, to suspend the act of the Thirtieth Legislature and revive the old law as to such judge or court; and said law is violative of section 56, art. 3, of the Constitution and section 28 of the Bill of Rights. (6) That said act is not in accordance with due process of the law of the land, and is violative of section 19 of the Bill of Rights. (7) That said law is not equal and uniform, and is discriminatory, and is violative of the Constitution of the United States in section 1, art. 14 thereof."

To support appellant's contention under the above grounds, to quash the venire, he cites us to section 56, art. 3, of the Constitution, which provides: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing 'the summoning or impaneling of grand or petit juries.'" Also to the following authorities: *Lewis' Sutherland on Statutory Construction*, vol. 1, § 200; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Dunne v. Kansas City Cable Railway Co.*, 131 Mo. 1, 32 S. W. 641; *State v. Herrmann*, 75 Mo. 354; *State v. Wofford*, 121 Mo. 61, 25 S. W. 851; *State v. County Court*, 89 Mo. 237, 1 S. W. 307; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Young v. State* (Tex. Cr. App.) 102 S. W. 118; *Holley v. State*, 14 Tex. App. 514; *Cordova v. State*, 6 Tex. App. 220; *Davis v. State*, 2 Tex. App. 425; *Orr v. Rhine*, 45 Tex. 352; *Cox et al. v. State*, 8 Tex. App. 254, 286-289, 34 Am. Rep. 746; *Womack v. Womack*, 17 Tex. 1; *Graves v. State*, 6 Tex. App. 234; *Gonzales County v. Houston* (Tex. Civ. App.) 81 S. W. 118; *Ellis v. Ft. Bend County*, 31 Tex. Civ. App. 596, 74 S. W. 45; *Flewellen v. Ft. Bend County*, 17 Tex. Civ. App. 155, 42 S. W. 775; *Hill County v. Atchison* (Tex. Civ. App.) 49 S. W. 144; *Coombs v. Block*, 130 Mo. 668, 32 S. W. 1139; *Glover v. Meinrath*, 133 Mo. 292, 34 S. W. 72; *McMahon v. Pac. Ex.*, 132 Mo. 641, 34 S. W. 479; *Dallas v. Electric Co.*, 83 Tex. 243, 18 S. W. 552.

After a careful review of these authorities we find many of them not at all bearing pertinently on the question under consideration, and none of them appear to us to be in consonance with the true principle and construction of article under consideration; but to our minds the case of *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343, which case was approved by this court in the case of *Gillaspie v. State*, 42 Tex. Cr. R. 351, 60 S. W. 1134, is decisive of the question under consideration. The court had under considera-

tion in the last-cited case the constitutionality of the fee bill (Acts 1897, p. 5, c. 5), limiting the fees and compensation of certain officers in counties of less than 3,000 voters, and providing that the county judges shall designate the number of deputies, etc. Chief Justice Gaines, in delivering the opinion of the court, among other things, says: "A law is not special because it does not apply to all persons or things alike. Indeed, most of our laws apply to some one or more classes of persons or of things, and exclude all others. Such are laws as to the rights of infants, married woman, corporations, carriers, etc. Indeed, it is perhaps the exception when a statute is found which applies to every person or thing alike. Hence it cannot be that the statute under consideration is special merely because it is made to operate in some counties of the state and not in others. The definition of a general law, as distinguished from a special law, given by the Supreme Court of Pennsylvania in the case of *Wheeler v. Philadelphia*, 77 Pa. 338, and approved by the Supreme Court of Missouri, is perhaps as accurate as any that has been given. *State v. Tolle*, 71 Mo. 645. The court in the former case say: 'Without entering at large upon the discussion of what is here meant by a local or special law, it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition.' The law in question is applicable to every county of the designated class. Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable; in others, that it must not be unreasonable or arbitrary, etc. If it is meant by this that the Legislature cannot evade the prohibition of the Constitution as to special laws by making a law applicable to a pretended class, which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of *Com. v. Patton*, 88 Pa. 258. That statute was made applicable to all counties in which there was a population of more than 60,000, and an incorporated city with a population exceeding 8,000, 'situate at a distance from the county seat of more than 27 miles by the usually traveled public road.' There was but one city in the state which came within the pretended class. The court held this a covert attempt at special legislation, and that the act was a nullity. * * * To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the Legislature is clear, the policy of the law is a matter which

does not concern the courts. A Legislature may reach the conclusion that the compensation of certain officers in certain counties of the state is excessive, while in others it is not more than enough. By the reduction of the fees of office throughout the state they may correct the evil in those in which the compensation is too great; but they would probably inflict a greater evil by making the compensation too small in all the others. In such a case it becomes necessary to make the law applicable to some, and not to all. There must be a classification. That classification may be either by population or by taxable values. One Legislature might, as the Legislature of Texas did, make the classification by population; another, as was done by the Legislature of Arizona, might make the taxable values of the respective counties the basis of the classification. Shall the courts inquire which is correct? Can they say that the work of an officer is not, in some degree, proportionate to the population of his county? On the other hand, can they say that, the more the property of a county, the more the crime? To ask these questions is to make it apparent that they are questions of policy, determinable by the political department of the government, and not questions the determination of which by the Legislature is subject to review by the courts. Therefore, should we adopt the rule that, in order to make an act a general law, the classification adopted should be reasonable, we should still be constrained to hold the statute in question a general law, and valid, under our Constitution; for we cannot say that the classification is unreasonable. It may be, as urged in the argument, that there are counties in the class to which the law is made applicable the population of which very slightly exceeds that of other counties which are without it, and that it seems unreasonable to make a discrimination upon so slight a difference. To this the answer is the line must be drawn somewhere, and that a similar difficulty would probably result if the classification were made upon any other basis. Exact equality in such matters, however desirable, is practically unattainable."

The jury law of this state provides that same shall apply only to counties having cities aggregating 20,000 in population according to the census of 1900. This is nothing but a rational classification warranted by the Constitution, and is not a local or special law within the contemplation of the constitutional clause under consideration. I hold it is not only a rational and reasonable classification, but that it is in entire consonance and accord with previous legislation on this subject, and the evident reason of the statute under consideration was the inability to get good, fair, and impartial juries in the congested centers of our state under the old system of selecting juries; but, whether this was the reason or not, the reason does not address itself to the court, but to the legisla-

live mind. Appellant, in his able supplemental argument filed herein, insists that the Clark-Finley Case is not in point, because the court there was considering a classification of counties by population under a rule that was easy of ascertainment, determinable by the presidential vote in each four-year election; the counties having less than 3,000 votes being exempted from the operation of the law, while those above that number fell within the terms of the law. Appellant insists that the decision in the Clark-Finley Case discussed the advisability and right of the Legislature to make a classification by population, and the question as to restrictions being imposed that would prevent one county from being exempted or being included in the law is not discussed; but the principles involved are in harmony with the principles, contended for by appellant, of the right of a classification by population, but that no restriction can be imposed upon it that would arbitrarily exclude some and include others. I cannot agree with the distinction attempted to be made by appellant between the principle laid down in the Clark-Finley Case and the question now under consideration. Under the fee bill all counties were within its provisions that had 3,000 voters at the last presidential election. This, in a sense, is an arbitrary rule of measurement or basis of ascertaining a class laid down by the Legislature of this state, which rule cannot be changed until four years have elapsed and other counties have reached a voting strength sufficient to place them under the fee bill.

I apprehend that appellant would not insist that the jury law was unconstitutional, from the argument suggested above, if there had been a clause in the law saying that the same should apply to all counties having cities of a population of 20,000 according to the census of 1900 and each recurring census. This would make it altogether like the fee bill. But we hold that a classification under the fee bill is as arbitrary as a classification under the jury law. There has to be some legislative yardstick used, and under the decisions of the Supreme Court of this state and of other states the matter of designating classes for legislation is a duty devolving upon the legislative power, and not upon the courts. There is no possible way of designating a county, when it comes to classifying it with other counties, unless you classify it by population or by taxable values. There is nothing in the statement of facts nor in the census of 1900 that indicates there is but one city in Texas with a population of 20,000; but the census shows several cities that had a population of 20,000. We cannot, furthermore, judicially declare a fact to be true de hors the record before us, and hence we cannot hold that there are cities in Texas now of a population of 20,000 that did not have said population in 1900. While as citizens we might believe the statement to be correct, yet as

judges of this court we have no such information. We accordingly hold that said law is constitutional, does not repeal the old jury law, except the counties affected thereby, and certainly does accord to appellant due process of the law of the land, and is not violative of section 19 of the Bill of Rights. We furthermore hold that the statute is not violative of section 1, article 14 of the Bill of Rights, which says that all laws must be equal and uniform. This is equal and uniform upon the same class. Many authorities are cited by appellant in his supplemental brief, and, as suggested, in his original brief, to support his contention; but we think the Clark-Finley Case above is decisive of the question. So believing, we hold the law is constitutional. The decision in the Clark & Finley case was reaffirmed by the Supreme Court in the case of Reed v. Rogan, 94 Tex. 183, 59 S. W. 257, wherein the court held that Laws 1897, pp. 186, 187, c. 91, providing that in a certain section of the state the school lands which have been leased shall not be subject to sale during the existence of the lease, is not a local or special law prohibited by Const. art. 3, pars. 56, 57, and was cited with approval, also, in the case of Clarke v. Reeves County, 25 Tex. Civ. App. 463, 61 S. W. 981.

Appellant's second complaint is that the court erred in failing to quash the sheriff's return made upon the special venire. The bill covering this matter occupies 40 pages of the record. The court approves same, with the following qualification: "That for all jurors whom the sheriff's return showed were summoned, either in person or by leaving summons at residence, and who were not present, an attachment was issued, and all of said jurors were brought into court and for good cause shown all were excused." With this explanation of the court there is nothing left to be considered concerning the objections of appellant to the summoning of the venire or the organization of the jury.

The sixth ground of the motion complains the court erred in overruling appellant's motion for a new trial on the ground of misconduct of the jury, as follows: "(1) Because the jury heard and discussed extraneous matter affecting the defendant during their deliberations in reaching a verdict, in that the fact was stated and discussed by the jury that the defendant had killed other men than the deceased, A. S. Johnson. (2) Because the jury ignored and discarded the special charges given by the court at the instance of the defendant, and refused to consider them as part of the law, on the ground that it was lawyers' talk and not the law. (3) Because the jury, in affixing defendant's penalty at 30 years, were influenced by the purpose of denying the defendant bail pending any appeal of the case."

As to the proposition that the jury ignored special charges, we held in the case of Dancy v. State, 41 Tex. Cr. R. 293, 53 S. W. 635,

that "jurors should not be permitted to show by their affidavit that they ignored and disregarded the charge of the court in considering the evidence." See, on same line, *Christian v. State* (Tex. Cr. App.) 21 S. W. 252, and *Weatherford v. State*, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

In answer to the proposition that the jury had evidence to the effect that appellant had killed another man, or other men, and that this was received by the jury, appellant files the affidavit of Sam F. Davis to the effect that Mason (one of the jurors) told him that that fact was mentioned in the jury room. The juror Mason took the stand and positively denied making any such statement to Davis, denying that anything of this sort occurred in the jury room. One juror by the name of Cogburn testified that such a thing was mentioned; that it had no influence on him whatever, but he could not tell who mentioned it. Eight jurors testified positively that no such thing occurred in the jury room. So we have nine other jurors swearing that no such thing occurred in the jury room, and we have one swearing that it did. It became an issue of fact for the trial court, and, he having decided it adversely to appellant, we are not in an attitude to review his decision on same.

As to the third proposition, one of the jurors stated he would not agree to less than 15 years, because the defendant could get out on bond if he appealed his case. But one juror swears to this, and he was not able to tell which juror mentioned it. All the other jurors denied that such a thing occurred. This being the state of the evidence on the matter, we cannot review it. Furthermore, in the case of *Jack v. State*, 20 Tex. App. 661, we think the proper rule in reference to these matters was laid down in the following language: "It seems to us it would be a dangerous and exceedingly pernicious practice for the courts to permit the sanctity of the jury room to be invaded and jurors be interrogated as to the arguments used in their deliberations and the influence of such arguments upon their minds, and the reasons and considerations upon which their verdict was based. There might arise, perhaps, an extreme case in which such practice would be tolerated, to prevent flagrant wrong and injustice. But this court would not be willing to sanction the procedure, unless it should manifestly appear that the ends of justice imperatively demanded it. If it were permitted to attack and set aside a verdict because of arguments and reasons advanced and urged by jurors and their deliberations thereon, it would destroy free discussion and interchange of opinions among jurors. It would open the door to a searching inquiry in relation to every act and word which transpired in the jury room, and would subject each individual juror to be placed upon trial before the court to answer for the sound-

ness and propriety of the opinions expressed by him in the jury room. There is no warrant in the law for such practice. While by our Code it is competent to prove misconduct by the voluntary affidavit of a juror, it is nowhere intimated even that jurors can be brought into court by process and compelled to go upon the witness stand and testify as to arguments used, opinions expressed, and votes given by jurors in the juryroom." I accordingly hold that there was no error in the court overruling the motion on account of the misconduct of the jury.

The seventh complaint is that the court erred in admitting in evidence the alleged written dying declaration of the deceased, of date January 22, 1907, because the predicate therefor was insufficient under the law to warrant its admission in evidence, and said predicate failed to show that deceased was in extremis or conscious of impending death, and failed to show that said statement was voluntarily made. I have carefully read the evidence complained of, and must say that I do not agree with appellant. But think the predicate was properly laid. While the evidence does not show that deceased expected to die in a moment, he did say he was going to die, and after making this statement the testimony was written down, in all respects legal, as suggested by many decisions of this court. Nor would the fact that there were erasures and mutilations in the paper detailing his statement render the evidence inadmissible. The witness who took same could explain the interlineations, as was done. Nor was there any error in permitting Dayton Moses to read the alleged dying declaration written by Charles M. Meng, and to testify "that the paper contained the substance of the statements made by A. S. Johnson, written by Charles M. Meng." The fact that Meng was present as a witness would not render his testimony the best evidence in relation to the paper written by himself, when Moses was there and heard everything deceased said, and the statement was written at the instance of Moses. I do not think there was any error in permitting the witness Moses to testify that he saw deceased (Johnson) and others in the St. George bar, a few moments before the shooting, taking a drink, and that the appearance of said A. S. Johnson at that time was that of a man in good humor; that Mr. Johnson and some three or four other men with him were discussing the Bailey question. The evidence in this record discloses the fact that deceased testified a few moments before the homicide that he was in the barroom adjoining the hotel, and took a drink with appellant and other parties, and walked out of the barroom into the corridor of the hotel, and a few moments thereafter the difficulty occurred in which deceased lost his life. This certainly renders the testimony germane. It is true appellant says he did not see Johnson in there and did not take any drink with

him; but this would not render the testimony inadmissible. The dying statement made to Dr. S. W. Rimmer, and the written statement taken down by Charles M. Meng, and the written statement made on January 24, 1907, were all introduced after a proper predicate was laid; and the fact that questions were asked that did not suggest answers, which questions were answered by deceased, would not render the testimony inadmissible.

The tenth complaint is that the court erred in failing to charge the jury as to the rule of law touching the consideration of dying declarations, and in failing to instruct the jury that before they could consider such dying declarations they must find and believe from the evidence that when the deceased made them, if he did, that he made them voluntarily and that he was conscious of impending death at the time. If there had been any issue on this question it would have been proper to so charge, but as I understand the record the deceased was conscious of impending death when he made the statement, and there was no question about the fact; hence I hold, as above stated, the predicate in each instance was properly laid.

Appellant's twelfth complaint is that the court erred in permitting the state in its cross-examination of the defendant to elicit from him the details of the difficulty occurring between the defendant and Bob Miller, shortly prior to the difficulty with deceased, resulting in the homicide charged, in which defendant had cursed Bob Miller and slapped his face, none of which details of the difficulty between the defendant and said Bob Miller had been drawn out in the examination in chief of the defendant. The only facts elicited from the defendant in the examination were that shortly prior to the homicide defendant had had an altercation with said Bob Miller, who stated to defendant that he would settle with defendant later; that defendant had taken his seat and was apprehensive of Miller's return when Johnson came up and pinioned him; that, immediately preceding Johnson's coming to defendant's chair, defendant had seen Miller and Johnson in the hotel lobby talking together and looking at him, and that his apprehensions were increased thereby. The bill presenting this matter in addition to the above, shows that appellant a few moments before the difficulty violently abused Miller and slapped his face, calling him every vile name that apparently he could call him before slapping him, and, as stated, a few moments thereafter took a seat. Miller and Johnson were seen by appellant talking, and Johnson went to where appellant was and sat down on the arm of the chair appellant was occupying. Now, as to whether appellant had ground to apprehend that Miller and Johnson were his enemies or not is best illustrated and made apparent by the previous colloquy between appellant and Bob Miller. Suppose Miller

had a few moments before the homicide abused appellant without cause, or with cause, and appellant had submitted, walked off, and had taken a seat, and subsequently, as he did, killed Johnson; would not appellant have a right to introduce the previous outrage upon him by Miller to illustrate the motive, animus, intent, and purpose that actuated appellant at the time of the homicide. Certainly he would. In the first place, it is a part of the res gestæ of this transaction, and clearly illustrates the motive, animus, and intent actuating appellant at the time. This testimony I think was clearly admissible under the following authorities: *Blackwell v. State*, 29 Tex. App. 200, 15 S. W. 597; *McKinney v. State*, 8 Tex. App. 626; *Leeper & Powell v. State*, 29 Tex. App. 69, 14 S. W. 398; *McMahon v. State*, 16 Tex. App. 361; *McCray v. State*, 38 Tex. Cr. R. 609, 44 S. W. 170. Where several assaults are committed at the same place, and almost simultaneously in point of time, and of the same manifest purpose, and were so closely connected as to relate to and be illustrative of each other, making each res gestæ of the other, then said assaults so committed are admissible. We further hold that said testimony is admissible and competent upon the question of motive, and was not such extraneous matter as to require the trial court to charge the jury in their consideration of extraneous matter as to the specific purposes for which it is admitted. For further discussion of this question, see *Hamilton v. State*, 41 Tex. Cr. R. 644, 56 S. W. 927; *Elmore v. State*, 110 Ala. 63, 20 South. 323; *People v. Gibbs*, 93 N. Y. 470; *Crass v. State*, 31 Tex. Cr. App. 312, 20 S. W. 579.

Appellant's thirteenth complaint is that the court erred in its charge to the jury in instructing the jury that the instrument or means by which a homicide is committed is to be taken into consideration in showing the intent of the party offending. To support this proposition appellant cites us to the cases of *Burnett v. State*, 46 Tex. Cr. R. 116, 79 S. W. 551, *Campos v. State* (Tex. Cr. App.) 95 S. W. 1042, and *Early v. State* (Tex. Cr. App.) 103 S. W. 874. I do not believe said authorities support appellant's position. Those were cases where there was some issue as to the character of the weapon; but here the weapon was a deadly one, being a pistol. This being true, it could not injure appellant to say, if a man shoots another with a deadly weapon, the presumption is that he intended to kill him. If there was any evidence indicating that the weapon was not a deadly one, the charge would have been appropriate; but, where there is no dispute about the deadly character of the weapon, it certainly could not injure appellant to give the statute.

The fourteenth complaint is that the court erred in giving the following charge to the jury on murder in the second degree: "Implied malice is that which the law infers

from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than, if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree." In the case of *Swain v. State*, 86 S. W. 338, cited by appellant, we stated that in the charge on murder in the second degree the court failed to inform the jury in regard to what was meant by "mitigate, excuse, or justify the act." In the case before us the court charged on manslaughter, and, even conceding that it is necessary to define these terms, we do not think it was necessary in this case. I see nothing amiss in the charge of the court complained of.

I have carefully reviewed all of appellant's special charges on self-defense, and, as far as same were applicable to the facts of this case, I think they were aptly covered by the court's main charge, which is quite full and voluminous on the law of self-defense, covering, as I conceive, every possible phase of self-defense as presented by the evidence. The charge also covers every possible phase of manslaughter presented by the evidence.

Appellant further complains that the court erred in not charging the jury to disregard that part of the closing argument of Judge Clint in which he said, in substance, "If Brown shot because he was being choked, then why didn't they prove by Dr. Baird and the other witnesses that he told them that night at his home, after the shooting, that Johnson had choked him as he testified on the witness stand." "You are instructed that under the law the defendant would not have been allowed to prove that he told Dr. Baird and others that Johnson had choked him, even if he had so told them, and you are instructed that this argument by Judge Clint was improper and should not have been made, and you cannot consider said argument against this defendant for any purpose whatever." The court did not err in failing to give this charge. While counsel had misstated the law, and, as appellant insists, he could not prove by Dr. Baird what he told him about the party choking him, yet an inaccurate argument based upon the evidence is not the basis for a charge. Counsel could answer this argument, and it was not error to refuse a charge on it. Nor did the court err in failing to charge the jury to disregard Judge Clint's argument to the effect that W. O. Brown would not sell to consumers. The court properly charged the jury to disregard the argument. Nor was it improper argu-

ment to tell the jury counsel believed they would convict the defendant because they were honest men. Nor was it improper for Judge Clint to allude to the fact that the law says all parties convicted of a felony are entitled to bail if the punishment is not exceeding 15 years in the penitentiary.

I note in the main charge of the court that he instructs the jury to disregard that part of Dayton Moses' testimony as to appearance and manner of deceased in the St. George saloon just prior to the shooting; that is, that at said time deceased was laughing and joking with a party of friends and apparently in a good humor. This certainly cures any error in the matter complained of. Furthermore, the court in the main charge charged the jury as follows: "The fact (if it is a fact) that the defendant, Brown, was in the wrong in striking Miller, as that difficulty is before you in the evidence, cannot be considered by you in passing upon whether or not the defendant was the aggressor in the subsequent transaction with the deceased, Johnson, resulting in the death of said Johnson." This charge was certainly helpful to appellant and eliminated any possible chance of appellant being convicted for killing Johnson because he had abused Miller. Under a long line of authorities of this court it was not necessary for the court to permit the circumstances of the previous difficulty to be introduced, on the ground as stated, to show motive, animus, intent, and *res gestæ*, and it was not error not to limit same in his charge to said purposes.

This is one of the most voluminous records that has ever come to this court. I have reviewed *seriatim* every suggestion made by appellant. I have written on all that I deem necessary to write upon. I would suggest that hereafter, in preparing bills of exception, only the exact point be made by the bill, and not all the evidence in the record touching the matter be incorporated in the bill, but simply the substance of the point relied upon. I have carefully reviewed all the evidence in this case, and must say that in my opinion the verdict was warranted by the evidence; and, finding no error in the record authorizing a reversal, the judgment should be in all things affirmed.

KILLMAN v. STATE

(Court of Criminal Appeals of Texas. May 20, 1908. Rehearing Denied June 24, 1908.)

1. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In a prosecution for the unlawful sale of intoxicating liquors, the general charge defined a sale within the statute, and the jury were instructed in a special charge that it was not a violation of the local option law to order whisky for another and pay for it with the money of such other, and if defendant bought liquor for another with such other's money he could not be convicted, and thereafter defendant requested an

instruction that to constitute a sale the minds of defendant and the buyer must have met in an agreement, express or implied, on the part of defendant to sell and on the part of the other to buy the liquor, and even if the alleged buyer understood the transaction as a sale, if defendant did not so understand it, but believed the liquor belonged to the buyer, defendant was not guilty, which charge was refused. The evidence as to whether defendant sold the liquor to the alleged buyer, or simply purchased it for him with the latter's money, was somewhat conflicting, but tended strongly to show that it was a sale, so as to justify such a finding by the jury. *Held*, in view of the court's general charge, as enlarged by the special charge, and under the facts of the case, that the requested charge was misleading and properly refused.

2. SAME—EVIDENCE—SUFFICIENCY.

In a prosecution of defendant for selling liquor in violation of the local option law, the evidence *held* to show an open violation of the law, and to require a verdict of conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300-322.]

3. CRIMINAL LAW—APPEAL—AMENDMENT OF JUDGMENT.

Defendant was convicted in the county court in two cases for unlawfully selling intoxicants, and in entering judgment in the court below the clerk failed to make the imprisonment assessed cumulative, and on appeal the state moved to make the imprisonment cumulative. *Held*, that under the law, and having regard to the functions of the Court of Criminal Appeals as an appellate court, the judgment could not be so amended, as the duty of the court ended when it passed upon the legality of the proceeding below.

Appeal from Brown County Court; A. M. Brumfield, Judge.

Steve Killman was convicted for unlawfully selling intoxicating liquor in violation of the local option law, and he appeals. Affirmed.

Harrison & Wayman, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Brown county with the unlawful sale of intoxicating liquors in said county in violation of the local option law. On trial he was convicted, and now appeals to this court, and seeks a reversal of said judgment of conviction.

1. Most of the questions raised on the appeal relate to the supposed invalidity of the local option election held in Brown county. These matters have all been fully considered and ruled adversely to appellant in the *Jerry Green Cases* (decided at the present term of this court) 110 S. W. 918, 919, 920, 925, 929, and need not be further considered now.

2. The charge of the court, taken in connection with special charge No. 1 given at the request of appellant's counsel, was a fair submission of the issues involved in the prosecution. In the general charge of the court the jury were informed that local option was in force in Brown county on the 6th day of March, 1906, and that it had been in force more than a year prior thereto. It defined clearly and correctly what was meant by the word "sale," and then charged the jury that if they believed from the evidence beyond a

reasonable doubt that the defendant, in Brown county, Tex., on or about the 10th day of March, 1907, did unlawfully sell intoxicating liquors to J. S. Blagg, as charged, then they would find appellant guilty, and assess his punishment as prescribed by law. The court also gave, at the request of appellant's counsel, the following special instruction: "You are instructed that it is no violation of the local option law for a person to order whisky for another and pay for it for such other person with money furnished by such person; and if you believe from the evidence that the money, if any, given by the witness Blagg to the defendant, if the said witness ever gave the defendant any money, was used by the defendant or others to pay for whisky ordered by defendant for said witness Blagg, or if you have a reasonable doubt thereof, you will return a verdict for the defendant." On the trial the appellant requested the court to instruct the jury in substance that, "in order for the transaction in evidence to constitute a sale, the minds of the defendant and the witness Blagg must have met in an agreement, express or implied, on the part of the appellant to sell and on the part of the witness Blagg to buy the whisky testified about, at or before the delivery of the whisky by appellant to said Blagg. Now, even though you should find that the witness Blagg understood from said transaction that he was paying for the whisky that he got from the defendant, if any, still, if you further find that defendant did not so understand, and that he was selling said whisky to the witness, but honestly believed said whisky to belong to the prosecuting witness, you will find the defendant not guilty." This is in effect a charge combining the law of mutual mistake and in a measure the doctrine in a local option case of treating the matter of sale from the defendant's standpoint. We think such a charge was not called for by the facts of the case, but would have been both misleading and confusing, and, considered in connection with the court's general charge, as enlarged by the special charge given, the court did not err in refusing same.

The facts in the case briefly showed that, about the date named in the information, J. S. Blagg bought a bottle of whisky from the appellant; that he went to his place of business, got a pint of whisky, and at the same time laid down 75 cents on the counter, took the whisky, and walked out of his place of business. On cross-examination Blagg stated that a short time previous to this he had gone to appellant's clubroom and made a written order for a quart of whisky, and at the same time paid appellant \$1.50 or \$1.75 for it; that soon after this he got this bottle of whisky. Blagg further testified that at the time he made this written order he told appellant that he wanted to join the club, and instructed appellant to keep a standing order for him—that is, never let him get out of whisky; that, when he came in to get whisky from

time to time, he wanted another bottle of whisky ordered to take its place. He testified, further, that when he went back to appellant's club he got a pint bottle of whisky and put 75 cents on the counter, and that he does not know whether the whisky he got at this time was his own whisky or not. The appellant testified in his own behalf, in substance, that some time prior to March, 1907, Blagg came to his club and told him he wanted to join same, and gave him \$1.50 and told him to order him a quart of whisky; that soon after this Blagg came in after his whisky, and told him that he wanted to put it in a bottle, that he could carry home with him in his pocket; that he filled a short quart out of a full quart that had been ordered for Blagg, and delivered it to him, and that after filling the short quart there was still a part of the whisky in the original bottle containing Blagg's whisky; that Blagg at another time soon after this gave another order for whisky, and paid him \$1.50 for it; that this was a verbal order; that he did not remember whether Blagg paid him 75 cents, on taking away the pint of whisky, as testified to by him; that he never delivered to the witness Blagg any whisky except that which belonged to him, and never received any money from him in payment of whisky except what he ordered, and to accompany the order. On cross-examination, he testified that Blagg never paid him 75 cents for whisky, but did pay him about 75 or 80 cents for storage charges and express on whisky. It was shown that appellant had internal revenue license as a retail liquor dealer. His explanation of having such license is that he was not engaged in selling whisky or beer, but that he was selling cider, and that he had been told by the United States revenue agent that in order to sell cider he must have license as a retail liquor dealer. It was shown by Blagg that he never gave appellant \$1.50 and asked him to order him a quart of whisky, except on one occasion. He also denied having at any time paid any express charges or storage. We think the facts, taken together, in view of all the circumstances, show an open violation of the law, and that the jury, under the testimony adduced in the case, could have done nothing else than to return a verdict as they have done.

3. A motion is made in this court by the state to make the punishment in this case cumulative. It is shown in the motion that appellant was convicted in two cases in the county court of Brown county, and that in entering the judgment in the court below the clerk failed to make the imprisonment here assessed cumulative, and it is sought to amend the judgment in this respect in this court. We do not believe that under the law, and having regard for the functions and the nature of this court as a court of appeals only, we should or can grant this motion. Our duty, we think, is ended when we have passed on the legality of the proceedings of the court

below leading up to the conviction of the appellant, and we would probably be without the authority to undertake in this court to reform the judgment of the court below by making its sentence cumulative.

Finding no error in the judgment of the court below, it is ordered affirmed.

KILLMAN v. STATE.

(Court of Criminal Appeals of Texas. May 27, 1908. Rehearing Denied June 24, 1908.)

1. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS — INSTRUCTIONS — WHAT CONSTITUTES SALE.

In a prosecution for selling liquor in violation of the local option law, defendant requested an instruction that if the jury should find that the alleged buyer instructed defendant to keep whisky ahead for him, and that money delivered by him to defendant, if any, was accepted by defendant, was used to pay expressage on whisky theretofore ordered, or if defendant understood that money delivered to him, if any, was to be so applied, they would find defendant not guilty, though they might find that the alleged buyer understood that he was paying for the whisky that he then carried away, while the trial court charged that, if defendant sold the whisky, he would be guilty, but it was not a violation of the local option law to order liquor for another and pay for it with such other's money, and if money given defendant was used to pay for liquor ordered for the buyer, or the express charges thereon, defendant would not be guilty, *held*, that the requested charge was sufficiently covered by the charge given.

2. SAME—SUFFICIENCY OF INFORMATION—EXISTENCE OF LOCAL OPTION LAW.

The local option statute provides that after the law has been put into operation it must continue for two years, and will continue in effect thereafter until set aside by vote within the given territory. An information for selling liquor in violation of the local option law alleged that a local option election was held in September, 1903, and that the alleged illegal sale occurred on May 18, 1906. *Held*, on motion to quash, that the information sufficiently alleged the violation of an existing law, as it would be presumed that the statute had not been repealed; the statute itself providing that it should continue in operation until repealed.

3. CRIMINAL LAW—TRIAL—CONDUCT OF ACCUSED—PRESENCE OF ACCUSED.

Code Cr. Proc. art. 633, provides that in all felony prosecutions defendant must be personally present at the trial, and also in cases of indictment or information for misdemeanor, where the punishment is imprisonment in jail. In a prosecution for violating the local option law, defendant went temporarily into an adjoining room, out of the presence and sight of the court and jury, during the argument of his counsel, and when his absence was noted the court stopped the argument, and defendant was brought back into the room. *Held*, defendant's absence from the courtroom did not violate the statute, and was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1463-1484.]

4. SAME—APPEAL—PROCEEDINGS NOT IN RECORD—TESTIMONY OF WITNESS ON RECALL BY JURY—DIFFERENCE FROM ORIGINAL TESTIMONY.

Code Cr. Proc. art. 735, provides that, if the jury disagree as to the statement of witness, they may have such witness recalled to detail his testimony upon the point in question, as nearly in the language of the original examination as possible. In a prosecution for violating the local

option law, the jury requested that the prosecuting witness be recalled to enable them to ascertain his testimony on a certain point, and upon his recall the foreman asked him what he "testified that he paid defendant the 15 cents for," to which question defendant objected, on the ground that the witness did not testify on the stand as to what he paid 15 cents for. *Held*, that to support the objection, defendant should have shown in the bill of exceptions the difference, if any, between the witness' original testimony and that given on recall, as it would be presumed that the court acted correctly in admitting the subsequent testimony, and that the witness' restatement of his testimony was the same as on the first examination.

5. SAME—TRIAL—DELIBERATIONS OF JURY—RECALL OF WITNESS—DIFFERENCE IN TESTIMONY.

Code Cr. Proc. art. 735, provides that, if the jury disagree as to the statement of witness, the court may order such witness recalled to detail his testimony on the point in question, as nearly as possible in the language used in his original examination. In a prosecution for violating the local option law, the jury requested the recall of the prosecuting witness, and he was asked by the foreman what he testified that he paid defendant the 15 cents for, to which he answered that he got a drink of whisky and paid defendant the 15 cents for it. The bill of exceptions, approved by the trial court, showed that the same witness testified on direct examination that he got a drink of whisky from defendant and paid him 15 cents for it, but on cross-examination testified that he could not say what the 15 cents was to be applied to, whether to pay expressage or to pay for the whisky, and that defendant might have used it to pay express charges on whisky ordered for him. *Held*, that the bill showed that the witness was recalled to restate his original testimony as given, and his testimony on recall was substantially the same as that given on the original examination.

6. INTOXICATING LIQUORS—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE—FOREMAN SALES.

In a prosecution for violating the local option law, the evidence showed that the prosecuting witness had given defendant an order for a quart of whisky in December, and gave him money to pay for it, and requested defendant to keep a sufficient amount of whisky on hand, so he could secure it when desired; but the money given defendant in December was the only money given him. The witness was permitted to testify, further, that he had gotten whisky from defendant a number of times, by the pint or drink, before the sale charged in the information, which was in May. *Held*, that this testimony was admissible, under the circumstances, to show whether defendant was letting the witness have whisky he had previously ordered, or whether he was selling his own whisky.

Appeal from Brown County Court; A. M. Brumfield, Judge.

Steve Killman was convicted for violating the local option law, and he appeals. Affirmed.

Harrison & Wayman for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law; the punishment assessed being a fine of \$100 and 60 days' imprisonment in the county jail.

Blagg, testifying for the state, stated that he had a transaction with appellant about May 8, 1906, and got from him a drink of whisky. He further testified he did not on that date, but along about the 20th or 25th of

April, 1906, went into appellant's place of business and got a drink of whisky, and at the time gave defendant 15 cents and walked out of the clubroom. On cross-examination he testified that some months prior to this transaction he made an order for a quart of whisky from defendant in writing, and paid at the time he made the order \$1.50, and stated to appellant that he wanted him to keep a standing order—that is, that he did not want to get out of whisky at any time, but wanted appellant to keep whisky ahead for him, so he could get it from time to time; that some days subsequent to making this written order he went to appellant's clubroom and got a flat quart of whisky, but did not pay anything to defendant at the time, and does not remember what he said at the time he got the quart bottle, but he put it in his pocket and walked out of the clubroom; that this transaction occurred in the winter, before the one upon which this prosecution is based; that he did not know, at the time he secured this flat quart of whisky, whether it contained a full quart or not; that he had never paid defendant any money for express charges, or storage charges, of which he was aware, nor did he remember that defendant ever asked him for money for that purpose. He was asked whether or not he had any whisky in defendant's club belonging to him at the time he got the drink testified about in this case, and he stated he did not know of his own knowledge whether he did or not; that he did not know whether there was any surplus left over from other whisky that he had ordered before. On redirect examination he testified the written order was made some time in December, preceding the transaction in question; that he had made no order for whisky since that date, unless what he told appellant in regard to keeping whisky ahead for him covered other transactions; that he had gotten a pint of whisky some time previous to the transaction in question, but did not know whether the whisky he got on that occasion was his or not—that is, whether or not it was a surplus from the previous quart he had ordered. On recross-examination he testifies that it was late in the evening when he got the drink of whisky in question, and he does not remember who was present, nor what was said by him or defendant at the time; nor did he remember that defendant told him the 15 cents was for express charges. He did not know whether he was expected to pay express charges on the whisky or not, nor did he remember of appellant ever mentioning this to him. He was not acquainted with the rules of the club about paying express and storage charges.

Appellant testified that his acquaintance with the witness Blagg was merely passing, and that some time prior to the transaction in question—he did not recall the exact date—Blagg came into the clubroom and made

a written order for a quart of whisky, giving him \$1.50 with which to pay for it; that at the time the witness Blagg told him he wanted him to keep whisky ahead for him, and that when he would get whisky from time to time he would leave money with which to order whisky; that he did not want to get out, but wanted to keep whisky on hand all of the time; that he sent the order, with the \$1.50, to Scott & Low at Ballinger, and received from them a full quart of whisky, a part of which he afterwards delivered to the witness in a flat quart bottle; that this was a few days after the order was made, and that there was still left in the full quart that had been ordered just about a pint of whisky; that the witness afterwards came in and got his surplus, but that later on he (appellant) remembered he made another order, which was verbal, for another quart of whisky; that the witness would come in and take away some of this whisky, sometimes a pint, and at other times he would come in and take a drink; that he kept his (Blagg's) whisky in a bottle separate and apart from other whisky, with his name on the bottle; and that when he would call for whisky he would give it to him out of his bottle. The appellant further testified that he neither sold nor dealt in whisky, but took orders for the same, and charged those who kept it on storage in his clubroom 25 cents for a quart of whisky and 35 cents a dozen for beer; that these charges were for storage, serving the drinks, cooling the beer, etc.; that he had during this time sent a lot of written orders together to Scott & Low at Ballinger, and would have all of said orders filled and shipped to him in one package; that when he did this he would apportion the express charges among those having whisky in the shipment; that he never sold Blagg a drink of whisky, and that he has no remembrance of his ever paying him 15 cents, but that if he did pay him 15 cents, as he has testified that he did when he got a drink of whisky, it was his proportion of express charges on whisky that he had ordered; nor does he remember telling the witness, at the time he got the drink of whisky and paid him the 15 cents, that it was for express charges, but that was the way it occurred if he paid him the 15 cents, that he could not remember every transaction occurring in his club, nor what was said at the time of such occurrence; but he did know he did not sell any whisky. Being crossed, the appellant stated that Blagg had gotten whisky from him a number of times before the transaction in question, but that it had always been ordered and belonged to Blagg; that he did not know whether he explained to Blagg, when he accepted the 15 cents, whether it was for express charges or not; that he did not remember doing so; that he did not think it was necessary always to explain such transactions; that there was no reason for his selling the whisky to Blagg, when

he had whisky that already belonged to him; that he does not remember of the witness paying him storage charges before this, but that the 15 cents he claims to have paid could not have been for that purpose, as he never charged less than 25 cents for storage charges; that he never would order less than a quart of whisky at a time for one man, and that he always sent the money for the whisky with the order; that the price never was less than \$1.25 per quart, but usually \$1.50 per quart. On redirect examination he says he did not remember all the transactions that took place in his club, and what was said at the time, but that he knows he did not sell the witness any whisky, and, if he paid him the 15 cents, it was used to pay express charges on the quart of whisky theretofore ordered for the witness Blagg. Appellant further stated in his testimony that, after filling the short quart out of the full quart, there would be left in the full quart just about a pint of whisky.

Blagg was recalled, and denied any recollection of a conversation between himself and appellant in regard to express charges, and in fact did not remember what was said between them, and also denied making any verbal order for whisky after he had made the original order in December; that he had never made any other order for whisky, except, at the time he made the original order, he told appellant to keep whisky on hand for him, but had gotten whisky at defendant's club at various times, and had gotten more than a quart of whisky from the time he made the written order up to the time he got the drink on which this case is predicated. He further stated, on cross-examination, that appellant might have said something about storage charges, but he did not remember it, and did not know anything about appellant's expectation that he (the witness) should pay storage or express charges, and had no recollection of appellant ever having explained these matters to him. This is the substance of the case.

Appellant asked, among other things, the following special charge: "You are further instructed that if you find from the evidence in this case that the witness Blagg instructed defendant to keep whisky ahead for him, and that the money delivered to defendant by the witness Blagg, if any was accepted by the defendant, was used to pay express charges on whisky theretofore ordered by defendant for said Blagg, if any, or if you find that the defendant so understood that the money delivered to him, if any, was to be so applied, you will find the defendant not guilty, although you may find from the evidence that the witness Blagg understood that he was paying for the whisky that he then carried from the club, if any, or if you have a reasonable doubt thereof, you will return a verdict for the defendant." The court charged the jury that, if they should find beyond a reasonable doubt that appellant sold Blagg the

whisky, etc., he would be guilty, and further gave this charge: "You are instructed that it is no violation of the local option law for a person to order intoxicating liquor for another, and pay for it for such other person with money furnished by such person, and if you believe from the evidence in this case that the money, if any, given by the witness Blagg to the defendant, was used by the defendant to pay for whisky, or the express charges thereon, ordered by defendant for said witness Blagg, or if you have a reasonable doubt thereof, you will return a verdict of not guilty." We are of opinion that the special charge requested by appellant is sufficiently covered by the charge given by the court, and there was no error in refusing the special instruction. The question presented in the special instruction mentioned above was asked in other forms; but we deem it unnecessary to notice them, as we are of opinion that the court sufficiently charged this phase of the case.

The motion to quash will not be discussed, other than to state that the form of the pleading in this case has been held sufficient in previous decisions of this court, unless it be in the following particular: The information alleges that the election was held in 1903, in September; that the sale occurred on the 18th day of May, 1906, and that, inasmuch as the information fails specifically to allege that the local option law had not been repealed by a subsequent election held at the expiration of two years, the pleader must positively allege the law was then in force; otherwise, the pleading would be insufficient. While it would be more specific and better pleading, perhaps, to have so alleged, yet we are of opinion that the information sufficiently alleges a violation of the then existing law by virtue of the previous election. As we understand the rule to be, wherever a local option law is put into operation, the presumption is that it will continue in operation until a vote in the territory repeals it. If the existence of the law terminated under the previous election at the end of two years, without an election setting it aside, by provision of the statute, the presumption would be the other way, and in fact the law would then be the other way; but under the terms of the local option statute as it is, after the law has been put into operation, it must continue for two years, and may continue and does continue thereafter until it has been set aside by a vote within the given territory; in other words, when the local option law is once put into operation, it so remains in force for two years necessarily, and thereafter until set aside by an election held for that purpose. We are therefore of opinion that the information is not sufficiently defective in this respect to require its quashal or being set aside.

A bill of exceptions recites that, while one of appellant's counsel was addressing the jury, defendant was permitted to be, and was,

absent from the courtroom, and out of the presence, sight, and hearing of the court, jury, and counsel, having gone to the closet adjoining the courtroom for five or six minutes. When the fact of his absence was made known, the court stopped counsel in his argument, stating that the defendant was absent from the courtroom. Thereupon counsel stated to the court that he did not waive the presence of the defendant; that he did not know of defendant's absence, and then and there objected to the proceedings had in defendant's absence; that in a few moments thereafter defendant was brought back into the courtroom by the sheriff, and the counsel proceeded with his argument. This is urged as reversible error. The statute (article 633, Code of Criminal Procedure) provides that, "in all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail." It has been held under this statute to be improper practice to take any steps or have any proceeding in a case when the defendant is not present, and it is material error, and will render the proceedings void, where such proceeding is had during the trial of a case in the absence of the accused. It has been also held that a court could not alter or change the charge to the jury in the absence of, or without the knowledge and consent of, the accused, and that it is beyond the court's authority to discharge a jury in a felony case in the absence of the defendant; but this rule seems to be different in misdemeanor cases. See *Selman v. State*, 33 Tex. Cr. R. 631, 28 S. W. 541. The cited case, however, was one in which imprisonment was not involved. It has been held, however, that it is not necessary that the accused should be present when the special venire is drawn in a capital case, nor when the court acts upon his motion for a change of venue, nor when the clerk enters a judgment of conviction. We are not aware of any case in which the court has gone to the extent of holding that, where a defendant voluntarily retires from the courtroom to a closet for a few moments during argument of his counsel, this would vitiate a conviction. Without discussing the question of waiver, or how far that might affect appellant's contention here, we are of opinion that the facts stated in the bill are not violative of the article of procedure above quoted. It is contended in the brief that, if appellant could be absent one minute, he might be absent during the entire trial. This argument is more specious than real. The case of *Bell v. State*, 32 Tex. Cr. R. 436, 24 S. W. 419, cited by appellant, was where a defendant was taken by the sheriff from the courtroom and evidence of a witness introduced during his absence. That case was correctly decided, and in our opinion is not in point under the facts here suggested by the bill of excep-

tions. This is quite a different proposition from those important steps that would or might affect appellant's right to be present during the formation of the jury, or introduction of evidence, or reading the charge, or overruling the motion for a new trial; for these matters would directly affect him, or might do so, and therefore they come within the letter and spirit of the provision of our Code of Criminal Procedure. The only possible harm that could have accrued under the facts stated in the bill was of appellant's own making, in that he voluntarily withdrew himself from the courtroom to the water-closet for a few moments and deprived himself of the right or the privilege of listening to the argument of his own counsel during the five or six minutes covering his absence. We do not believe this is sufficient to require this court to reverse the judgment.

There is another bill of exceptions which recites that, after the jury had been considering their verdict about 30 minutes, they were brought into the courtroom by the sheriff, and through their foreman, Gordon, asked the court that the prosecuting witness, Blagg, be recalled in order that they might ask him what his testimony was upon a certain point, whereupon the court had Blagg recalled, and thereupon the court stated that he would permit Gordon to ask the witness what his testimony was upon the point. Gordon asked the following question: "What did you testify you understood you were paying the defendant the 15 cents for when you paid it to him?" Appellant objected to this question, and the form of it, which the court sustained, and informed Gordon that he would not permit the question to be answered in that form, as it called for the conclusion and undisclosed understanding of the witness. Gordon then asked this question: "What did you testify that you paid the defendant the 15 cents for?" Exception was reserved to this on the same ground as to the previous question, and, being overruled, the witness answered: "I got the drink of whisky and paid the defendant the 15 cents for it." The objections urged by appellant were, first, that said witness Blagg did not testify on the stand before as to what he was paying the defendant the 15 cents for when he gave it to him; second, that it was wholly irrelevant and immaterial what the witness' undisclosed intention and understanding was at the time he gave the defendant the 15 cents, being immaterial for any purpose; and, third, that his undisclosed understanding did not bind defendant, but that only what was said and done at the time by the parties would be admissible in evidence against defendant, and that it was but the opinion and conclusion of the witness. It will be noted that appellant objected that Blagg did not testify on the stand before as to what he was paying the defendant 15 cents for when he gave it to him. This is but a ground of objection, and not a statement of the fact that the tes-

timony here repeated was different from what it was in his original testimony. In order to have shown that the testimony was different from what it was when originally stated, the bill should show the difference, if any existed. In the absence of a showing that it was different, the presumption obtains that the court acted correctly in admitting it, and that the witness' testimony restated was the same as first delivered. The statute provides (article 735, Code of Criminal Procedure) that "if the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand, and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used in his examination as nearly as he can." This bill sufficiently shows, in our judgment, that the witness was recalled at the instance of the jury in regard to the above, about which he was asked to restate his testimony. The court approves this bill by stating that the prosecuting witness, Blagg, testified on direct examination that "I got the drink of whisky from the defendants and paid him 15 cents for it"; but on cross-examination he testified, "I cannot remember what was said at the time, either by myself or by the defendant, and, further, I cannot say of my own knowledge what the 15 cents was to be applied for, whether to pay express charges on whisky theretofore ordered by me or not; that the defendant might have used it, for all I know, to pay the express charges on the quart of whisky ordered for me before; that I never paid the express charges, if there was any owing by me, more than I paid when I made the order, and neither had defendant said anything to me about owing express charges." So, under this qualification, as far as questioned, the witness seemed to have restated his testimony on the recall as he did on his original examination. The remainder of his testimony was not called for by the jury, nor asked to be restated by the defendant in connection with what the witness did state. So we are led to believe that the only disagreement between the jury was as to the language used by the witness in regard to what he stated at the time that he got the whisky. We are of opinion, therefore, as this bill is presented, there is shown no reversible error.

It is also contended in another bill of exceptions that there was error in permitting the witness Blagg to testify that he had gone into appellant's place of business a number of times before the transaction upon which this prosecution is predicated and got whisky from the defendant; that on one occasion he had gotten a pint of whisky, and a number of times had gotten drinks of whisky. The contention was that it was irrelevant and immaterial; that it did not show or tend to show system, was not a part of the *res gestae*, did not identify the transaction in question

in any manner, and did not show, nor tend to show, criminal intention on the part of defendant. We are of opinion that under the peculiar facts of this case this testimony was admissible. It seems from the testimony that the witness Blagg had by written order requested and instructed appellant to send for a quart of whisky in December, for the payment of which he handed him \$1.50; that he had further stated that he desired that appellant should keep a sufficient amount of whisky on hand for him, so that he could get it when he desired to use it, but that this \$1.50 was the only money that he gave appellant with which to order whisky. There is no testimony, as we understand the record from either side, that there was ever any other money given appellant with which to order whisky, except the \$1.50 mentioned, and the testimony further shows that Blagg on several occasions got whisky, either by the pint or by the drink, from appellant. It became, then, a part of the case to show whether or not the whisky obtained by the witness Blagg, forming the predicate of this prosecution, was part and parcel of the whisky appellant had ordered for Blagg, and it was material, in our judgment, and relevant, to show these different transactions in order to arrive at the correct conclusion as to whether appellant was letting Blagg have his own whisky, or whether he was selling it to him, and under the complicated and confused manner in which these matters were carried on, and sales and purchases made, this testimony would tend to solve the question as to whether this particular transaction was a subterfuge or not; and, viewing it from this standpoint, we are of opinion that the testimony was admissible. This particular drink of whisky was secured some time perhaps in the latter part of April or in May. An order had been given the previous December, and if this was the only order made, and appellant had gotten all of the whisky so ordered prior to the time he purchased this whisky, this evidence became material to show or elucidate that fact or question. We are of opinion, therefore, the court did not err.

The other questions presented have been decided adversely to appellant in the companion case of Killman v. State (No. 3,681, decided at the present term of the court) 112 S. W. 90.

Finding no reversible error in the record, the judgment is affirmed.

WEBB v. CALDWELL et al.

(Court of Civil Appeals of Texas. July 2, 1908.)

1. EVIDENCE — PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTIES.

It will be presumed in the absence of a contrary showing, that a sheriff complied with Sayles' Ann. Civ. St. 1897, art. 2359, requiring the sheriff in specified cases to return the bond executed by an execution defendant to obtain

possession of the property levied on, indorsed "Forfeited."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

2. EXECUTION — LIEN — GIVING OF DELIVERY BOND—FORFEITURE—EFFECT.

Where the bond given by an execution defendant as authorized by Sayles' Ann. Civ. St. 1897, art. 2357, to obtain possession of the chattels levied on under an execution, has been forfeited for the nondelivery of the chattels according to the terms of the bond, and nonpayment of the value thereof, the levy by virtue of the execution does not operate as a lien on the chattels, for whatever lien was created by the levy was released by the acceptance of the delivery bond, unless the chattels were thereafter voluntarily delivered by the execution defendant into the custody of the officer to be sold under the original levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 417, 418.]

3. INJUNCTION—LIABILITY ON BONDS.

Where, in a suit to enjoin the sale of property levied on under an execution, it did not appear as a fact, though alleged, that any writ of injunction was ever issued or served on the sheriff, or that he was in any manner restrained from performing any duty under the execution, it was error to direct a verdict against plaintiff and the sureties on the injunction bond.

Appeal from District Court, Newton County; W. B. Powell, Judge.

Action by T. A. Webb against Georgia Caldwell and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. R. West, for appellant. C. C. Wightman and J. A. Gillette, for appellees.

HODGES, J. This suit was instituted by the appellant, T. A. Webb, against Georgia Caldwell and the sheriff of Newton county and W. H. Webb, for the purpose of enjoining the sale of certain property which had been levied upon by the sheriff and upon which the appellant claimed to have a mortgage; and, in the alternative, to recover a personal judgment against W. H. Webb and for the foreclosure of his mortgage on some mules belonging to the latter. The petition alleges, in substance, that on the — day of —, 1905, W. H. Webb executed and delivered to the appellant his promissory note for the sum of \$900, which note was secured by a chattel mortgage executed and delivered at the same time on 10 mules belonging to and in possession of W. H. Webb. At the time the mortgage was executed, the Webbs were in Matagorda county, but their homes were in Ft. Bend county, and the property mortgaged was situated in Matagorda county. The mortgage was filed within a very short time thereafter for registration in Ft. Bend county. Subsequently the property was shipped to Newton county, passing through Ft. Bend county on the train, for the purpose of being used in doing some grading in Newton county. It was permitted to remain in that county for more than four months by the appellant, T. A. Webb. Previous to that time Mrs. Georgia Caldwell had procured a judgment

against W. H. Webb in the district court of Harris county, which had been partially satisfied; but a balance of over \$300 remained unpaid. After the property had been in Newton county more than four months, she procured the issuance of an alias execution, which was levied upon five of the mules previously mortgaged to T. A. Webb, the levy being made on the 9th day of April, 1905. On the same day W. H. Webb, whose property the mules were, executed a delivery bond for the sum of \$350 conditioned as required by law, the same being the value of the mules levied upon. The court gave a lengthy peremptory charge to the jury, instructing a verdict in favor of the appellee Georgia Caldwell against the appellant and the sureties on his injunction bond for the sum of \$41.94 as damages for wrongfully suing out the writ of injunction restraining the sale of the mules levied upon, and a finding to the effect that the mortgage upon the mules, held by the appellant, T. A. Webb, was subordinate to the lien acquired by virtue of the levy of the writ of execution issued upon the unsatisfied judgment in favor of the appellee against W. H. Webb; also a finding in favor of the appellant against W. H. Webb for the sum of \$600, and that he had a mortgage lien on the mules upon which the execution had been levied, but that such mortgage was inferior to the lien acquired by the appellee as above stated; that the market value of the mules levied upon was \$350. A verdict was returned in accordance with this instruction, and a judgment entered in conformity therewith.

The testimony showed that the mules which had been levied on were on the same or the next day after the levy again delivered into the possession of the owner upon the execution by him of a delivery bond to the sheriff. Article 2357, Sayles' Ann. Civ. St. 1897, provides that, when any personal property is taken under an execution, it may be returned to the defendant by the officer upon the delivery by the defendant to him of a bond payable to the plaintiff, with two or more good and sufficient sureties to be approved by the officer, to the effect that the property shall be delivered to the officer at the time and place named in the bond to be sold according to law, or for the payment to the officer of the fair value thereof, which shall be stated in the bond. Article 2358 provides that when property has been replevied in any manner provided in the preceding article, the defendant may sell or dispose of the same, paying the officer the stipulated value thereof. Article 2359 provides that in case of the nondelivery of the property according to the terms of the bond, and nonpayment of the value thereof, the officer shall forthwith return the bond indorsed, "Forfeited," to the clerk of the court from which the execution issued; that, if the judgment remains unsatisfied in whole or in part, the clerk shall then issue execution against the principal debtor and the sureties on the bond

for the amount due not exceeding the stipulated value of the property. The facts show that this delivery bond was executed and delivered to the sheriff, and the mules sold by the defendant in execution to parties undisclosed in the record before this suit was filed. The record does not show whether or not the sheriff indorsed any forfeiture upon the bond as required by statute; but, the law having imposed that duty upon him, we must assume that he did it. The bond having been forfeited, the levy upon the mules by virtue of that writ of injunction lost its force and no longer operated as a lien upon the property, and thus left it unincumbered by any priority over the mortgage of the appellant, even if we concede that it was entitled to such priority while in force. Hence we conclude that there was no occasion for any determination by the court of the relative priority of the two liens; the facts, as well as the pleadings, having disclosed that the appellee had no lien by virtue of any levy upon the mules at that time. We think the court erred in giving such instructions to the jury upon that issue; for whatever lien may have been created by the levy of the execution upon the mules was released by the acceptance of the delivery bond, unless the mules were thereafter voluntarily delivered by the defendant into the custody of the sheriff to be sold under the original levy. We do not think the court should have instructed a verdict against the appellant and the sureties for the sum of \$41.94 on his injunction bond. The statement of facts does not show that any writ of injunction was ever issued or served upon the sheriff, or that he was in any manner restrained from performing any duty under the writ of execution. It is true that it is alleged that a writ was issued, and that he was restrained from selling the property, but proof of that fact is wholly wanting in the record.

For the errors discussed, the judgment is reversed, and the cause remanded.

WITLIFF et al. v. SPREEN.

(Court of Civil Appeals of Texas. June 30, 1908.)

1. CONTINUANCE—AMENDMENT OF PLEADING—ABSENT TESTIMONY.

In an action to recover property alleged to have been obtained through fraud, it was improper to refuse defendants a continuance where plaintiff amended his petition three days before the trial by averring that specified persons other than those named in the original petition conspired with defendants to defraud plaintiff, where it was impossible for defendants to procure the testimony of such persons, and affidavits were filed showing that defendants expected to prove by such persons that no conspiracy existed, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 99-112.]

2. JURY—CHALLENGES—RIGHTS OF SEVERAL DEFENDANTS.

Each defendant was not entitled to six peremptory challenges, where there was no fact issue between them, though one raised an issue

between himself and plaintiff not raised by the other defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 609.]

3. CONSPIRACY—FRAUD—EVIDENCE.

Under allegations that defendants conspired with others to defraud and deceive the general public and plaintiff in particular, plaintiff could show fraudulent transactions of the character described in the petition with which plaintiff was not connected.

4. EVIDENCE—FRAUD—SIMILAR ACTS.

In an action to recover property alleged to have been fraudulently obtained, plaintiff could not show that one of the defendants had been arrested for swindling and was under bond to answer the charge.

5. CANCELLATION OF INSTRUMENT—RELEASE OF RIGHTS ACQUIRED.

While, in so far as plaintiff sued for damages for defendants' deceit in inducing him to purchase a patent right for his son, it was unnecessary for plaintiff to tender the son's release of his claim to the patent right, to entitle plaintiff to rescind the contract of sale and to recover the consideration, the son should be a party to the suit, or plaintiff should tender such release.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 33-38.]

6. TROVER AND CONVERSION — DAMAGES — MEASURE.

In a suit to recover for the conversion of property obtained by fraud, the measure of damages is the value of the property when it was wrongfully obtained or its value at any time thereafter prior to the trial of the cause; plaintiff not being entitled to recover the value of the property as fixed by the fraudulent contract under which it was obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 260-272.]

Appeal from District Court, Austin County; L. W. Moore, Judge.

Action by H. F. Spreen against T. H. Witliff and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Pennington & Schulz, Bell, Johnson, Matthaël & Thompson, and Buchanan & Rasberry, for appellants. C. G. Krueger, L. J. Storey, and J. T. Duncan, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellants T. H. Witliff and Julius Witliff to recover certain real and personal property described in the petition or its value, and to cancel a deed made by appellee to T. H. Witliff conveying 152 acres of land, and a deed made by T. H. Witliff to Julius Witliff conveying the same land. The original petition alleged, in substance, that the defendants and one Max Holtz had conspired together to cheat and defraud plaintiff by inducing him through false representations to purchase for his son, John Spreen, the right to sell in the state of Iowa a patent device known as the "Peacock bed brace," the "patent right" for the manufacture and sale of which was owned, or claimed to be owned, by defendant T. H. Witliff. Various fraudulent and deceitful acts and representations of the alleged conspirators are set out in detail in the petition, and it is alleged that, by reason thereof, plaintiff was

induced to purchase said "patent right," and in payment therefor to turn over to the defendant T. H. Witliff the property described in the petition for recovery of which, or its value, the suit is brought. The petition also asks for damages in the sum of \$12,500 for the fraud and deceit alleged to have been practiced by defendants upon the plaintiff. The suit was filed on April 30, 1907. On June 14, 1907, three days before the trial of the case in the court below, plaintiff filed an amended petition, in which he alleges a conspiracy on the part of defendants and said Max Holtz and "one Robinson, one Montgomery, one Krause, one Rushing, one Williams, and one Baxter Shemwell" to cheat and defraud "the public generally and this plaintiff in particular." The general method pursued by the alleged conspirators and the several acts of fraud charged to have been perpetrated against plaintiff are set out in detail. The defendants answered by general and special exceptions and general denial, and by several special pleas, the nature of which it is unnecessary to state. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff for the cancellation of the deeds and the recovery of all of the property sued for, or its value.

The first and second assignments of error complain of the ruling of the trial court in refusing to grant defendants' application for a continuance. This application was based upon the inability of the defendants to procure the testimony of the parties named in the petition as co-conspirators with defendants in the alleged fraud upon plaintiff. The amended petition, alleging fraudulent acts on the part of the defendants and the co-conspirators named therein, was filed only three days before the trial, and it appears without contradiction that it was impossible for defendants to have obtained the testimony of the parties with whom they were charged to be in conspiracy to defraud the public in general and the plaintiff in particular. It is alleged in the application for a continuance, which is verified by the affidavit of the defendants, that they expect to prove by said absent witnesses that all of the transactions by and between defendants and themselves were bona fide, and that no conspiracy existed between them to defraud or deceive the public or the plaintiff in this case. Under the allegations of conspiracy, much evidence was introduced as to transactions in which the defendants and their alleged co-conspirators participated, and the materiality of the testimony for which the continuance was sought cannot be questioned. We think the trial court erred in overruling the motion for a continuance, and the assignments complaining of this ruling must be sustained.

We will not discuss the remaining assignment of error in detail, but will content ourselves with a general statement of the legal principles which should control the rulings of the court upon another trial. There was no

error in refusing the request of the defendants to allow each of them six peremptory challenges in selecting the jury to try the issues of fact involved in the case. There was no fact issued between the two defendants, and the fact that one of the defendants raised fact issues as between himself and the plaintiff which were not raised by the other defendant did not entitle each of them to six peremptory challenges in selecting the jury. Under the allegations of the petition charging that the defendants had conspired with the other parties named in the petition to systematically practice fraud and deceit upon the general public and the plaintiff in particular, testimony of fraudulent transactions of the character described in the petition with which the plaintiff was not connected was admissible in evidence in support of the allegations of fraud in the transactions with the plaintiff. The plaintiff should not have been permitted to ask the defendant Julius Witliff if he had not been arrested for swindling, and the objection of said defendant to such question and to his answer thereto, to the effect that he had been arrested and was under bond to answer such charge, should have been sustained. In so far as the cause of action alleged by plaintiff was one sounding in damages for deceit, it was not necessary for him to tender a release by his son, John Spreen, of all claim or right he might have to the "patent right" for the state of Iowa sold him by the defendants, but, to entitle plaintiff to a rescission of the contract of sale and recovery of the consideration therefor the vendee in such sale should be a party to the suit, or the plaintiff who furnished the consideration and now seeks to recover same should tender to the defendant a release by the vendee of all rights acquired by him under his contract of purchase. In a suit to recover for the conversion of property obtained by fraud, the measure of damages is the value of the property at the time it was wrongfully obtained, or its value at any time thereafter prior to the trial of the cause, and in such case it is error to charge the jury that the plaintiff is entitled to recover the value of the property as fixed by the fraudulent contract under which it was obtained. What we have said disposes of all the assignments which present any error which is likely to occur upon another trial.

For the reasons indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

ATCHISON, T. & S. F. RY. CO. et al. v.
HARRINGTON.

(Court of Civil Appeals of Texas. June 20, 1908.)

1. TRIAL—INSTRUCTIONS—MATTERS NOT IN ISSUE.

Where, in an action against a railroad for damages to plaintiff's cattle in transit through

delay, etc., there was no evidence showing that there was a practicable route over which defendant, in the exercise of proper diligence, might have forwarded the cattle, an instruction submitting to the jury the issue of negligence in failing to deliver the cattle over another route was reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

2. APPEAL AND ERROR—HARMLESS ERROR.

Error in admission of evidence was harmless, where the witness for the objecting party testified to substantially the same state of facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from District Court, Deaf Smith County; J. N. Browning, Judge.

Action by E. D. Harrington against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for another trial.

Terry, Cavin & Mills and Madden & True-love, for appellants. Cowan, Burney & Goree and Stephens & Miller, for appellee.

SPEER, J. Appellee, Harrington, sued appellants, the Atchison, Topeka & Santa Fé Railway Company and the Pecos & Northern Texas Railway Company, to recover the sum of \$23,178.50 as damages to three train loads of cattle shipped from Bovina, Tex., to Everts, S. D. There was a trial before a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of \$6,000, from which both defendants have appealed.

Appellee pleaded that the two roads sued were in reality one and the same line of railroad, or that each was the agent of the other, and that, if mistaken in these allegations, then that they were partners; that he had ordered cars for his cattle to be delivered on May 22, 1903, and that defendants had negligently failed to deliver them until May 28th and 29th; that one train carrying his cattle, and leaving Bovina on May 28th, was stopped at Wellington, Kan., and the other two, leaving Bovina May 29th were stopped at Woodward, Okl., on May 30th, and unloaded and detained at these places until June 13th; that at Wellington and Woodward the pens and places where said cattle were kept were too small, were muddy and wet, etc.; that appellee urged that his cattle be taken out of the pens, and placed on grass, and that where his cattle were placed in pasture, the grass was insufficient in quantity and poor in quality. Appellee also alleged that he protested against his cattle being unloaded at Wellington and Woodward, and urged that they be carried forward, and, if necessary, that they be detoured, offering to bear the extra expense, and if they could not be forwarded, that they be returned to Texas, to be shipped by another route to their destination; that if appellants' line of road was washed out, so that it could not proceed with his cattle, it was because the same was improperly constructed and equipped, and that the companies were negligent in receiving the

stock for shipment after they knew, or reasonably should have known, of the rains and floods which were alleged to have prevented the immediate transportation of the cattle to their destination. The companies answered by general and special demurrers, general denial, and by special pleas, denying the partnership under oath, alleging the separate corporate existence and lines of defendants, and written shipping contracts limiting the liability of each carrier to its own line, etc. The answer further alleged that the Pecos & Northern Texas Railway Company promptly performed its part of the contract, but the Atchison, Topeka & Santa Fé Railway Company was prevented by an unprecedented flood of waters, destroying its roadbed and tracks, so that such delay was unavoidable, and that it did all it could to prevent injury to plaintiff's cattle, and that they were not, in fact, injured by such delay, but that they were injured, if at all, through the negligence of the plaintiff and his shippers in charge.

We shall not undertake to discuss in detail the various assignments of error, since the cause must be reversed for reasons herein-after pointed out, and many of the assigned errors are of such character as probably will not arise on another trial. At most, we will suffice it to say that assignments not specifically discussed are overruled, as not presenting reversible error. We think the evidence was sufficient to raise the issue of a partnership or joint undertaking in the transportation of appellee's cattle, and that therefore the numerous assignments based upon a contrary contention, whether they relate to the admission of evidence, or to charges of the court, should all be overruled.

We do not approve the court's ruling in admitting the testimony of appellee's witness Camp, to the effect that while his train of cattle was being held at Wellington, he went to Wichita, and there had a conversation with the local agent of the Missouri Pacific Railway Company, who offered to forward the cattle from that place, and upon his return to Wellington he tried to get Purdy, the local agent of appellant the Atchison, Topeka & Santa Fé Railway Company to forward the cattle to Wichita for delivery to the Missouri Pacific Railway Company. We are inclined to think the court erred in admitting this evidence over appellants' objection that the agent Purdy had no authority to change the routing of this shipment, which did not originate at his station. See *G., C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968. But if this ruling is erroneous, we would hardly reverse the case for this alone, since appellants' witness Purdy himself testified, without objection, to substantially the same state of facts.

But the error for which we do reverse the case consisted in submitting to the jury the issue of negligence in failing to detour the cattle over another route. The court thus

submitted that issue: "If it became and was made necessary, as the result of an unprecedented flood, to stop the cattle at Woodward and Wellington, as is alleged by defendants, and if after the cattle were so stopped, plaintiff or his agents or shippers in charge demanded that said cattle be, by the defendants or either of them, detoured and sent forward over another route, or over the lines of other carriers, then it became and was the duty of such defendant to detour and forward said cattle, if it was reasonable and practicable so to detour and forward the same, over the route and lines, if any, designated by plaintiff. If you find and believe from the evidence that plaintiff or his shippers in charge did request such detouring, and did designate a route of road over which plaintiff so desired said stock forwarded, and if you believe such route was open, and it was practicable for defendants, or either of them, to have forwarded such stock over such route, and the defendant so requested to forward said cattle failed or refused to exercise such reasonable diligence to forward such cattle as an ordinarily prudent person would have exercised under the same circumstances to forward the same, and if, by the exercise of such care, said cattle could have been forwarded, and the damage thereto, if any, lessened, then the defendant so failing or refusing so to detour said cattle is liable to plaintiff for such damages (if any) as might have been avoided by such detouring, and not caused by the carelessness and negligence of plaintiff or his shippers in charge." The assignment complaining of this charge is sustained upon appellants' fourth proposition that it submits an issue to the jury not raised by the evidence. Appellee, though he has taken great pains to answer most of appellants' numerous assignments, has not suggested any reply to this proposition, and though we have carefully examined the voluminous statement of facts, we ourselves have failed to find any evidence indicating that there was a practicable route open over which appellants, in the exercise of proper diligence, might have forwarded appellee's cattle. Indeed the evidence seems pretty clearly to negative the idea that any such route was open at all. This was a most material issue, and the submission of it, therefore, must work a reversal of the judgment.

We find no error in the giving or refusing of charges, but for the error above discussed the judgment is reversed, and the cause remanded for another trial.

THOMPSON et al. v. CLINE.

(Court of Civil Appeals of Texas. June 27, 1908.)

DEEDS—RESERVATIONS—CONSTRUCTION.

A guardian of an heir sold 150 acres out of a 300-acre survey, reserving the standing timber thereon, without specifying any time within which the same should be removed. Subsequently the heir conveyed to a grantee the

survey, except "150 acres heretofore conveyed." The deed recited that it was intended to convey all lands that the heir might own, or be entitled to as heir, except an undivided interest in another survey. *Held*, that the heir's interest in the 150 acres, because of the reservation of the timber, together with the interest in the land necessary for the support and growth of the timber until removed, did not pass to the grantee.

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by H. A. Cline against J. L. Thompson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Mooney & Mann, for appellants.

REESE, J. This is a suit in the district court for the standing timber on 150 acres of land, part of the Claiborne Hughes survey of 300 acres. Appellee, Cline, as plaintiff, recovered judgment, in a trial before a jury, and the defendants appeal.

No briefs for appellee are on file. There is only one assignment of error, which complains of the action of the court in refusing to admit in evidence before the jury the deed from H. A. Cline to M. Dies. By this deed H. A. Cline conveyed to M. Dies various tracts of land, among them the following: "Also 300 acres of land patented to Thos. Magness, assignee of Claiborne Hughes, * * * save and except 150 acres heretofore conveyed to Robert Toler." The deed further conveys, in addition to the specific tracts mentioned, "all lands that I may own or be entitled to as an heir of W. B. Cline, save and except an undivided interest in and to the S. P. Wilson survey." The 150 acres of the Hughes survey, the standing timber upon which is the basis of this suit, had been inherited by appellee from W. B. Cline, and had been sold by his guardian to R. J. Toler. With regard to this transaction we copy from the statement in appellants' brief, as follows: "The title to the 150 acres of land in the Claiborne Hughes survey, being a part of the entire survey, was in H. A. Cline, on the day and date of the sale by his guardian to R. J. Toler. The standing and growing timber, however, all being reserved by the guardian, remained in said Cline, no time being specified in said agreement, or subsequent acknowledgment of said reservation, within which said timber was to be removed. On the 4th day of September, 1895, H. A. Cline conveyed to M. Dies, for the sum of \$5,000, part cash and part in notes, various tracts of land, among which he conveys the following: 'Also 300 acres of land, patented to Thos. Magness, assignee of Claiborne Hughes, situated in Tyler county, about two miles west from Hollister, save and except 150 acres, heretofore conveyed to Robert Toler.' For a more particular description of said land reference is had to a deed from Thos. Magness, by sheriff, to W. B. Cline, recorded in book 1, pages 743, 744, of the deed records of Tyler county, which is made a part here-

of. And concluded said deed with the following clause: 'And additional to the above-described tracts of land this deed is intended to carry all lands that I may own or be entitled to as an heir at law of W. B. Cline, save and except an undivided interest in and to the S. P. Wilson survey.' This deed was offered in evidence by the defendants, and plaintiff objected to same. Whereupon the court sustained said objection, and declined to permit said deed to be read in evidence before the jury, whereupon the defendants then and there, in open court, excepted to said ruling."

It is the contention of appellants that the reservation of the timber on the 150 acres, with no limitation of the time within which it was to be removed, left in H. A. Cline an interest in the land, which passed to M. Dies by the terms of the deed referred to, and thence to appellants. If it be true that by reserving the timber Cline reserved also such interest in the land as was necessary for the support and continued growth of the standing timber until such time as it was taken off, such interest in the 150 acres did not pass to M. Dies by the deed, which expressly excluded the 150 acres from the conveyance. Neither can the standing timber on the 150 acres be held to have passed to Dies by the terms of conveyance of "all lands that I may own as an heir of W. B. Cline," granting that appellee had a qualified interest in the 150 acres for the support and growth of the timber until it was taken off. The deed referred to could not affect the question of the right of appellee to the standing timber on the 150 acres, and was properly excluded.

No other errors are assigned. The judgment is affirmed.

Affirmed.

PITTMAN et ux. v. BYARS et ux.

(Court of Civil Appeals of Texas. May 20, 1908. Rehearing Denied June 25, 1908.)

1. CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTION—JUDICIAL DECISIONS.

Where language similar to that in a present Constitution is found in former Constitutions, it is presumed that it was intended to use such language in the sense previously given to it by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 13.]

2. SAME.

Where provision of a Constitution after having been construed by a court of final jurisdiction is re-enacted without material change, such construction becomes a part thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 13.]

3. SAME.

Where, in the revision or amendment of a Constitution, the new instrument re-enacts in the same words provisions which it supersedes, it is presumed that no change of law in that particular was intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 13.]

4 JURY — RIGHT TO JURY TRIAL — HABEAS CORPUS—CONSTITUTIONAL PROVISIONS.

Const. Bill of Rights, art. 1, § 15, providing that the right of trial by jury shall remain inviolate, and Const. art. 5, § 10, providing that in the trial of all causes in the district courts, either party shall, on application, have the right of trial by jury, do not entitle a party to a jury trial in a habeas corpus proceeding as a constitutional right.

5 HABEAS CORPUS—JUDGMENT—CONCLUSIVE-NESS.

A judgment on a first application for habeas corpus to obtain the custody of a child is not a bar to a second application between the same parties for the custody of the same child, where there has been a change of material facts since the first application and on which the second application is based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25. Habeas Corpus, § 121.]

Appeal from District Court, Bastrop County: Ed R. Sinks, Judge.

Petition for habeas corpus by A. B. Pittman and wife to obtain the custody of their minor child Forrest Pittman against W. B. Byars and wife. From a judgment dismissing the petition, petitioners appeal. Reversed and remanded.

See 99 S. W. 1032, and 101 S. W. 789.

C. W. Webb and Orgain & Maynard, for appellants. M. H. Hill and Fowler & Fowler, for appellees.

RICE, J. Appellants brought this suit by petition for writ of habeas corpus for possession and custody of their minor child, Forrest Pittman, in the district court of Bastrop county; appellant A. B. Pittman alone having heretofore filed another petition before the judge of said court for a writ of habeas corpus to recover the possession of his said son. The former writ, being granted by the judge of said court, was heard by him in vacation on the 31st of March, 1906, and the relief prayed for was denied, and an order entered allowing said child to remain in the custody of appellees, his grandparents. From this action of the court, said appellant Pittman prosecuted an appeal to this court, and on a hearing of said appeal said judgment was affirmed. See *Pittman v. Byars*, 99 S. W. 1032. Appellant then prosecuted a writ of error to the Supreme Court, which was denied on the ground that the order entered by the district judge refusing the relief prayed for was not the judgment of said district court, and that no appeal could be prosecuted therefrom. *Pittman v. Byars* (Tex. Sup.) 101 S. W. 789.

The present petition, therefore, which is the second application for a writ of habeas corpus for the custody and possession of said child, was filed on the 4th day of June, 1907, and alleged, among other things: That the action of the district judge on said first application, having been heard by him in vacation, was without authority of law and void, and that none of the facts which justify said action by the court, if any, on said first application existed at the time said second appli-

cation was made, setting out the facts upon which this the second application was based, and that plaintiffs were therefore now entitled to the custody and possession of said child. The writ was granted on said application and made returnable to the next term of the district court of Bastrop county for trial, where on the first day of the term appellants asked the court for a jury in said cause, depositing the required jury fee, which demand was refused on the ground that no jury was allowed on the trial of a habeas corpus case, to which ruling appellants excepted, reserving their bill. On the 19th of June said cause came on for trial, whereupon defendants presented exceptions and demurrers to plaintiffs' petition, which were sustained by the court and the suit was dismissed. Exceptions were duly reserved by appellants to said action of the court, and this appeal is prosecuted therefrom.

Appellants urge by their first assignment of error that the court erred in refusing to grant them a trial by jury, as asked by them. They insist that this is a civil case, and that they are entitled under the Constitution and laws of this state to a trial thereof by jury, and that it was error to deny the same. "The right of trial by jury is of ancient origin, and the provisions of the various state Constitutions, while differently worded, contain provisions guaranteeing this right. They have uniformly been construed, however, as not conferring a right to trial by jury in all classes of cases, but merely guaranteeing the continuance of the right, unchanged, as it existed either by common law or by statute in the particular state at the time of the adoption of the Constitution. In cases where the right existed prior to the constitution, it cannot be denied, and this applies to cases of a similar character arising under statutes enacted subsequently to the adoption of the Constitution. There were, however, prior to the adoption of the Constitution certain classes of cases which were triable without jury, and all cases previously triable without jury may still be so tried. And it is, furthermore, competent for the Legislature to provide a trial without a jury in cases similar to those in which such trial was in use prior to the Constitution. The constitutional provisions guaranteeing the right of trial by jury have been construed not to extend the right to any class of persons not so entitled prior to the adoption thereof." 24 Ency. Law & Proc. pp. 100 et seq. "In addition to the general constitutional provisions stated, there are in some jurisdictions constitutional provisions providing for jury trials 'in all civil cases,' or in all cases at law without regard to the amount in controversy. These provisions did not extend the right to all cases which are not criminal, but merely guarantee the continuance of the right as it previously existed in what were regarded as civil actions and triable by jury at the time of the adoption of

the Constitution." Id. p. 107. Under these and similar constitutional provisions in most, if not all, of the states, there are many kinds and character of actions in which it has been held that the parties thereto were not entitled to trial by jury, such as proceeding by injunction, mandamus, habeas corpus, contempt, motions to disbar, and many others; and we understand it to have been, and is yet, the uniform practice in this state for the courts in habeas corpus trials to determine all matters triable therein without the intervention of a jury.

In civil proceedings, other than actions, the right of trial by jury, unless extended by statute, applies only to actions according to the course of the common law, and not to special proceedings of a summary character. 24 Ency. Law & Proc. p. 128; *Koppikus v. State Capitol Com'rs*, 16 Cal. 248; *Crow v. State*, 24 Tex. 13; *Janes v. Reynolds*, 2 Tex. 250; *United States in Re Chow Goo Pool* (C. C.) 25 Fed. 77. See, also, 31 Cent. Dig. tit. "Jury," § 104. A jury trial cannot be demanded as a constitutional right in proceedings for the appointment of guardians for infants or for inebriates and other incompetents, unless there is some statutory authority therefor. 24 Cyc. pp. 131, 132. In Pennsylvania a judgment giving the custody and earnings of a child to its mother, when the father, from drunkenness or other causes, neglects to provide for it, without trial by jury, is not in violation of the constitutional provision that the right of trial by jury, as heretofore, shall remain inviolate. *Van Billiard v. Van Billiard*, 6 Pa. Co. Ct. R. 333. The constitutional requirement that the right of trial by jury shall remain inviolate does not confer the right where it did not exist before the adoption of the Constitution. *Tims v. State*, 23 Ala. 165; *Blanchard v. Raines' Ex'x*, 20 Fla. 467; *Ross v. Irving*, 14 Ill. (4 Peck) 171; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; 31 Cent. Dig. p. 183, § 16, and cases there cited. In *Hurd on Habeas Corpus*, p. 296, it is said, relative to the mode of trial: "The trial has always been to the court or judge, and hence it is commonly called a hearing. Although the trial of questions of fact under the writ by the court has been deprecated as infringing the right of trial by jury, yet the inconvenience and delay consequent upon a jury trial, the desire to obtain, and of the judges to confer, instant relief in cases of wrongful imprisonment, to which perhaps should be added the common opinion that an order in habeas corpus had not the force and effect of a final judgment, have overcome all objections, and the practice has long been settled in England and America of submitting all questions arising under the writ to the determination of the court. The provisions of the Constitution of the United States and of the several states for the inviolability of the right of trial by jury did not extend to proceedings in habeas corpus cases, as it has sometimes

been claimed. It is not provided in the Constitution of any state that all issues of fact shall be tried by a jury. The provision in all is that the right of jury trial shall not be violated; that is, the right as it was understood and enjoyed at the time of the adoption of the Constitution, and, as such trial was not then demandable as a matter of right in habeas corpus proceedings any more than it was in a proceeding in equity, it is not now. It is, however, within the power of the court, perhaps, in the exercise of its discretion, to direct an issue of fact under the writ to be tried by a jury. This has sometimes been done, but the practice has not met with general favor. The mode of trial has been the subject of observation in several cases. In the *Matter of Hakewell* there is an intimation that a jury in some cases might be employed. That was a habeas corpus by the mother to obtain possession of her children from their father, and was subsequently conducted under the provisions of St. 56 Geo. III, c. 100, § 3, which enacts 'that in cases provided for by this act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in the return by affidavit, etc., and do therein as to justice shall appertain.' *Jervis, C. J.*, alluding to the doubt expressed in the case of *Watson*, whether there may be any mode other than by action of impeaching the truth of such return, or of introducing new matter, says: 'I must confess I should have thought it was competent to the party, at whose suit the writ is obtained, to impeach the return upon affidavit or to traverse it, and go to a jury or to argue upon the return that it does not justify the detention.' In New Jersey an application to the court to impanel a jury to ascertain the facts in a case of habeas corpus was refused as early as 1782. In the case of *State v. Farleey*, 1 N. J. Law, 41, the application was renewed in the year 1790, when it was again refused. The court said: 'We have no power in such a case to order a jury. The writ is a writ of right intended for the protection of individuals against arbitrary and illegal detention, and we are to decide upon it in our own constitutional capacity sitting here to superintend the liberty of the citizen, and to protect it from violation.' To the same effect is the case of *State v. Beaver et al.*'

In *Church on Habeas Corpus* (2d Ed.) § 172, it is said: "A very important question is whether the issues in habeas corpus proceedings are to be tried by a judge or jury. The trial of questions of fact by the court seems to be the controlling principle in both England and the United States." In section 173 of the same volume it is said: "The hearing or trial is had before the court or judge before whom the writ is made returnable. By statute it is frequently provided that the writ may be issued by one court or judge and

returnable before another judge or court. By the habeas corpus act of the United States and many of the several states, the truth of the facts set forth in the return to a writ of habeas corpus may be inquired into, but this trial of the facts will generally be conducted by the judges or the courts. This has become a well-established rule of procedure, and is found to be conducive to the best interests of the prisoner. It affords him the invaluable right to have the question of his personal liberty determined at once. Whatever objections may have ever been raised to thus leaving all the issues of act involved in habeas corpus proceedings to be determined by the court, they have been silenced by the long and well-settled practice in both England and the United States; and, if 'the course of a court makes a law' and 'the practice is a decisive evidence of the law,' then is the law well founded that the issues of fact in such proceeding should be left to the determination of the court. The practice of the courts, however, is not to be understood as affecting their powers. A trial by jury cannot be demanded by a prisoner or respondent in a habeas corpus proceeding as a matter of right. Might as well a trial in a preliminary examination, or in chancery, by jury be demanded. There is no provision in the Constitution of the United States, neither is there anything in the state Constitutions, which gives the right to have these issues of fact tried by a jury in such proceedings. The Constitutions, federal and state, provide substantially that the right of jury trial shall not be violated, but it is no violation of this inestimable privilege to deny it in chancery proceedings, preliminary examinations, and proceedings by habeas corpus. But the court or judge sitting on the return to a writ of habeas corpus may in its discretion order any controverted fact in the matter to be tried by a jury. This power may be exercised, but it is not the practice to do so, and it has met with little favor. In Indiana, in 1864, it was contended that the petitioner for a writ of habeas corpus had the right to a trial by jury. Section 20 of the Bill of Rights in the Constitution of the state then read as follows: 'In all civil cases the right of trial by jury shall remain inviolate.' The court said in rendering its opinion: 'It has been the practice in this state, as well before as since the adoption of our Constitution, to try the issues of fact in habeas corpus cases by the court or judge without a jury. Such a proceeding is not a civil case within the meaning of section 20 of the Bill of Rights. * * *' Again, in 1872, the Supreme Court of the same state in *Garner v. Gordon*, 41 Ind. 42, adhered to this ruling, and likewise held that a proceeding by habeas corpus was not a civil action within the meaning of the section of the Code giving the right to a change of venue. *Id.* § 174. This is a case of first impression in this state on this subject, so far as we are able to ascertain. The language of our Constitution granting the right of trial by jury to every party in all

cases in the district court is sufficiently broad and expansive to grant the right here contended for, unless it be held that prior to and at the time of the adoption of our Constitution this character of action was not such a one as entitled the parties thereto to the right of trial by jury. Appellants contend, however, that, under our present Constitution and laws, in this class of cases, either party has the right to a trial by jury upon a proper demand being made therefor; and argues in support of this contention, first, that a habeas corpus case is a civil case, citing *Legate v. Legate*, 87 Tex. 250, 28 S. W. 281, *Ex parte Calvin*, 40 Tex. Cr. App. 84, 48 S. W. 518, and *Rice v. Rice*, 24 Tex. Civ. App. 506, 59 S. W. 941, in each of which it is held that a habeas corpus proceeding is a civil case, and that the district courts have jurisdiction thereof. In *Ex parte Calvin*, supra, which was a habeas corpus proceeding for the custody of a minor, the Court of Criminal Appeals held that the same was not a criminal, but a civil, case, and the appeal was dismissed by reason thereof for want of jurisdiction.

Article 1, § 15, Bill of Rights, reads: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and efficiency." Art. 5, § 10, Const., reads: "That in the trial of all cases in the district courts the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be impaneled in any civil case unless demanded by a party to the case and a jury fee be paid by the party demanding a jury, for such sum and such exceptions as may be prescribed by the Legislature." Article 3188 of our Revised Statutes of 1895 provides that no trial by jury shall be had in any civil suit, unless an application therefor be made in open court, and a jury fee be deposited. Article 3189 provides that "any party to a civil suit in the district or county court, desiring to have the same tried by a jury, shall make application therefor in open court on the first day of the term of the court at which the suit is to be tried, unless the same be an appearance case, in which event the application shall be made on default day." These seem to be the only regulations made by our statute touching the right of trial by jury in civil cases, and it is insisted by appellants that these requirements were met and complied with by them, as appears from their bill of exceptions. In the case of *Davis v. Davis*, 84 Tex. 24, which was a contest over the probate of a will, and where a jury was demanded and refused, the court held, under a constitutional provision somewhat similar to the present one, that the Legislature which passed a law denying the right of trial by jury in probate matters could not lawfully alter, abridge, or construe any part of the Constitution, and held such statute unconstitutional. In *Cockrill v. Cox*, 65 Tex. 673, referring with approval to the case

of *Davis v. Davis*, *supra*, the court construing the law and the Constitution, held that in a contest of a will, without expressly construing whether it was a case at law or equity, or whether the parties would be called plaintiff or defendant, must, on demand therefore, be tried by a jury. In the recent case of *Tolle v. Tolle* (Tex.) 104 S. W. 1049, on certified question from this court to the Supreme Court, Judge Gaines, delivering the opinion of the court, being an application for letters of administration upon the estate of Emil Tolle, wherein a request for a jury had been denied, held that the party demanding it was entitled to a jury, quoting section 10, art. 5, Const., remarking that: "Language cannot be more comprehensive than this. Hence, if a probate proceeding is properly styled 'a cause,' this section undoubtedly gives the right of trial by jury. Bouvier's Law Dictionary defines a cause as 'a suit or action; any question civil or criminal, contested before a court of justice.' The questions in this case are certainly questions contested before a court." In closing said opinion it is said: "We do not think the fact that in a contest of the probate of a will that property rights are necessarily involved can make any difference. It is not a question of the nature of the contest; but merely, is there a matter of fact for a jury to determine? We are unable to distinguish the case before us from that of *Cockrill v. Cox*."

When language similar to that in the present Constitution is found in former ones, it is presumed that it was intended to use such language in the present Constitution in the sense which had previously been given to it by the courts. *Taylor v. Boyd*, 63 Tex. 541. When a statute or Constitution, after having been once construed by a court of final jurisdiction, has been re-enacted without material change, such construction becomes a part of the new law or construction. *Scott v. State*, 6 Tex. Civ. App. 345, 25 S. W. 337. When in the revision or amendment to the Constitution the new instrument re-enacts in the same words provisions which it supersedes, it is presumed that no change of law in this particular was intended. *Ex parte Coombs*, 38 Tex. Cr. R. 651, 44 S. W. 854. The Constitution preceding our present one had a similar provision to the one under consideration. Both before and since the adoption of the present Constitution, it has been the uniform practice in this state for habeas corpus cases to be tried before the court, and not by a jury, and this has been as well the settled practice in England as in the United States. Notwithstanding the broad language used in the Constitution, we are loath to believe that it was the intention of the framers thereof to change the rule in this respect, and to require that habeas corpus cases should be tried by a jury, and not by the court. Therefore we are inclined to follow the beaten path of the common law as well as the uniform practice by our own courts,

and hold that the court below did not err in refusing to grant appellants a trial by jury.

By their second assignment of error appellants urge that the court erred in sustaining appellees' general demurrer to their petition; and by their third assignment complain that the court erred in sustaining respondents' special exception and dismissing the suit, which special exception, in effect, contended that the judgment of the 31st of March, 1906, was *res adjudicata*, and that appellants were estopped thereby. In the cases of *Legate v. Legate*, 87 Tex. 250, 28 S. W. 281, and *Rice v. Rice*, 24 Tex. Civ. App. 506, 59 S. W. 941, and *Ex parte Calvin*, 40 Tex. Cr. App. 84, 48 S. W. 518, it was held that a suit by habeas corpus for the custody of a child was a civil action, and the sole question to be determined in such cases is: Who is entitled to the custody of the child? It appears from the allegation of the petition for the writ of habeas corpus in this case that the facts herein are entirely different from the facts relied upon in the first application for the writ. Therefore, under the rules of law, the judgment on the first application would be no bar to the second suit between the same parties for the custody of the same child when there has been a change of material facts since the first trial and upon which the second application is based. It would probably have been better if the pleader in this case had set up the facts upon which the first application was based, together with the facts relied upon to support the second. In order that the court might determine from the face of the pleadings that a different state of facts in fact existed, and that the petition on its face was therefore sufficient. But we think the petition, in the absence of a special exception in this respect, is good, and that the law is well settled that upon trials of this character, where it is shown that the facts alleged are different from those set forth in the first trial, that then the judgment had in the first trial cannot be pleaded in bar of the second. In *Hurd on Habeas Corpus* (2d Ed.) p. 462, it is said: "The decision and judgment in the first habeas corpus proceeding was at most only conclusive in respect to the facts and circumstances then existing, and not as to such as might arise afterwards." In 15 Am. & Eng. Ency. Law (2d Ed.) p. 213, it is said: "When the purpose of a writ of habeas corpus is to obtain custody of children, the decision of the court in regard to the right of custody becomes *res adjudicata*, and bars a second application on the same facts, but, if a different state of facts and circumstances can be shown, a second application may be entertained." 9 Am. & Eng. Ency. Law (1st Ed.) p. 238, says: "The determination of a court on habeas corpus respecting the custody of children is conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the

state of the case or relative claims of the parent to the custody of the child in any material respect. But the estoppel, even in such cases, continues only when the circumstances are the same." The petition in this case alleges that none of the facts relied upon to support the first judgment now exist, but that a totally different state of facts exists. Under the authorities, we believe the court erred in sustaining appellees' general demurrer and special exception to the petition, and, for the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

CONTINENTAL OIL & COTTON CO. v. SCOTT.

(Court of Civil Appeals of Texas. May 23, 1908. Rehearing Denied June 20, 1908.)

1. MASTER AND SERVANT — DEFECTIVE MACHINERY—ASSUMPTION OF RISK.

A servant, thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a servant while operating a defective machine, evidence held to show that plaintiff was an experienced operator, with full knowledge of the condition of the machine and of the danger therefrom, and assumed the risks incident thereto by his continued use thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 981-986.]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action for personal injuries by W. O. Scott against the Continental Oil & Cotton Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Alexander & Thompson and Hardwicke & Hardwicke, for appellant. Wagstaff & Davidson, for appellee.

Statement.

PRESLER, J. Appellee, as plaintiff below, sued appellant, as defendant in the district court of Taylor county, Tex., for damages on account of personal injuries, sustained by plaintiff on the 29th day of September, 1905, while employed by the defendant company as a ginner at Merkel, in Taylor county, Tex. It was alleged that plaintiff was injured on account of a defective, broken, and dangerous gin stand, the defect being that the breast of the gin stand when raised would not remain up, on account of the fact that the machinery was worn, broken, and defective; that plaintiff did not know of this defect, but that defendant did know of the defect, and failed to warn the plaintiff of the danger, but represented to the plaintiff that it was all right,

and that defendant required the plaintiff to raise the breast of the gin stand, and to use a small stick to clean the saws connected with the gin stand—by reason of all which alleged negligence plaintiff was injured, resulting in the laceration and loss of his arm by being cut by the gin saws, due to the breast of the gin stand falling and carrying his hand into the saws thereof. For answer, besides the general denial, defendant specially pleaded that, if there was any danger connected with or incident to the operation of the gin stand, the same was known to plaintiff, in that he was an experienced hand, and that the alleged defects were patent, open, and known to plaintiff, and such defects, if any, were not known to this defendant. For further answer defendant pleaded that the injuries of plaintiff were due to his own want of care and negligent acts, which were the direct and proximate cause of the injuries, and precluded any recovery. Defendant further pleaded that the injury to plaintiff was the result of his violation of instructions which were given to him, namely, not to expose his hands in cleaning the gin saws, but to use the stick and block. A trial of the case resulted in a judgment for plaintiff for the sum of \$3,000. Defendant's motion and supplemental motion for a new trial were overruled, to which order exception was taken, and in open court notice of appeal was given by defendant to the court of Civil Appeals for the Second Supreme Judicial District. On motion orders were entered by the court, granting 20 and 30 days' time, respectively, in which to prepare the record for appeal. The appeal has been duly perfected, and the case is presented herein on the following assignments of error:

Opinion.

Appellant's first assignment of error is as follows: "The honorable trial court erred in refusing defendant's special charge No. 1, in which the court was requested to direct a verdict for the defendant, because, upon the uncontradicted and undisputed testimony, plaintiff should have been held precluded from any recovery as a matter of law, in that the undisputed evidence shows that he was an experienced ginner, and the alleged defect in the machinery of which he complained was open, patent, and well known to him, together with the effect of such condition in the machinery, and the evidence was undisputed that with such knowledge he assumed the risk incident to the business as conducted. His own testimony was too inconsistent and contradictory to sustain an issue in his behalf, in that, on former trial, it is shown he testified he was holding the gin breast at the time of the accident, whereas, on last trial he testified to the contrary, besides other testimony discrediting him as a witness, and evidencing his contributory negligence." We are inclined to the opinion that the trial court erred in refusing, at the request of appellant, to give

a peremptory charge to the jury to return a verdict for the defendant, and that appellant's assignment of error, as hereinbefore set out, should be sustained; the plaintiff having testified that the defect complained of in the gin stand was open, patent, and well known to him, as well as the effect of such defect in permitting the gin stand to fall as it had on at least one occasion prior to the accident. Further, the testimony of plaintiff was that, at the time of the accident, he was a ginner of 15 years' experience; that he had more opportunity to discover the defect than any other person working in or around the gin, and all of the other testimony introduced tended to corroborate the testimony of the plaintiff to the point that, with knowledge, he assumed the risk incident to the service as it was conducted, and especially the risk from the condition of the gin stand, expressly complained of.

Plaintiff testified that: "The gin stand was defective, because the small bar that keeps the lever from working back and forth lengthwise of the stand had been broken off. I don't know as I can exactly say when I noticed this bar being broken off, but I had spoken to the superintendent, either the day of the accident, or the day before, and told him that bar was off. I don't clearly remember what he said in reply. I came to learn of this defect in the gin stand by seeing that bar off." Plaintiff further testified: "My way of unchoking a gin was to take the top breast off, leaving the saws visible, and I was doing that, and the superintendent, Mr. Johnson, came around, and told me not to do that; that it was taking up too much time, but to take a stick and raise the breast, and job it in the gin that way [illustrating], and he says the saws will then take it off. I told him that I had never done that before in my life. And so the first opportunity I did that—the first stroke I made—a gin breast fell down and took my arm off. The guide bar was off the gin stand—that is a bar that goes up and holds the side of the breast, a lever that comes up there, about two inches wide, a little slide coming up by the side of it, and that lever works in this slot, and that keeps the bar from wobbling off that little catch or fit there for it to rest on—and this guide bar was completely off, and did not keep the lever from wobbling, and this breast fell off. I never examined the notch in the lever; but this guide was gone. It had dropped off, and was just hanging down. It was placed there to keep the lever from wobbling out of its place. I called the superintendent's attention to that guide being off that day or the day before, I am not positive which; that is the first that I knew of it being off. The superintendent, Mr. Johnson, told me that it was all right, to go right on ahead; that the gin was all right. There is a bottom breast that holds that top breast off, and that lets all of the cotton out of the roll, and then you see nothing but the saws. The lint sticks to

the ribs if there is any there, and if you lift up the breast, you can see anything down to the bottom of the breast; and he instructed me to raise that lever and take a stick and job in there. It takes more time to take off the top breast. You have to then form another roll; still, I do not know whether it does take so much more time. When you shove this lint up in the ribs, it is liable to cause such friction as to set the gin afire, and I called his attention to that. I got my right hand caught in the gin. I do not know what kind of a stick it was; it was just a little stick lying there in the hall between the two gin batteries. I do not know how it come there. I never saw it before in my life, and I just picked it up, and shoved it up in the gin. I do not know how far my hand was up in the gin; the breast came down the first stroke I made. I cannot tell how hard or how easy it went; the first stroke I made it was gone, and that is all I can tell about it. I have run gins, off and on, for 15 years—just a laborer around gins. I am not an educated man—I suppose not. I educated myself; I went to school about six months. I am not a machinist; don't know much about machinery. I never followed the occupation of fixing or repairing gins. * * * I had been running gins up to the time I took this employment, off and on, for about 15 years, not at it every year. In one sense I told Mr. Guitar that I had had experience as a ginner; in one sense of the word I am a ginner. I had been running the gins in question, from the 11th of September to the 29th, daily. The lever that I spoke of at the side of the gin could be easily seen; it comes right up by the side of the gin; you don't have to remove anything to see it—right open before your eyes. I could see that it was loose, and called the superintendent's attention to it. I had seen it drop down once before that I know of, and don't recollect whether more than that or not. The purpose of this lever was to hold the breast up; suppose that is what it was put there for in the operation of the machinery. My idea in calling the superintendent's attention to that was that it was off. I thought that it would let the breast fall down. It would let it down. * * * The superintendent of the gin, Mr. Johnson, had authority to direct me where to work and to control me in the exercise of my duties. I did not have control of the hands all the way through; it takes two to make a contract. I did not tell him that I would, or would not. He told me to see that the hands worked. He saw me there working with the saws where they were choked, with the top breast off, and he told me to use a stick for that, and not to take the breast off; that it was taking up too much time to take the top breast off, but to take a stick and job up there in the gin. I cannot tell what kind of a stick, but the stick was about 12 inches long. I may have testified on the former trial that it was 15 inches long—somewhere

in the neighborhood of that; it was just a stick lying there in the hall that I picked up and made the job with. I don't know whether he had used the stick there before he showed it to me or not. He did not take the stick and show me how to use it. Of course, a man would have sense enough not to put his hands on the saws. When I raised the top breast up there was no danger of letting the breast down on me. I had never used the stick that way before, and don't know whether he intended it as a safeguard or not. He did not tell me this before I was hurt. The reason I was hurt, the gin breast fell down and caught my hand, and the reason it fell down was because that bar or guide was off, and the lever not properly adjusted. It fell down, but I do not know whether it fell just like it did before when I turned it or not. I never knew it to fall up; certainly it would naturally fall downward. That was what that guide was there for—to sustain that bar or lift. I did testify, I suppose, in my deposition, that I knew of no one there that knew more about that gin stand than myself, for I run the gins myself, and I do not know what the other fellows knew. I don't know of anybody else that knew of this to fall down there before. * * * When I got both these breasts up, I depended on that lever to hold them up—that is what it was put there for—and by pulling it, it raises both the top and lower breasts, and the purpose of that little slot or guide is to keep the lever from giving, so as to keep the breast up. The lever is about an inch wide, and something like a quarter of an inch thick, and that come up to the sides of the end of the gin stand, working in a little groove and hooks over that little tit, and this bar or guide that I speak of was for the purpose of keeping it from slipping, and if it was in position, it would not slip; that is what it was put there for. It had slipped on me before this; one time it fell before. I knew it was there for that purpose. I knew it was not then there, and I called their attention to it. * * * Of course, had I been using a stick 15 inches long, and reaching in there for the purpose of cleaning the gin, my hand would have been 15 inches further from the saws than it would had I been using my fingers for the purpose of cleaning it. I cannot tell where my hands were at the time, or where I had that stick; I just reached back and got the stick and made a punch. I cannot tell whether I had hold of the end or in the middle of the stick, and the breast fell down on me when I first made the job. Evidently I had hold of the stick by the end closest to the saws. I just picked it up, and used it to push that lint up by instructions given me. I don't know that I paid very much attention to how I took hold of that stick when I picked it up. I found it down there in the gangway. * * * The stick was about 15 inches long, or a little longer possibly. * * *

J. W. Maxwell, witness for defendant, testified: "My business inside was merely a superior, to notice if all seemed to be working well. Mr. Scott had charge of the gin stands, and thought himself competent to attend to same, and so expressed himself." This witness also testified to various acts of taking unnecessary risks, and of carelessness in so doing on the part of appellee, Scott. On one occasion he states: "I saw Mr. Scott, down on his floor where his duty lay, off and on, every day I was there, until the accident happened. Several times, during my oversight of the ginners, I had seen him put his bare hands between the ribs and the breast of the gins whilst they were at work, picking out lint from the ribs below the saws, and expostulated with him about it. * * * He replied: 'I've been working at the business for some years, and am not going to get hurt.'" Fred Guitar, witness for defendant stated; "When I employed Mr. Scott, he told me he had had several years' experience; was a thorough ginner." J. L. Johnson, witness for defendant, testified: "I looked after some 20 gins for the company at that time. I think I brought Mr. Scott to the Merkel gin, and put him to work. I took him over from Abilene in a buggy, I believe. At that time Mr. Scott had the management of the gin hands inside the gin in my absence; I made him manager when I was absent. * * * Scott was a good ginner, and seemed to understand his business all right; but I saw him doing several things there that I would not like myself to do, or any one about it. Sometimes a gin will get choked up, get lint in the ribs, and instead of his using a stick and punching that lint out, he would use his fingers; and I says to him: 'Will, you ought not to do that.' I says: 'If you do that, maybe some time when I go off and come back will find you lying out dead and all cut to pieces.' I says: 'Those breasts are liable to drop at any time,' and told him not to monkey around those saws while they were running. We had just a little stick to punch the lint out, about 18 inches long—something like that—and then we used another block, that we put under the breast in case it should drop. That lever sets on a little notch, and sometimes the shaking of the machinery will cause that breast to drop; and, when that block is used, in case the breast should happen to drop, it could not catch his fingers. There was a block there. I think maybe the block I had there was a foot long—the block we used under the breast. I don't know what Mr. Scott was using at the time he was hurt."

It is true appellee testifies that he did not know of the danger, but we are inclined to hold that his knowledge and experience, obtained by many years' work in running and operating gin stands, as appears from the testimony, clearly disproves the truth of this declaration on his part. Upon a thorough

examination of the case of *Gulf, Colorado & Santa Fé Ry. Co. v. Wells* (Tex.) 16 S. W. 1025, chiefly relied on by appellee, and referred to by him as being much similar to the case at bar, we are of the opinion that said case is clearly to be distinguished from the one under consideration, in that the appellee in this case was an experienced gin man, thoroughly conversant with the proper method of operating gin stands, and of the appliances and methods necessary to be used in preventing injuries to persons operating them. In fact, he appears to have been, from the evidence, about the best-informed and most experienced gin man connected with the establishment. We note, however, that it appears in the evidence, and is referred to in appellee's brief that he was an uneducated man. We are unable, however, to see what bearing his lack of literary or classical education could possibly have on any issue in this case. He appears to have been a thoroughly experienced gin man, which is material, while in the *Wells* Case there is evidence in the record, as remarked by the court rendering the opinion, tending to show that appellee in that case was a raw and inexperienced hand, and that such fact was known to the section foreman; that he had only been in railroad service three or four months prior to the accident. While we regard the opinion of Judge Fisher as having been overruled, instead of adopted, as stated by appellee, by the Supreme Court of Texas, we are disposed to concede that this action of the Supreme Court was upon another and a different question, and one not involved in this case, and that the excerpt quoted from Judge Fisher's opinion, if extended sufficiently to take in all that he said in that connection, is a correct annunciation of law, and applicable to this case. The quotation is as follows: "The servant is not called upon to desert his master's service for any defect he may discover in the machine he uses. The defect may not be of such a character as would indicate danger to an ordinarily prudent man, and, if this be so, why is not the servant justified in relying upon the superior knowledge of his master, and resting in safety upon his assurance that the use of the machine, with its defect, is not dangerous?" In immediate connection with this quotation, and following the same, the court further observed: "There may be defects in machinery of such character that danger would be inferred under the well-known laws governing matters that are of common knowledge to all, or the defect may be of such character that would, in the nature of things, impress even an unskilled man that a use of the machine is thereby rendered dangerous. In such cases the declarations of the master that the defect does not render a use of the machine hazardous would avail the servant nothing, because, from his knowledge of the fact of danger, the representation appears false. He is not

mislead, by the master's declaration, to assume risks of which he was ignorant. If the employé be ignorant of the danger, or if it is not apparent, or the defect is of such a character that danger would not be implied, we think the servant can safely rely upon the assurance of the master that a use of the machine with its defects is not dangerous."

We think that the law, as above stated, is clearly applicable to the facts of this case, and sustains our conclusion that the appellee in this instance clearly assumed the risk incident to the continued use of a defective and dangerous machine. The duty of the master to exercise ordinary care to furnish suitable and safe machinery is well established; but, conceding this, and conceding a failure of the master in this respect, it is nevertheless true that if the servant knows, or by the exercise of ordinary care for his own safety would have known, of the defect and failure of which he complains, and of the danger of the continued use of the defective machine, and continues to use the same without promise on the part of the master of guarantee against injury or of mending the machine, he assumes the risk arising from the failure of the master, and cannot recover for injuries incurred thereunder. *Smith v. Armour Co.* (Tex. Civ. App.) 84 S. W. 675, with the authorities reviewed therein by Chief Justice Conner.

We therefore conclude, as indicated above, that this cause, should be reversed, and here rendered for appellant, which is accordingly done.

IVY v. IVY et al.

(Court of Civil Appeals of Texas. June 19, 1908.)

1. APPEAL AND ERROR—STATEMENT OF FACTS—SUFFICIENCY.

A statement of facts not in narrative form as required by Acts Called Sess. 30th Leg. (Laws 1907, p. 510) c. 24, § 5, but consisting of stenographer's notes in full, containing questions and answers, prepared since the taking effect of the act, will be stricken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2490, 2785.]

2. SAME — RULINGS ON EVIDENCE AND INSTRUCTIONS—REVIEW—STATEMENT OF FACTS.

In the absence of a statement of facts, errors in the giving and refusal of instructions, in the admission of evidence, and in the ruling on motions for new trial because of the insufficiency of the evidence cannot be considered.

3. SAME.

Though it is the general rule that, in the absence of a statement of facts, the court will not consider errors in the admission or rejection of evidence, yet in an action by heirs of a grantor to set aside a deed on the ground that the deed was executed merely to give the grantee a temporary standing as a taxpayer and landowner, and under an agreement that it should not have any effect, but should be destroyed by the grantee after an approaching election, the exclusion of testimony which was in any possible state of the evidence material, and which established, if true, the defense pleaded, will be reviewed, though there is no statement of facts.

4. DEPOSITIONS — ERRONEOUS EXCLUSION OF DEPOSITION.

Where, in a suit by heirs of a grantor to set aside a deed, plaintiffs took the deposition of defendant, but declined to read it at the trial, defendant was entitled to offer it in evidence, though it related to transactions between himself and the deceased grantor, and the court could not justify the exclusion of the deposition as an exercise of discretion in refusing to allow a deposition to be read when the witness is in court and in a position to testify orally, and though other evidence might have been introduced as to which the excluded deposition was merely corroborative.

5. SAME.

The error in excluding the deposition of a party taken at the instance of the adverse party, when offered by the party after the adverse party had declined to read it, is not cured by the fact that the party testified, where the testimony in the deposition related to transactions between the party and a deceased person under whom the adverse party claimed, and where it did not appear that the party testified to such transaction when testifying as a witness at the trial.

6. TRIAL—IMPROPER ARGUMENT OF COUNSEL.

It is improper for counsel for a party to refer in his argument in a disparaging way to the fact that the adverse party had made use of his unquestioned right to object to certain testimony.

7. JUDGMENT—PERSONS BOUND.

A third person made a party in partition by intervention, who filed, after judgment and pending motion for a new trial, a disclaimer in favor of his son, was bound by the judgment.

8. EVIDENCE — PAROL EVIDENCE — VARYING TERMS OF DEED.

That a deed purporting on its face to convey real estate absolutely was executed under an agreement that it should not have any effect as a deed, but should only be used to serve a temporary purpose and then be destroyed, may be shown by parol evidence without violating the rule with regard to contradicting the terms of a written instrument by parol.

Appeal from District Court, Harris County;
W. P. Hamblen, Judge.

Action by R. Ivy and others against J. F. Y. Ivy. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

W. G. Love, R. J. Channell, and Hogg, Gill & Jones, for appellant. Fisher, Sears & Campbell and Brockman, Kahn & Newman, for appellees.

REESE, J. In this suit R. Ivy and others, children and heirs at law of Mrs. Elizabeth Ivy, deceased, sue J. F. Y. Ivy for partition of certain property in the city of Houston. It is alleged in the petition that plaintiffs are the owners of six-sevenths of the property, and that defendant owns the other one-seventh. Defendant answered by general denial, and denying specially the title of plaintiffs, and asserting ownership of the entire property under a deed to himself alleged to have been executed by Elizabeth Ivy in 1893, and praying, by way of cross-action, that his title be established and quieted against the claims of plaintiffs.

It is alleged by defendant that the property was purchased by himself and his mother, the said Elizabeth Ivy, in 1876, defendant furnishing \$425 of the purchase money, and his mother the balance; that defendant and

his mother, together with plaintiffs, who were younger children of the said Elizabeth Ivy, continued to reside on the property as their home, the defendant being the recognized head of the family; that he furnished his mother and the other children their maintenance and support, and also out of his own means made improvements and repairs on the property, and that he continued to support the said Elizabeth, who lived with him, after his marriage, upon said property; that on September 11, 1893, in consideration of his equitable title to said property, and as some measure of compensation for his services and expenses in supporting and caring for her and the other children, and in consideration of \$5 in cash paid by him, and for the purpose of vesting the title in him, the said Elizabeth Ivy executed and delivered to him a deed of conveyance of the property. Defendant further pleaded the statute of limitations of 10 years by reason of his adverse possession. By supplemental petition plaintiffs denied generally the allegations of defendant's answer and cross-bill, and by way of special answer denied defendant's title to any interest in the property, except the one-seventh interest inherited from Elizabeth Ivy, and the one-seventh interest acquired by conveyance from Amelia McGovern, one of the plaintiffs, since the institution of the suit. As to the deed from Elizabeth Ivy to defendant, it is averred that the same was without consideration, and was never given or intended to be given for the purpose of conveying title to defendant, but it is alleged that defendant, being a candidate for office or desirous of becoming a candidate for office, solicited the said Elizabeth Ivy to make him a deed to the property for the sole and single purpose of enabling him to appear ostensibly as a property owner and taxpayer, he owning no property in the city of Houston, and that the deed was executed with the understanding and agreement on the part of defendant and the said Elizabeth Ivy that the same should have no actual force and effect as a conveyance of the property, and was to be canceled and destroyed as soon as the election was over and should not be recorded; that defendant never claimed to have said deed, or set up any title thereunder until after this suit was filed, but frequently declared that the same had been destroyed shortly after its execution. It was averred that after this suit was filed this deed, which had been hid away and which had not been recorded, was resurrected by defendant for the purpose of fraudulently showing title to the property. They prayed that the deed be canceled and held for naught. By supplemental answer defendant specially excepted that the deed could not be impeached by parol evidence, denied the allegations of the supplemental petition, and pleaded the statute of limitations of two and four years to the prayer for cancellation of the deed. By further supplemental petition plaintiffs deny, in

detail and specially, all of the allegations of defendant's cross-bill as to any payment by him for the property or any improvements thereon; say that he was a minor when the property was bought, and had no money, and that the entire purchase money of the property was \$450, all of which was paid by Elizabeth Ivy out of her own money. The charge of fraudulent concealment by defendant of his claim and the allegations as to the true character of the transaction are elaborately reiterated. Upon trial with a jury there was a verdict for all of the plaintiffs, except Mrs. McGovern, for five-sevenths of the property and for defendant for two-sevenths. Upon this verdict there was a judgment awarding each of the plaintiffs, except Mrs. McGovern, one-seventh of the land, and defendant two-sevenths, with an order appointing commissioners to make partition. A motion for new trial being overruled, defendant appeals.

On a former day of the term motion was submitted by appellees to strike out the statement of facts, on the ground that the same had not been prepared in accordance with the provisions of section 5, c. 24, Acts Called Sess 30th Leg. (Laws 1907, p. 510); in that, instead of being in narrative form, it consisted of the stenographer's notes in full, containing questions and answers as under the act of 1905. The statement was prepared since the taking effect of the act of 1907. This motion was sustained, and the statement of facts stricken out.

The first and second assignments of error assail the ruling of the court in the admission of evidence. The third, fourth, seventh, eighth, and tenth assignments complain of the giving and refusal of instructions to the jury. The fifth assignment is based upon the refusal of the court to grant appellant's motion for a new trial on the ground that the undisputed evidence showed that the deed which was offered in evidence from Elizabeth Ivy to J. F. Y. Ivy was executed and delivered to him by Elizabeth Ivy, and said deed on its face conveyed to him the title to the land, and there was no evidence showing or tending to show that the purpose of or intention of Elizabeth Ivy in the execution or delivery of said deed was different from the purpose and intention expressed in the deed.

The sixth assignment is based on the error of the court in overruling the motion for a new trial on the ground that the legal effect of the deed was to convey the property which could in no event be defeated without clear and positive proof of an agreement at the time of the execution of the deed that the deed should not take effect, and that the evidence of such intention was too weak and insufficient to overcome the presumption from the execution of the deed. In the absence of a statement of facts, none of these assignments authorize a reversal of the judgment, nor can they be considered for that purpose.

The general rule, as announced in a great

many decisions by our Supreme Court, is that errors assigned in the giving and refusing of charges or in the admission or exclusion of evidence will not be considered in the absence of a statement of facts. *Cannovan v. Thompson*, 12 Tex. 248; *Hutchins v. Wade*, 20 Tex. 9; *Fulgham v. Bendy*, 23 Tex. 65; *Blackwell v. Patton*, 23 Tex. 674; *Devore v. Crowder*, 66 Tex. 206, 18 S. W. 501; *Cottrell v. Teagarden*, 25 Tex. 319; *Thompson v. Callison*, 27 Tex. 440. Plaintiffs upon interrogatories took the deposition ex parte of defendant, J. F. Y. Ivy, which deposition was regularly taken and returned into court. Upon the trial, plaintiffs declining to read the answers to these ex parte interrogatories, defendant offered to do so, whereupon plaintiffs objected on the grounds that the answers therein were with regard to transactions between defendant and Elizabeth Ivy, deceased, plaintiffs suing as her heirs, and that defendant was incompetent to testify as to such matters. The deposition was offered on the part of defendant on the ground that he had, by the filing of the interrogatories and taking the deposition by plaintiffs, been called by them to testify to the matters referred to. The objection of plaintiffs was sustained by the court, and the evidence excluded, to which defendant excepted. The bill of exceptions is signed by the trial judge with the explanation that defendant was afterwards sworn as a witness and testified in the case. It is not stated that he offered or was allowed to testify as to the nature of the transactions with Mrs. Ivy leading to the execution of the deed. The excluded deposition contained defendant's version of this transaction, and tended to support the allegations of his answer and cross-bill that the deed was a bona fide transaction, and was intended as a full conveyance of the property, and to rebut the allegations of the supplemental petition in this regard. It will be seen that the testimony excluded, in any possible state of the evidence, was of the most material character, and that it afforded, if true, a complete defense to plaintiffs' action. In such case the assignment of error presenting this question comes within certain exceptions to the general rule above stated, that errors in the exclusion of evidence will not be revised in the absence of a statement of facts. *Galbreath v. Templeton*, 20 Tex. 47; *Fox v. Sturm*, 21 Tex. 407; *Tarlton v. Dally*, 55 Tex. 96; *Lockett v. Schurenberg*, 60 Tex. 613; *Torrey v. Cameron & Co.*, 74 Tex. 187, 11 S. W. 1088. In the last case cited the Supreme Court says: "We understand the general rule to be that without a statement of facts this court will not revise the rulings of the court below in the admission or the exclusion of evidence. The reason is that in most cases without a statement of the whole evidence it is impossible for the court to determine whether or not the error, if error it be, has operated to the prejudice of the appellant. An exception to the rule has, however, been repeatedly recognized

and acted upon by this court. *Harvey v. Hill*, 7 Tex. 591; *Fox v. Sturm*, 21 Tex. 407; *King v. Gray*, 17 Tex. 62; *Galbreath v. Templeton*, 20 Tex. 46; *Dalby v. Booth*, 16 Tex. 563; *Tarleton v. Daily*, 55 Tex. 92. Where the evidence appears material and relevant to the issues under any probable state of the testimony, and where the ground of objection is one that is not tenable, we apprehend the bill of exceptions ought to be considered and the ruling revised, although no statement of facts appears in the record." Considering the assignment of error in the light of the bill of exceptions, the ruling of the court in excluding the deposition, or at least that part thereof of most material to defendant, relating to the transaction between himself and Mrs. Ivy with regard to the execution of the deed, was clearly erroneous. *Hadley v. Upshaw*, 27 Tex. 547, 86 Am. Dec. 654; *Gilkey v. Peeler*, 22 Tex. 663; *Grieb v. Stahl*, 107 S. W. 41, 20 Tex. Ct. R. 447. The fact that defendant was sworn and testified in the case does not cure the error. If he had testified to the transaction with his deceased mother as in the excluded deposition, this would have rendered the error harmless, but it would be most unreasonable to assume, in the absence of a statement of facts, that he did so, or would have been allowed to do so, in the face of the objection to the deposition and the court's ruling thereon.

The case was briefed by appellees' counsel to meet the case as presented with a statement of facts in the record, and in their reply to the ninth assignment of error no reference is made to any testimony of defendant with regard to the matters about which he had been held to be incompetent to testify by the ruling of the court in excluding the deposition. It is entirely proper that this should be considered also as rebutting any assumption, in the absence of a statement of facts, that he so testified as to relieve the erroneous ruling of its harmful effects. Nor was the ruling justified under any proper exercise of discretion in refusing to allow a deposition to be read when the witness is in court and in a position to testify orally. *Schmick v. Noel*, 64 Tex. 406. As to the matter referred to, he could only testify when called to do so by the opposite party. Article 2302, Rev. St. 1895. It does not matter that other evidence may have been introduced as to which the excluded evidence was merely corroborative. *Dupree v. Estelle*, 72 Tex. 576, 10 S. W. 666. The assignment of error must be sustained, and this requires a reversal of the judgment.

It was improper for counsel for plaintiffs to refer, in a disparaging way, to the fact that defendant had made use of his unquestioned right to object to certain testimony. It should not have been allowed by the trial court. We cannot say, however, that this affords ground for reversal in this case.

If there was any error in the way in which the judgment was entered as to Anton Frank, Sr., it will be obviated by proper pleading up-

on another trial. We think, however, that Frank being a party to the suit by intervention, and having filed in the cause, after judgment and pending motion for new trial, a disclaimer in favor of his son, Anton Frank, Jr., the judgment is binding upon him, and that is all that defendant can require. The facts are different from those in *Railway Co. v. Wilson*, 85 Tex. 516, 22 S. W. 578, cited by appellees.

For its guidance upon another trial, it is proper to say that we agree with the trial court that the statute of limitation as to suits for cancellation of a deed does not apply. The theory of plaintiffs' case is that there was in fact no executed deed, based upon the agreement of Mrs. Ivy and defendant that the instrument signed by her should not take effect as a conveyance *inter partes*.

The question presented by the third assignment of error is not free from difficulty. We do not regard it as settled by any decision of our Supreme Court. The assignment complains of the giving of the following charge: "You are charged that the deed in evidence from Elizabeth Ivy to J. F. Y. Ivy is sufficient in itself to pass all of the title of Elizabeth Ivy to the property in question and would constitute him the exclusive owner thereof, and therefore you will find for the defendant, J. F. Y. Ivy, unless you believe from a preponderance of the evidence that the deed in question was given to him by Elizabeth Ivy without intention to convey the land to him, but only for the temporary purpose of having him appear as a property owner, and with the understanding that it should have no force or effect, and be destroyed by defendant, John F. Y. Ivy, and, if you so find, then you will find for plaintiffs." The pleadings clearly presented the issue as to whether or not this instrument was executed by Mrs. Ivy upon an agreement with defendant that it should not, in fact, have any effect as a deed to convey the property, but should only be used to serve a temporary purpose and then be destroyed. If this be the fact, it would undoubtedly constitute a fraud on the part of defendant to undertake to make use of the deed now, after Mrs. Ivy's death, as a valid conveyance of the property. These facts we think may be shown by parol without violating the general rule with regard to contradicting the terms of a written instrument by parol. *So. Street Ry., etc., Co. v. Metropole Shoe Co.*, 91 Md. 61, 46 Atl. 513; *Earle v. Rice*, 111 Mass. 20; *Grierson v. Mason*, 60 N. Y. 394; *Rearich v. Swinehart*, 11 Pa. 223, 51 Am. Dec. 540-543. In the case last cited, decided by the Supreme Court of Pennsylvania, the court says: "The destruction of a written instrument by parol testimony may seem dangerous, and it is so, but the community would be in a still worse condition if it were established as an inflexible rule that, when a man's hand was once got to an instrument, no matter by what means, the doors should be shut against all inquiry." It is charged in plaintiffs' petition

that this conveyance was given for the purpose of enabling defendant, the oldest son of the grantor, who was living with her, to appear as a property owner and taxpayer in his candidacy for an office, with no thought or intention on the part of either grantor or grantee that it should ever have any real force or effect as a conveyance of the property, and that, having served this purpose, it should, without having been recorded, be destroyed, that it was kept hidden and its existence even denied by defendant until after the death of the grantor and until this suit was filed, when it was brought forward and the present claim set up under it as a valid conveyance of the property. If these allegations of the petition be true, it would be intolerable that plaintiffs should not be allowed to establish them by parol, unless some well-established rule of law forbids. We do not think the rule of law relied upon by defendant does so forbid. If the evidence introduced tended to support the allegations of the petition with regard to the execution of this instrument, we do not think the charge given was erroneous.

For the error of the court in excluding the ex parte deposition of defendant, the judgment is reversed, and the cause remanded.

Reversed and remanded.

HOUSE v. WELLS et al.

(Court of Civil Appeals of Texas. June 3, 1908.)

JUDGMENT—CONSTRUCTION—ACTION AGAINST PARTNERSHIP.

The defendant in a petition was T. W. House, described as a copartnership, composed of T. W. House and J. H. B. House. The prayer, however, was for judgment against the persons named as composing the said firm and also as individuals. The judgment dealt with T. W. House, which under the pleadings might mean and consistently with the record did mean the copartnership of that name. *Held*, that the adjudication was against the defendants in the firm name, and the failure to adjudicate against them as individuals was in effect a denial of any such relief.

On motion of sureties on supersedeas bond to set aside judgment of affirmance (108 S. W. 196) and dismiss appeal. Motion overruled.

JAMES, C. J. The defendant in the petition was T. W. House, described as a copartnership composed of T. W. House and J. H. B. House. The prayer, however, was for judgment against them as composing said firm and also as individuals. The judgment deals with T. W. House, which under the pleadings may mean and consistently with the record does mean the copartnership of that name. Is the judgment not final because it fails to adjudicate concerning the individual liability of the partners?

The adjudication against the defendants by the firm name disposed of both partners and their liability as far as the partnership assets extended. The failure to adjudicate

against them as individuals was in effect a denial of any such relief. It seems to us that the case was disposed of as to both the partners by a judgment against the firm. And for the same reasons the judgment over in favor of the firm against the sureties disposed of that branch of the case. The motion assumes that it must be taken that the judgment where it mentions "T. W. House" means the individual T. W. House, when that is not what the judgment intended when the matter is considered in the light of the whole record.

Motion overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. RICH.

(Court of Civil Appeals of Texas. June 13, 1908.)

1. CARRIERS—LIVE STOCK—ACTION FOR INJURY—PLEADING.

In an action against carriers for injury to a live stock shipment, the petition was not insufficient for failing to separately allege the items of damage to the stock through rough handling, long confinement in the cars, failure to feed and water, etc.

2. EVIDENCE—OPINIONS—CONSIDERATION.

In an action against carriers for injury to a live stock shipment, plaintiff's testimony that he received no consideration for executing the contract of shipment under his plea of failure of consideration was not wholly as to a question of law, but was rather a mixed question of law and of fact, and it was proper, since if there was no consideration for the contract it would not be binding, whether there was a formal plea of fraud, duress, or mutual mistake, or not.

3. TRIAL—EVIDENCE—OBJECTIONS.

In an action against carriers for injury to a live stock shipment, the admission of testimony: "I think that the mule that had the hip sweeney was damaged in the sum of \$75, and the other one was damaged \$25"—was not error as against an objection that it was "irrelevant, immaterial, and not the proper measure of plaintiff's damages, and not the proper way to prove same, if he had sustained any damages."

4. WITNESSES—CROSS-EXAMINATION—SCOPE—TESTING ACCURACY OF WITNESS.

Plaintiff's witness, in an action against a carrier for injury to a live stock shipment, having stated that there was no market value for the stock in their injured condition, etc., it was error to exclude a question asked him by the carrier as to what he based his judgment on, and if he did not testify that they would not sell for more than half they would have sold for if uninjured, because he did not know the extent of their injury, and "if you knew they would soon recover from such injuries they could be sold for a great deal more than half"; the carrier being entitled to thoroughly cross-examine witness to test the accuracy of his opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106-1103.]

5. CARRIERS—INJURY TO LIVE STOCK CARRIED—MEASURE OF DAMAGES.

The difference in the market value of live stock in an injured and an uninjured condition is the owner's measure of recovery against carriers for injuring them in transporting them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 963, 964.]

6. DAMAGES—INSTRUCTIONS.

In an action against carriers for injury to a live stock shipment, it was error to direct the

jury to return a verdict not exceeding a specified sum on finding for plaintiff, though there was much testimony tending to show that that was the extent of his damage, especially since the verdict returned was for that amount.

7. CARRIERS—LIVE STOCK—CONNECTING CARRIERS—ACTIONS—EVIDENCE.

That the jury, in an action against a carrier for injuries to live stock, could not determine from the evidence what amount of damages occurred on the respective lines, did not warrant a finding for the carriers.

8. SAME—DEFENSES.

That animals contributed to injuries received in transportation by their inherent vice, etc., does not prevent the owner from recovering for injuries caused by the carrier's negligence; there being no issue of his contributory negligence in placing vicious animals in the car together.

9. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction, in an action for negligent injury directing the jury to adopt as their verdict the lowest estimate of plaintiff's damages made by any of the witnesses, was erroneous as being on the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-548.]

Appeal from Childress County Court; W. B. Howard, Judge.

Action by L. B. Rich against the Missouri, Kansas & Texas Railway Company of Texas and another. From a judgment for plaintiff, the named defendant appeals. Reversed and remanded as to appellant.

Speer & Weldon, for appellant. G. E. Hamilton, for appellee.

SPEER, J. This appeal is from a judgment in favor of L. B. Rich against the Missouri, Kansas & Texas Railway Company of Texas for damages to a shipment of live stock and a quantity of emigrants' household goods.

There was no error in overruling appellant's special exception addressed to appellee's petition because of its failure to separately allege the items of damage to his live stock by reason of the rough handling, long confinement in the cars, failure to feed and water, etc. In the nature of things the pleader could not definitely state the amount of damages due to each of these causes, and the authorities cited by appellant are not applicable to such a case.

Appellee's testimony that he received no consideration for executing the contract of shipment given in support of his plea of failure of consideration was not wholly as to a question of law, but was rather a mixed question of fact and of law, and there was no error in permitting it. Of course, if there was no consideration for the contract, it would not be binding, whether there was a formal plea of fraud, duress, or mutual mistake, or not, and this answers appellant's third assignment.

Appellant's fourth assignment is not supported by the record, for the answer of appellee that he had sold his mules and harness for \$300 appears to have been in reply to a

question from appellant's codefendant, and not from the appellee, as the assignment states, and we are not prepared to hold the same erroneous on cross-examination.

Over appellant's objection, appellee testified: "I think the mule that had the hip sweeny was damaged in the sum of \$75, and the other one was damaged \$25." The objection interposed was that the answer was "irrelevant, immaterial, and not the proper measure of plaintiff's damages, and not the proper way to prove same, if he had sustained any damages." As against these objections, the court committed no error in admitting the testimony.

By proper bills of exception, it is shown that the witness T. J. Jeffries, who testified in behalf of appellee that he was acquainted with the market value of mules and horses, such as appellee's were, if uninjured, in Childress, Tex., and that there was no market value for such stock in the injured condition described by counsel, and, after he had placed the value of appellee's mules in an uninjured condition at \$350, was then asked by appellee's counsel the following question: "What would the same mules with their legs badly swollen, skinned, and bruised in places all over, drawn, shrunk, and one of them suffering with hip sweeny, and both lame, have been worth on the market at Childress in October, 1906?" To this the witness replied: "As stated before, there was no market value at Childress in October, 1906, for animals of this class in the injured condition detailed by you; but they could not be sold for half as much as if uninjured." Counsel for appellant then asked the witness the following question: "If there was no market value for such animals as these in their injured condition, and you think they could not have been sold for more than half as much as they could if uninjured, upon what do you base your judgment, and is it not a fact that the reason you say they could not be sold for more than half what they would sell for if uninjured is because you do not know the extent of their injury, and if you knew they would soon recover from such injuries they could be sold for a great deal more than half?" Upon appellee's objections, the witness was not permitted to answer this question. We have recently indicated, in the case of Ft. Worth & Rio Grande Ry. Co. v. Word, 111 S. W. 753, that the measure of damages for injuries to a shipment of live stock not intended for immediate market was to be determined by the same rules as though the animals were to be sold on the market, but that, in arriving at the amount of such damages, the subsequent history of the animals with respect to their recovering from the injuries was a proper subject of inquiry to aid the jury in determining the extent of the real injuries, and, while the damages are to be fixed as of the date when the animals reached their destination, yet the rapidity with which they are shown to have recovered from their bruises and oth-

er injuries is a potent circumstance in determining the real as against the apparent damages sustained. In keeping with this principle, appellant should have been permitted to thoroughly cross-examine the witness Jeffries to test the accuracy of his opinion, for it was only an opinion, at best, that the animals in controversy had sustained injuries to the extent of one-half their value. For this error the judgment of the county court must be reversed.

As indicated above, we hold against appellant as to its contention, that the difference in the market value of appellee's animals in an injured and uninjured condition was not the measure of his recovery. We are inclined, also, to hold that the court erred in his charge wherein he instructed the jury, if they found for the plaintiff, to return a verdict for his damages "not to exceed \$480." The prayer of the petition was for \$750 upon this item, and, if that sum had been named as the maximum limit of the recovery, the reference, perhaps, would not have been reversible. It has several times been held to be improper for the court in his charge on the measure of damage or amount of recovery to make reference to the amount claimed in the plaintiff's petition. *Glasscock v. Shell*, 57 Tex. 215; *Willis v. McNeill*, 57 Tex. 465; *G., H. & S. A. Ry. Co. v. Kelley* (Tex. Civ. App.) 28 S. W. 470; *Tex. & Pac. Ry. Co. v. Huffman*, 83 Tex. 286, 18 S. W. 741; *Tex. & N. O. Ry. Co. v. Carr* (Tex. Civ. App.) 42 S. W. 126. On the other hand, it has also been held that where the evidence supports the amount of the verdict and there is nothing to indicate that the jury was influenced by the charge, the error is not ground for reversal. See authorities cited in *Tex. & N. O. Ry. Co. v. Carr*, supra. In the present case much of the testimony was to the effect that appellee's animals would have been worth about \$1,000 in an uninjured condition, and that they were damaged to the extent of one-half their value. In this state of the evidence, the trial court's charge that the verdict should not exceed the sum of \$480 was particularly misleading, especially in view of the fact that the verdict actually returned was for that amount. We cannot say that the error was harmless, but are inclined to the view that it improperly influenced the jury in reaching a verdict.

Appellant's requested charges were all correctly refused: The first because it improperly directed a verdict for the defendants if the jury were unable to determine from the testimony what amount of damages occurred on the line of the respective defendants, and the fourth because it directed a verdict for the defendants, notwithstanding their negligence resulting in injury to appellee's stock, if the animals themselves had contributed to their injuries by their inherent vice, etc. There was no issue in the case of appellee's contributory negligence in placing vicious animals in the car together, and the mere fact that the animals may have bitten, kicked, or otherwise

injured each other would be no excuse for appellant's negligence.

In view of another trial, we call attention to appellant's special charge No. 7, which was given. This charge was clearly upon the weight of the evidence, in that it directed the jury to adopt as their verdict the lowest estimate made by any of the witnesses of appellee's damages.

The judgment of the county court as between appellant the Missouri, Kansas & Texas Railway Company of Texas and the appellee is reversed and remanded for another trial, but as to the Ft. Worth & Denver City Railway Company the judgment is not disturbed.

HUGGINS v. REYNOLDS.

(Court of Civil Appeals of Texas. May 3, 1908. Rehearing Granted June 27, 1908.)

1. ABANDONMENT—NATURE—EFFECT.

One may abandon his right to property by evidencing his intention by an act legally sufficient to divest ownership, and another, reducing the property to possession after such abandonment, is not guilty of conversion.

2. LANDLORD AND TENANT—ABANDONMENT BY TENANT OF CROP—EFFECT.

A tenant may, notwithstanding the expiration of the tenancy, proceed to gather the remnant of his crop, but he must act promptly if he intends to claim the crop; and, where he declines to do his duty, and abandons the crop, he cannot sue the landlord for a conversion thereof.

Appeal from Clay County Court; S. A. Denny, Judge.

Action by P. R. Reynolds against J. L. Huggins. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Allen & Wantland and P. M. Stine, for appellant. Allen & Jones, for appellee.

CONNER, C. J. Appellee was a tenant of appellant, and instituted suit in the justice court, upon an account aggregating \$96. Among other items specified was one of \$40 for "three-fourths of two bales of cotton less cost of picking." The landlord, Huggins, replied with a counterclaim, aggregating the sum of \$105.70. In the justice court appellee, Reynolds, failed to recover, and appealed his cause to the county court of Clay county. The trial there resulted in a general verdict for appellee in the sum of \$45.93, from which this appeal has been prosecuted.

On a former day of the term the appeal was dismissed, because the transcript, as then appearing, failed to show a disposition in the justice court of appellant's counterclaim, but since that time the record has been corrected in this respect, and we now, therefore, set aside the former judgment of dismissal, and proceed to determine the questions presented by the assignments. Appellant, among other things, requested the following special charge, which the court refused to give, and to which action of the court error is assigned, viz.: "In this case you are

further instructed that if plaintiff's tenancy terminated on the 1st day of January, 1907, and if thereafter plaintiff delivered up possession of the rented premises, and if, as to any part of the cotton plaintiff had grown on said premises, and that then remained unpicked, plaintiff abandoned said cotton, and declared his intention not to pick the same, and that defendant might turn in on it, and if thereupon defendant hired the same to be picked, and sold the same, then plaintiff is not entitled to recover any part of the proceeds thereof." Appellee's lease terminated January 1, 1907, and appellant, Huggins, testified, in substance, that on or about the 15th day of January, 1907, he went to see appellee, who had then removed from the witness' place, in order to get the unobstructed use of the rented premises for pasturage, and that appellee then directed him "to go ahead and turn in, that he (appellee) was not going to pick any more of the cotton"; that it was after this that appellant caused to be picked and sold the cotton, the proceeds of which was sued for in this case. It seems to be well settled in the authorities that a party may abandon and relinquish his right to property. If the owner sees proper to abandon his property, and evidences his intention by an act legally sufficient to vest or divest ownership, why may he not do so? In *McGoon v. Ankeny*, 11 Ill. 558, it is said, quoting from the head note: "A party, considering an article entirely worthless, casts it away, intending to abandon it; he loses his title to it." And on the same subject, in the case of *Wyman v. Hurlburt*, 12 Ohio, 81, 40 Am. Dec. 461, the Supreme Court of Ohio says, again quoting from the headnote: "Abandonment of property divests the owner of his title therein, and the finder, who reduces the same to possession after such abandonment, is not guilty of conversion." And in the case of *Davis v. Butler*, 6 Cal. 511, the Supreme Court of that state says, quoting from the headnote: "An abandonment of property determines the right of the party thereto from the date of the act, and the property is, to him, as though he had never owned or occupied it." And the right to so abandon property is clearly recognized by our own court, as may be seen by an examination of the case of *Dikes v. Miller*, 24 Tex. 417. So that it would seem that appellant would not be liable for the "three-fourths of two bales of cotton," for which appellee sued, if he in fact, as appellant in substance testified, wholly abandoned it. He might, under certain circumstances, notwithstanding the expiration of his tenancy, proceed to gather the remnant of his crop. See unpublished opinion by this court in cause No. 5,662, *Bowles v. Driver*, 112 S. W. 440. But if so, it was his duty to act promptly, if he intended to claim the right; and, having declined to do his duty in this respect and after having abandoned the cotton, if he did so, he could

not thereafter sue appellant as for a conversion thereof.

We find no other error in the proceedings as assigned, but are unable to say from the verdict of the jury, that they did not find for appellee for the item mentioned, and the judgment must accordingly be reversed, and the cause remanded for the error of the court in refusing said special charge.

CHICAGO, R. I. & G. RY. CO. v. CRENSHAW.

(Court of Civil Appeals of Texas. May 30, 1908.)

1. APPEAL AND ERROR — APPLICATION FOR LEAVE TO FILE BRIEFS—GROUNDS—SUFFICIENCY.

The application of appellant for leave to file briefs will be denied, where his counsel was not misled by reason of an agreement that the filing of briefs was waived in all cases in which a designated attorney represented defendant, where such counsel had no information that the designated attorney represented defendant, especially where he did not make any request that the filing of briefs should be waived until after the expiration of the time fixed for filing briefs.

2. SAME—DISMISSAL OF APPEAL—GROUNDS—WANT OF PROSECUTION.

A motion by appellee to dismiss an appeal for want of prosecution will be dismissed, where an inspection of the record discloses fundamental error in the want of jurisdiction of the lower court over the amount in controversy.

3. COURTS—COUNTY COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—AMENDED PETITION.

The allegation in an amended petition, in an action against a carrier for \$192 for damages to a shipment of cattle, filed in the county court on appeal from a justice's court, that plaintiff claims damages to the cattle amounting to \$200, followed by a prayer for judgment for such damages, with interest and costs, puts the amount in controversy beyond \$200, and ousts the jurisdiction of the county court to determine the case, though in determining the amount in controversy as affecting the jurisdiction of the trial court, an amended petition speaks from the date of the original institution of the suit, unless it sets up a new cause of action, or increases the amount originally sued for, so as to claim an amount not within the jurisdiction of the court.

Appeal from Montague County Court; Geo. S. March, Judge.

Action by Lee Crenshaw against the Chicago, Rock Island & Gulf Railway Company. From a judgment in favor of plaintiff, rendered by the county court on appeal from a justice's judgment, defendant appeals. Reversed and remanded.

Graham & Williams and Lassiter & Harrison, for appellant. Chas. Crenshaw, W. C. Newman, and J. A. Templeton, for appellee.

SPEER, J. In this case appellee recovered judgment against appellant for damages to a shipment of cattle growing out of the latter's negligence, from which judgment the defendant has appealed.

No briefs have been filed for appellant, and we are asked by appellee, therefore, to dis-

miss the appeal for want of prosecution. This motion of appellee, however, is met by appellant's request for leave to file briefs, setting up a general agreement with J. A. Templeton, Esq., to the effect that filing briefs in the lower court, notice, etc., on the part of this appellant, in cases in which said Templeton represented the appellee, was always waived by said Templeton. It appears undisputably, however, that while Mr. Templeton did present a motion for the appellee in this case, he was not otherwise of counsel for him, and had no authority, and did not undertake, to waive the filing of briefs according to the rules. Counsel for appellant was in nowise misled, since he at no time had any information that Mr. Templeton represented appellee, or in any manner appeared in this court for him, nor did he ever make any request that the filing of briefs in the lower court should be waived until after the expiration of the time within which he could have filed briefs under the most liberal interpretation of the rules. We, therefore, overrule appellant's request for permission to file briefs, and would grant the prayer of appellee to dismiss the appeal, were it not for the fact that an inspection of the record discloses fundamental error, for which the cause must be reversed.

It affirmatively appears that the county court, from which this appeal has been taken, had no jurisdiction over the amount put in controversy by appellee's amended petition. The cause originated in the justice court, where suit was instituted on May 17, 1906, and was a "suit upon damages for \$192." There was no prayer for any sum, whether as "interest" or otherwise, beyond this amount. On appeal to the county court the pleadings of the plaintiff were amended, so as to claim damages for 4 head of cattle at \$17 per head, amounting to \$68, and for 66 head of cattle at \$2 per head, amounting to \$132, aggregating the sum of \$200, and closed with a prayer for "judgment for his debt, damages, interest, and costs of suit, for general and special relief," etc. Clearly this allegation, under the authorities, put the amount in controversy beyond \$200, and as clearly ousted the jurisdiction of the county court to determine the cause thus appealed from the justice court. *Tex. & Pac. Ry. Co. v. Walter Hunt & Co.* (Tex. Civ. App.) 85 S. W. 1168. In determining the amount in controversy for the purpose of ascertaining the jurisdiction of the trial court, an amended petition is supposed to speak as from the date of the original institution of the suit, unless it "sets up a new cause of action, or increases the amount originally sued for, so as to claim an amount not within the jurisdiction of the court." *Ft. W. & D. C. Ry. Co. v. Underwood*, 99 S. W. 92, 17 Tex. Ct. Rep. 420. So that, if appellee's amendment in the county court had merely sought to recover \$192, with interest from the date of the injury, and the pleadings in the justice

court had also included interest, the county court, perhaps, under the authority cited, would not have lost all jurisdiction, even though the accumulated interest to the time of trial, when added to the sum named, would have exceeded \$200. But even when tested by this rule, the amended petition stated an amount beyond the jurisdiction of the county court, because the pleadings of the justice court not only did not include a prayer for interest, but the amended pleadings in the county court otherwise increased the amount in controversy, by placing the damages at exactly \$200. So that, whether the case of *Ft. Worth & Denver City Ry. Co. v. Underwood* in effect overrules the case of *Texas & Pacific Ry. Co. v. Hunt*, or not, the amended pleadings in any event set up an amount beyond the appellate jurisdiction of the county court. The judgment of the county court is reversed, and the cause remanded, with instructions to dismiss the suit, unless appellee shall reduce his demand to \$200.

Reversed and remanded.

BUCHANAN v. BARNESLEY.†

(Court of Civil Appeals of Texas. June 6, 1908. Rehearing Denied July 4, 1908.)

1. EVIDENCE—PRESUMPTIONS—VALIDITY OF OFFICIAL ACTS—CONFLICTING ACTS.

No presumption will arise in favor of the validity of an award of land by the Commissioner of the General Land Office during the life of a lease as against the validity of his action in making the lease.

2. PUBLIC LANDS—TEXAS SCHOOL LANDS—LEASE—VALIDITY.

In October, 1897, H. obtained a lease of school land from the Commissioner of the General Land Office for a term of five years. In November, 1899, the lease was transferred to plaintiff, and immediately filed in the General Land Office. In November, 1900, the lease was canceled for failure to pay the fourth annual rental. In October, 1900, plaintiff received a 10-year lease for the same and other land, and received a receipt for his first annual payment and for a certain sum as back rent, which was approximately the amount due on the former lease. In trespass to try title plaintiff introduced the papers mentioned, but made no explanation as to the back rent. *Held*, that the H. lease was a valid lease at the time plaintiff's 10-year lease was executed. Hence the latter was void, and no obstacle to an award to defendant in 1907 on which judgment was rendered.

3. SAME—LIMITATIONS OF ACTIONS—RIGHT TO PURCHASE PUBLIC SCHOOL LAND—STATUTORY PROVISIONS.

The statute of limitations of 1905 provides that hereafter all persons claiming the right to purchase or lease any public free school lands, etc., which have been or may be hereafter sold or leased to any other person under any provision of law shall bring his suit therefor within one year after the act goes into effect or after the date of the award of sale or lease and not thereafter, and, if no such suit is instituted, it shall be conclusive evidence that the law with reference to the sale or lease has been complied with, provided that nothing in the act shall be construed to affect the state in any action or proceeding brought by it in respect to any of said lands. *Held*, that the intention was not to deny to the state any of the rights it had

† Writ of error refused by Supreme Court.

previously exercised through its duly appointed agents as to public lands, and, where a 10-year lease was executed to plaintiff in 1900 during the life of a five-year lease and in 1907 the land was awarded to defendant, no action by the state was necessary to cut off plaintiff's rights for the invalidity of his lease was recognized by the award to defendant.

Appeal from District Court, Ector County.

Trespass to try title by M. G. Buchanan against T. C. Barnesley. From a judgment for defendant, plaintiff appeals. Affirmed.

Caldwell & Whitaker and Cowan, Burney & Goree, for appellant. Cannon & Leslie and Starley & Hudson, for appellee.

SPEER, J. This is a suit in trespass to try title instituted by appellant to recover from defendant sections 41, 42, 43, and 44, in block 32, of the public school lands in Crane county. The trial court instructed a verdict in favor of the defendant, and, from the judgment based thereon, the plaintiff has appealed.

It is contended by appellant that the instruction for the appellee was wrong for the following reasons: First. It was proved that appellant was the owner of lease No. 31,919, covering the lands in controversy, issued by the Commissioner of the General Land Office on October 31, 1900, for a period of 10 years from the 27th day of October, 1900, and that all rentals thereon to the state had been paid. Appellant's insistence is that while the evidence showed an award to appellee on April 20, 1907, no presumption will arise in favor of the action of the commissioner in making the award as against his action in making the lease; that the presumptions are in favor of the lease as against the award, since the commissioner had no authority to make the award pending a valid lease of the lands to appellant. This contention in the abstract is correct (*Smithers v. Lowrance* [Tex.] 93 S. W. 1054), but appellee is not forced to rely wholly upon the presumption usually attaching to the act of an official. He attacks appellant's lease because it covers lands previously included in a lease to one Harrington, No. 19,869, of date October 20, 1897, for a term of five years from September 2, 1897. Appellant's lease covers the identical land of the Harrington lease, save that it contains one section not included in the Harrington lease. There was a formal transfer of the Harrington lease to appellant, dated November 27, 1899, which transfer, indorsed on the back of the lease, appears to have been filed in the General Land Office on the same day. Appellee introduced in evidence a certificate of cancellation of lease No. 19,869 for failure to pay the fourth annual rental, which certificate was dated November 2, 1900. He also introduced in evidence a certificate from the State Treasurer showing the payment on October 27, 1900, by Buchanan of the sum of \$21.60, first annual payment on his lease, No. 31,919, and also the further sum of \$136.30 as "back rent." From this testimony we

think it quite clear that appellant's lease, No. 31,919, was inhibited under the law, as announced in *Ketner v. Rogan*, 95 Tex. 559, 68 S. W. 774. It is there declared to be the policy of our laws that the public lands belonging to the state are intended primarily for sale, and that the Commissioner of the General Land Office has no power to cancel an existing lease and immediately to issue a new lease for a further period of time merely because the lessee may desire such extension. To do so is in effect to withhold the land indefinitely from settlement and sale. Appellant contends that the evidence fails to show that the Harrington lease was a valid lease at the date of the execution of his lease, No. 31,919, and that, therefore, by reason of the presumption of the regularity of the commissioner's act in making the latter lease, we should hold that the Harrington lease was properly subject to cancellation for nonpayment of rentals. But we are of the opinion that the evidence above set forth establishes the fact that the Harrington lease was a valid lease on the day appellant's lease bears date. The action of the commissioner in canceling the Harrington lease for the nonpayment of the fourth annual rental (as to which there was no default when appellant's lease was issued) tends strongly to show that all previous payments had been made. The assignment of the lease to appellant and his consequent liability for the payment of the lease money, together with his payment at the time of taking the renewal lease, is further evidence that the Harrington lease continued to be a valid lease, since the law, it seems, would apply such payment to the rentals accruing on the first lease, notwithstanding he may have intended and directed a contrary application. *Thomson Bros. v. Lynn*, 36 Tex. Civ. App. 79, 81 S. W. 330. But beyond this, the certificate of the State Treasurer, showing the payment by appellant of "back rent," was properly referable to the Harrington lease, since a calculation shows that to have been approximately the amount due on that lease, and appellant, although he testified as a witness, offered no explanation whatever. So that we hold upon this issue that appellant's lease was shown to be void, and therefore no obstacle to the award to appellee.

Appellant's next contention is that, though his lease should be held to be void, yet appellee cannot take any advantage of its invalidity, "because no action or proceeding has ever been brought by the state of Texas to establish the invalidity of the lease, and said lease has stood without attack by any one for more than one year since the enactment of the limitation statute of 1905." Laws 1905, p. 35, c. 29. The statute thus invoked is as follows:

"That hereafter all persons claiming the right to purchase or lease any public free school lands or any lands belonging to the state university, or either of the state asy-

lums, which have been heretofore or which may be hereafter sold or leased to any other person under any provision of the law authorizing the sale or lease of any of said lands; shall bring his suit therefor within one year after this act goes into effect, or after the date of the award of such sale or lease, if such award is made after the taking effect of this act, and not thereafter."

"Sec. 2. If no suit has been instituted by any person claiming the right to purchase or lease any of said land within the period of time limited in the first section of this act, it shall be conclusive evidence that all requirements of the law with reference to the sale or lease of such lands have been complied with; provided that nothing in this act shall be construed to affect the state of Texas in any action or proceeding that may be brought by it in respect to any of said lands."

But we construe the opinion in the case of *Slaughter v. Terrell* (Tex.) 102 S. W. 399, as deciding this question contrary to appellant's contention. In applying that act to a state of facts not unlike the present, Mr. Justice Brown, for the Supreme Court, uses the following language: "Clearly this applies only to cases where the state recognizes the validity of the purchase being attacked, and does not apply to a case like the present, where there had been a forfeiture of the former purchase by the land commissioner and the land again put upon the market. There is no necessity for a suit by a purchaser of forfeited land." It was evidently not the intention of the framers of this act to deny to the state any of the rights which it had previously exercised through its duly appointed agents with reference to the public lands. The provision that nothing in the act shall be construed to affect the state of Texas in any action or proceeding that may be brought by it certainly should not be held to abridge any of the rights previously exercised by the state through her commissioner under other statutes in no manner repealed by the terms of the act in question.

Finally, appellant contends that the evidence raised an issue upon which he should have been allowed to go to the jury under his rights as assignee of Joe S. Bengé and T. H. Benton, who applied to purchase sections 42 and 43, respectively. Without detailing all the evidence on this issue, we content ourselves with announcing the conclusion that the effect of the undisputed evidence was to show that these applicants, who applied for the sections mentioned on September 3, 1902, fully acquiesced in the rejection of their applications by the commissioner, and their subsequent conduct in respect to the land was wholly incompatible with the bona fide intention on their part to assert title to the same. See *Hamilton v. Gouldy* (Tex. Civ. App.) 103 S. W. 1117.

The trial court therefore committed no error in instructing a verdict, as he did, and the judgment is affirmed.

THOMAS et al. v. MATTHEWS et al.

(Court of Civil Appeals of Texas. June 13, 1908.)

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—STATEMENT OF FACTS—FAILURE TO FILE—EFFECT.

Where the statement of facts contained in the record does not appear to have been filed by the district clerk, the appellate court will decline to consider it.

2. EXECUTORS AND ADMINISTRATORS—COMPENSATION—PROVISIONS OF WILL—CONSTRUCTION.

A provision of a will that the executors should be paid for their services one-half the fees allowed by law in such cases contemplated the fixed fees allowed by law to guardians of estates, and the compensation was to be determined by Sayles' Ann. Civ. St. 1897, art. 2780, fixing such fees at 5 per cent. on all sums that the guardian actually receives or pays away in cash.

3. SAME—POWERS OF EXECUTORS—RELEASE OF LIENS.

Where a will giving testator's property to his wife and children for life with remainder to his grandchildren specifically vested the property in the executors for the use of the beneficiaries, and imposed on them the duty of collecting debts due the estate, they had implied authority to execute all necessary releases of liens against the real estate held for the beneficiaries.

Appeal from District Court, Throckmorton County; Cullen O. Higgins, Judge.

Action to construe a will by J. A. Matthews and another against D. B. Thomas and others. From the judgment, defendants appeal. Affirmed.

B. F. Reynolds, for appellants. J. L. Blanton, J. H. Barwise, and W. T. Andrews, for appellees.

SPEER, J. This is a suit by the executors for the construction of the following will:

"The State of Texas, County of Throckmorton. Know all men by these presents: That I, E. P. Davis, of Throckmorton County, Texas, do make and publish this my last will and testament.

"1st. I desire all my debts and funeral expenses paid as soon after my death as convenient.

"2d. I nominate, constitute and appoint J. A. Matthews and A. H. Carrigan as my executors of this my last will and testament. Said executors shall be required only to give bond in a sum double the appraised value of my personal property at the time this will is probated. Said executors and their successors shall be paid for their services in executing this trust one half (½) the fees allowed by law in such cases. The court probating this will may appoint a substitute executor or executors to carry out the trust herein provided for in the event of a refusal or failure of the executors herein named to act or in the event of the death or inability of any of said executors to act, but said appointment shall not be made except the appointee or appointees are acceptable to all adult beneficiaries named herein, and that shall be expressed in writing.

"3d. It is my will and desire that all monies due me shall be collected as soon as possible.

"4th. I give and bequeath to my wife all my household and kitchen furniture and effects of every kind.

"5th. I give and bequeath to my wife and children all my real estate only for their natural lives and the remainder to go to the children of my said children, and my wife shall only receive a child's portion of my estate for life. If I have five children surviving me, it is my will that my wife and each of said children receive a life estate of one sixth of my real estate, according to value, and in the event I shall have more or less children at the date of my death, then the real estate shall be divided according to value and not quantity among my wife and children according to number. In the event of the death of my wife, then the estate for life herein devised her shall descend to my children for their natural lives and the remainder to my grandchildren. In the event of the death of any of my children without issue, then the life estate held by said child or children so dying without issue shall be distributed equally among my wife and children then surviving, for their natural lives and the remainder to my said grandchildren. In the event of the death of any of my children leaving issue, then the issue of my children shall inherit the remainder of the estate so held by my child so dying with issue. If any of my children should die leaving issue and after that any of my children should die without issue, then the issue of my child or children surviving their said parent or parents shall be entitled absolutely to the shares of my estate his or their parents would be entitled for life. It is my will and desire and I so bequeath only a life estate in my real property equally according to value among my wife and children and the absolute fee simple estate of my real property I bequeath to my grandchildren per stirpes and not per capita according to value. I authorize my said executors to divide my real estate according to value as soon as practicable and have an order entered of record on the minutes of the court probating this will allotting to my wife and children their respective shares for life, and my wife shall have immediate control of her shares; my children shall have possession of their shares respectively, as soon as each becomes of age or as soon as they marry. My executors shall have possession of my real estate until it has been divided and allotted as above provided and the net income from it shall become the property of the child to whom it is allotted.

"6th. I give to my wife and children in equal parts all the personal property I may die possessed of. I direct that my executors divide my cattle, horses, hogs, and ranch personal property of every kind equally among my wife and children according to

value and in doing so may sell any or all of it as to them may seem proper. My executors may sell the personal property of any one or all of the personal property of any of the minor devisees of my personal property. The bank stock or any other corporation stock owned by me at my death shall not be sold by my executors unless it becomes necessary for the interest of my minor children. It is my will, desire and bequest that my minor children shall have no guardian of the estate hereby bequeathed to them, but my said executors and their successors have full possession and control over all the real and personal estate hereby bequeathed them, the same as if they were guardians of their estates by appointment of court. My executors shall invest all the money of my minor children upon the same security and in the same manner now provided by law in the case of guardians. For the purpose of providing my executors with full power over the estates of my minor children herein designated, I grant to my said executors possession and control of the property herein bequeathed to my minor children for the use and benefit of my said minor children until they shall each marry or attain the age of 21 years and then the said minor children upon their marriage or attaining majority shall receive his or her pro rata portion of my estate. My executors shall, out of the income of the estate herein granted to my minor children, care for, provide all necessary means for the education and maintenance of my minor children until they shall attain the age of 21 years or marry, but each child shall receive only the income from his or her pro rata share of the estate bequeathed them herein.

"7th. I direct, require and empower the court probating this will to require annually on the first of each January after my death, a full statement under oath from my executors, as to all money or other property they shall receive and what disposition they have made of same; also to inquire annually on the first day of January of each year as to the sufficiency of the sureties of my said executors and if not satisfied with the sufficiency of said sureties to require my said executors or their successors, to give new security in 30 days after being notified so to do and if said request is not complied with in said 30 days, then said court is to appoint a successor or successors to carry out this trust.

9th. The bequest herein provided for includes all my separate estate and all the community property of my wife and myself and I have disposed of all of it in the manner in which I wish it to be used, held and owned.

"Witness my hand this 21st day of Sept., 1897. E. P. Davis.

"Witnessed by: N. Henderson, A. H. Carigan, and R. Cobb."

The statement of facts contained in the record does not appear ever to have been

filed by the district clerk, and we decline to consider the same. The only question, therefore, which we are called upon to decide, is whether or not the judgment of the district court is such a one as could have been rendered under the pleadings. A copy of the will was attached to plaintiff's petition, and, while the petition contained a prayer for the construction of the will "fully and completely so that no question can or should arise," yet its specific allegations reasonably show the necessity for a construction of those parts actually construed by the trial court.

The judgment rendered was as follows:

"(1) That in the second paragraph of said will it is provided that said executors therein named shall be paid for their services for executing the trusts therein imposed upon them one-half the fees allowed by law in such cases, which clause of said will this court construes that plaintiffs as such executors shall be entitled to as their compensation under the terms of said will 2½ per cent. of all moneys collected and also the sum of 2½ per cent. of all moneys paid out by them as such executors on behalf of the said estate of E. P. Davis, deceased, and also that the said plaintiffs shall be entitled to the sum of 2½ per cent. of money received by them as trustees of the estate of the said minor children (defendants herein) under the terms of said will, and the sum of 2½ per cent. of all moneys paid out by them as such trustees as aforesaid, and that the above compensation includes 2½ per cent. on all moneys loaned and invested by them as such trustees for the benefit of said minor children, and the sum of 2½ per cent. of all moneys collected by them as such trustees on such loans and investments aforesaid, but that no fees shall be allowed such executors for payments to themselves as trustees, and that plaintiffs shall be entitled to all expenses incurred in the management of said estate of said E. P. Davis, deceased, and of said minor children as now provided by law for guardians and executors.

"(2) And the court further construes said will to give and grant to said plaintiffs as executors and trustees as aforesaid the power and authority to make, execute, and deliver all releases of incumbrances and liens of every kind and nature on any real estate held for the benefit of said estate of E. P. Davis, deceased, and said minor defendants, and also gives and grants to said plaintiffs as such trustees full power and authority to bargain, sell and convey any and all lands acquired by them as such executors and trustees for the benefit of said estate since the death of said E. P. Davis, deceased.

"(3) And the court further construes said will to give and grant to said plaintiffs as said trustees and executors the authority to sell and convey or allot and distribute to any of the defendants (legatees) any lands acquired by said executors and trustees since the death of said E. P. Davis, deceased, and

that the title so conveyed shall be a fee-simple title, free from any of the limitations imposed by the terms of said will upon the lands owned by the testator at the time of his death. The said executors are directed to pay the costs of this proceeding out of the funds of said estate."

The district court of Throckmorton county had jurisdiction to construe the will in controversy (*Thornton v. Zea* [Tex. Civ. App.] 39 S. W. 595, and authorities there cited), and we think the pleadings, together with the attached will, authorized the judgment rendered. The provision of the will that the executors should be paid for their services one-half the fees allowed by law in such cases clearly contemplated the fixed fees allowed by law to guardians of estates. Article 2780, Sayles' Ann. Civ. St. 1897, fixes such fees at "5% on all sums that he (the guardian) actually receives or pays away in cash." We think this article should be held to determine the amount of appellees' compensation under the will.

We think, too, the trial court correctly interrupted the will as authorizing the appellees to make, execute, and deliver all necessary releases of liens against the real estate held for the beneficiaries. By the terms of the will the property of the estate was specifically vested in the executors for the use of the beneficiaries, and this, together with the duty imposed upon them to make collections of the debts due the estate, evidenced an implied authority in them to execute the necessary releases. While the evident purpose of the testator was to vest a life estate in his real property in his wife and children with remainder to his grandchildren, it would be reading into the will something that was never written to hold that such was his intention with reference to the real estate to be acquired by the executors, whether as an incident to their administration of the estate in making collections, or in the exercise of the power conferred on them to make investments in such property. In either event, the executors would have the power to sell and make title to the property so acquired.

The judgment of the district court is therefore affirmed.

DALLAS BREWERY v. HOLMES BROS. et al.

(Court of Civil Appeals of Texas. June 27, 1908.)

1. INTOXICATING LIQUORS—CONTRACTS—CONSIDERATION—ILLEGALITY.

There can be no recovery of the price of intoxicating liquors sold to a liquor dealer to be retailed in a local option district, where the seller knows that the liquors are to be sold in such district, and aids and abets the retailer in evading the law, and where the moneys to be obtained from the sale are to go towards paying for the liquors sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 476.]

2 EVIDENCE—JUDICIAL NOTICE—GOVERNMENTAL SUBDIVISIONS—TOWNS—COUNTY SEATS.

Though courts will take judicial knowledge of the local divisions of the country, as in states, provinces, counties, cities, towns, local parishes, or the like, so far as political government is concerned, or affected, and of the relative positions of such local subdivisions, yet they will not take notice that particular places are, or are not, in particular counties, unless such place is the county seat of a county, in which case they will take notice that such county seat is in that county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 9-14.]

3 SAME—BEER—INTOXICATING CHARACTER.

In an action for the price of beer sold, defended on the ground of illegality of consideration, the court will not take judicial knowledge that beer is an intoxicating liquor; the statute (article 402, Pen. Code) defining the offense of selling intoxicating liquor in a local option territory not naming beer as an intoxicating liquor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 6.]

4 SAME—WHISKY.

The court will take judicial notice that such well-known beverages as whisky, brandy, gin, and the like are intoxicating.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 6.]

5. INTOXICATING LIQUORS—CONTRACTS—RECOVERY OF PRICE—EVIDENCE—SUFFICIENCY.

In an action for the price of beer sold, defended on the ground of illegality of consideration in that the beer was intended to be sold in a local option territory, evidence considered, and held insufficient to show that the place where the liquor was retailed was a local option territory, so as to defeat the action.

Appeal from Wood County Court; J. C. Rouse, Judge.

Action by the Dallas Brewery against Holmes Bros. and others for the price of intoxicating liquors sold. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Appellant, Dallas Brewery, on July 15, 1907, filed this suit in the county court of Wood county, Tex., against the appellees, Holmes Bros. and J. O. Robertson, on a sworn account to recover a balance due in the sum of \$528, which was alleged to be a balance due to appellant by appellees for goods, wares, and merchandise sold and delivered to defendants with such other proper and necessary allegations in a suit to recover the balance due on a sworn account, whereby the defendants were liable. On October 7, 1907, the defendants Holmes Bros. answered by general demurrer, general denial, and the defendant W. F. Holmes filed a sworn plea, denying a partnership as to Holmes Bros., the plaintiff having alleged in its original petition a partnership as to the defendants C. C. and W. F. Holmes. On October 23, 1907, the defendants C. C. and W. F. Holmes further answered, C. C. Holmes by an amended original, and specially pleading illegality of the sale by plaintiff to himself, that the sale was of intoxicating liquors to be by him retailed in local option territory, and of which fact the plaintiff had knowledge, wherefore the sale was void, etc. W. F. Holmes adopted the answer of C.

C. Holmes. The plaintiff on October 23, 1907, filed a denial of all of said special answer, and dismissed as to the defendant J. O. Robertson. Upon a trial of the cause, before the court, a judgment was rendered that the plaintiff take nothing by this suit, and that the defendants recover of the plaintiff their costs, to which judgment the plaintiff excepted and in due time perfected an appeal to this court.

E. A. Tharp, for appellant. Bozenan & Campbell, for appellees.

BOOKHOUT, J. (after stating the facts as above). It is contended under the first and second assignments of error that the court erred in not rendering judgment in this case for the plaintiff, Dallas Brewery, against the defendant C. C. Holmes for \$528, the amount sued for, because said defendant C. C. Holmes admitted on the trial of the cause that he was indebted to the plaintiff for said amount of money, and had once offered the plaintiff a tract of land in payment. The defendant C. C. Holmes testified as follows: "I owe the Dallas Brewery \$528 on this account. I offered to give them a piece of land in payment." He further stated that he ordered the goods from plaintiff, and had paid part of it. If the consideration of the account was intoxicating liquors sold by the plaintiff to defendants in a county or district where local option was in force, then such sale was illegal and in violation of law and plaintiff was liable to prosecution for making the sale. The pleading of defendants was that the consideration of the account was the sale by plaintiff to them of intoxicating liquor in Wood county, in which county local option had been adopted, and was in force, and the sale was therefore illegal; that plaintiff sold the liquors to defendants, knowing they were to be retailed by them in a county in which local option was in force, and that the account was to be paid out of the moneys received by defendants from the sale of the same; that plaintiff instructed defendants how to keep down suspicion and deceive the officers, whose duty it was to see the law was enforced, and aided and abetted defendants in selling the beer in violation of law. It would thus seem that the sale by plaintiff to defendants was not only made in violation of law, but that it was made with knowledge that the purpose of defendants was to retail the liquor in violation of law, that plaintiff aided in the sales, and that the moneys for the payment of plaintiff's account were to be derived from such illegal sales. If either of these defenses is sustained by the evidence, plaintiff is not entitled to recover. *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593; *Campbell v. Jones*, 2 Tex. Civ. App. 264, 21 S. W. 723.

The fourth and fifth assignments assail the

court's findings of fact as being without evidence to support them, in that there was no evidence that Alba is in Wood county, or that the beer was sold to defendants to be resold by them in Wood county. There is evidence tending to show the sale was made by the plaintiff to defendants at Alba, Tex. The proof shows that local option is in force in Wood county. The evidence does not show that Alba is in Wood county, or that local option is in force in Alba. Nor does the evidence show that the liquor was sold by plaintiff to defendants to be retailed by them in Wood county. The court's conclusions of fact, that Alba is in Wood county, and that local option was in force in Alba, and that the liquors were sold to defendants to be by them retailed in Wood county, are not sustained by the evidence.

It is contended by appellees that the court will take judicial knowledge that Alba is in Wood county. This contention is not sustained. The courts are authorized to take judicial notice of the local divisions of the country, as in states, provinces, counties, cities, towns, local parishes, or the like, so far as political government is concerned or affected, and of the relative positions of such local divisions; but they will not take notice that particular places are, or are not, in particular counties, unless such place is the county seat of a county, in which case they will take notice that such county seat is in that county. *Carson v. Dalton*, 59 Tex. 502; *Railway v. Lightfoot* (Tex. Civ. App.) 106 S. W. 395. Alba is not a county seat, and we cannot judicially know that it is in Wood county.

Again, there was no proof that beer is an intoxicating liquor. The account sued on was for beer sold by plaintiff to defendants. Appellees insist that the courts judicially know that beer is an intoxicating liquor. The statutes do not name beer as an intoxicating liquor. Article 402 of the Penal Code makes it an offense, punishable by fine, for "any person to sell any intoxicating liquor" in any county, justice's precinct, city, or town in which the sale of intoxicating liquor is prohibited under the laws of the state. No decision of our Court of Criminal Appeals has been cited by appellees which directly holds that the courts will take judicial cognizance that beer is an intoxicating liquor. On the contrary, the holding of that court seems to be that the evidence must show that the beverage sold is an intoxicating liquor. *Scales v. State*, 83 S. W. 380, 11 Tex. Ct. Rep. 514; *Mayne v. State*, 86 S. W. 329, 12 Tex. Ct. Rep. 806. It is only as to such well-known beverages as whisky, brandy, gin, and the like that the courts will take notice that they are intoxicating. *Rau v. People*, 63 N. Y. 278; 23 Cyc. pp. 229-231; 17 Am. & Eng. Enc. Law (2d Ed.) p. 200. In the absence of evidence that Alba is in Wood county, or that local option was in force in Alba, and that beer is an intoxicating liquor,

the judgment in favor of defendants cannot be sustained.

The judgment is reversed, and the cause remanded.

SHAW v. SHAW.

(Court of Civil Appeals of Texas. May 16, 1908. Rehearing Denied June 18, 1908.)

1. RECEIVERS — APPOINTMENT — GROUNDS — STATUTORY PROVISIONS.

Rev. St. 1895, art. 1465, §§ 1-3, provides for the appointment of receivers in certain specified cases. Section 4 provides for the appointment in all other cases where receivers have heretofore been appointed by the usages of the court of equity. *Held*, that section 4 is not a limitation on the right given by the preceding sections, but an extension of it, and when the facts in a particular case justify the appointment under sections 1, 2, or 3, the right is a legal one, and not dependent upon the general rules of practice in courts of equity.

2. DIVORCE—PROPERTY RIGHTS—RECEIVER.

Rev. St. 1895, art. 1465, authorizes the appointment of a receiver in an action between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. Article 2985 provides that, pending a suit for divorce, the court or the judge thereof may make such temporary orders respecting the property and parties as may be deemed necessary and equitable. *Held*, that the appointment of a receiver is authorized in an action by a married woman against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, where the character and condition of the property are such that the interest of plaintiff can be best protected by the appointment of a receiver.

3. SAME.

The rights given in divorce cases by statute to sequester the property, and to an injunction to restrain defendant from disposing of the property, are not exclusive; and, being less full and complete than that furnished by the appointment of a receiver, the existence of those rights would not prevent the appointment.

4. SAME.

The fact that the petition may show upon its face that defendant has an interest in the real property involved in the suit, and that he has been enjoined from disposing of sufficient of it to protect plaintiff against any damage that she might sustain by his mismanagement or fraudulent disposition of the personal property, would not defeat plaintiff's right to have a receiver to take charge of the personal property.

5. RECEIVERS—APPOINTMENT ON AFFIDAVIT.

In an action by a wife against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, a receiver of the property could be appointed solely upon plaintiff's affidavit therefor, notwithstanding defendant's denial, by affidavit, of all of the allegations of the petition.

6. SAME—ORDERS TO TURN OVER PROPERTY—EXEMPTING PROPERTY RENTED BY ORDER OF COURT.

Where a receiver had been legally appointed, and by order of court had rented certain

of the land, the persons renting it were entitled to hold it for the length of their terms, and in an order for the receiver to turn over the property in his hands to the person from whom it was received, the rented lands were properly excluded.

7. SAME — DISCHARGE OBTAINED BY APPLICANT—COSTS.

Where an applicant for a receiver asks and obtains the receiver's discharge, all the costs of the receivership, including the receiver's compensation, should be borne by the applicant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 397-401.]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Mary G. Shaw against Benjamin W. Shaw, for a judgment fixing her separate interest in certain property, and for a divorce. From an order appointing a receiver, defendant appeals. Affirmed.

Meek, Highsmith & Warren, for appellant. Vasmer & Briant, for appellee.

PLEASANTS, C. J. On November 11, 1907, appellee filed suit against her husband, B. W. Shaw, appellant herein, for the purpose of obtaining a judgment, fixing her separate interest in certain property described in her petition. In response to the prayer of said petition the trial court enjoined the defendant from further control and management of the property, and appointed a receiver to take charge and management thereof pending the final disposition of the suit. From the order appointing said receiver, which was made on December 23, 1907, the defendant appealed to this court, and upon a hearing of said appeal, on March 28, 1908, the judgment of the trial court was affirmed (111 S. W. 223).

Pending that appeal the plaintiff in the court below, on January 20, 1908, filed an amended petition, alleging facts which, if true, entitle her to a divorce from the defendant, and praying that she be granted such divorce. This amendment describes real and personal property, which it is alleged is the separate property of plaintiff, a large portion of said property consisting of a plantation in Ft. Bend county and a stock of goods in a store and saloon situated on said plantation. The amendment closes with the following allegations and prayer: "And plaintiff further shows unto the court that the receiver now acting herein, under appointment of this honorable court, was appointed, at the instance and upon the representation of plaintiff, for the purposes and upon the grounds alleged in plaintiff's said original petition; that the cause of action herein alleged and the facts herein set up are different, in substance and in legal effect, from those set forth in said original petition; that the original pleadings, under which said receiver was appointed, and the affidavits in support thereof, have been destroyed by fire, and that exact and accurate copies of the same and the contents thereof cannot be produced; wherefore plaintiff says that the receiver herein, heretofore ap-

pointed, be discharged, and said receivership vacated, in such manner and at such time as to the court may seem for the best interest of the property involved in this suit. And plaintiff further shows that, because of defendant Shaw's disregard for such injunction and restraining orders as the court has heretofore issued, and because of the probability of his carrying into execution his said threats to sell and dispose of said property, as aforesaid, as he has already done concerning some of the said property, as before described, and as it is necessary and proper for the preservation and protection of said property that some competent person be placed in charge and control thereof, plaintiff prays that a receiver be herein appointed to take possession and control of said property, under the directions of this honorable court, to administer the same during the pendency of this suit; and in this connection represents that, if said defendant Shaw be allowed to again regain possession of said property, or to assume the management of said plantation, he will immediately do and commit irreparable injury and waste, and will, as he has done heretofore, intimidate and frighten away tenants now on said place, all of whom are negroes, and will, by thus driving off said tenants, cause said plantation to remain uncultivated during the ensuing year; that if said Shaw should again be permitted to come upon said place in the capacity or with the authority of manager of the same, that all said tenants will immediately leave said plantation out of fear of said Shaw, because of the threats, abuses, and injuries done them by said Shaw heretofore, and while they were working as tenants on said farm. And plaintiff avers that an emergency and an urgent necessity exist, requiring the immediate appointment of such a receiver as herein prayed for; that said plantation, store and saloon business, live stock, and other incidents to said farm are worth about \$45,000; that there are now due and owing debts of said store and saloon business to the amount of about \$3,000. And plaintiff shows that there are nine or more bales of cotton, produced from said plantation, now in the hands of defendant William Christian, and she says that, if said defendant Christian be not enjoined from paying the proceeds arising from the sale of said cotton over to the said defendant Shaw, said Shaw will waste and squander the money so arising, to the permanent injury of plaintiff. And plaintiff further shows that said defendant Shaw has, during the pendency of this cause, taken personal property and money belonging to plaintiff to the amount and value of \$2,000, and has converted the same to his own use, to the damage of plaintiff; and plaintiff now asks that, in the event the court should find that said defendant Shaw has any community interest in any of the property herein mentioned, his said interest, if any, be charged with said sum of \$2,000. Wherefore, premises considered, plaintiff

prays that the injunction and restraining orders heretofore issued in this cause be continued in effect; that the receiver heretofore appointed be dismissed and discharged, such discharge to become effectual at such time or in such manner as to the court may seem best; that defendant Christian be enjoined from paying over to said defendant Shaw any money arising from the sale of any cotton in his hands; that a receiver be appointed herein to take charge and control of the property, herein described, in Ft. Bend county, with such powers as to the court may seem meet and proper; that upon a trial hereof the marriage heretofore existing between plaintiff and defendant Shaw be dissolved, and she be granted a divorce; that the property, real and personal, hereinbefore described, be held and adjudged to belong to plaintiff, save that located in Brazoria county, for costs of suit and for such other relief, legal and equitable, to which plaintiff may be entitled, and as in duty bound," etc.

Upon a preliminary hearing of the application for receivership, contained in appellee's amended petition before set out, the trial court, on January 22, 1908, made the following order: "On this 22d day of January, 1908, came on to be heard the petition of plaintiff, same being plaintiff's second amended original petition herein filed, wherein the plaintiff prays that the receiver herein heretofore appointed be discharged, and said receivership vacated, and that a receiver be appointed to take possession and control of the plantation and mercantile business located on said plantation, together with the saloon business conducted in connection with said mercantile business, and also praying that the injunction, as heretofore ordered and existing, be continued in force; and thereupon came on to be heard, in connection therewith, the affidavit of plaintiff in support of the allegation in said petition praying for such receivership; and also come on to be heard the first amended original answer of defendant B. W. Shaw; and the plaintiff and said defendant Shaw appearing in person and by counsel, and the court, having been advised in the premises, and having heard the argument of counsel upon the matter of the appointment of a receiver herein, as well as the retention, in full force, of the restraining orders hereinbefore issued, is of the opinion that said receivership, as heretofore ordered, be and the same is hereby vacated, and the receiver heretofore appointed be and he is hereby discharged and dismissed. It is therefore ordered, adjudged, and decreed by the court that said receivership be vacated, and that Alf. H. Tolar, receiver herein, as aforesaid, be and he is hereby dismissed and discharged as such receiver, and he is ordered to file in this court, at the earliest practicable time, a full report and statement of his doings under said former appointment. And it further appearing to the court, that the protection and preser-

vation of the property in controversy in this suit, located in Ft. Bend county, and consisting of the plantation described in the pleadings in this cause, together with the store and saloon business located on said plantation and the several bales of cotton now in the hands of William Christian in Houston, Harris county, require the appointment of a receiver for the proper management and care thereof during the pendency of this suit, it is therefore ordered, adjudged, and decreed by the court that Alf. H. Tolar be and he is hereby appointed receiver herein, upon his taking the oath, as required by law, and making the bond required by law in the sum of \$2,000, to be approved by the court; and that, as such receiver, he shall immediately take full charge, control, and management of said plantation and store and saloon business, together with all the live stock upon and belonging to said plantation, wherever the same may, at this time, be located, or in whomsoever's possession they may be found, as well, also, as all personal property belonging to said business or plantation, and the tools, implements, and equipments thereon or belonging thereto, as well as all money, notes, accounts, bills, choses in action, and all property, of every character, in any wise incident or appurtenant to said store and saloon business and said plantation; and the said receiver is hereby ordered and directed to continue the operation of said business and said plantation in such manner as to him may seem for the best interest thereof, and he shall make and enter into such rental and other contracts, looking to the cultivation of said plantation for the ensuing year, as to him may seem for the best interest thereof; he shall also take care of and provide for the live stock on said plantation, and which belong thereon, and shall purchase, upon the best terms and for the lowest prices, the necessary feed for the same, and pay for such purchases out of any money in his possession as such receiver; and said receiver shall make and file with this court an inventory of the property which comes into his hands as such receiver, and shall do and perform such other things, in connection with said receivership, as the court may, from time to time, order and direct. And it is further ordered, adjudged, and decreed by the court that the injunction and restraining order against the said Benjamin W. Shaw, as the same has been heretofore ordered and decreed, be and the same is hereby ordered and decreed to continue in full force and effect. It is further ordered that the costs in this cause, that have accrued up to and until the date of this decree, be and the same are hereby adjudged against the plaintiff."

On the same day the receiver theretofore appointed was discharged under his former appointment, and again qualified as receiver under said order of January 22d. Thereafter, on January 24, 1908, after the execution, by defendant, of a supersedeas appeal bond, the

trial court entered the following order directing the receiver to turn over to defendant the property in his possession involved in this suit: "On this 24th day of January, 1908, came on to be heard the matter of the supersedeas bond executed by the defendant in the above numbered and entitled cause, and approved by the clerk of this court on the 23d day of January, 1908, and the disposition of the property, now in the hands of the receiver heretofore appointed by the court, and the proceeds of such of the property so coming into the hands of said receiver, and that has heretofore been sold or otherwise disposed of, under instructions and confirmatory orders given and entered in this cause; and the court, having heard the argument of counsel, and being fully advised in the premises, is of the opinion that said receiver, Alf. H. H. Tolar, be directed to turn over, to the said defendant, all the property now in his possession as such receiver, save and except as hereinafter provided. It is therefore ordered, adjudged, and decreed by the court that said Alf. H. H. Tolar, receiver in this cause, be, and he is hereby directed and instructed to deliver into the possession of defendant B. W. Shaw all the property and effects now in his hands, or under his control, as such receiver, that came into his hands as such receiver, save and except such portions of the plantation in Ft. Bend county which have been leased to various tenants under former orders of this court, and which portions have been, by said receiver, delivered unto such tenants, by virtue of said lease contracts, and save and except, further, such sum of money, if any, now in the hands of said receiver, necessary and proper for the payment of the reasonable compensation of said receiver for his services, by virtue of his said appointment; and such amount of money shall be, by said receiver, retained by him pending the further orders of this court, and said receiver shall immediately prepare and file in this court a full account and statement of his doings hereunder. And it is further ordered, adjudged, and decreed that the injunction and restraining orders heretofore issued in this cause, as against the said defendant B. W. Shaw be and they are hereby ordered to remain in full force and effect to all of which the defendant, in open court, at the time, excepted and excepts, and gives notice of appeal to the Court of Civil Appeals of the First Supreme Judicial District of the state of Texas at Galveston."

The first four assignments presented in appellant's brief assail the order of the trial court appointing a receiver upon the following grounds: First, because the legal remedies of sequestration and injunction, given a wife for the protection of her separate property pending a suit brought by her against her husband for divorce, are entirely ade-

quate, and therefore she is not entitled to the equitable remedy of a receivership; second, that the facts stated in the petition are not sufficient to authorize the appointment of a receiver; and, third, that the defendant having denied, under oath, all of the allegations of plaintiff's petition, and there being no evidence in the case other than the affidavit of the plaintiff and the counter affidavit of the defendant, the order of the court appointing a receiver was without sufficient evidence to support it. We do not think any of these objections to the order appointing a receiver are valid. A receivership is not a purely equitable remedy under the laws of this state. Our statute provides for the appointment of receivers in the following cases: "(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. (2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt. (3) In cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. (4) In all other cases where receivers have heretofore been appointed by the usages of the court of equity." Rev. St. 1895, art. 1465.

Section 4 of this article of the statute is not a limitation upon the right given in the preceding sections, but an extension of such remedy to all cases in which the remedy was allowed under the rules and usages of courts of equity; and, when the facts in a particular case justify the appointment of a receiver under sections 1, 2, or 3 of this article, the right to a receivership is a legal right, and is not dependent upon the general rules of practice in courts of equity. *Summer v. Crawford*, 91 Tex. 130, 41 S. W. 994. As stated in our opinion rendered upon the appeal from the former order in this case appointing a receiver (vide *Shaw v. Shaw*, [Tex. Civ. App.] 111 S. W. 223), we think plaintiff, upon the facts alleged in her petition, was entitled, under the first section of the article above quoted, to have a receiver appointed to take charge of and manage the property in controversy pending the final determination of the suit. *Stone v. Stone* (Tex. Civ. App.) 43 S. W. 568; *Cotton v. Rand* (Tex. Civ. App.) 92 S. W. 266. There

is probably less question of plaintiff's right to this remedy upon her present application therefor than there was before the suit became, by amendment, a suit for divorce, as well as for the recovery of the property. It is true the statute gives a plaintiff, in a suit of this kind, the right to sequester the property, and also the right to an injunction to restrain the defendant from disposing of the property, but, as stated in our former opinion, these remedies are not exclusive. Article 2985 of the Revised Statutes expressly provides that: "Pending any suit for divorce the court or the judge thereof may make such temporary orders respecting the property and parties as may be deemed necessary and equitable." If the general equitable rule denying the right to a receivership in cases in which an adequate remedy at law exists was applicable, we would hold that the remedy by injunction or sequestration not being as full and complete as that furnished by the appointment of a receiver, the trial court was authorized to make such appointment. It is not enough for the full protection of appellee's rights that appellant be enjoined from exercising further control and management of the property, but her best interest requires that the mercantile business should not be closed, and that the farming business upon the plantation should not be interrupted, and this result could not be so readily obtained by sequestration proceedings as by the appointment of a receiver. It cannot be said that a writ of sequestration in this case would be as practical or efficient in accomplishing the ends of justice and its prompt administration as the appointment of a receiver, and therefore the trial court was authorized, under rules of equity practice, to make such appointment. The fact that the petition may show upon its face that appellant has an interest in the real property involved in the suit, and which he has been enjoined from disposing of sufficient of it to protect appellee against any damage that she might sustain by his mismanagement or fraudulent disposition of the personal property, would not defeat appellee's right to have a receiver to take charge of said personal property. What has been said disposes of appellant's first and second objections to the order above stated.

There is no merit in appellant's third objection, stated above. In addition to the affidavit of plaintiff to the facts alleged in her petition, upon which the order appointing the receiver is based, the record shows that, prior to the time of the first appointment of a receiver in this suit, the defendant had violated the injunction theretofore issued by the court, restraining him from disposing of the property. The court was authorized to grant the prayer for a receivership solely upon the affidavit of the plaintiff, notwithstanding the defendant, by affida-

vit, denied generally each and all of the allegations of the petition.

The fifth assignment complains of that portion of the order, made after the filing of the supersedeas bond, directing the receiver to turn over the property in his hands, save and except those portions of the plantation which he had previously leased to tenants, under order of the court, and authorizes the receiver to retain sufficient funds of the receivership to compensate him for his services. This court having held that the first order appointing a receiver was valid, the acts of the receiver under such appointment, done under and in compliance with the order of the court, were legal and binding, and the parties who had rented land of said estate from the receiver for the year 1908 were entitled to hold the same, and the court did not err in exempting such rented property in the order directing the receiver to turn the property in his hands over to appellant.

The appellee having asked and obtained the discharge of the receiver, all the costs of such receivership, including the compensation of the receiver, should be borne by her; and, if upon a final trial of the case defendant recovers any interest in the funds in the hands of the receiver, such interest should not be charged with any of the costs of the first receivership. For this reason the order of the court directing the receiver to retain sufficient of the funds in his hands to compensate him for his services cannot be held valid as an adjudication of any of the costs of said receivership against the defendant, and upon the final hearing of the cause the court should adjudge such costs as above indicated.

We think the judgment of the court below should be affirmed, and it has been so ordered. Affirmed.

DARNELL LUMBER CO. v. CITY LOAN & TRUST CO. et al.

(Court of Civil Appeals of Texas. June 13, 1908. Rehearing Denied June 27, 1908.)

WITNESSES—EXAMINATION—LEADING QUESTIONS.

In an action on a note, it was error to allow defendant to be asked whether he had any understanding with the maker to engage in any fraudulent conspiracy to impose worthless negotiable paper upon any person and to allow him to answer: "No, sir; every transaction we had with them was just as legitimate as with any other banking institution. Every transaction I ever had with them, perfectly legitimate"—the question being suggestive, and it not being within the court's discretion to allow it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-839.]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by the Darnell Lumber Company against the City Loan & Trust Company and others. From the judgment, and from an or-

der denying a new trial, plaintiff appeals. Reversed and remanded.

Stewart & Templeton and James Derden, for appellant. Sidney L. Samuels and Green & Blanton, for appellees.

PRESLER, J. This action was instituted in the district court of Tarrant county by appellant, as plaintiff, against the City Loan & Trust Company, W. H. Peckham, Chas. Grusendorf, and Otho S. Houston, as defendants, to recover of them the sum of \$1,500, with 6 per cent. interest thereon from January 7, 1905. The action was based on a certificate of deposit, which was issued on said date by said City Loan & Trust Company, payable to the order of Otho S. Houston, on November 1, 1905, and which recited that said Houston had deposited with said company \$1,500, for which said certificate was issued. The instrument sued on was negotiable in form and was indorsed by Otho S. Houston without recourse to W. H. Peckham, by whom it was indorsed in blank. It was also indorsed in like manner by Chas. Grusendorf, from whom the plaintiff acquired it. The plaintiff sought to recover upon said paper against all of the defendants as the makers and indorsers thereof, respectively, and it also sought to recover of said Houston in an action for deceit the amount called for by said certificate. Because of such alleged deceit, and because said paper was not what on its face it purported to be, plaintiff also sought to hold the defendant Houston as an indorser thereof, notwithstanding he indorsed same without recourse. Pending the litigation, defendant Peckham died insolvent, and the suit was abated as to him. A trial was had before a jury, which, in response to special issues submitted by the court, returned a verdict, upon which the court rendered judgment for the plaintiff against the City Loan & Trust Company and Chas. Grusendorf for the amount sued for, and against the plaintiff in favor of the defendant Houston. The plaintiff filed a motion for a new trial, which was overruled. From such judgment and order the plaintiff has appealed to this court and assigns numerous errors, which will not here be considered consecutively.

The issue of fraud on the part of appellee was sharply presented by the pleadings and the evidence, and the trial court submitted to the jury the following special issues, viz.: "Find and state whether or not, before the plaintiff purchased from Charles Grusendorf the certificate of deposit issued by defendant City Loan & Trust Company to Otho S. Houston, and described in plaintiff's petition, he, the said Houston, stated to Mr. Darnell, plaintiff's representative: (1) That said certificate was good as gold. (2) That the City Loan & Trust Company was solvent. (3) That the certificate was issued for money deposited with said City Loan & Trust Company by said Houston. If you find that

Houston made to Darnell the alleged representations that said certificate was good as gold, and that the City Loan & Trust Company was solvent, then: (4) Find and state whether or not the same was understood by and between Houston and Darnell as statements of facts, or (5) as statements of opinion merely, of Houston. If you do not find that any of said alleged representations by Houston to Darnell were made, it will be unnecessary for you to consider any of the following special issues; but if you find that any of said representations were made by Houston to Darnell, then you will (6) further find and state whether or not the same were untrue. And, if you find the same were untrue, then and in that event only you will further find and state: (7) Whether or not said Darnell believed them to be true; and (8) whether or not he was thereby induced to purchase said certificate from Grusendorf; and (9) whether or not said Houston knew the same to be untrue when he made them, if you find he made them; and (10) whether or not he, in good faith, believed any of said representations, if any, to be true; and, if yea (11) then which of said representations did he so believe to be true; and (12) did he have a reasonable basis for such belief? (13) Find and state whether or not said representations, if any, were made before the sale of the certificate by Houston to Grusendorf, and for the purpose, on the part of Houston, of thereby effecting said sale of the certificate to Grusendorf by Houston; or (14) whether or not said Houston had already sold said certificate to Grusendorf before said representations, if any, were made by Houston to Darnell."

We find that to these questions the jury answered as follows: "(1) To issue No. 1, we answer 'No.' (2) To issue No. 2, we answer 'Yes.' (3) To issue No. 3, we answer 'No.' (4) To issue No. 4, we answer 'No.' (5) To issue No. 5, we answer 'Yes.' (6) To issue No. 6, we answer 'No.' (7) To issue No. 7, we answer 'No.' (8) To issue No. 8, we answer 'No.' (9) To issue No. 9, we answer 'No.' (10) To issue No. 10, we answer 'No.' (12) To issue No. 12, we answer 'No.' (13) To issue No. 13, we answer 'No.' (14) To issue No. 14, we answer 'Yes.'"

The answers thus returned to the questions propounded by the trial court, in view of the evidence in this case, fairly indicate to us that it is more than probable that the minds of the jury were confused in attempting to understand the questions submitted and to clearly and without contradictions answer them from the evidence, and it is very doubtful in our mind whether the court should have attempted to render any judgment thereon in favor of either appellant or appellees. Without, however, expressly deciding this question, we are constrained to hold that this cause should be reversed and remanded for a new trial because of the error complained of in appellant's seventeenth as-

signment of error, which is as follows: "The court erred in permitting counsel for defendant Houston to propound to said defendant a leading question, and in permitting said defendant to answer same, as complained of in plaintiff's bill of exception No. 3." The question thus permitted over appellant's objection, as shown by its bill of exception, was: "Did you or not have any understanding with the City Loan & Trust Company to the end or purpose of engaging in any fraudulent conspiracy to impose worthless negotiable paper upon any person or any concern?" To which the witness Houston answered: "No, sir; every transaction we had with them was just as legitimate as with any other banking institution. Every transaction I ever had with them, perfectly legitimate, and every time certificate they issued to me was issued for what I sold them—vendor's lien notes." We are of the opinion that the question objected to was leading and suggestive of the desired answer and related to a material issue in this case—that of the good faith of the appellee Houston in the transactions involved in this case—and the readiness and ability with which the witness responded to the suggestive question propounded to him shows that he was neither an ignorant nor an unwilling witness, and we are of the opinion that the question and the answer thereto were improperly admitted in evidence.

We do not think that appellees' contention, in reply to this assignment, that permitting the question objected to was in the discretion of the trial court, and impliedly that such discretion so exercised should not be revised by this court, is sustained by the authorities in this state. In the case of *I. & G. N. R. Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 501, Chief Justice Gaines rendering the opinion, in deciding adversely a like contention, held: "It is urged also that, although the question may be leading, since it was in the discretion of the court to permit leading questions, the admission of the answer to it is not a ground for a reversal of the judgment. There are authorities which so hold, but such is not the rule in this state. The question was sharply presented in *Davis v. State*, 43 Tex. 189, and in disposing of it the court there said: 'The questions suggested to a person of the lowest capacity the answers desired. As such, these questions should not have been permitted to be put to the witness, and the court should have sustained the objections to them.' " Mr. Starkie says: "Questions to which the answer 'Yes' or 'No' would be conclusive would certainly be objectionable, and so would any question which plainly suggested to the witness the answer which the party or his counsel hoped to extract." Starkie, Ev. p. 166. See, also, *Ft. Worth & R. G. Ry. Co. v. Jones* (Tex. Civ. App.) 85 S. W. 37; *Long v. McCauley* (Tex.) 3 S. W. 689. As above indicated, this case should be reversed and remanded for a new trial, and it is so ordered.

MORRIS v. SMITH.

(Court of Civil Appeals of Texas. June 27, 1908.)

1. TRUSTS—CONSTRUCTIVE TRUSTS.

When one in a fiduciary position, acting within his powers, purchases property with trust funds or funds in his hands of fiduciary character, and takes title in his own name without any declaration of a trust, a trust respecting such property results at once in favor of the original beneficiary, and defendant having sued on a note in which plaintiff had an undivided interest, and having obtained a foreclosure of the vendor's lien securing it, the land having been sold to defendant's partner and defendant and the partner having divided the land and sold it at a large profit—plaintiff could recover his proportionate part of the land or of the profits, or sue defendant for converting his part of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 153.]

2. TROVER AND CONVERSION—CONVERSION OF NOTE—LIABILITY.

Defendant having converted to his own use a note owned jointly by him and plaintiff became liable to plaintiff for its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 266.]

3. SAME—DAMAGES.

In recovering for the conversion of a note owned jointly by plaintiff and defendant, plaintiff's right to recovery was not limited to the note's market value, where the undisputed proof showed that when converted it was worth more than the amount for which plaintiff sued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 266.]

4. SAME—RIGHT TO RECOVER INTEREST.

Though, defendant having converted to his own use a note owned jointly by him and plaintiff, plaintiff could have recovered the value of his interest in the note, and, as damages, interest thereon from the date of the note to the date of conversion, it was improper to allow him interest where he did not claim it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 254.]

5. JUDGMENT — RECOVERY — CONFORMITY TO PLEADING.

Plaintiff, having sued for a specified sum upon an account and for conversion, could not recover a greater sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 443, 444.]

6. APPEAL AND ERROR — REVIEW — PRESUMPTIONS.

The transcript on appeal from justice court and from that court to the Court of Civil Appeals not showing that plaintiff sought to recover interest as part of his demand, and the court having failed to authorize such recovery, the Court of Civil Appeals will presume that there was no pleading authorizing such recovery, though plaintiff's brief states that interest was originally claimed in the county court and defendant's counsel agrees to the statement.

Error from Tarrant County Court; John L. Terrell, Judge.

Action by L. P. C. Smith against J. L. Morris. From a judgment of the county court for plaintiff on appeal from justice's court, defendant brings error. Judgment affirmed on plaintiff remitting part thereof.

Robt. G. Johnson, for plaintiff in error.
B. J. Houston, for defendant in error.

CONNER, C. J. Defendant in error instituted this suit in a justice court for damages for the alleged conversion of a promissory vendor's lien note. His damages were laid in the sum of \$180. The judgment in the justice court was in favor of plaintiff in error. In the county court, however, in a trial before a jury, there was a judgment for defendant in error in the sum of \$244.20, from which this appeal has been prosecuted.

Briefly stated, the undisputed facts show that plaintiff in error had been intrusted with the collection of a note in which defendant in error had an undivided interest of about \$165; plaintiff in error being the owner of the other undivided interest. The note was secured by the vendor's lien upon a certain tract of land subject to a prior lien in favor of one Dave Smith. The evidence further shows that plaintiff in error in the proper court instituted suit in his own name upon the note so jointly owned by the parties to this suit, and obtained a judgment for the amount due on the note with a foreclosure of the lien and order of sale; the order of sale providing that the prior mortgage of Dave Smith, who had been made a party to the foreclosure suit, be first paid out of the proceeds of the sale. The undisputed evidence further shows that plaintiff in error by virtue of the order of sale procured by him as stated secured the sale of the land, and it was bought in by Wade Hampton for the sum of \$300. Wade Hampton was a partner with plaintiff in error in the real estate business, and the \$300 was paid in part by a credit upon the judgment. Plaintiff in error or said Hampton, or both, paid off the Dave Smith mortgage pursuant to an agreement made with his representatives before the sale. They thereupon divided the land so purchased by Hampton, and soon thereafter sold it for several thousand dollars in excess of an amount sufficient to discharge all liens that had been resting thereon.

It is insisted that the evidence was insufficient to sustain the verdict and judgment on the issue of the conversion of the note upon which defendant in error alleged he had an interest. In this, however, we entirely differ with the plaintiff in error. In respect to the note for the conversion of which defendant in error sued, plaintiff in error plainly acted in the relation of an agent or trustee, and equity will require of him a faithful fulfillment of his obligation. As to the interest of defendant in error in the note, it was his duty to act in the utmost good faith, and equity will not permit him to take advantage of or reap the benefit from the true relation so held by him. It is a principle of equity that whenever a trustee or other person in a fiduciary position, acting within the scope of his powers, purchases land or other property with trust funds or funds in his hands impressed with a fiduciary character, and takes the title to such property in his own name without any declaration of a trust, a trust with respect to

such property at once results in favor of the original cestui que trust or other beneficiary. 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 422. An application of this principle would have entitled defendant in error to his proportionate part of the land or of the profits secured by means of the judgment in which both parties hereto were jointly interested, but defendant in error in his suit saw proper to treat the note as converted rather than to attempt to share in the proceeds of the sale, and with such selection of remedy no one can complain, as defendant in error clearly had the right either to hold the property secured by means of the note and judgment thereon, or, if he preferred to do so, sue as he did as for a conversion. The evidence we think undoubtedly sufficient to authorize the jury and court in the conclusion that, by the prosecution of the judgment and subsequent sale of the land and entire appropriation of the proceeds, plaintiff in error converted the note wholly to his own use, and therefore, under well-settled rule, became responsible to defendant in error for its value. Plaintiff in error insists that the value was such only as the note before the suit would have brought upon the market, but in this also we must differ with plaintiff in error. We think the undisputed proof shows that the note at the time of its conversion was in value worth all and more than the amount for which defendant in error sued.

Plaintiff in error, however, among other things, insists that the verdict of the jury and judgment is unauthorized, in that interest was allowed upon the claim sued upon, and this contention we find we must sustain. The transcript entirely fails to show that in his suit defendant in error claimed any interest upon the demand for which he sued. In the proper court he would have been entitled to recover his interest of \$165 in the converted note, and, as damages, interest thereon from the date of the note to the date of conversion. The interest, however, to which he would have been so entitled would be awarded as damages, and not as interest *eo nomine*. See *Schulz v. Tessman & Bro.*, 92 Tex. 488, 49 S. W. 1031; *Railway Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1054. The \$165 plus interest so computed, however, would have made the amount of defendant in error's claim slightly in excess of the jurisdiction of the justice court at the time of the institution of his suit therein. It was necessary, therefore, in order that the justice court might have jurisdiction to proceed, that plaintiff reduce his demand to less than that to which he was entitled, and he in fact did so, the justice's transcript showing that he sued upon an account and for conversion for the sum of "\$180." This sum, therefore, constituted the limit of his recovery, and we find that, while the transcript from the justice court has undertaken to specify as the statute requires the pleadings of the party, it nowhere shows that defendant in error as part of his

demand sought to recover interest, nor does the transcript show that such demand was made in the county court, and the court's charge in the county court failed to authorize the recovery for interest, and we must assume, therefore, that there was no pleading authorizing such recovery. It is true that in the brief for defendant in error there is a statement which is agreed to by the counsel for plaintiff in error, to the effect that, among other things, interest was in fact claimed originally in the county court, but we know of no rule which would authorize us to thus substitute what the law requires to be shown in the transcript.

It follows that the judgment in the county court should have been limited to the sum of \$180, and for the error in rendering a judgment in excess of that amount the judgment will be reversed and the cause remanded, unless defendant in error shall within 20 days file a remittitur of all such excess, in which event the judgment will be affirmed for the remainder, with the costs of appeal taxed against defendant in error.

HILLSBORO COTTON MILLS v. KING.

(Court of Civil Appeals of Texas. June 27, 1908.)

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—MINORS—CHANGE OF EMPLOYMENT.

Where a cotton mill company, with knowledge that an employé employed by it as a doffer boy, with his mother's consent, was a minor, changed his work and put him to work around a carding machine without his mother's knowledge, which work was more dangerous, and while so working he was injured as the proximate result of such change and his capacity to earn money diminished, the cotton mill company is liable.

2. HUSBAND AND WIFE—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF—RIGHT OF WIFE TO SUE ALONE.

In an action for injury to plaintiff's minor son, wherein plaintiff alleged that she was a widow, she was required to show her right to sue without joining her husband, and the contention that a plea that she was a married woman without right to sue without joining her husband attacked her legal capacity to sue, and to be available should have been sworn to and filed in due order of pleading, cannot be sustained where defendant filed a general denial and alleged that plaintiff was a married woman.

3. SAME—ACTION FOR INJURY TO CHILD.

A wife cannot sue for injury to a minor son without joining the husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 738-744; vol. 37, Parent and Child, § 91.]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by F. A. King against the Hillsboro Cotton Mills. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See 109 S. W. 484.

This suit was filed March 13, 1907, by appellee. In her petition she alleges that she is the mother of Coleman King; that appel-

lant is a corporation and conducts a cotton milling business; that Coleman King was a child of 12 years of age; that he was employed to work in appellant's cotton mill as a doffer boy, and that after he was employed appellant put him to work at the carding machine, which was a more dangerous business than he was employed in; that appellant failed to warn him of any danger, and that in front of and about the carding machine appellant permitted oil to be on the floor, and that Coleman King stepped in the oil and fell in the machine and was injured. Appellee claimed that appellant was negligent in putting Coleman King to work at a more dangerous business than that for which he was employed; that it was negligent in failing to warn him, and negligent in permitting the grease to accumulate on the floor, and was negligent in failing to direct Coleman King about the business of stripping the cards; and that, on account of his immature years and lack of experience, he did not know the dangers incident to the new employment. Appellant, after the general denial, claimed in its pleading that if the appellee's son was injured that appellee applied to it for employment for her son; that she was experienced in the use of the machinery, and knew what he was engaged in doing; and that, if the employment was dangerous, she was guilty of contributory negligence. It further alleged that Coleman King was a bright and intelligent boy and fully understood the machinery and any danger incident to its operation; that the accident was due to one of the risks assumed by him, and pleaded contributory negligence on the part of Coleman King. Appellant filed a plea alleging that appellee was a married woman and not joined by her husband in the suit. A trial resulted in a verdict and judgment in favor of appellee in the sum of \$1,400. Appellant's motion for new trial, having been overruled by the court, it perfected an appeal to this court.

Morrow & Smithdeal, for appellant. Poin-dexter & Padelford and Collins & Cummings, for appellee.

BOOKHOUT, J. (after stating the facts as above). The first assignment of error assails as error that portion of the fourth paragraph of the main charge, reading as follows: "Or, if you believe that without the consent of the plaintiff herein the said Coleman King was caused by the defendant to work around a machine that was more dangerous for him, the said Coleman King, to work with and around than the machine with which he was originally employed to work and that he was injured as alleged, and that said change from one machine to the other, if any, was the proximate cause of the injuries complained of, and that his capacity to earn money during his minority has been diminished, and that the said Coleman King was a minor and the son of plaintiff

and that the defendant knew that he was a minor, you will return a verdict in favor of the plaintiff, unless you find for the defendant under instructions hereinafter given you or under the instruction given you in some special charge."

Appellant presents two propositions challenging the correctness of this charge, in effect, that whether or not it was negligence for the appellant to cause Coleman King to work around a machine that was more dangerous for him than the machine with which he was originally employed to work was a question to be determined by the jury, and that, there being no law which prohibited appellant from causing said Coleman King to work at a more dangerous machine than the machine he was employed to work with, it was error for the court to tell the jury that, if he was put to work at a more dangerous machine, they were to find for the appellee without also submitting to the jury the question as to whether or not such act on appellant's part was negligence. We do not agree to these propositions.

One of the grounds on which appellee relied for a recovery was that Coleman King, her son, was employed to work at the spinning frame or as a doffer boy, and was transferred to the carding machine in another and different character of work and a more dangerous work. There was evidence that the carding machine was a more dangerous machine than the spinning frame. If Coleman King was employed by appellant as a doffer boy with the consent of his mother, appellee herein, and the appellant, knowing that he was a minor, changed his work and put him to work around a carding machine, and such change was made without the knowledge or consent of appellee, and to work around the carding machine was more dangerous than his work as doffer boy, and if, while so working, he was injured as the proximate result of such change and his capacity to earn money during his minority by reason of such injury was diminished appellee was entitled to recover. *Railway v. Brick*, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; *Railway v. Hervey* (Tex. Civ. App.) 89 S. W. 1095. The fact that appellee was willing that her son should perform the duties of doffer boy did not authorize the appellant to change his employment and put him at work without her consent around a more dangerous machine. The charge was correct.

The second assignment of error complains of the court's action in refusing a special charge requested by appellant, substantially, as follows: "You are instructed that it appears from the undisputed evidence that plaintiff was married to one J. C. Joyce before this suit was instituted, and that said Joyce is still living, and, there being no evidence before you that the said marriage has ever been dissolved, you are instructed that the plaintiff has no right to maintain this

suit, and to find a verdict for the defendants, and so say." The defendant pleaded that plaintiff was a married woman, and that she had no right to maintain the suit without joining her husband. The appellee contends that this plea attacks the legal capacity of plaintiff to maintain the suit, and should have been sworn to and filed in due order of pleading. We do not agree to this contention. Plaintiff alleged that she was a widow. The defendant filed a general denial, and specially alleged that plaintiff was a married woman. The plaintiff was required to show her right to maintain the suit. Under the law, if plaintiff was a married woman, she could not maintain the suit in her own name. The damages sought to be recovered would constitute community estate of herself and husband. The statute gives the husband, during marriage, the sole management of the community property, and he alone is ordinarily the only person authorized to sue for it. *Speer on Married Women*, § 287; *Murphy v. Coffey*, 33 Tex. 508; *Middlebrook v. Zapp*, 73 Tex. 29, 10 S. W. 732; *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *Vaughn v. Railway*, 34 Tex. Civ. App. 445, 79 S. W. 345. There was no pleading by plaintiff that she had been abandoned by her husband Joyce and left without means of support, or any allegation bringing her within the exception to the general rule above announced. *Leeds v. Reed* (Tex. Civ. App.) 36 S. W. 347; *Ezell v. Dodson*, 60 Tex. 331. There was evidence that plaintiff married J. C. Joyce in 1904, and there was no evidence that he was dead, or that the marriage relation had been dissolved. Plaintiff testified Joyce was living in Hill county the last time she saw him, which was two years before the trial. Under the pleading and evidence, it was error to refuse the charge requested.

The judgment is reversed, and the cause remanded.

STONE v. SCHNEIDER-DAVIS CO.

(Court of Civil Appeals of Texas. June 27, 1908.)

1. BANKRUPTCY — DISCHARGE — DEFENSE IN OTHER SUIT—FAILURE TO PLEAD.

Where a party permits a judgment to go against him in the county court, without urging as a defense his adjudication as a bankrupt and his subsequent discharge, obtained before the judgment rendered against him in the county court, he may not thereafter bring suit to enjoin the sale of property under an execution sued out on such judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 825-828.]

2. EXEMPTIONS — PROPERTY EXEMPT — IMPLEMENTS OF TRADE.

Furniture, such as dishes, counters, stools, ranges, and the like, used in conducting a restaurant is not exempt from forced sale under Rev. St. 1895, art. 2397, subd. 3, exempting all "tools, apparatus and books, belonging to any trade or profession."

Appeal from Dallas County Court; H. F. Liveley, Judge.

Suit by M. O. Stone against the Schneider-Davis Company, to enjoin an execution sale. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff claimed that the furniture used in his restaurant business, such as dishes, knives, forks, cups and saucers, ranges, counters, stools, and the like, was exempt under Rev. St. 1895, art. 2397, subd. 3.

Mure & Allen, for appellant. Flippin & McCormick, for appellee.

BOOKHOUT, J. This was suit by appellant against appellee to enjoin the sale of certain property, levied upon by the sheriff of Dallas county under an execution issued on a judgment rendered in the county court of Dallas county in favor of Schneider-Davis Company and against M. O. Stone. It was alleged that at the time of the pendency of the suit in the county court, in which the judgment was rendered, plaintiff, M. O. Stone, had been adjudicated a bankrupt, and at the time of the rendition of the judgment had been granted a discharge, that the debt for which the judgment was rendered had been duly listed in the schedules of plaintiff filed in the bankrupt court, and was not exempt or excepted from a discharge in bankruptcy, and that said debt was discharged by reason of plaintiff's discharge in bankruptcy. It was further alleged that the plaintiff was engaged with another in conducting a restaurant business, and that the property levied upon was partnership property, in which plaintiff owned a one-half interest, and that the same was necessary to the conducting of the restaurant business. A description of the property was set up, and it was alleged plaintiff owned a half interest therein, of the value of \$500. Defendant filed a general demurrer to the petition, which the court sustained and the suit was dismissed. Plaintiff excepted and perfected his appeal.

The contention of appellant is that the court erred in sustaining the demurrer. We do not agree to this contention. It was the duty of appellant, if he wished to avail himself of his discharge in bankruptcy, to have pleaded the same in the county court, and on trial to have made proof of the same in support of his plea. This he did not do, but permitted the suit to proceed to judgment. *Levyson v. Harbert*, Banks & Co., 3 Willson, Civ. Cas. Ct. App. § 214; *Manwarring v. Kouns*, 35 Tex. 171; *Aaron Coffee v. Ball*, Hutchins & Co., 49 Tex. 25; *Miller v. Clements*, 54 Tex. 354. Nor was the property levied upon exempt from execution as "the apparatus and furniture belonging to the trade and business" of one engaged in the restaurant business. This exact question was decided adversely to appellant in the case of *Frank v. Bean*, 3 Willson, Civ. Cas. Ct. App. § 211.

See, also, *Heidenheimer Bros. v. Blumenkron*, 56 Tex. 308; *Bond v. Ellison*, 2 Posey, Unrep. Cas. 388; *Dodge v. Knight* (Tex.), 16 S. W. 628; *Mueller v. Richardson*, 82 Tex. 363, 18 S. W. 693.

We conclude there is no error in the judgment and the same is affirmed.

GUNTER v. ROBINSON.

(Court of Civil Appeals of Texas. July 3, 1908.)

1. PRINCIPAL AND AGENT—IMPLIED AUTHORITY OF AGENT—SALE OF PERSONALTY.

An agent in charge of his principal's ranch business, with authority to sell stock, to make contracts with reference to the payment therefor, and having the management of affairs generally, is not thereby authorized to bind his principal by an agreement that a note, taken in part payment of the price of mules, should be paid by the purchaser breaking land for another, who would pay the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 278-312.]

2. CONTRACTS — PERFORMANCE OF BREACH—PERFORMANCE IMPOSSIBLE.

Nonperformance of a contract to break and cultivate land is not excused by the fact that the land was "hogwallow," and that the season was one of excessive rainfall, so that it was impossible to cultivate the land, where the character of the land was known, and no provision made to excuse performance in the event of excessive rain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1409-1415, 1444-1446.]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Suit by Roxana Gunter, executrix of the will of Jot Gunter, deceased, against William Robinson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. S. Lawrence and E. C. McLean, for appellant.

TALBOT, J. This is a suit on a promissory note for the sum of \$225, executed and delivered, by the appellee, Robinson, to Jot Gunter in his lifetime, for a part of the purchase price of a pair of mules. The sale of the mules was made to appellee by L. M. Tuck, as the agent of Gunter, for the sum of \$312.50; \$87.50 thereof being paid in cash, and the note sued on being for the balance of said sum. The defendant pleaded the general issue, and specially that said note had been paid off and discharged in the following manner, namely: That at the time of the purchase of the mules from Gunter through his agent Tuck, and at the time of the execution of said note, the said Tuck was also the agent of one W. C. Eubank to contract for the renting and breaking up of certain sod lands then owned by the said Eubank; that when said note was executed, Tuck, as the agent of Eubank, then and there contracted and agreed with appellee that appellee was to break certain sod lands

of the said Eubank, for which he was to pay appellee \$1.50 per acre, and that whenever as much as 50 acres of said land had been broken, a credit should be placed upon said note for the amount due at the price agreed upon, and the interest of said note abated to the extent of credit, and that whenever the amount of ground was broken necessary for the satisfaction of said entire note, the same should be canceled and surrendered to appellee, it being understood between the parties that the said Eubank would pay the said Tuck, and that Tuck would credit the amount so paid to him on the note, and pay the same off, and pay over said money to said Gunter; that under and by virtue of said contract appellee did break about 160 acres of sod land, which amounted to the sum of \$240, which was paid to Tuck by Eubank in accordance with the understanding and agreement between them; that appellee had fully complied with his contract, by breaking the land aforesaid, at and prior to the 23d day of February, 1905, and was then entitled to a credit of \$240; that at that time said note, with the interest thereon, amounted to the sum of \$232.50, which, deducted from said amount due appellee on said contract for breaking the land, left a balance of \$7.50 due appellee, for which he prayed judgment. In reply to the answer filed by appellee the appellant, after general and special exceptions thereto, pleaded that, as a part of the contract between appellee and Eubank for breaking the sod land, the appellee obligated himself to cultivate the land so broken by him, and to pay Eubank, as rental for the same, one-third of the grain and one-fourth of the cotton raised, and in default of the appellee cultivating all of the land so broken, he was to pay to the said Eubank the sum of \$3 per acre, for every acre not cultivated, as money rent; that appellee failed and refused to cultivate about 80 acres of the land broken by him, whereby he became liable to Eubank for the sum of \$240, which Eubank charged to him, and failed, because thereof, to pay anything on said note. By supplemental answer appellee pleaded that if it was true that he failed to cultivate said 80 acres of land broken by him, such failure was due solely to the act of God, in this: That said land was low and flat and "hogwallow," and that season was one of continuous and excessive rainfall, so that it was impossible for him, by the exercise of any care, diligence, or industry, to have cultivated said land further than he did. The trial of the case before a jury resulted in a verdict and judgment in favor of appellee, from which the appellant has appealed.

The assignments presenting the main questions in the case, as we view them, are to the following effect: (1) That the trial court erred in permitting the defendant, over the objection of the plaintiff, to introduce evidence of a verbal contract or understanding

between L. M. Tuck, as the agent of Jot Gunter and of Eubank, and the appellee, made at the time the note sued on was executed, that appellee was to pay off said note by breaking 150 acres of land for Eubank at \$1.50 per acre, and that appellee complied with such agreement; (2) that the verdict of the jury, is contrary to the law and the evidence in this: That there is no evidence whatever that L. M. Tuck had any authority to accept anything, in payment of the note sued on, other than money. These assignments seem to be well taken. The record discloses that proof of such a contract as is mentioned in the assignment was received over the objection of the appellant, and that the only evidence of Tuck's authority to make the contract is embraced in Tuck's own statement, which is as follows: "At the time of the execution of the note for \$225 sued on, I was the agent of Jot Gunter at his ranch at Gunter, Tex. The note was part of the purchase price of a span of mules. I had charge of Gunter's business on his ranch at Gunter—had authority to sell stock, make contracts with reference to the payment of it, and the managership of his affairs generally." The note sued on was dated September 23, 1904, and payable December 1, 1904. It was in the ordinary form of a promissory note, whereby appellee promised to pay to the order of Jot Gunter \$225, with interest, etc., "at the First National Bank of Gunter, Tex." There was no direct evidence that the note in question remained in the hands of the agent Tuck for collection, or that he was authorized to collect it; and whether an agent authorized to sell personal property has implied authority to receive payment is a question upon which there has been much difference of opinion. It seems that its solution must depend largely upon the nature of the particular transaction and the usages, if any, in relation thereto. Mech. on Agency, § 336. It does not follow as a matter of course that an agent, employed to negotiate, make, or conclude a contract, has incidental authority to receive payments which may become due under such contract. But it is a well-settled general rule that the mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them. Mech. on Agency, § 352. If he is authorized to receive payment, he is ordinarily deemed intrusted with the power to receive it in money only. The testimony, as contained in the record before us, is not sufficient to show that Tuck was either expressly or impliedly authorized to collect the note sued on, or, if so authorized, that he was empowered to accept payment thereof in anything except money. The most that can be said of the testimony on this phase of the case, as developed on the trial, is that Tuck, as the agent of Gunter, was simply empowered to make the sale of the mules to appellee,

receive the cash paid, and take his note for the deferred payment; that this was the extent of his authority to contract for the payment of stock sold by him for his principal, Gunter. In the case of *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306, 18 S. W. 1078, it is held "that an agent, who was authorized merely to sell upon a credit, could not take for a deferred payment a written promise, which the promisor had the election to discharge, in anything but money." There being no express authority shown for Tuck to make the contract that the note taken for the mules sold to appellee could be paid off by the breaking of sod land for Eubank, and no circumstances appearing from which such authority can be implied, it follows that such a contract, if made, was not binding on Gunter or his legal representatives. For this reason the court also erred in giving appellee's special charge made the basis of appellant's eighth assignment of error.

It is further assigned that the court erred in permitting the appellee to testify that the land he failed to cultivate was deep "hog-wallowy" black land; that it rained so that the hogwallows kept full of water from the 1st day of April until June, and he could not, for that reason, cultivate it. This assignment, we think, should also be sustained. The character of the land was evidently known to appellee at the time the alleged contract upon this phase of the case was made, and no provision seems to have been made to relieve him of the performance of his part of it in case of excessive rains producing the conditions charged, and upon which he seeks to avoid liability. When a party voluntarily undertakes, and by contract binds himself, to do an act or thing without qualification, and the performance thereof becomes impossible by some contingency which should have been anticipated and provided against in the contract, and such provision is not made, the nonperformance will not be excused. *Houston Ice & Brewing Co. v. Keenan* (Tex.) 88 S. W. 197. The facts alleged were not sufficient to exonerate appellee from liability on the ground that performance had been prevented by an act of God.

Other assignments need not be discussed.

For the reasons stated, the judgment is reversed, and the cause remanded.

HARKINS v. MURPHY & BOLANZ et al.
(Court of Civil Appeals of Texas. July 3, 1908.)

1. ATTORNEY AND CLIENT—EFFECT OF ADMISSION TO BAR.

An attorney after being admitted to practice becomes an officer of court, exercising a privilege or franchise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 21.]

† Application for writ of error dismissed by Supreme Court for want of jurisdiction.

2. PRINCIPAL AND AGENT—"AGENCY."

"Agency" is the legal relation founded upon the express or implied contract of the parties, or created by law by virtue of which one party, the agent, is employed and authorized to act for the other, the principal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 261-262.]

3. ATTORNEY AND CLIENT—RIGHT OF ONE NOT ADMITTED AS ATTORNEY.

A party to an action in a court of record cannot prosecute or defend his suit by an agent or attorney in fact who is not an attorney at law, duly licensed to practice as such, nor can a writ of error in the Court of Civil Appeals be prosecuted by such an agent or attorney in fact.

4. PRINCIPAL AND AGENT—"ATTORNEY IN FACT."

An "attorney in fact" is defined as a private or special attorney, appointed for some particular or definite purpose not connected with a proceeding at law; hence the very definition excludes the idea that he is authorized to represent his principal in proceedings in court.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 635.]

5. CRIMINAL LAW—RIGHT OF ACCUSED TO APPEAR BY COUNSEL—CONSTITUTIONAL PROVISION—"COUNSEL."

The word "counsel," as used in Const. art. 1, § 10, providing that an accused has the right of being heard by himself or counsel, or both, has a well-established meaning, and as there used it means an advocate, counselor, or pleader, one who assists his client with advice, and pleads for him in open court; and it does not mean one not admitted to practice law.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1644.]

6. ATTORNEY AND CLIENT—APPEARANCE IN CIVIL ACTIONS—CONSTITUTIONAL PROVISIONS—APPEARANCE BY ONE NOT AN ATTORNEY.

The Constitution is silent as to the right of a party to a civil action to appear by another, but Rev. St. 1895, art. 1209, provides that any party to a suit may appear and prosecute or defend, either in person or by an attorney of the court. *Held*, that the statute requires that a party shall prosecute or defend his suit in person, or by an attorney of the court; for by implication the right of any other to do so is excluded.

Error from District Court, Dallas County; Richard Morgan, Judge.

Action by James Harkins against Murphy & Bolanz and others. Judgment for plaintiff, and defendants bring error. Writ dismissed.

Herman Kruegel, for plaintiffs in error. Cobb & Avery, for defendant in error.

RAINEY, C. J. This suit was instituted in the district court of Dallas county by James Harkins, acting by his agent and attorney in fact, Herman Kruegel, against Murphy & Bolanz and others, as defendants, in the nature of a bill of review and to set aside the judgment and for a new trial in case No. 20,340, styled "James Harkins v. Murphy & Bolanz et al."; the judgment therein having been rendered May 17, 1901. The pleadings of plaintiff are voluminous, consisting of 47 pages of typewritten matter. The defendants excepted to the petition, among other things, for the reason that the suit was brought and was being prosecuted by Herman Kruegel, who is not an attorney

at law, and has no right to prosecute suits for others in the courts of this country. This exception, among others, was sustained, and, the plaintiff declining to amend, the suit was dismissed. The plaintiff, acting solely by said Herman Kruegel, perfected a writ of error to this court. Defendants in error duly filed a motion in this court to dismiss the writ of error, on the ground that this suit was brought by, and the petition for writ of error and assignments of error were filed by, and the writ of error is being prosecuted by, Herman Kruegel, as agent and attorney in fact for James Harkins, and said Kruegel is not a lawyer, and has no legal right to bring and prosecute suits and writs of error for others. The pleadings of plaintiff upon their face allege that Herman Kruegel is not a lawyer, but that he is agent and attorney in fact for James Harkins.

The question presented by the motion is: Can a party appear in a court of record, and prosecute or defend his suit therein, by his agent or attorney in fact, who is not an attorney at law duly licensed to practice as such? The plaintiff in error contends that section 10, article 1, of the Constitution provides that in criminal prosecutions the accused has the right of being heard "by himself or counsel or both," and that this power is broad enough to include his right to appear by agent or attorney in fact, although such agent or attorney in fact is not an attorney at law. The laws of this state at the time of the adoption of the Constitution required that one desiring a license to practice as an attorney and counselor at law present his application for license to the district court, accompanied by a certificate from the county commissioner's court that he is 21 years of age, and that he has a good reputation for moral character and honorable deportment, after which he was required to undergo an examination; and, if satisfied with his legal attainments, the court was authorized to give him a license. He was required to take the constitutional oath of office, and could be removed or suspended from practice by any of the courts in which he was authorized to practice. There were other laws in force at the time, carefully guarding the right to practice law, not only in the admission to practice, but in the standing and maintaining such rights thereafter. Rev. St. 1895, art. 255 et seq. Since the adoption of the Constitution the law has been made much more stringent in these requirements (Gen. Laws, 1903, p. 59, c. 42), and the course of study to be pursued by the applicant has been carefully mapped out (Rules for Supreme Court, 96 Tex. 637). An attorney, after being admitted to practice, becomes an officer of court, exercising a privilege or franchise. 4 Cyc. 898.

The bill is signed by Herman Kruegel, agent and attorney in fact. Agency is the legal relation founded upon the express or implied contract of the parties, or created

by law, by virtue of which the party—the agent—is employed and authorized to act for the other—the principal. Mechem on Agency, p. 1, § 1. If the contention of plaintiff in error is correct, then, as stated by Chief Justice Marston in the case of Cobb v. Judge of Superior Court, 43 Mich. 290, 5 N. W. 310: "Parties may appear by agents possessing no legal qualification or even ordinary intelligence, and of the worst possible character. They may be minors, and may even be persons who have been disbarred and removed by this court from practicing as attorneys and solicitors. They could not practice as attorneys, possessing neither the legal nor moral qualifications for such a position, and yet they could appear as agents. They would possess the rights of attorneys, but not be subject to the responsibilities. Their removal by the court, if they could be removed, would be a mere idle ceremony. Litigants might again employ them, and authorize them to appear and represent their interests, so that persons who could not practice as attorneys could as agents, with equal rights and powers. Such could not have been the intention of the framers of our fundamental law, or of the people in adopting it. There are still additional reasons for this view. Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their clients, but be able to assist the court in the trial of the cause. Yet what protection to clients or assistance to courts could such agents give? They are required to be of good moral character, so that the agents and officers of the court, which they are, may not bring discredit upon the due administration of the law, and it is of the highest possible consequence that both those who have not such qualifications in the first instance, or who having had them have fallen therefrom, shall not be permitted to appear in courts to aid in the administration of justice. One of the principal powers possessed by courts for the protection of the public, and to maintain the high standing, character, and reputation of the bar, is the right to expel members who have been shown guilty of immoral acts, thus rendering them unworthy to longer retain their position as officers of the court." We do not wish to be understood, in quoting the above, as reflecting on the agent and attorney in fact of plaintiff in error, or as intimating that he is not a man of good reputation and standing. In the case from which the quotation is taken the Supreme Court of Michigan had under consideration a clause of the Constitution of that state, providing that "every suitor shall have the right to prosecute or defend his suit, either in person or by an attorney or agent of his choice." We have not the Constitution of that state before us, but Mr. Mechem in his work on Agency, in discussing the question, states the clause as above quoted. Mechem on

Agency, § 806. It was held that this clause did not authorize a party to appear in a court of record by an agent who is not an attorney at law. The decision is exhaustive, and shows careful investigation, and should be considered decisive of the contention of plaintiff in error.

Again, it is insisted that Kruegel not only prosecutes this suit as agent, but also as attorney in fact of James Harkins. An attorney in fact is defined as a private or special attorney, appointed for some particular or definite purpose not connected with a proceeding at law. Weeks on Attorneys (2d Ed.) § 28; Black's Law Dictionary, p. 105. Thus it is seen that the very definition of attorney in fact excludes the idea that he is authorized to represent his principal in proceedings in court. The Constitution authorizes the accused, in criminal prosecutions, to appear by himself or counsel, or both. The word "counsel," as used in the Constitution, has a well-established meaning. As there used it means an advocate, counselor, or pleader; one who assists his client with advice, and pleads for him in open court. Black's Law Dictionary, p. 283. It does not mean one not admitted to practice law.

Then, again, this section of the Constitution has reference to criminal prosecutions. The Constitution is silent as to the right of a party to a civil action to appear by another. Article 1209 of the Revised Statutes provides that "any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." This statute, under the familiar maxim, "expressio unius est exclusio alterius," requires that a party in prosecuting or defending his suit shall do so in person or by an attorney of the court. The Legislature having expressly named an attorney of the court as entitled to represent a party to a suit thereby, by implication, excluded the right of any other to do so. The trial court properly held that James Harkins could not institute and prosecute his suit in court by his agent and attorney in fact, who was not an attorney of the court, nor can he prosecute a writ of error in this court by such agent and attorney in fact, who is not a licensed attorney of this court.

It follows that the motion to dismiss the writ of error must be sustained.

The writ of error is dismissed.

BINYON v. SMITH et al.†

(Court of Civil Appeals of Texas. April 25, 1908. Rehearing Denied June 6, 1908.)

1. APPEAL AND ERROR—PARTIES—DEATH OF PLAINTIFF—PERSONAL INJURIES.

Under Rev. St. 1895, art. 973, providing that an action shall not abate by the death of a party after an appeal bond has been filed and approved, or after a writ of error has been served, etc., an action for personal injuries does

not abate by the death of plaintiff after judgment in his favor and after defendant has filed his petition for writ of error and error bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1847.]

2. DESCENT AND DISTRIBUTION—DEATH OF JUDGMENT CREDITOR—RIGHTS OF WIFE AND CHILDREN.

Under Rev. St. 1895, art. 1689, providing that on the death of any person intestate his estate shall descend to his wife and children, the right acquired by a judgment for plaintiff suing for a personal injury passes on his death intestate to his wife and children.

3. APPEAL AND ERROR—WRIT OF ERROR—PERFECTING WRIT OF ERROR.

Under Rev. St. 1895, art. 1402, providing that, where the bond on writ of error and the petition therefor have been filed, etc., the writ of error shall be held to be perfected, a plaintiff in error who filed his petition and error bond perfected the writ of error.

4. SAME—PARTIES ON WRIT OF ERROR.

Under Rev. St. 1895, arts. 973, 1240, 1399, requiring the Appellate Court to adjudicate a writ of error, notwithstanding the death of a party to the record after service of the writ, authorizing a defendant to accept service of any process or waive service, etc., a defendant suing out and perfecting a writ of error to review a judgment for plaintiff in a personal injury action may, after plaintiff's death, proceed by causing service of citations in error on the surviving wife and children, who may accept service thereof.

5. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries to an employee while assisting in moving an engine and smoke-stack, evidence held to require the submission to the jury of the issues of the employer's negligence and the employee's contributory negligence.

6. PARTNERSHIP—DISSOLUTION—ASSUMPTION OF FIRM LIABILITIES—"ALL LIABILITIES."

A partner agreeing on the dissolution of the firm to assume "all liabilities" of the firm assumes the liability of the firm in favor of an employee injured through its negligence, especially where there was evidence that the employee's suit was contemplated and discussed as a possible liability, though the copartner then insisted that there was no liability, but without falsely representing to the partner any of the facts.

Error from District Court, Tarrant County; Irby Dunklin, Judge.

Action by D. E. Smith against J. M. Stewart and W. J. Binyon, Jr. There was a judgment for plaintiff against both defendants and for Stewart over against Binyon, and he brings error and prosecutes the same, after plaintiff's death, against his wife and children. Affirmed.

Orrick & Terrell and W. F. Young, for plaintiff in error. C. M. Templeton, for defendants in error.

CONNER, C. J. This suit was instituted by D. E. Smith against J. M. Stewart and W. J. Binyon, Jr., composing the partnership of the Stewart-Binyon Transfer & Storage Company, to recover damages for personal injuries received while in the employ of said partnership. He alleged, in substance, that about the 24th day of August, 1905, the defendants were engaged in moving a large engine, some boilers, and other attachments, among which

† Writ of error refused by Supreme Court.

was a large smokestack weighing about 1,000 pounds; that the smokestack had become fastened between the wall of the building and the engine, one end being on the ground and the other in the air; that, in order to extricate it, the defendant J. M. Stewart ordered plaintiff and one McCarthy to go underneath the smokestack and cut the rivets which joined the sections together; that, while complying with this order, in some manner unknown to plaintiff, the smokestack broke from its fastenings, and suddenly fell on the plaintiff, breaking his left hip. It was further alleged that the place to which plaintiff was ordered to do the work of cutting the rivets was one of great danger fully known to the defendants, but wholly unknown to plaintiff; that the defendants were guilty of negligence in ordering the plaintiff to work in said place; that said McCarthy was a foreman of defendants with authority to employ and discharge workmen and to direct and control plaintiff and other employees, and was directing and controlling the plaintiff at the time of the accident; that the injury was due to negligence on the part of McCarthy in neglecting to block up or brace said smokestack, or to use some other precaution to prevent the same from falling upon the plaintiff while cutting it in two, and in failing to keep or provide a proper lookout to warn plaintiff in event said smokestack commenced to slip or fall. The defendant Binyon pleaded the general denial, contributory negligence, and assumed risk, and specially pleaded over against the defendant Stewart to the effect that Stewart was personally in charge of the work and alone directed it, and that as between him (Binyon) and Stewart he was guiltless, and prayed for judgment against Stewart in event the plaintiff obtained a judgment against the firm. The defendant Stewart pleaded, in substance, the same general pleas as his codefendant, and also specially against defendant Binyon that the firm had been dissolved, and that by the terms of the dissolution Binyon expressly assumed the liabilities of the firm, and he prayed that, in event the plaintiff should recover a judgment, he (Stewart) should recover a like judgment against Binyon. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$250 against both defendants, and in favor of the defendant Stewart over against Binyon for such part of the judgment as he might be required to pay.

By an independent counter proposition of the defendants in error, who have succeeded to the rights of D. E. Smith as hereafter stated, a preliminary question of practice has been raised of which we must first dispose. It appears from the record that after the rendition of the judgment in favor of D. E. Smith, and after plaintiffs in error had seasonably filed in the court below their petition and approved bond for the writ, but before the service of citation in error, the said D. E. Smith died intestate. Plaintiffs in error there-

upon filed an amended petition, setting up the fact of Smith's death, averring that he left no debts; that there had been no administration, nor necessity therefor; and praying for citation to issue to the surviving wife, Lucy A. Smith, and surviving children, Zene E. Smith, Zeñus W. Smith, and Mary J. Smith, who were alleged to be the sole surviving heirs of D. E. Smith, deceased. The said wife and surviving children thereupon duly waived the issuance and service of citation in error, and have entered their appearance herein both by formal written waiver and by filing and urging briefs in this court. The statute directs that service of the citation in error "shall be made by delivering to the defendant in error, and if more than one, then to each of them, in person, a true copy of such citation." See Rev. St. 1895, art. 1395. The statutes, however, do not seem to have expressly designated the persons upon whom the citation in error shall be served in cases where, as here, the defendant in the writ dies after the petition and bond have been filed, but before service of citation upon him. After judgment, however, actions for personal injuries do not abate. Rev. St. 1895, art. 973; *Railway Co. v. Nolan*, 53 Tex. 146; *Gibbs v. Belcher*, 30 Tex. 79. Hence the adjudged right passes to the surviving wife and children of the deceased by our statute of descent and distribution. Rev. St. 1895, art. 1689. The surviving wife and children then are the proper parties in interest, and we see no reason why, in the absence of a devise or of administration or of necessity therefor, they may not enter their appearance on appeal. The statute last above cited (article 973) expressly requires Courts of Civil Appeals, as also the Supreme Court, to proceed to adjudicate appeals by writ of error where a party to the record dies after the "writ of error has been served." In this case plaintiffs in error perfected their appeal when they filed their petition and error bond. Rev. St. 1895, art. 1402; *Vineyard v. McCombs* (Tex.) 99 S. W. 544. It follows, we think, that plaintiffs in error under the facts alleged by them were authorized to further proceed in the prosecution of their appeal by causing service of citations in error on the surviving wife and children, as in the familiar case of a party defendant who dies before judgment. If so, those now defending could certainly accept service as they have done. Rev. St. 1895, arts. 1240, 1399. Without further elaboration, we are of the opinion that it is our duty to proceed to the determination of the appeal on its merits, instead of dismissing it, as urged.

The principal contention before us on the merits is that the evidence is insufficient to sustain the verdict and judgment. It is insisted that D. E. Smith knew the situation surrounding the work to be done and knew the effect or probable effect of doing the work in the way in which it was done, and that he hence assumed the risk, from which it is in-

sisted the court erred in refusing to give the peremptory instruction in favor of plaintiffs in error, as requested by them, or that at least the court should have granted the motion for a new trial. The facts, briefly stated, are that D. E. Smith, as alleged in his petition, was working for plaintiffs in error, and had been for some 30 days prior to the time of his injury engaged in moving heavy articles; that at the time of the accident the company was engaged in taking the boilers and machinery out of the burned ruins of the old packing house in North Ft. Worth, Tex.; that Smith had been working in the building on the work of removing the wreckage for a week, his particular employment at the time being the cutting of pipe; that in moving the débris a piece of four-foot smokestack of sheet iron from three-sixteenths to one-fourth inches in thickness had become fastened or wedged in between the west wall of the building and the back end of the furnace wall. The space between the two walls named was about four or five feet. The pipe was about 25 or 30 feet long in sections of 5 feet each riveted together; the stack lying north and south, the south end resting on the ground and the north end elevated in the air. The height of the north end of the stack above the ground varied according to the evidence from 6 feet to 15 feet. The stack was "cata-cornered," as expressed by some of the witnesses, and as a result was wedged between the walls as stated. The work done was ordered by plaintiff in error Stewart in person. Stewart testified that he had long experience in moving heavy articles of the kind and in handling smokestacks, and knew that the work ordered was dangerous; that he directed that the stack should be blocked up. Smith testified, however, that, if any such direction was given by Stewart, he did not know it, and further to the effect that he had no experience in handling smokestacks of the kind, although in a general way he knew that it was dangerous to go under the stack, and knew that hammering thereon would naturally tend to loosen the stack from its place. There was evidence, however, tending to show that efforts had been made to move the stack before the order to cut the rivets, and Smith testified to the effect that his purpose and that of McCarthy was to cut some of the rivets on the bottom side, and then step from under the stack and cut those on the sides and higher up, and thus permit the stack to sink or fall. Smith also testified that as they approached the stack for the purpose of cutting the rivets he tapped it several times with his hammer in order to ascertain if it was fast. There was also evidence tending to show that there was a window in the west wall of the building about six or eight feet back of Smith and through which a person, if stationed there,

could have observed whether the stack was slipping after McCarthy and Smith began working on it. Smith denied that he observed that the stack was becoming loosened from its wedged condition, but another workman testified that he did and called Stewart's attention to the fact, and was by Stewart directed to "go out there and tote some blocks up there."

While, as may be seen from the above synopsis of the evidence, Smith testified in a general way that he knew it was a dangerous place in which to work, and that the probable effect of hammering on the smokestack was to make it fall, it further appears that repeated efforts to loosen it had been unsuccessfully made before and that Smith was without much experience in that kind of work. The testimony, as we think, tends to show that Smith, after the tests made by himself, thought that he could safely cut a number of rivets on the under side before the stack would be so weakened as to give way, and we think that it was for the jury to say whether under all of the circumstances Smith was guilty of contributory negligence. The testimony of Stewart indicates that he knew that the smokestack should have been blocked up or that at least some other precaution was taken, and the inference of negligence from his failure to see that the stack was properly blocked up, or that Smith and McCarthy were notified of the loosening of the stack after he (Stewart) had been informed of it, is very strong. So that on the whole, and after a careful review of all of the testimony, we are of opinion that the court properly refused the peremptory instruction in favor of plaintiffs in error, and properly overruled their motion for a new trial.

The only remaining question presented by the assignments arises under the cross-plea of plaintiff in error Stewart, but it seems clear to us from the testimony that at the time of the dissolution of the firm of Binyon & Stewart it was expressly agreed between them that Binyon should assume "all liabilities" of the firm. And, aside from the import of the terms tending to include the cause of action in behalf of D. E. Smith, there is evidence tending strongly to show that Smith's suit (instituted a short time after the dissolution) was expressly contemplated and discussed as a possible liability, although Stewart then insisted, as he did throughout the trial, that there was no liability, inasmuch as he was guilty of no negligence. This evidently was but an opinion, and it nowhere appears that Stewart falsely represented to Binyon any of the facts. Indeed, no allegation of this character is made. We therefore find no error as assigned in the charge of the court submitting this issue.

We conclude that all assignments of error should be overruled, and the judgment affirmed.

GRAHAM et al. v. REMMEL.

(Supreme Court of Arkansas. June 15, 1908.)

1. INSURANCE — CONTRACT — MEETING OF MINDS.

Defendants applied for a joint life policy on a ten-year distribution plan, and executed the note sued on for the premium, payable 30 days after delivery of the policy. On the policy being tendered, defendants requested that it be exchanged for a policy issued on the five-year distribution plan, but a misunderstanding arose as to the nature of the latter policy with reference to which the minds of the parties never met, whereupon the insurance company reissued the first policy and tendered the same to defendants, which they refused to receive. *Held*, that the transaction with reference to the five-year policy did not cancel or abrogate defendant's agreement to accept and pay for the original policy.

2. SAME—PREMIUM NOTE—ACTION BY AGENT—RIGHT TO SUE.

Where a premium note on a life policy was payable to the agent of the insurance company, and on the maker's refusal to comply with the contract and take the policy, the agent settled with the company for any interest it had in the contract, he was authorized to sue on the note in his own name as the real party in interest by Kirby's Dig. §§ 5999, 6002.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by H. L. Remmel against J. R. Graham and others. Judgment for plaintiff, and defendants appeal. *Affirmed*.

J. W. & Jas. M. Stayton and Morris M. Cohn, for appellants. Rose, Hemingway, Canrell & Loughborough and S. D. Campbell, for appellee.

FLETCHER, Special Judge. A statement of this case will be found in 78 Ark. 140, 88 S. W. 899, where a former judgment in favor of H. L. Remmel was reversed with directions to the trial court to admit evidence which had been rejected and to submit the issues of fact to a jury. A second trial resulted in a verdict in favor of Remmel upon the first count of the complaint, and Graham Bros. have again appealed.

We discover no reversible error in the instructions given or in refusing requests for others. The verdict sustains the contention of Remmel that the first contract executed by Graham Bros. to him was binding upon them; but it is contended that this contract was abrogated by a cancellation of the 10-year policy issued in accordance therewith. This was done upon the request of Graham Bros. that they be permitted to exchange the 10-year policy for a policy to be issued upon what is known as the 5-year distribution plan, and upon the understanding that such policy would be accepted in lieu of the 10-year policy and paid for by Graham Bros. when delivered. The verdict of the jury establishes the fact, and it is admitted in argument by counsel, that there was a misunderstanding between the parties as to the nature of this 5-year policy, that the minds of the parties never met as to it, and hence that the negotiations relating to the same never cul-

minated in an effectual and binding contract. This left the contract as to the first policy in full force, and the company, at the request of Remmel, had the right to reissue that policy, which it did by issuing and tendering through Remmel another just like the first. *Utley v. Donaldson*, 94 U. S. 47, 24 L. Ed. 54.

It is again contended that Remmel was acting merely as the agent of the company, and had no right of action upon the contract. The contract was made in his name, and the proof shows that he had settled with the company for any interest it had in the contract, and the company had no further interest in it. The suit was properly brought by him and in his name. Kirby's Dig. §§ 5999, 6002.

Affirmed.

EARNEST v. ST. LOUIS, M. & S. E. R. CO.

(Supreme Court of Arkansas. June 29, 1908.)

1. DEATH—ACTIONS FOR CAUSING—RIGHTS AT COMMON LAW.

At common law a right of action existed for an injury to the person, which did not result in death, but no right of action existed for the death of a human being.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 10.]

2. LIMITATION OF ACTIONS—CONDITIONS PRECEDENT—STATUTORY ACTIONS.

Where a statutory right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right of action, and will control no matter in what forum the action is brought.

3. DEATH — LIMITATIONS — APPLICATION OF STATUTE.

Rev. St. Mo. 1899, § 2864 (Ann. St. 1903, p. 1637), gives a cause of action for wrongful death. Section 2868 (page 1652) provides that the action shall be commenced within one year after it has accrued. *Held*, that the time within which suit may be brought is not a mere statute of limitation, but a limitation of the liability itself, and a condition to sue at all, and an action under the section brought after a year from its accrual being barred in Missouri could not be maintained in Arkansas.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 52.]

4. LIMITATION OF ACTIONS—PLEADING—DEMURRER RAISING DEFENSE.

As a rule the statute of limitation cannot be taken advantage of by demurrer to the complaint in an action at law, unless the complaint shows that a sufficient time has elapsed to bar the action, and the nonexistence of any ground of avoidance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670-672.]

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Death action by Mrs. David A. Earnest against the St. Louis, Memphis & Southeastern Railroad Company. Judgment for defendant on demurrer to complaint, and plaintiff appeals. *Affirmed*.

Whipple & Whipple, for appellant. W. F. Evans and W. J. Orr, for appellee.

HART, J. On the 31st day of October, 1902, David A. Earnest was a conductor on appellee's line of railway, which extends from Cape Girardeau, in Missouri, to Pochontas, in Arkansas. On that day at the town of Delta, in Missouri, while engaged in his duties as freight conductor and while attempting to uncouple two cars of defendant's train, said David A. Earnest was caught between the cars and mashed. He died from the wounds received in a few days thereafter. Appellant alleges that the injury and death was caused by the negligence of the appellee; that she is the widow of said David A. Earnest, deceased; that said deceased had no minor children; that she has resided in the state of Arkansas since the death of her husband, and was never a resident of the state of Missouri. The action was commenced in the circuit court of Randolph county, Ark., on the 16th day of July, 1904. Appellee filed a general demurrer to the complaint. The demurrer was sustained, and judgment was rendered in favor of the defendant for costs. An appeal was granted to this court.

This suit is based on section 2864 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, p. 1637), which reads as follows: "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employé whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employé whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any steamboat, or the machinery thereof, or in any stage coach or other public conveyance, the corporation individual or individuals in whose employ any such officer, agent, servant, employé, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence or criminal intent above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased; Provided, that if adopted, such minor child or children shall have been duly adopted according to the laws

of adoption of the state where the person executing the deed of adoption resided at the time of the adoption; or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency and that the injury received was not the result of unskillfulness, negligence or criminal intent." Section 6 of the act of December 12, 1855 (Rev. St. 1855, p. 649, c. 51), now section 2868 of the Revised Statutes of 1899 (Ann. St. 1906, p. 1652), reads as follows: "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of action shall accrue."

The first question presented by the record is whether this statute of Missouri creates a statutory liability. At common law a right of action existed for an injury to the person, which did not result in death, but no right of action existed for the death of a human being. Counsel for appellant seems to have been confused in regard to the two classes of cases. In *Barker v. Hannibal & St. Joseph Railway Co.*, 91 Mo. 91, 14 S. W. 281, the Supreme Court of the state of Missouri said, in discussing this statute: "It may be observed that damages for the tort to a person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrongdoer. Our statute, on this subject, both gives the right of action and provides the remedy for the death where none existed at common law, and where an action is brought, under the statute, it can only be maintained subject to the limitation and conditions imposed thereby." This case was cited and followed in *Brink v. Wabash Ry. Co.*, 160 Mo. 92, 60 S. W. 1058, 53 L. R. A. 811, 83 Am. St. Rep. 459, and the following quotation adopted from the case of *Insurance Company v. Brame*, 95 U. S. 754, 24 L. Ed. 580: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." In the case of *Railroad v. Barker*, 33 Ark. 353, 34 Am. Rep. 44, this court said: "By the common law the death of a

human being could not be made the subject of a civil action." And in *Davis v. St. L., L. M. & S. Ry. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283, this court said: "The English rule which is commonly followed by the courts of the states whose statutes embody the provisions of Lord Campbell's act is that the rights of action given by the latter statutes to the personal representative of one whose death has been caused by another is created by the statute, and is not a continuation of the right of action which the deceased had in his lifetime, although the new right, it has been ruled, arises only by preserving the cause of action which was in the deceased." The Supreme and appellate courts of Missouri hold that the provisions of the Missouri statute above quoted as to the parties who may sue, and the time within which they may sue, are conditions attached to the right itself given by the statute, and not limitations merely. *Barker v. Railroad*, 51 Mo. 86, 14 S. W. 280; *Case v. Cordell*, 103 Mo. App. 477, 78 S. W. 62; *Packard v. Railroad*, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607.

The general rule is that where a cause of action does not exist at common law, but is created by the statutes of a state, it only exists in the manner and form and for the length of time prescribed by the statutes of the state which created it. *Finnell v. Southern Kan. Ry. Co.* (C. C.) 83 Fed. 427. The rule has been announced and approved in the following cases: *Munos v. Railroad*, 51 Fed. 188, 2 C. C. A. 163; *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Railway Co. v. Hine*, 25 Ohio St. 629; *Eastwood v. Kennedy*, 44 Md. 563; *Negaubauer v. Railroad*, 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674; *Dennis v. Atlantic Coast Line R. R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746; *Gern v. La Campagne General Transportation Co.*, 110 Fed. 996; *Boston & Maine R. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, in discussing a like statute, the court said: "The time within which the suit must be brought operates as a limitation of the liability itself, as created, and not of the remedy alone. It is a condition to sue at all." In *Hamilton v. Railroad*, 39 Kan. 2, 18 Pac. 60, the Supreme Court of Kansas in passing upon the precise question presented here, said: "The statute of Missouri provides who may bring an action and the time and conditions within which it must be instituted, and compliance with these requirements is essential to the maintenance of the action. If the injury was not actionable in Missouri where it was inflicted, certainly it is not actionable here; and, unless it appears from the record that the widow could maintain an action in that state, she has no cause of action which she can assert in this jurisdiction."

Therefore we conclude that it is now well

settled that where a statutory right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right of action and will control, no matter in what form the action is brought. As a rule the statute of limitation cannot be taken advantage of by demurrer to the complaint in an action at law, unless the complaint shows that a sufficient time had elapsed to bar the action, and the nonexistence of any ground of avoidance. *Dowell v. Tucker*, 46 Ark. 438. But counsel for appellant has not raised this question, and, besides, we have held that the time fixed by the statute is not strictly a statute of limitation, but attaches as a condition to the right to sue.

The demurrer in this case was properly sustained, and the judgment is affirmed.

JOHNSON v. STATE.

(Supreme Court of Arkansas. June 29, 1908.)

1. CONTEMPT—REVIEW—PRESUMPTIONS.

On certiorari to review a conviction for contempt, alleged to have been committed in a chancellor's presence, it will be conclusively presumed that the chancellor recited in his judgment all the facts constituting the alleged contempt.

2. SAME—ACTS NOT CONSTITUTING CONTEMPT—FILING VEXATIOUS MOTIONS.

It is not a contempt of court to file and present a motion, or repeated motions, thought to be made to vex or delay, unless they are presented in a contemptuous or disrespectful manner, or are contemptuous in themselves; the court being empowered to strike improper motions.

3. SAME.

Though it is a contempt for an attorney to file a paper reflecting upon the integrity, fairness, and impartiality of the judge, or to file an affidavit or motion to disqualify a judge, or to obtain a new trial, or to change the venue on account of alleged prejudice or bias where the statute does not make that a ground for the motion, it is not contempt per se for an attorney to file a motion for his client, suggesting the disqualification of the judge to try a cause, where the judge is related, within the fourth degree, to one having a direct pecuniary interest in the result of the suit, but not a party to the record.

4. JUDGES—DISQUALIFICATION—RELATIONSHIP TO INTERESTED PERSON.

Under Const. 1874, art. 7, § 20, providing that no judge shall try a case in which he may be interested, or where either of the parties is related to him, by consanguinity or affinity, within such degree as may be prescribed by law, a judge is disqualified where he is related, within the fourth degree, the line fixed by statute, to one pecuniarily interested directly in the result of the suit, though not a party to the record, and not necessarily bound by the judgment, and a judge related within such degree to an attorney, whose fee depends substantially, if not wholly, upon the determination of a cause, is disqualified.

Certiorari to Yell Chancery Court; Jeremiah G. Wallace, Chancellor.

Certiorari to review a judgment adjudging Jo Johnson to be in contempt. Judgment vacated.

Jo Johnson, in pro. per. Wm. F. Kirby, Atty. Gen., and Danl. Taylor, Asst. Atty. Gen., for appellee.

McCULLOCH, J. Petitioner is an attorney at law, and procured from this court a writ of certiorari, to bring up for review the record of a judgment of the chancery court of Yell county against him for contempt. The judgment, which explains the whole proceedings, is as follows (omitting caption): "Now on this day the defendant Jo Johnson, being plaintiff's solicitor in a cause pending in this court, wherein W. T. Dunbar is plaintiff, and Joseph Evins and others are defendants and cross-complainants, the said Johnson appearing for and representing the plaintiff W. T. Dunbar, and the said Johnson having filed and argued before the court a number of other vexatious motions in said cause, which had been overruled by the court, thereupon the said Johnson offered to file the following motion in said cause, to wit: 'In the Chancery Court of Yell County for the Dardanelle District. W. T. Dunbar, Plaintiff, v. Joseph Evins et al., Defendants (W. D. Bell, Cross-Complainant). Suggestion of Disqualification of Chancellor. Comes the plaintiff, by his attorney, and suggests to the court that the attorney's fee of Judge R. C. Bullock, one of the attorneys for the said cross-complainant, as well as the fees of all the attorneys for said cross-complainant, largely and substantially, if not wholly, depend upon the rendition of a judgment and decree in this case in favor of said cross-complainant; that said R. C. Bullock is related to the judge of this court within the fourth degree of consanguinity. Wherefore plaintiff prays that the said Bullock be interrogated as to his interest in the subject-matter of this suit, and in the determination of same, so that the said judge may decline to sit at the hearing of this case, if found proper so to decline. Jo Johnson, Attorney for Plaintiff.' Thereupon the court assessed a fine of \$50 against the said Jo Johnson for the contempt of court. It is therefore ordered and adjudged by the court that the state of Arkansas do have and recover of and from the said Jo Johnson the sum of \$50, as for fine and penalty for contempt, and all her costs in this behalf laid out and expended, and that the state of Arkansas have execution therefor; and said Johnson excepts."

This court, in *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633, settled the practice to be followed in reviewing judgments rendered by circuit and chancery courts for contempts committed in the presence of the court. Judge Riddick, speaking for the court in that case, said: "As contempts committed in the presence of the court may be summarily tried and prosecuted without process or pleading of any kind, it is highly proper that the judgment should contain a finding of the facts constituting the contempt. Chief Justice Ruffin, of the Supreme Court of North

Carolina, in a case of this kind before that court, said that 'it befits every court, which has a proper tenderness of the rights of the citizens, and a due respect to its own character, to state in its judgment explicitly the facts constituting the contempt, not suppressing those on which the person might be entitled to be discharged more than it would insert others which do not exist, for the sake of justifying the commitment.' *Ex parte Summers*, 27 N. C. 149. He shows clearly and convincingly the reasons why such a finding of facts should be made in the judgment, but he held that the absence of such a finding did not render the judgment void." Judge Riddick also added this, with respect to a judgment for contempt: "When a judgment of that kind is entered against an offender, the statements in the record must be taken, in a proceeding of this kind, as absolutely true, and we cannot interfere, unless it clearly appears that the judgment is wrong." We therefore indulge the conclusive presumption that the learned chancellor recited in his judgment all of the facts constituting the alleged contempt of court; and, as the face of the judgment does not disclose any finding that the petitioner's manner in presenting his motion was discourteous or disrespectful to the court, or that he was guilty of any contemptuous conduct, unless the presentation of the motion be found, in itself, to constitute contempt, we presume that there was no objectionable conduct other than the mere filing of the motion.

There is a recital, however, that petitioner had previously filed in the case, and argued before the court, other vexatious motions. When these motions were filed the judgment does not recite, nor does it declare that petitioner had been guilty of contempt in filing any of them. The mere filing and presentation of a motion or repeated motions, which are thought to be for the purpose of vexation or delay, do not constitute contempt of court. The court may, in the exercise of its inherent powers, strike them from the files, because they are not presented to subvert the ends of justice, and are merely for vexation or delay; but, unless they are presented in a contemptuous or disrespectful manner, or unless they contain matter which, of itself, constitutes contempt, the court cannot treat them as contemptuous merely because they are thought to be for vexation or delay. Take, for instance, motions for continuance or change of venue: The court may well treat repeated motions of this kind as dilatory in their purpose, and refuse to hear them; but, if they are presented in a respectful manner, it shows no contempt of court, and cannot be so treated, unless they involve some violation of the court's orders, so as to amount to an obstruction of the administration of justice.

We have, then, the question presented whether or not it is contemptuous per se for an attorney at law to file in court a motion

for his client, suggesting the disqualification of the judge to sit in trial of a cause wherein he is related, within the fourth degree, to some person who has some direct pecuniary interest in the result of the suit, but is not a party to the record. It goes without controversy that when an attorney files a paper reflecting upon the integrity, fairness, and impartiality of the judge, he thereby makes himself guilty of contempt of court. An affidavit or motion, filed for the purpose of disqualifying the judge, or obtaining a new trial on account of alleged prejudice or bias, or for the purpose of changing the venue on that ground, would undoubtedly be a contempt of court, where the statute does not make it grounds for the motion. *Harrison v. State*, 35 Ark. 458; *In re Jones*, 103 Cal. 307, 37 Pac. 385. But we cannot see how the filing of a motion, suggesting the disqualification of a judge on alleged grounds, which do not reflect on his integrity or impartiality, can be held to be contempt, even if the suggested grounds of disqualification do not amount to such in law. The attorney would, at least, have the right to raise and present, in a respectful manner, to be passed upon, the question of the judge's disqualification, without laying himself open to a charge of contempt, provided the grounds alleged did not reflect upon the integrity or impartiality of the judge so as to bring the court into contempt. It is in no wise calculated to bring a judge into contempt before the public, or to lower the dignity of his position, by suggesting his disqualification in a case because of relationship to a person directly interested in the subject-matter of the litigation. Conceding it to be true that a suggestion of a judge's disqualification, by reason of his relationship to an interested party, implies, to some extent, the possibility of his partiality to that side, yet a suggestion of that kind does not reflect upon the personal integrity of the judge, or his inclination to be fair and impartial, like a suggestion that he is so prejudiced against a party that he cannot, or will not, hear the case fairly or impartially. We are of the opinion, moreover, that the motion suggested legal grounds for disqualification of the chancellor, and that, for that reason also, he was not guilty of contempt in filing the motion.

It is alleged in the motion that one of the attorneys in the case was related to the chancellor within the fourth degree of consanguinity, and that the attorney had a contingent interest in the amount sought to be recovered. The Constitution of the state provides that "no judge or justice shall preside in the trial of a cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity within such degree as may be prescribed by law," etc. Const. 1874, art. 7, § 20. The statute fixes the fourth degree as the line of prohibition. While the Constitution speaks of a "party"

to the cause, we are of the opinion that, both upon sound reason and according to the weight of authority, the word should not be construed, in a technical and restricted sense, to mean a party to the record, but it should be held to mean any one who is peculiarly interested directly in the result of the suit, although not a party to the record, and not necessarily bound by the judgment. Any other construction totally disregards the spirit, and defeats the purpose of the constitutional prohibition; for if a judge may be influenced at all in his judgment by the fact that a person, who is directly interested in the result of the suit, is related to him, the potency of the influence is not lessened by the absence of the related party from the record. For a very thorough and convincing discussion of this question, see the following authorities: *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 618, 90 Am. St. Rep. 108; *Crook v. Newborg*, 124 Ala. 479, 27 South. 432, 82 Am. St. Rep. 190; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. We are aware that the authorities are not entirely harmonious on this question, but we are satisfied, after careful consideration, that the conclusion we have reached is in accord with sound reason and a majority of the adjudged cases.

Upon the whole case, we conclude that the learned chancellor erred in adjudging petitioner to be in contempt, and his judgment is therefore set aside and quashed.

CATON v. WESTERN CLAY DRAINAGE DIST. et al.

(Supreme Court of Arkansas. June 29, 1908.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DRAINS—ASSESSMENTS.

Act May 23, 1907 (Acts 1907, pp. 890-910), providing for the drainage, etc., of certain portions of Clay county, and providing in section 8, par. "g," for publication of notice to all persons interested of the assessments, and giving them 30 days in which to file exceptions thereto, complies with the due process of law requirement of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 871-875.]

2. STATUTES—NOTICE OF INTENTION TO APPLY—NECESSITY.

The question whether an act is a local or special one, so as to require notice of intention to apply therefor as provided by Const. art. 5, § 25, is a legislative, and not a judicial, one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 6, 53.]

3. CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS—DELEGATION OF LEGISLATIVE POWERS.

The Legislature may determine benefits or assessments to be placed on lands in districts which it forms for public improvement, or it may delegate that duty to an inferior tribunal; and when that duty is performed by the inferior tribunal it is an agency carrying out the legislative will.

4. DRAINS — ASSESSMENTS — VALIDITY—CONSTITUTIONAL REQUIREMENTS.

The provisions of the Constitution requiring taxation to be according to value and equal and uniform (Const. art. 16, § 5) do not apply to assessments for public improvements levied by the General Assembly or authorized by it.

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Action by William Caton against the Western Clay Drainage District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The following portions of the act of May 23, 1907, are discussed in the opinion:

"Sec. 8. (a) For the purpose of paying the general expenses of said corporation and to be expended under the orders and directions of the board of directors (there shall be levied and collected and there is) hereby levied on all lands, lots, railroads and tramroads in said district for the year 1907, the following taxes, viz: On each acre of land a betterment of two cents per acre; upon each mile of main line of railroad a betterment of twenty dollars per mile; upon each mile of side track, a betterment of five dollars per mile; and upon each mile of tramroad, a betterment of five dollars per mile and upon each town or city lot a betterment of ten cents per lot, and in the same ratio upon all fractional blocks, or other subdivisions. Said sums are hereby levied annually upon all the property aforesaid until the objects and purposes of this act are completed and the expense incurred in the completion thereof shall have been paid: Provided said levy may at any time be suspended or reduced by the board of directors of said corporation. * * *

"(e) Said corporation shall have power, and it shall be its duty to assess the value of the benefits estimated to accrue to all said property by reason of the construction of said system of drainage or levees. Such assessment may be made before entering upon any part of the work of construction, or it may be made as it becomes necessary to levy special assessments upon the property within any subdistrict. Such assessments may be readjusted by the board of directors at any annual meeting, but at no other time, if improvements shall be placed upon the land, or for any reason such readjustment becomes just and proper, upon reasonable notice to all persons affected thereby.

"(f) The benefits aforesaid shall be assessed by a board of assessors, two of whom shall be landowners of the district, and the other a competent civil engineer, who shall be appointed by said corporation and who shall view the property to be assessed. They shall make and file in the office of the said corporation a list of the lands assessed according to convenient subdivisions by the government surveys, or where there has been no government survey, by any other survey; of the lots, blocks or other subdivisions in cities and towns according to the recorded plats there-

of now used, if any; and of the railroads and tramroads by name and length thereof assessed; or in the absence of a descriptive name, by the name of the owners; and opposite each tract or parcel of said property shall be indicated plainly the amount of benefit assessed by them against it; and such assessment shall be made without regard to ownership, and it shall be immaterial that the descriptions used are not technically correct, so that the description be sufficient to apprise the owner with reasonable certainty what property is intended.

"(g) Publication of notice shall thereupon be made by said corporation by two insertions in a weekly newspaper published in said county, notifying all persons interested, that said assessment has been made and filed as aforesaid. Said notice shall describe the property, but need not give the names of the owners, and if it shall contain the names of the supposed owners, any error with respect thereto shall be immaterial. The said notices may be in the following form, to wit:

"Notice.

"Notice is hereby given that the assessment of the property benefited by the improvement for which subdistrict ———, was formed has been filed in the office of this corporation and that assessments are made thereby upon the following described property: (Then shall follow a descriptive list of the property assessed.)

"Now, therefore, all persons, firms and corporations having or claiming to have any interest in said property or any part thereof, are hereby required to take notice of such assessment, and to file exceptions thereto, if any, they desire to file, within thirty days hereafter, and that if no exceptions be filed, the said assessment will be approved by the board of directors of this corporation.

"[Signed]

"Western Clay Drainage District,

"By ———, Secretary.

"(h) If any person, firm or corporation interested in any of the property so assessed shall consider the amount of the benefit so assessed against it to be excessive, or shall desire for any other reason to object to the same, he shall within thirty days after the last insertion of the notice aforesaid, make and file in the office of the secretary of said corporation, his exceptions to said assessment, stating in detail his objections thereto. When said thirty days shall have expired, the board of directors shall approve of all of said assessments as to which no exceptions have been filed. If exceptions have been filed the same shall be considered by the board and disposed of in a proper and just manner; and for that purpose a day shall be set by said board of directors for a hearing on such exceptions, at which hearing evidence may be submitted in support of or against such exceptions. * * *

"(k) In estimating benefits the present mar-

ket value of the property shall be taken as a basis, and an estimate shall then be made of the market value thereof, after said system of drainage shall have been completed; and if this exceeds the present market value, so much of the increased value as is estimated to be caused by the drainage of the property, shall represent the benefits accruing to said property and be so assessed. * * *

"(m) The said special assessment shall be a charge and a lien against all the said property in said subdistrict from the date of the filing of said list of assessments and lands assessed in the office of the recorder of deeds as hereinbefore provided, and shall be entitled to precedence over all judgments, executions, incumbrances or liens, whensoever created and of whatsoever character, and shall so continue until such special assessment with any penalty, interest, or cost that may accrue thereon shall be fully paid. * * *

"(q) Any person who shall fail to begin legal proceedings within thirty days after any decision of said board of directors, contrary to his contention, as to the amount and validity of assessments, shall thereafter be forever barred. And no court shall have jurisdiction to correct or invalidate any such assessment, until the party praying therefor shall have first made application to said board of directors for relief, and relief has, by them, been denied to him.

F. G. Taylor, for appellant. D. Hopson and G. B. Oliver, for appellees.

HILL, C. J. This appeal involves an attack upon the constitutionality of an act of the General Assembly of 1907, entitled "An act to provide for a topographical survey of and to authorize the drainage and levying of certain portions of the Western district of Clay county, Arkansas, by and under the supervision of a board of directors, to be vested with corporate powers and to be named 'Western Clay Drainage District,' and for other purposes," approved May 23, 1907, and found on pages 890 to 910 of the Acts of 1907. The sections under review will be set out by the reporter in the statement of facts.

1. The first attack upon the act is that it deprives the owner of his property without due process of law. The act provides, in section 8, par. "g," for publication of notice to all persons interested of the assessments, and gives them 30 days in which to file exceptions thereto. This complies with the due process requirement.

2. The next objection is: "Because said act is a local or special law, and no notice was given of intention to apply therefor as required by section 25, art. 5, of the Constitution of Arkansas." This question has so often been held to be a legislative and not a judicial one that it would be a waste of time to cite the cases.

3. The next objection is that the act delegates judicial power to the board of direct-

ors, and that the judicial power of the state is vested in the courts in section 1, art. 7, of the Constitution. The Legislature may determine benefits or assessments to be placed upon lands in districts which it forms for public improvement, or it may delegate that duty to an inferior tribunal; and when that duty is performed by the inferior tribunal, it is an agency carrying out the legislative will, and has often been sustained by this court. *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590; *Coffman v. St. Francis Drainage Dist.*, 83 Ark. 54, 103 S. W. 179; *Sudberry v. Graves*, 83 Ark. 344, 103 S. W. 728; *Craig v. Russellville Waterworks Imp. Dist.*, 84 Ark. 390, 105 S. W. 887; *Road Imp. Dist. v. Glover (Ark.)* 110 S. W. 1031; and authorities cited in these decisions.

4 and 5. The next objections are that the assessments violate section 5, art. 16, of the Constitution. But the provisions of the Constitution in regard to taxation do not apply to assessments for public improvements levied by the General Assembly or authorized by it. See authorities above cited, and *Improvement Dist. v. Sisters of Mercy (Ark.)* 109 S. W. 1105.

It is conceded that the other questions presented have been decided adversely to appellant (*Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27 S. W. 590), and the court will not reopen the questions settled in that case.

Judgment is affirmed.

CUMNOCK et al. v. STATE.

(Supreme Court of Arkansas. June 29, 1908.)

1. CONSPIRACY—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

The existence of a conspiracy composed of only two persons cannot be established by evidence of the acts or declarations of one in the absence of the other; it being required that there should at least be present of those affected by the acts or declarations when made a sufficient number to constitute a conspiracy, and even in such case the declarations would be insufficient if denied at the time by those present.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 102.]

2. CRIMINAL LAW—EVIDENCE—ACTS AND DECLARATIONS AFTER CONSPIRACY.

Acts or declarations done or made by one conspirator after the conspiracy is formed in furtherance, aid, or perpetration thereof may be introduced in evidence against the conspirators.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 989, 990.]

3. SAME—BURDEN OF PROOF.

No evidence of acts or declarations of a conspiracy should be admitted against accused until the fact of conspiracy is first shown, or until at least a prima facie case is made out either against all the conspirators or against those who are affected by the evidence proposed to be offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1012.]

4. CONSPIRACY—CRIMINAL PROSECUTION—INSTRUCTIONS.

In a prosecution for conspiracy, the court charged that the only evidence that could be re-

lied on as connecting defendant F. with defendant C. or render him liable for C.'s acts or statements, or to establish any conspiracy between them, consisted in his receipt of a list from S. and his delivery of the same to G.'s attorney, and, if such acts under all the circumstances were reasonably susceptible of an innocent interpretation, the jury should find a verdict of not guilty; that they could not rely on the statements and acts of C. in F.'s absence to establish the alleged conspiracy. The court modified the last sentence of the instruction so as to charge that the jury could not rely "alone" on statements and acts of C. in F.'s absence to establish the alleged conspiracy. *Held*, that the instruction was erroneous, both in its original and modified form.

5. SAME—JOINT DEFENDANTS—CONVICTION—CONSPIRATORS.

Where two defendants jointly indicted for conspiracy were tried together and proof of the guilt of both was necessary to establish the conspiracy, the conviction of both was necessary to sustain the indictment.

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

Frank Cumnock and W. C. Faucette were convicted of conspiracy to bribe certain jurors, and they appeal. Reversed and remanded.

Murphy, Coleman & Lewis, Jas. P. Clarke, and T. D. Crawford, for appellants. Wm. F. Kirby, Atty. Gen., for the State.

BATTLE, J. The grand jury of Perry county indicted Frank Cumnock and W. C. Faucette as follows:

"The grand jury of Perry county, in the name and by the authority of the state of Arkansas, accuse Frank Cumnock and W. C. Faucette of the crime of conspiracy, committed, as follows, to wit: The said Frank Cumnock and W. C. Faucette, in the county and state aforesaid, on the 9th day of August, A. D. 1907, unlawfully and corruptly did conspire, agree, and confederate together, and each with the other, to commit the crime of bribery, by then and there unlawfully and corruptly paying, and procuring to be paid and delivered, to jurors whose names are unknown to the grand jury, and who were then and there petit jurors duly and legally summoned, sworn, qualified, impaneled, and acting as petit jurors on the regular petit jury for the August term, 1907, of the Perry county circuit court, which court was then and there in session in pursuance to and in accordance with law, one hundred dollars, gold, silver, and paper money, of the value of one hundred dollars, as for and by way of a bribe, with the unlawful intent to bias the members of said jury, and to incline the said jurors to be more favorable to the defendant in a cause then and there pending in said Perry circuit court, and which cause said circuit court had jurisdiction to, wherein the state of Arkansas was plaintiff and A. T. Gross was defendant, wherein said A. T. Gross was charged with the crime of soliciting a bribe, and being a matter, cause, case, and proceeding which might and did come before said court and said petit jury during

said term for trial, the said Frank Cumnock and W. C. Faucette then and there well knowing said jurors were jurors aforesaid, against the peace and dignity of the state of Arkansas."

A change of venue was asked and granted from the Perry to the Pulaski circuit court.

The defendants were jointly tried and convicted of the crime charged; and their punishment was assessed at a fine of \$100 each, "and three months' imprisonment each in the county jail." They moved for a new trial, which was denied; and they appealed.

In the course of their trial and in behalf of the state, John D. Shackelford testified. He said he had a conversation with Cumnock, at which Faucette was not present, and testified in relation thereto as follows: "Yes; he [Cumnock] commenced by saying that Mr. Faucette [defendant] had sent him over to see me, and he said that Bill [Faucette] said for him to come over and see me, and see if I could not give them relief, and I told him I could not afford to get mixed up in it, and he says: 'Gross feels about it that he cannot go to trial up there, and our people are disposed to blame you for it.' And I says: 'I have not got any control over my brother. He is up there, and I cannot control him, and I cannot afford to get mixed up in it.' And he said: 'If you don't do something, we are going to hold it in for you next spring in the election. You can relieve the situation, and you ought to do it.' I says: 'That is unfair to me. I am not able to control the situation; and, if you are going to fight me because of that, and because I cannot control my brother, you will have to do it.' And I pleaded with him that he ought not to hold me responsible for it, and he told me then, if I would line up and bring some pressure to bear, how they would line up over there, and said that Bill said they would give me Argenta solid; that Bill said he would do it, and he could do it if I would make my brother lay down on Rhoton."

He testified that he wrote a letter to his brother, a part of which is as follows:

"Little Rock, Ark., August 8, 1907.

"Dear Jim: Frank Cumnock has just paid me a visit on behalf of Faucette et al., requesting me to bring to bear some influence on you in the interest of Senator Gross. They want you to put up a job on Rhoton, and as a reward they offered to give me material assistance in my race for county judge, and as an argument they say Rhoton is against me," etc.

Again he testified:

"About 9 o'clock he came back to the office and said that he had had another conversation with Faucette in which the agreement was reached that something must be done; that, if they could not reach the case one way, they must do it another; and the idea was that the proper thing to do was to hang the jury."

J. M. Shackelford testified in behalf of

the state as to a conversation he had with Cumnock, in the absence of Faucette, in which he spoke of himself and Faucette as "they." He testified as follows: "In the conversation with me he indicated that he was up there for the purpose of aiding Mr. Gross, that is about what he said about it; and then he asked me if I was not attorney for the state, and if Mr. Rhoton was not depending on me to pick his jury for him, and I told him I was, and that I was representing the state, and that he was relying on me. Then he said that the thing they wanted was to get me to assist them to put up a job on Rhoton so as to either acquit Gross or to hang the jury, and said they were willing to spend some money for that purpose; but they wanted me to do it on the basis that they would assist John D. Shackleford in his race in this county. That was the consideration they proposed to give me of material assistance for him; but that they were willing to do anything that was necessary that it would take to influence the jury. If it took some money, they had it; and he asked me what I thought about it, and I told him I could not do anything about it, and then he wanted to know if Mr. Rhoton was relying on me, and would take whoever I told him, and he wanted to know how much money it would take, and said they wanted the jurors fixed so that there would not be one man hanging out against eleven; and I told him I didn't know what amount it would take, but no great amount, and that I supposed it might be arranged for a small amount; that I had some good friends on the jury, and supposed \$25 apiece would be enough for them. And he said they would readily give that, and went on to say, 'We will just make it \$75,' and further he said, if that would not be enough, they would make it \$100. And I said to him: 'All right. I will undertake it.' And he said he didn't have the money himself; and he says: 'Wait here in the room a few minutes, and I will go down and see Faucette and bring the money back.' And I told him that I would wait. After he had been down towards the courthouse for 15 or 20 minutes, he came back, and said they didn't have that much money with them, but he said he would go to Little Rock and get the money, and wanted me to go ahead and carry out the arrangements, and he would go down on the afternoon train and get the money, and bring it back that night, and for me to meet him at Perry that night, and he would deliver the money; and said he wanted me to go ahead and fix the men, and tell Pratt who they were, and I told him I didn't propose to do it that way, that I had some good friends on the jury, and I didn't care to state what jurors they would be, but that I would furnish him a list of eight names, some two of whom would be the men I had fixed, and that I would furnish the list to them so they would have it, and could use it in picking the jury, and he

agreed to that arrangement and went out, and he took the mail hack and left there. That was about what occurred on the morning of the picking of the jury in the afternoon."

The testimony in this case is voluminous. It is not necessary to state more of it than we have for the purposes of this opinion.

The court, over the objection of the defendants, instructed the jury as follows:

"No. 6. You are instructed that the statements of one conspirator made during the existence of the conspiracy are evidence proper to be considered against co-conspirators."

And they asked and the court refused to instruct the jury as follows:

"(6) You cannot find the existence of a conspiracy alleged in the indictment in this case from anything that Cumnock may have said or done in Faucette's absence and without his knowledge; and things said or done by Cumnock in the absence of Faucette are to be taken as done without his knowledge, in the absence of evidence to the contrary."

And they asked and the court refused to instruct as follows:

"The only evidence that can be relied upon as tending to connect the defendant Faucette with Cumnock or render him liable for Cumnock's acts or statements, or to establish any conspiracy between him and Cumnock, consists in his receipt of the list from Shackleford and his delivery of same to Gross' attorney, Neal, and, if these acts, under all the circumstances and evidence in the case, are reasonably susceptible of an innocent interpretation, you should give them such interpretation and render a verdict of not guilty. You cannot rely on statements and acts of Cumnock in Faucette's absence to establish the alleged conspiracy."

And the court modified the last sentence of the instruction, over objections of defendant, as follows:

"You cannot rely alone upon statements and acts of Cumnock in Faucette's absence to establish the alleged conspiracy." And the court gave the instruction as modified.

It is well settled that the existence of a conspiracy composed of only two persons cannot be established by evidence of the acts or declarations of one in the absence of the other. There must at least be present of those affected by the acts or declaration, when made, a sufficient number to constitute a conspiracy, and even then it would not be sufficient if denied at the time by those present. *Chapline v. State*, 77 Ark. 444, 95 S. W. 477, and cases and authorities cited; *Lawson v. State*, 32 Ark. 220; *Rowland v. State*, 45 Ark. 134; *Gill v. State*, 59 Ark. 430, 27 S. W. 598.

Although evidence of mere acts or declarations of one conspirator, in the absence of the other, is inadmissible to establish the conspiracy, yet acts or declarations done or made by one conspirator after the conspiracy is formed, in furtherance, aid, or perpetration

of the alleged conspiracy, may be shown in evidence against himself and co-conspirators. As said by Greenleaf: "No evidence of the acts or declarations of a conspiracy should be admitted against the accused until the fact of conspiracy with them is first shown, or until at least a prima facie case is made out either against them all, or against them who are affected by the evidence proposed to be offered, and that of the sufficiency of such prima facie case to entitle the prosecutor to go into other proof the judge, in his discretion, is to determine. *Chapline v. State*, 77 Ark. 444, 450, 95 S. W. 477, and authorities cited.

The court erred in giving the modified instruction. It should not have been given either with or without the modification. The court also erred in refusing to give the other instruction asked for by the defendants, and in giving that objected to by them.

To sustain the indictment, it was necessary to convict both. They were tried together, and proof of the guilt of both was necessary to establish the conspiracy. If either was innocent, there was no conspiracy. 1 Bishop's New Criminal Procedure, § 1018, subd. 5; 51 Am. Dec. (notes) 84; *State v. Jackson*, 7 S. C. 238, 24 Am. Rep. 476.

There are other questions in the case which we do not deem it necessary to decide.

Judgment reversed, and cause remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. STATE. (Supreme Court of Arkansas. June 15, 1908.)

1. STATUTES.—CONSTRUCTION—MEANING OF WORDS.

In construing a statute, inapt words should be disregarded, and the intent gathered from the whole act, read in connection with its title and evident purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 266, 267.]

2. RAILROADS—STATUTORY REGULATIONS—CONSTRUCTION—"PERMANENTLY DONE"—"PERMANENTLY EMPLOYED"—"RUNNING REPAIRS."

Act May 1, 1905, to provide for the protection of mechanics, etc., employed in the construction and repair of railway equipment, makes it unlawful for a railroad company or corporation, or other persons who own, control, or operate any lines of railroad in the state, to build or repair railroad equipment without first maintaining at every division point a building or shed over the repair tracks where such work is permanently done, so as to provide that all men permanently employed in the construction and repair of railroad equipment shall be under shelter during inclement weather. *Held*, that the phrase, "where such work is permanently done," means where constantly done, and the phrase "permanently employed" means regularly employed, and the act applies to repair tracks where the "running repairs" were made consisting of the substitution of new for broken parts on cars and supplying missing parts so as to keep the cars in transit.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—REGULATION OF BUSINESS—ARBITRARY CLASSIFICATION.

The classification made by the act is not violative of the constitutional provision guar-

anteeing to all the equal protection of the laws, because at some future time a commercial corporation or individual not owning or operating any lines of railroad in the state may engage in the business of repairing railroad equipment in the state, and the act would then fall unequally upon persons similarly situated and engaged in like occupations, since the Legislature in making such a general classification is not required to provide for every imaginable and exceptional case which may arise in the future.

Error to Circuit Court, Crawford County; J. H. Evans, Judge.

The St. Louis, Iron Mountain & Southern Railway Company was convicted of violating Act May 1, 1905, for the protection of mechanics, etc., employed in constructing and repairing railway equipment, and it brings error. Affirmed.

Information was filed in Crawford county against the appellant railroad company, charging it with a misdemeanor in having violated the act of May 1, 1905, entitled "An act to provide for the protection of mechanics, laborers and other persons employed in the construction and repair of railway equipment, and providing a punishment for the violation thereof." Laws 1905, p. 593.

The act reads as follows:

"Section 1. It shall be unlawful for any railroad company or corporation, or other persons who own, control or operate any lines of railroad in the state of Arkansas to build, construct or repair railroad equipment, without first erecting and maintaining at every division point a building or shed over the repair tracks, same to be provided with a floor where such construction or repair (work) is permanently done, so as to provide that all men permanently employed in the construction and repair (of) cars, trucks and other railroad equipment, shall be under shelter during snows, sleet, rain and other inclement weather.

"Sec. 2. Every corporation, person or persons, manager, superintendent or foreman of any company, corporation, person or persons, who shall fail or refuse to comply with the provisions of this act after the 1st day of November, 1905, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars; and each and every day that said railroad company, corporation, person or persons, manager, foreman or agent of any such railroad company, corporation, person or persons, shall refuse or fail to comply with the provisions of this act, shall constitute a separate and distinct violation thereof."

Section 3 contains the usual repealing clause, and declares the act to be in force from and after the 1st day of November, 1905.

The defendant was found guilty, and has appealed. The evidence adduced at the trial proved these facts: Van Buren is a division point on the line of the appellant railroad,

and it maintained repair tracks there which were built in 1903. The number of men employed in repair work varied, but a force was regularly employed, and was about 15 or 20 at the time the company was charged with the violation of the act, and usually averaged about that many. There was no building or shed over the repair tracks, nor a floor where the construction or repair work was done. There was no protection from the weather for employes engaged in this repair work. The repairs usually done were substituting new for broken knuckles, putting in draft timbers, bolsters, end sills, and putting roofs on cars and supplying new trucks and wheels for defective or broken ones. Generally speaking, the work done on these repair tracks was that of putting in missing or defective or broken parts on cars which were necessary to enable the car to keep in transit and component parts of the cars were kept in stock for this purpose, and other light repairs that are necessary to conform to the M. C. B. rules and regulations covering interchange of cars. The repairs done at this point were "running repairs." The shops at Baring Cross, near Little Rock, is where the general and permanent repair and construction work of the company is done for the territory in which Van Buren is situated. Many of the repairs made at these repair tracks are just as permanent as those made at Baring Cross or any other shops. The men engaged in this work were employed by the hour, and were at liberty to check out and cease work whenever the weather was stormy or inclement. The company posted notice to that effect. There are frequently as many as 50 or 60 cars, and sometimes more, on these tracks for repairs at one time.

Lovick P. Miles, for appellant. Wm. F. Kirby, Atty. Gen., and Dan. Taylor, Asst. Atty. Gen., for appellee.

HILL, C. J. (after stating the facts as above). Two questions are presented on appeal: Does the act apply to the conditions shown to exist at Van Buren? Does the act violate the Constitution of the United States or the Constitution of Arkansas?

1. The jury found, and correctly, under the facts, that the work done at Van Buren on the repair tracks was such as was contemplated by the act. The use of the word "permanent" in the act is inapt. The first use of it, "where such work is permanently done," means "constantly"; and "constant" is one of its synonyms. The second use of it, "all men permanently employed" in the repair of cars, is equivalent to "all men regularly employed." Taking the act as a whole, and reading it in connection with its title and the evident purpose thereof, its meaning is reasonably clear. It is the duty of the court to disregard inapt words used, and to enforce it according to its intent gathered from the whole act, and not from any partic-

ular word or words therein. Even if the literal use of the words "permanent" is accepted, the work done at Van Buren is within it, for repairs which were made there were usually as permanent as those made elsewhere. For instance, as one of the witnesses illustrated, if a sill was put in, it was as permanent as if done at Baring Cross. But this literal interpretation was not intended by the Legislature.

2. Was the act constitutional? The contention of counsel is thus stated: "A brief analysis of the act discloses its fatally arbitrary classification. It applies only to any railroad company or corporation or other persons who own, control, or operate any lines of railroad in the state of Arkansas engaged in the building, construction, or repair of the railroad equipment at every division point. Any other corporation or other person engaged in the building, construction, or repair of railroad equipment within this state may avoid the burden imposed by this act and engage in the building, construction, or repair of railroad equipment without limit and compel those engaged in this work to pursue their labor without shelter during snow, sleet, rain, and other inclement weather." It is not shown here, as it was in *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, that as a matter of fact the law operated only upon one corporation, although others in like and similar conditions were not affected by it, owing to a classification based entirely upon volume of business. Nor was shown here, as in *Yick Wo v. Hopkins*, 118 U. S. 353, 6 Sup. Ct. 1064, 30 L. Ed. 220, that, although fair on its face, yet the practical operation of the law made it fall unequally upon persons similarly situated. The contention here is that the act shows upon its face an arbitrary selection of railroad corporations who own, control, and operate lines of railroad in the state engaged in the building, construction, or repair of railroad equipment at division points to bear the burden imposed, and excludes by this selection any other persons or corporations who may be engaged in the construction, building, or repairing of railroad equipment. It is stated at the bar that there are no such corporations or persons engaged in such business in this state, and, so far as the court knows from such sources as it is proper for it to take information, this statement is true.

It is asserted, and probably the court could take cognizance of it as a matter of common knowledge, that there are persons and corporations in other states engaged in the building, construction, and repair of railroad equipment who do not own or operate any lines of railroad. The argument is that under this act it is possible for a commercial corporation or private individual to engage in this business in Arkansas, and, when that happens, which may occur at any time, then

the act will fall unequally upon persons similarly situated and engaged in like occupations, and thereby be offensive to the equal protection of the law provision. The court in *Williams v. State*, 108 S. W. 838, said: "The Legislature in framing this statute met a condition which existed, and not an imaginary or improbable one." While it is not improbable that some commercial corporation may engage in this business in this state, yet that is an imaginary objection to the operation of the act, and it was "a condition, not a theory," which called forth this legislation. The Supreme Court of the United States in *Ozan Lumber Co. v. Union Co. Bank*, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. —, in referring to a statute of this state which exempted from its terms "merchants and dealers who sell patented things, in the usual course of business," said: "Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual, and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of circuit court herein. 127 Fed. 206. But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the amendment. It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case, and a Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws." The difference between the classification which does not cover every supposed case and yet is valid, and one where the classification applies to a large number of people in like and similar conditions, and is consequently invalid, is well illustrated in the *Ozan Lumber Co. Case* and *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. "There is no objection to legislation being confined to a peculiar and well defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work." *Minn. Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322. Illustrating and applying this principle, see *Holden v. Hardy*, 169 U. S.

366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *M. & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585. The court is unable to find the classification here made offensive to the equality clause of the Constitution as construed by the Supreme Court of the United States, whose decisions are binding on this subject.

It is also contended that the act is void on account of the unreasonable penalties provided for its violation, and the recent case of *Ex parte Young* (decided by the Supreme Court of the United States on March 3d) 28 Sup. Ct. 441, 52 L. Ed. 714, is cited to sustain it. An examination of the act there condemned and the act here will show the entire inapplicability of the doctrine there announced.

The judgment is affirmed.

TIDWELL et al. v. SOUTHERN ENGINE & BOILER WORKS.

(Supreme Court of Arkansas. June 29, 1908.)

1. SALES—DELAY IN DELIVERY—WAIVER.

A buyer of machinery, to be manufactured by the seller ready for shipment on a designated date, waived the delay in the shipment by treating the contract as in force after the designated date, by urging or permitting the seller to continue performance.

2. SAME—PERFORMANCE OF CONTRACT—UNREASONABLE DELAY.

A manufacturer agreed to manufacture and sell a sawmill outfit, consisting of boiler, engine, etc., and have the same ready for shipment on or about a designated date, "or as soon thereafter as practicable." The buyer, nine days after the designated date, treated the contract as in force, and urged the manufacturer to continue performance. The outfit was ready for shipment seven days later. *Held*, that the delay, between the date the buyer treated the contract as in force and the time the manufacturer was ready to make the shipment, was, as a matter of law, not unreasonable.

3. SAME—TIME FOR DELIVERY.

Acquiescence by a buyer in the delay of a seller in manufacturing the article, and making the same ready for shipment, operates as an extension of the time for delivery.

4. APPEAL AND ERROR—EXCLUSION OF TESTIMONY—REVIEW.

Where the record does not show what the answer to excluded questions would have been, the ruling on the questions was not shown to be prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4048, 4049.]

5. SAME—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

Where a buyer of goods, to be manufactured by the seller for shipment on a designated date, acquiesced in the delay in the manufacture thereof, the error, if any, in excluding evidence of misrepresentations of the seller's agent as to the time in which the goods could be delivered was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4189-4193.]

6. SALES—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—LIQUIDATED DAMAGES.

A contract for the sale of an article, to be manufactured by the seller for shipment on a designated date, stipulated that it was not subject to countermand, except on payment of a specified per cent. of the contract price, which should be paid "as liquidated damages." The seller failed to have the article ready for shipment on the designated date, but the delay was waived by the buyer, who, after the article was completed, countermanded the order therefor *Held*, that he was liable to the amount of the specified per cent. as liquidated damages.

Appeal from Circuit Court, Clark County; J. M. Carter, Judge.

Action by the Southern Engine & Boiler Works against A. S. Tidwell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McMillan & McMillan, for appellants. Mathes & Westbrooke, for appellee.

McCULLOCH, J. Appellee is a Tennessee corporation, domiciled at Jackson, in that state, and instituted this action at law against appellant, in the circuit court of Clark county, to recover stipulated damages for failure to perform his written contract for the purchase of a sawmill outfit, consisting of boiler, engine, sawmill, edger, saws, belting, pulleys, etc. The contract is dated July 28, 1906, and provided that the appellee should "manufacture, or buy and furnish and sell," to appellant, the articles described, and to have the same ready for delivery on board cars at Jackson, Tenn., or at factory where made, "on or about August 15, 1906, or as soon thereafter as practicable." The contract contains the following stipulation, viz: "This order is not subject to countermand, except on payment of 20 per cent. of contract price, which is agreed to be paid as liquidated damages." The price agreed upon in the contract was \$1,675, and appellee sued for 20 per cent. of that sum.

Appellee introduced the written contract in evidence, and also the subsequent correspondence between the parties, showing that appellant countermanded the order. Appellee's manager also testified that the articles were ready for shipment, on board cars, on August 31, 1906, and explained that the delay was caused on account of having to manufacture the boiler according to the specifications.

The following written correspondence by mail passed between the parties:

"Okolona, 8—3—06.

"So. E. & B. Works, Jackson, Tenn. About one week ago, I gave your Mr. Brown order for mill complete. Have not heard from him or yourselves since. Kindly advise if order has been received and how soon I may expect shipment.

A. S. Tidwell."

"August 7, 1906.

"Yours of 3d received. Order entered for our best attention, and will get machinery out as soon as possible. We think we can make

shipment by about week after next. The fact that there is a portable boiler in the order delays the shipment, as we are compelled to build this boiler, which is a slow process. No one carries these boilers in stock, and no factory can build them in less time than two or three weeks from receipt of order.

So. E. & B. Works."

"Little Rock, 8—2—06.

"So. E. & B. Works, Jackson, Tenn. Kindly advise me at Burns, Tenn., by Thursday, 16th mail, what headway you are making on my order 28th.

A. S. Tidwell."

"August 14, 1906.

"In answer to yours of the 12th, will say that we could get your order filled by the date you want it if the tubular boiler would be satisfactory. The delay in your order will be in getting the portable boiler manufactured. We have the engine made now, and we have some parts of the sawmill machinery ready, but the boiler will have to be built from the beginning, and it will not be possible to get this before the first of September, and it may be later.

"So. E. & B. Works."

"Okolona, Aug. 24, '06.

"So. Engine & B. Works. Kindly advise me how you are progressing on the order given Mr. Brown on July 28th. I was assured that this shipment would come out promptly when I placed the order, and I have been somewhat disappointed that I have not been advised that shipment has already been made.

A. S. Tidwell."

"Aug. 27, 1906.

"A. S. Tidwell. In answer to yours of the 24th, will say that we are making very good progress on your order, and expect to get shipment out next week. Quite a number of our men were sick last week, and we did not make as good progress as we expected, but we think now, with force of men we have at work that we will be able to get your order completed and shipped out the early part of next week, and trust this will be satisfactory.

"So. E. & B. Works."

"Okolona, 8—29—06.

"So. Engine & B. Works—Gentlemen: I have yours of 27th inst., and note the contents thereof. Inasmuch as it seems so indefinite about your getting this machinery out, I think it will be wise for me to change my plans a little, and not put in the mill now, so you can withhold shipment after same is ready until you are further advised.

"A. S. Tidwell."

Appellee replied to the last letter agreeing to withhold shipment for a while, and further correspondence passed between them concerning postponement of the shipment. On October 31, 1906, appellant wrote countermanding the order and refusing to accept the articles at all. A witness for appellee testified that the actual damage sustained by appellee, on account of appellant's refusal to accept, amounted to \$450 or \$500, giving the various items of damage. The court instruct-

ed the jury to return a verdict for appellee, which was done. The instruction was correct. Appellee fully made out its case by exhibition of the contract and the correspondence.

The only question left in the case was whether or not appellee was ready and offered to perform the contract within the time therein specified, viz., "on or about August 15, 1906, or as soon thereafter as practicable." This might have been an open question for the determination of the jury but for the fact that appellant waived the delay in shipment. He did this as late as August 24, 1906, by treating the contract as still being in force, and by urging or permitting appellee to continue performance. 3 Page on Contracts, § 1502. The period between that date and the time when appellee was ready to make shipment was so short that the court properly declared it, as a matter of law, not to be unreasonable. Even if the delay had not been otherwise excusable, acquiescence therein by appellant operated as an extension of the time for delivering.

As we hold that the facts hereinbefore recited make out a case in favor of appellee, the introduction of certain evidence as to the kind of machinery, and the time necessarily consumed in manufacturing it, to which appellant excepted, could not have been prejudicial. It is not shown in the record what the answers of appellant, as a witness in his own behalf, to the excluded questions would have been. Therefore no prejudice appears in the exclusion.

Moreover, as the excluded questions related to an alleged misrepresentation of appellee's agent, when the contract was entered into, as to the time within which the machinery could be delivered, there was no prejudice in excluding them for that reason, as we have already shown that appellant acquiesced in the delay and thereby waived it.

The undisputed evidence brings the facts of the case within the test laid down by this court as to liquidated damages. *Nilson v. Jonesboro*, 57 Ark. 169, 20 S. W. 1093; *Stillwell v. Paepke Leicht L. Co.*, 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. CITIZENS' BANK OF LITTLE ROCK.

(Supreme Court of Arkansas. June 29, 1908.)

1. CARRIERS—BILLS OF LADING—FREIGHT—WRONGFUL DELIVERY.

Defendant carrier transported certain cotton under bills of lading consigned to the shippers' order, with directions to notify a cotton company. On arrival of the cotton at destination, the carrier delivered it to a compress company, as a warehouseman, and the bills of lading, with drafts attached thereto, were delivered to plaintiff bank, which paid the drafts and charged the amount to the cotton company, holding the bills of lading as collateral. Plaintiff thereafter intrusted the cotton company with the bills of lading whenever it desired to replace

them with the compress receipts or other bills of lading for outgoing cotton, and in some instances, where compress receipts were not returned for all the cotton called for in the bill of lading, the bill would be indorsed by the compress company and returned to stand for the bales not called for by the corresponding warehouse receipts. In some manner, through the fraud of the cotton company, defendant carrier was induced to ship out cotton represented by these remnants of the bills of lading, without any credit being given on the bills, and without any satisfaction of the bank's claim thereon. *Held*, that the bank was entitled to recover from the carrier for such cotton as it held bills of lading not exchanged for warehouse receipts.

2. SAME—ACTS OF WAREHOUSEMEN.

Where a carrier, having shipped cotton under order bills, delivered the same to a compress company at destination as a warehouseman, the compress company became the agent of the carrier to take up the carrier's bills of lading, and issue warehouse receipts therefor.

3. SAME—"DUEBILL."

A "duebill" issued by a carrier in lieu of a bill of lading for cotton, representing the excess of cotton called for by an incoming bill of lading on the issuance of an outgoing bill for a smaller number of bales, could not be regarded as a bill of lading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 129.]

4. SAME—"BILL OF LADING."

A "bill of lading" has a twofold aspect. It is both a receipt and a contract. As a receipt, it is prima facie and not conclusive evidence of the facts recited, and between the parties is impeachable for mistake, error, or false statements therein.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 790-795.]

5. SAME—AUTHORITY OF AGENTS—RECEIPT OF GOODS.

It is not within the scope of the authority of the agents of a carrier to issue bills of lading for goods not actually received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 138, 145.]

6. SAME—STATUTES.

Under the express provisions of Kirby's Dig. §§ 524, 532, neither a carrier nor a warehouseman can issue any receipt for goods not actually received into the possession of the carrier or warehouseman.

7. SAME—DELIVERY TO CARRIER.

A delivery of goods to a carrier must be for immediate transportation, and, if they are delivered to be stored for a specified time, or until the happening of a certain event, or until further orders, the carrier is a mere depository, or bailee, and his liability is measured by the principles governing that relation, and not by those relating to carriers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 617.]

8. SAME—BILLS OF LADING—STATUTES.

Kirby's Dig. § 530, providing that bills of lading for goods actually deposited shall be transferable by indorsement, and that the transferee shall be deemed the owner of the goods, makes a bill of lading representative, so far as the delivery is concerned, of the commodity itself.

9. SAME—DUEBILL.

Where a bill of lading for cotton, assigned to plaintiff bank, was surrendered for compress receipts to a compress company to which the railroad company had delivered the cotton at destination, and the railroad company thereafter issued a duebill for the balance of the cotton called for by the compress receipt, on issuing an outgoing bill for a portion thereof, which duebill merely called for the return of 12 bales,

which the railroad company never received, such duebill was a mere promise to issue a bill of lading which was beyond the scope of the authority of the agent making it; and hence the carrier was not liable thereon.

10. SAME—ESTOPPEL.

Where a bill of lading for cotton delivered by a carrier to a compress company had been surrendered for compress receipts, and such receipts for a duebill issued by the carrier's agent without authority, and the carrier was induced to ship out the cotton on other orders through error or fraud, it was not estopped to deny that it ever received the cotton pursuant to the duebill.

Appeal from Pulaski Chancery Court;
Jesse C. Hart, Chancellor.

Action by the Citizens' Bank of Little Rock against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

T. M. Mehaffy and J. E. Williams, for appellant. Rose, Hemingway, Cantrell & Loughborough, for appellee.

HILL, C. J. This is another chapter in the financial career of the Alphin Lake Cotton Company. It is an action brought by the Citizens' Bank of Little Rock to recover of the St. Louis, Iron Mountain & Southern Railway Company the value of cotton delivered by it to the cotton company without a surrender of the bills of lading representing said bales. There are 13 counts in the complaint, the first 12 counts for 62 bales, and the thirteenth count for 12 bales. The latter will be considered separately, as it presents a different question.

The transactions involving the loss to the bank of the 62 bales of cotton set forth in the 12 counts were as follows: Various shipments of cotton were made to the Alphin Lake Cotton Company in the same method as those described in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522; that is to say, the shipper delivered the cotton to the railroad company and took a bill of lading assigned to shipper's order. Usually it was in care of the compress company in Little Rock, with directions to notify the Alphin Lake Cotton Company. In all cases the cotton was delivered to the compress company. The bills of lading for said cotton had been attached to drafts drawn upon the Alphin Lake Cotton Company by the shipper, and these drafts were paid by the bank and the amount thereof charged to the Alphin Lake Cotton Company, and the bills of lading held by the bank as security for the advance thus made to the Alphin Lake Cotton Company. The method pursued by the railroad companies, the compress companies, and banks in Little Rock in handling cotton, through which was made possible the success of the schemes of the Alphin Lake Cotton Company, was fully stated in *Citizens' Bank v. Ark. Comp. Co.*, 80 Ark. 601, 96 S. W. 997, 117 Am. St. Rep. 102. The evidence in this case as to the cotton customs is the same as in that case.

The bank intrusted the Alphin Lake Cotton Company with the bills of lading whenever the cotton company desired to replace them with compress receipts (or other bills of lading for outgoing cotton); and in lieu of the bills of lading thus intrusted to the cotton company would be returned compress receipts, or, in some instances where compress receipts were not returned for all of the cotton called for in the bill of lading, there would be an indorsement made upon the bill of lading by the compress company that certain bales of cotton had been received on transfer receipt, the number of which was given, and the bill of lading would be returned and stand good for the bales not called for by the warehouse receipt. For instance, a bill of lading for 40 bales contained an indorsement showing that for 34 of the bales transfer receipts had been issued, which would leave the bill of lading to stand for the 6 bales for which compress receipts were not issued. In some way, not explained in the evidence, the cotton company got the railroad company to ship out cotton that was represented by these remnants of the bills of lading, and in three instances where there had been no credit upon the bills of lading. The bank sued for the 13 bales represented by the three uncredited bills of lading, and for 49 bales represented by bills of lading upon which credits had been indorsed, reducing them to that number of bales, which bills originally called for many more bales than the 49 which were the remnants. There can be no doubt of the right of the bank to recover for the 13 bales of cotton for which it held bills of lading, and which it had not temporarily surrendered for exchange for warehouse receipts, as the decision in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522, settles every possible phase of the controversy over them. See, also, *Ark. So. Ry. Co. v. German Nat. Bank*, 207 U. S. 270, 28 Sup. Ct. 78, 52 L. Ed. 201, where an interesting review of that case may be found. There can be no distinction worked out between the actions based on the remnants of the bills of lading and those based on the bills of lading as originally received by the bank. The compress company became the agent of the railroad company for the purpose of taking up its bills of lading and issuing therefor warehouse receipts. Where all of the cotton had not been received by the compress company when the bill of lading was presented to it, or for some other reason, the compress company only issued its receipts for a part of the cotton called for in the bill of lading, and it then indorsed upon the bill of lading a credit for the amount which had been taken up by these receipts and left the bill of lading outstanding for the bales not called for by the receipt, and this bill of lading was returned to the bank in that condition and held by it as security for the bales of cotton for which it did not get warehouse receipts, and warehouse receipts took the place of the balance originally called

for by the bill of lading, and were noted on the bill of lading. When the cotton company received a bill of lading from the bank for the purpose of getting compress receipts in lieu thereof, it was acting as agent for the bank; and, had this loss occurred through its conduct while so acting for the bank, then the bank could not recover herein. But such is not the case; for in every instance where the cotton company was intrusted with the bill of lading the same was returned, or compress receipts for the bales called for in it in lieu thereof, or, where credits were made, compress receipts were returned for the amount thus credited; and these matters were checked up by the bank every day, and no shortage was found in this respect. Therefore it is clear that the limited agency of the cotton company for the bank did not cause the loss herein sued upon.

It was also shown that of the 62 bales that were shipped out by the railroad company without the surrender of bills of lading the proceeds of 46 of them went to the Citizens' Bank, the plaintiff in this case. In each of these instances, however, the proceeds went to the bank through collecting a draft attached to an outgoing bill of lading, which bill of lading had been obtained by the surrender of a warehouse receipt which had been taken out of the bank for the purpose of being exchanged for the said outgoing bill of lading, and the draft was placed to the credit of the cotton company when drawn by the cotton company with said outgoing bill of lading attached; and in this way the bank paid twice for one bale of cotton, and received the proceeds thereof from it when the draft attached to the outgoing bill of lading was paid, but left it unpaid for its first advancement when it paid the draft attached to the incoming bill of lading. There was nothing in the evidence that showed that the bank knew that the cotton was being thus manipulated. So far as the 62 bales of cotton represented by the unsundered bills of lading and the remnants of bills of lading are concerned, there are no facts to take the case without the principles governing in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522, and to this extent the judgment is affirmed. The facts in regard to the 12 bales of cotton are as follows: The compress company was in the habit of issuing one receipt for several bales of cotton, instead of issuing separate receipts for each bale of cotton, and would issue a receipt for as many bales as would be called for by the bill of lading. In shipping out cotton it was necessary, under the custom then prevailing, to get a turn-out order for the bales to be shipped and to get a compress receipt for an equal number of bales to those called for by the turn-out order. In order that the cotton company might make a shipment, the bank delivered to it, for the purpose of obtaining an outgoing bill of lading, a certain compress receipt calling for a large number of bales of cotton. The cotton

company did not ship out all of the cotton called for by said compress receipt, but delivered the compress receipt to the railroad company and got an outgoing bill of lading for 12 bales less than the amount called for by said receipt, and returned the outgoing bill of lading to the bank, and for the 12 bales called for by the receipt not in the bill of lading delivered to the bank a certain receipt, or "duebill," as it was called (which term for the want of a better will be adopted), issued under authority of Mr. A. R. Bragg, division freight agent of the railroad company. This receipt or duebill was as follows: "No. 1, return 12 bales, account Alphin-Lake, Bill of Lading 379, A. R. B. 11/15/02." This was written by Mr. G. W. Swain, who was bill of lading clerk under Mr. Bragg, and who was empowered by Mr. Bragg to issue such an instrument. There was a custom existing in the division freight office of issuing bills of lading for compress receipts; and, where the compress receipts called for more cotton than the shipper desired to ship out, the receipt was surrendered, and the freight office would execute a duebill for the excess in the number called for in the compress receipt. These duebills were accepted by the railroad company the same as compress receipts. This custom prevailed in Little Rock, but was not shown to extend beyond it, or that it was known to any officials of the railroad other than the local ones.

The facts showed here, as they did in the case of *Citizens' Bank v. Ark. Comp. Co.*, 80 Ark. 601, 96 S. W. 997, 117 Am. St. Rep. 102, that the compressed receipts were not relied upon to identify particular bales. They represented merely so many bales of cotton, and the identification of the cotton was furnished by the turn-out order. The procedure was thus explained by Mr. Justice Riddick: "When he [Lake] desired to ship any cotton held by the compress company, he obtained from the bank receipts for the number of bales he desired to ship, and the compress company would then ship the cotton out on his 'turn-out' order upon his surrendering receipts for an equal number of bales, without regard to whether these receipts had been issued or assigned to him or not; for, prior to this litigation, the receipts which the compress company gave for the cotton contained only a meager description of the cotton, and cotton standing on the books of the warehouse to the credit of one person would be shipped out on the order of such person upon his surrendering receipts issued to him or to any other person for a like number of bales. In other words, the compress company, the banks, and cotton dealers dealt with these compress receipts as if they called for no particular cotton, but only for a certain number of bales of cotton." The testimony shows that the railroad officials redeemed their duebills by issuing a bill of lading for them, just as they would issue a bill of lading for a compress receipt; the identity of the cotton for

which the bill of lading was issued not depending in either instance upon the compress receipt (or duebill) itself, but it took both the receipt (or duebill) and the turn-out order to identify the cotton shipped. The bank accepted and retained this duebill in lieu of compress receipts, and now sues the railroad company upon it. Can it recover upon it? It is not a bill of lading. A bill of lading has a twofold aspect. It is both a receipt and a contract. 1 Hutchinson on Carriers, § 157; Pollard v. Vinton, 105 U. S. 7, 28 L. Ed. 998. As a receipt, it is *prima facie* and not conclusive evidence of the facts recited, and between the parties it is impeachable for mistake, error, or false statements in it. 1 Hutchinson on Carriers, § 158. A carrier acts through agents, and is bound by all they do within the scope of their authority; and it is within the scope of their authority to receive goods and issue bills of lading therefor, but it is not within the scope of their authority to issue bills of lading when the goods are not received. 1 Hutchinson on Carriers, § 159-162. The statute forbids any warehouseman or carrier to issue any receipt for goods unless the goods shall have been actually received into its possession. Kirby's Dig. § 524. 532. A delivery of goods to a carrier must be for immediate transportation. If goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until further orders, the carrier becomes a mere depository or bailee, and his liability only measured by the principles governing that relation, and not as a carrier. 1 Hutchinson on Carriers, § 112, and cases in note 23. Section 530 of Kirby's Digest makes warehouse receipts given by warehousemen for cotton or other commodities, when stored or deposited, and bills of lading or transportation receipts given by carriers, transferable by indorsement, and all persons to whom the same shall be transferred shall be deemed to be the owner of such goods, and the goods shall not be delivered except upon surrender of such warehouse receipt. This section, and others in chapter 15, make the warehouse receipt or bill of lading representative, so far as delivery goes, of the commodity itself, and guards and protects the value of such evidence of the commodity by requiring the actual delivery of the commodity before the issuance of the receipt and forbidding the delivery of the commodity without the surrender of the evidence of it. The Legislature of 1907 provided for giving bonds pending the transmission of a bill of lading, which is but another emphasis of the protection which the law affords these evidences of property.

An application of the principles above announced to the facts at bar brings this conclusion: It was beyond the scope of the freight agent's authority, and contrary to law, to issue a bill of lading or receipt for goods not actually received, and such receipt is not binding, at least before the right of a

bona fide holder of a negotiable bill of lading intervenes, upon the carrier. There was no cotton actually delivered to the railroad when Mr. Bragg issued the duebill sued on. If the compress receipt which was surrendered when the duebill was issued be taken as an actual delivery of the cotton, yet it was not delivered for immediate shipment, but merely to be held until some further orders were received for it to be shipped out; and in the meantime the railroad company was merely a depository, and liable only as such for the safe-keeping; and in this instance there was nothing to keep safely other than a mere symbol of the property itself. This symbol was an incomplete one, as the custom required another instrument to identify the cotton in order that the proper bill of lading could be issued therefor. The bank permitted its compress receipt, which represented so many bales of cotton—indeterminate, it is true, but still a given number of bales of cotton in a warehouse—to be surrendered, and accepted in lieu thereof this duebill. The duebill represented nothing tangible. It is a promise to issue a bill of lading, and such a promise is beyond the scope of authority of the agent making it. It is a mere symbol for another symbol. It cannot be binding upon the railroad as a receipt, for no goods were received. It is not a bill of lading, and the statute relating to them cannot apply. It is a promise to give a bill of lading for 12 bales of cotton because the carrier holds a compress receipt for 12 bales, but the carrier's agent cannot bind the carrier by a bill of lading until the goods are actually delivered for immediate shipment. In no view of it is it a binding obligation of the railroad company. It is said by the appellee that it makes no difference whether Bragg had authority to issue the duebill or not, since the railroad actually got the cotton sued for. They invoke the doctrine of estoppel against a corporation pleading an *ultra vires* act when it has received the consideration for the act, when it is an executed contract. The railroad received this cotton for transportation only, and did not take it as its own, and did not receive any benefit other than its freight tolls. It was through some error or rashness that the railroad company was induced to ship it out without surrender of the bill of lading or compress receipt representing it, and that is the foundation of the claim against it. But, as the bill of lading had been surrendered for compress receipts and compress receipts for this duebill, liability cannot be sustained on such ground, but must rest upon the duebill alone. The railroad company, like the bank, is an innocent victim of the machinations of the Alphin Lake Cotton Company. This is conceded to be a case in which one of two innocent parties must suffer for the misdeeds of a "daring financial buchaner," and the doctrine invoked is wholly foreign to the issues.

The judgment in favor of the bank for the

value of the cotton sued for in the first 12 counts is affirmed, and the judgment in favor of the bank for the value of the 12 bales sued for in the thirteenth count is reversed, and judgment entered here for the proper sum.

HART, J., having presided in the chancery court, was disqualified, and did not participate herein.

STATE v. DULANEY.

(Supreme Court of Arkansas. June 29, 1908.)

1. CRIMINAL LAW—APPEAL BY STATE—STATUTORY PROVISIONS.

Under the express provisions of Kirby's Dig. §§ 2602-2604, the prosecuting attorney shall pray an appeal where it is desired by the state, and the clerk shall make out a transcript of the record and transmit it to the Attorney General, who, on inspecting the record, if satisfied that error has been committed to the prejudice of the state, and upon which it is important to the correct and uniform administration of the criminal law that the Supreme Court should decide, may lodge the transcript in the office of the clerk of the Supreme Court and take the appeal, but a judgment in favor of a defendant which operates as a bar to further prosecution would not be reversed by the Supreme Court, even though error was committed in the trial to the prejudice of the state.

2. BRIBERY — EVIDENCE — ADMISSIBILITY — PROSECUTION FOR BEING ACCESSORY TO BRIBE.

Where certain evidence would be competent in a prosecution for bribery, it would also be competent in a prosecution for being accessory to the bribing of the person accused, since there is no distinction in principle between the two cases.

3. CRIMINAL LAW — EVIDENCE—SIMILAR ACTS AND TRANSACTIONS.

In a prosecution of a member of the Legislature for being accessory to the bribing of himself, testimony of a witness that defendant was made chairman of the Railroad Committee of the house through his influence, and that he paid defendant \$1,000 to do his will in regard to railroad matters, and that there was a general agreement between him and defendant as to other matters in which he was interested and in which defendant agreed to do his will, and that money was to be put up to influence legislative action on the bill in connection with which the bribery was charged, in which bill witness was interested, and which bill was of the character covered by the general agreement between the parties, but that witness was absent when the bill came up, which was the reason that he did not personally give the money to the defendant, was admissible to show that the crime charged was within the scope of the purpose for which defendant and witness had conspired, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged, though the state could not connect the witness and defendant with the particular bill concerning which the bribery was charged, other than through the general scheme suggested by the agreement between them, which agreement was entered into at the beginning of the legislative session and before the bill to which the bribery related was introduced.

4. SAME.

Though the general rule is that evidence of other crimes or offenses is inadmissible against a defendant charged with a particular crime, evidence of offenses or acts similar to the

one charged in an indictment is competent for the purpose of showing knowledge, intent, or design, and such principle is not an exception to the general rule, since it is not proof of other crimes as crimes that is permitted, but merely evidence of other acts which are from their nature competent as showing knowledge, intent, or design, although they may be crimes and the fact that such evidence shows that defendant was guilty of another crime, does not prevent it being admissible when otherwise it would be competent on the issue being tried.

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

A. D. Dulaney was acquitted of being an accessory to the crime of bribery, and the state appeals, desiring a review of a ruling of the trial court sustaining an objection to certain testimony offered by the prosecution. Ruling held error.

A. D. Dulaney was the Representative of Little River county in the General Assembly of 1905. He was indicted by the grand jury of Pulaski county on a charge of being an accessory to the crime of bribery, committed by one A. J. Kiser giving the said Dulaney the sum of \$200 to corruptly influence his vote on a bill pending in the House of Representatives, entitled, "An act requiring long distance telephone companies to permit physical connection with local telephone companies and for other purposes." On the trial the defendant was acquitted.

The issues in the case were these: The state introduced evidence tending to prove that Kiser was interested in the defeat of the bill named in the indictment, and that King and Ritchie were interested in its passage; that Dulaney undertook to manage the bill in behalf of King and Ritchie on the floor of the House, and that he voted for a suspension of the rules in order that the bill might be considered; that the rules were suspended and the bill read a second time and referred to the railroad committee, of which Dulaney was chairman; that after supporting the bill for some time, he, in a veiled way, made a demand for money, which was refused, and that soon thereafter he announced to King that he could no longer continue to handle the bill on the floor of the House, as he was deluged with communications from his constituency opposing the bill, and that he thereafter opposed the bill and voted against it; that after the bill was defeated, he received from Kiser a draft for \$200, transmitted to him through Powell, a friend of Kiser's, manager of a telephone system and likewise interested with Kiser in the defeat of the bill in question; the letter transmitting said draft indicated upon its face that the amount was in payment of some real estate; and it was shown that the property was four lots in the town of Wilton; that said lots were worth \$12.50 to \$15 each, or a total of \$50 to \$60; that they were owned by a brother of defendant, and that no deed had appeared of record for the same conveying them to Kiser, and that Kiser made

admissions of having paid said sum to the defendant on account of said bill. On the other hand, the defendant introduced evidence tending to prove that he was at all times opposed to the bill, and merely voted for a suspension of the rules as a courtesy to the friends of the bill in order that it might be considered on its merits; that his opposition was known at the time he voted for this suspension of the rules; that he had made no proposition, veiled or otherwise, to King or Richie or any one else for money to support the bill, and that he did not receive any money for his opposition to it; that the \$200 received from Kiser was a business transaction not related to any of his official duties, and that the lots sold to Kiser were worth the price that he paid, or more; that the deed to them had been executed by his brother and delivered to Kiser, and that he was representing his brother in this sale to Kiser; and also introduced evidence tending to show that two of the principal witnesses for the state were not men of good reputation for truth and morality (on the other hand, the state in rebuttal offered testimony that they were men of good reputation in these respects); he also introduced testimony contradicting different witnesses for the state upon many material matters.

The state proved by T. L. Cox that he represented various corporations and corporate interests in connection with the General Assembly of 1905; that he kept his clients advised of legislation pending and bills introduced and bills passed, and that he used money on bills for the purpose of influencing legislation thereupon, and represented corporate interests in that capacity; that he was acquainted with Dulaney, who was chairman of the railroad committee in the House. The state offered to prove by said witness that he had had Dulaney appointed chairman of the railroad committee; "that Dulaney then came to him, and they had a meeting in his room in which Dulaney wanted to see whether arrangements could be made about the amount of money he could get on various matters that would come before the committee in which Cox was interested for the various corporations, that they finally entered into this agreement: That the amount would not be fixed except on the railroad. In that they agreed upon \$1,000, and that was paid to him; that thereupon an agreement—his general agreement—was that such other matters, and bills that came before that committee in which Cox was interested, or any corporation he represented was interested, that Dulaney should take money on them as a bribe for doing his will—what was wanted done by Cox; that he did take it in pursuance of that; that he took money on some other measures in pursuance of this general agreement; that Cox was interested in this telephone bill; that money was put up to defeat the bill." The court stated that he would not admit this

testimony unless the state could show there was an agreement concerning the particular bill. The prosecuting attorney then stated more fully his offer as follows: "We cannot prove by Cox that on this particular bill he gave money to Dulaney, but Cox explains that by the fact that he was out of the city at the time this bill came up, and that he was not here at the time it was pending in the House. We cannot show that this particular bill was ever mentioned in any conversation had between Cox and the defendant, other than it was understood that the defendant should look after all bills in which Cox was interested. This agreement and understanding was had at the beginning of the session of 1905 and before this telephone bill was introduced in the Senate. By the Court: Can you show that the defendant knew that Cox was interested in the defeat of this telephone bill—Senate Bill No. 215? By Lewis Rhoton, Prosecuting Attorney: No, sir; we cannot show that. We can only show the general agreement and understanding as I have before stated." The court sustained the objection to this testimony, and the state excepted, and it is the ruling of the court thereupon that the state desires a review by this court.

Wm. F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for the State. W. L. Terry and Murphy, Coleman & Lewis, for appellee.

HILL, O. J. (after stating the facts as above). Where an appeal on behalf of the state is desired, the statute provides that the prosecuting attorney shall pray the appeal, and the clerk shall make out a transcript of the record and transmit it to the Attorney General. If the Attorney General, on inspecting the record, is satisfied that error has been committed to the prejudice of the state, and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide, he may lodge the transcript in the clerk's office of the Supreme Court and take the appeal. But a judgment in favor of a defendant which operates as a bar to further prosecution shall not be reversed by the Supreme Court, even though error was committed in the trial to the prejudice of the state. Sections 2802, 2803, 2804, Kirby's Dig. This is a method afforded the law officers of the state to take the opinion of the Supreme Court upon questions which they consider important to the correct and uniform administration of the criminal law.

The court is met with an objection to a consideration of the other questions involved by the insistence that the indictment cannot be sustained as it charges Dulaney with being an accessory to a bribery of himself, the bribery committed by Kiser, instead of accusing him of being guilty of the crime of bribery. The reason for the form of the

indictment is neither apparent nor important on this appeal. The gist of the charge is that Dulaney was an accessory to Kiser bribing him; and the testimony which was offered by the state and rejected by the court, which ruling the state has asked the court to review, would be competent under this indictment if competent under an indictment charging bribery and the sufficiency of the indictment is not a question now. Such evidence has been admitted by other courts in a case of soliciting a bribe (*Higgins v. State*, 157 Ind. 57, 60 N. E. 685), and in attempting to corrupt a juror (*State v. Williams*, 136 Mo. 293, 38 S. W. 75), and no distinction in principle can be discerned between such cases and one where the charge is being an accessory to bribery of the defendant himself.

The testimony of Cox, which the state offered and which the court refused to admit, would have proved, if the jury had believed it, that Dulaney held the position of chairman of the railroad committee through Cox's influence; and that he had an agreement with Dulaney to pay him \$1,000, and did pay him that sum, to do Cox's will in regard to railroad matters, and that the general agreement also included other matters, which were any bills that came before that committee in which Cox was interested, or in which corporations that he represented were interested; that Dulaney was to take money on them as a bribe for doing his will; that he did take it in regard to railroad legislation and on some other measures in pursuance of the general agreement to do Cox's will, and that money was put up to defeat this bill and Cox was interested in it, but Cox was absent when the bill came up, which was the reason that he did not personally give the money to Dulaney upon it; but the state could not connect Cox and the defendant regarding this particular bill other than through the general scheme above stated, which scheme was entered into at the beginning of the session and before the telephone bill was introduced. Was this testimony of Cox's competent?

The principle of evidence that offenses or acts similar to the one charged may be competent for the purpose of showing knowledge, intent, or design is as thoroughly established as the general proposition that other crimes or offenses cannot be shown in evidence against a defendant charged with a particular crime. While the principle is usually spoken of as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts which are from their nature competent as showing knowledge, intent, or design, although they may be crimes, which is admitted. In other words, the fact that evidence shows the defendant was guilty of another crime does not prevent it being admissible when otherwise it would be competent on the issue under trial. *Higgins v.*

State, 157 Ind. 57, 60 N. E. 685; 1 Wigmore on Evidence, § 300. This court has applied the principle under discussion in *Howard v. State*, 72 Ark. 586, 82 S. W. 196; *Johnson v. State*, 75 Ark. 427, 88 S. W. 905; *Woodward v. State*, 84 Ark. 119, 104 S. W. 1109.

The Court of Appeals in New York stated the principle as follows: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." And in discussing the fourth ground above enumerated, it says: "Fourth. As to a common plan or scheme, it sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both." *People v. Molineaux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Mr. Wigmore, in speaking of the admissibility of such evidence in charges of bribery, says: "On a charge of bribery, any of the three general principles—knowledge, intent, and design—may come into play. To show knowledge of the nature of the transaction, a former transaction of the sort may serve, as indicating an understanding of the particular transaction. To show intent, another transaction of the sort may serve to negative good faith. To show a general design, a former attempt towards the same general end may be significant." 1 Wigmore on Evidence, § 343. In the notes to this section may be found a review of the authorities; and it is found that they are not uniform in sustaining the principles announced by Mr. Wigmore, and he indulges in some caustic criticism of the courts that take views opposed to his statement of the correct principle.

The best thought on the subject seems to be with Mr. Wigmore, and is found applied in the following bribery cases: *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; *Higgins v. State*, 157 Ind. 57, 60 N. E. 685; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123. The last case is especially pertinent here. Schnettler was on trial charged with accepting a bribe when a member of the House of Delegates in the city of St. Louis, in regard to a certain bill authorizing a corporation to construct, maintain and operate a

street railway business on certain streets and other public places in said city. Evidence was adduced to show that a "combine," as it was called, was formed by members of the House of Delegates to corruptly control legislation. Over the objection of the defendant, the state was permitted to prove that the defendant had received \$2,500 as a bribe to induce him to cast his official vote in favor of a bill previously pending before the House of Delegates affecting the lighting of the public streets of St. Louis—a separate and distinct measure from the one concerning which he was charged with bribery. The court said: "The authorities all hold that as a general rule the state cannot prove against a defendant the commission of offenses other than the one charged and for which he is upon trial; but an exception exists with respect to this rule where the collateral crime is brought into a common system, a system of mutually dependent crimes, or is linked to the crime under trial as to show that it is part of the same scheme or understanding, or in some way have some logical connection with the crime charged."

Applying the above-announced principle to the facts of the case, the court then said: "It appears from the evidence that about the time of the organization of the House of Delegates a combination was entered into between various members of that body, including the defendant, for the purpose of controlling legislation by the members of the combine demanding and receiving money consideration for the passage or defeat of certain bills which might be brought before them, to be paid by the individuals, corporations, or parties interested therein, and that defendant did in fact receive the sum of \$2,500 on account of his vote on the lighting deal. This arrangement was not only with respect to the lighting deal in which he received \$2,500 for his vote, but it applied to all other matters of a similar character which might come before the House of Delegates, and was, therefore, part of the same scheme, or arrangement, and logically connected with the charge in the information, hence formed an exception to the general rule, and the facts in respect thereto were admissible in evidence for the purpose of showing that the crime charged was within the scope of the purpose of which the conspirators were banded together, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged."

The bill mentioned in this indictment was before the committee of which defendant was chairman. The evidence offered tended to prove that all bills affecting corporations which were referred to the committee of which he was chairman should be looked after by him in the interest of his corrupt general agreement with Cox, where Cox was interested, and that Cox was interested in

this bill, while it is not offered to be shown that Dulaney knew Cox was interested in this particular bill, yet the bill was of character that was covered by his general agreement with Cox, and it was a part of the same scheme and arrangement, and logically connected with the matters covered in the general agreement. A perusal of the evidence in the case shows that had the state's witnesses been believed, the jury would have been authorized to convict; and, on the other hand, had the defendant's witnesses been believed, the defendant was fully exonerated of the charge against him, and the court warranted in believing the charge against him an effort to ruin him by his personal political enemies. In view of such conflicting evidence, it was manifestly improper that proper corroborating evidence of each side be not excluded. The evidence excluded was admissible for the purpose of showing that the crime charged was within the scope of the purpose for which it was alleged the defendant and Cox had conspired, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged; which testimony would be meaningless unless pointedly explained by this general corrupt agreement to which it was alleged this defendant was a party.

It is therefore the opinion of the court that the circuit court erred in not admitting the offered evidence.

JACKSON et al. v. BECKTOLD PRINTING & BOOK MFG. CO. et al.

(Supreme Court of Arkansas. June 15, 1901.)

1. JUDGMENT—DECREE—ENTRY IN VACATION—PROOF.

That a decree was erroneously entered in vacation may be established by evidence admissible in the case.

2. SAME—VALIDITY.

A decree in chancery entered in vacation as of the term prior to the date when the case was submitted, pursuant to an understanding with some of the defendants, was void.

[Ed. Note.—For cases in point, see Cent. vol. 30, Judgment, § 14½.]

3. EQUITY—LACHES.

Equity, in the exercise of its own independent powers, may refuse relief sought, after a long and unexplained delay, where injustice would be done in the particular case by granting the relief asked.

[Ed. Note.—For cases in point, see Cent. vol. 19, Equity, §§ 212-214.]

4. JUDGMENT—DECREE—VACATION—LACHES.

Equity will not set aside a foreclosure decree, otherwise valid, because entered in vacation, where complainants with knowledge of their rights delayed to apply for relief for many years, and until after the land sold under the decree had been purchased by others who had been given possession and had cleared quantities of the timber therefrom, change of circumstances, etc.

[Ed. Note.—For cases in point, see Cent. vol. 30, Judgment, §§ 863-866.]

5. CURTESY—EQUITABLE ESTATES—EQUITY OF REDEMPTION.

A husband has curtesy in trust as well as in legal estates and in an equity of redemption in mortgaged premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Curtesy, § 21.]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Action by George M. Jackson and others against the Becktold Printing & Book Manufacturing Company and others. Decree for defendants, and complainants appeal. Affirmed.

The present suit filed on the 11th day of August, 1902, by appellants, the husband and children of the late Fannie C. Jackson against appellees was brought to set aside a decree of the circuit court sitting in chancery purporting to have been rendered at the January term, 1897, of the court, but alleged to have been rendered and entered of record in vacation in July, 1897, and to redeem certain lands ordered sold by said decree, and for an accounting of the mortgage debt, rents, profits, and waste. Fannie C. Jackson in her lifetime was the owner of the premises referred to, and in March, 1892, she executed a mortgage thereon to W. G. Bryan, which he, in October, 1895, assigned to W. B. Becktold & Co., a partnership. On the 20th day of April, 1896, Becktold & Co. brought suit to foreclose said mortgage and made said Fannie C. Jackson and W. G. Bryan parties defendant thereto. In May, 1896, Fannie C. Jackson departed this life, intestate, leaving her surviving George M. Jackson, Sr., her husband, and the remaining plaintiffs and appellants in the present suit as their children and her sole heirs at law. On the 16th day of July, 1896, Becktold & Co. commenced a new suit to foreclose the mortgage above mentioned, in which all the appellants except George M. Jackson, Sr., were made defendants. In January, 1897, the appellee, Becktold Printing & Book Manufacturing Company, hereafter called "Becktold Company" a corporation, was by order of the court, on its own application and on the application of Becktold & Co., substituted as plaintiff in that foreclosure proceeding by reason of the fact that Becktold & Co. had, pending the action, assigned the mortgage to the corporation. There was entered upon the records of said court a judgment and decree finding that there was due upon the mortgage the sum of \$5,525, and directing a sale of the premises for the payment thereof. The records of the court show that this decree was rendered and entered of record during the January term, 1897. Pursuant to the directions of the decree, the lands were advertised for sale by the commissioner of the court, and on the day of sale were struck off to the appellee, Becktold Company. The sale was reported to the court, and duly confirmed at the next term thereof. A deed was executed by the commissioner to said Becktold Com-

pany, which was approved by the court. Thereupon the said Becktold Company entered into possession of said lands. The complaint alleges that it went into possession of all said lands about the 1st day of January, 1898. On the 7th day of February, 1898, the Becktold Company by its deed duly recorded conveyed a part of these lands to B. B. Biffle. Thereafter and before the institution of this suit, Biffle conveyed a part of the lands so purchased by him to other appellees herein. The Becktold Company, also, by direct conveyances, duly recorded, conveyed a part of the lands to other appellees herein. The record does not disclose whether any of the lands are now owned by the Becktold Company, nor does it contain a complete description of the lands sold to Biffle. It only shows the date of the sale to Biffle and contains a description of the lands sold by Biffle to other purchasers.

The testimony in this case shows that the foreclosure suit was not heard and determined at the January term, 1897, of the court, but that the case was taken under advisement until after the adjournment of the court, and it was agreed by the parties to the suit that the findings of the judge should be made in vacation, and the result embodied in a decree to be entered of record as if in term time. Pursuant to this understanding, the judge of the court decided the case, in July, 1907, in vacation, and caused a decree to be prepared in accordance with his findings and had the same entered of record as if the proceedings were had during the January term, 1897, of the court. George M. Jackson, Sr., was present at the January term, 1897, when the agreement for rendering and entering of record the decree in vacation was made. He represented the defendants to that suit. They were nonresidents and not present. Maude S. Jackson was alleged in the complaint in the foreclosure proceedings to be a minor, and a guardian ad litem was appointed to make her defense. His answer denies that she was at that time a minor. The present record does not disclose whether or not she was at that time a minor, nor at what time, she reached her majority, but she sues as an adult in the present case. George M. Jackson, Sr., testified that he objected to the decree rendered in vacation after it was made, and told the Becktold Company that the defendants all of whom he represented would not be bound by the decree. No objections were made to the confirmation of the sale, or to any of the subsequent proceedings in the case. As above stated the present suit was instituted to set aside the decree rendered in the foreclosure proceedings. The defendants appellees in this court filed separate answers containing a general denial of the allegations of the complaint and pleading laches and estoppel on the part of the plaintiffs, to maintain their action. The chancellor found as a fact

that the foreclosure decree was in vacation of the court, but held that such facts could only be shown by the record in the cause, and therefore dismissed the complaint, except as to George M. Jackson, Sr., for want of equity, because the record in the cause did not show that the foreclosure decree was pronounced in vacation. The court also found that George M. Jackson, Sr., as the husband of said Fannie C. Jackson had an interest in the lands, and was not bound by the decree rendered in the foreclosure proceedings because he was not a party thereto, and appointed a commissioner to state an account between him and the Beckett Company. This decree was rendered at the March term, 1907, of the court, and the Beckett Company excepted to that part of the decree which held that G. M. Jackson, Sr., had an interest in the land, and prayed an appeal to the Supreme Court, which was granted. In October, 1907, the plaintiffs in the court below were granted an appeal by the clerk of this court.

J. D. Block and F. H. Sullivan for appellants. L. Hunter, Moore & Spence, and J. L. Hornsby, for appellees.

HART, J. (after stating the facts as above). The evidence in this case shows that the decree was rendered in vacation. The chancellor so found, but was of the opinion that such fact could only be shown by the record in the cause, and therefore excluded from his consideration all the evidence contained in the deposition of witnesses showing or tending to show that the decree was actually rendered in vacation. In this there was error. The precise question was otherwise determined in the case of Biffie v. Jackson, 71 Ark. 226, 72 S. W. 566. The court said: "That the original decree was rendered in vacation is abundantly established by the testimony both of witnesses and the record, since it is shown that the depositions upon which the decree is based were taken after the adjournment of the court at which the decree purports to have been rendered." It was held in the same case and in the later case of Boynton v. Ashabrunner, 75 Ark. 415, 83 S. W. 566, 1011, 91 S. W. 20, that a decree in chancery rendered in vacation, though entered on the judgment record in a blank space left for the purpose, is a nullity. This is the general rule in the absence of statutory provisions providing for the rendition of decrees in vacation. If the fact of its rendition in vacation could not be shown by testimony and could only be shown by the record, we would have the anomalous conditions in cases like the present one of a decree being a nullity and of the parties affected by it being denied the right to establish that fact.

In the case of Bobo v. State, 40 Ark. 224, Chief Justice English said: "Courts have a continuing power over their records not affected by lapse of time. Should the record in any case be lost or destroyed, the court

whose record it was, possesses the undoubted power, at any time afterwards, to make a new record. In doing this it must seek information by the aid of such evidence as may be within reach tending to show the nature and existence of that which it is asked to establish. There is no reason why the same rule should not apply when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by other satisfactory evidence." This rule has been followed ever since by this court, and was reiterated in the case of Ward v. Magness, 75 Ark. 12, 86 S. W. 822.

While the consideration of public policy which requires that a record shall be taken as importing verity yields to equities which require it to speak the truth, it does so only when the party seeking the relief is not guilty of laches. State v. Hill, 50 Ark. 461, 8 S. W. 401. Mr. Freeman in his work on Judgments, § 102, says that the rule will be strictly applied, and that any laches shown against the moving party will prove fatal to his relief. This court has held that the writ of certiorari will be refused when the party seeking it fails to show that he has proceeded with due expedition after discovering that it was necessary to resort to it. Black v. Brinkley, 54 Ark. 372, 15 S. W. 1030; Lyons v. Green, 68 Ark. 205, 56 S. W. 1075. The reason of the rule is based upon grounds of public policy, and the doctrine of laches is grounded upon the same principle. Its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands. 18 Am. & Eng. Ency. of Law. The general rule of the doctrine of laches as stated by Mr. Justice Harlan has been quoted with approval by this court in the case of Sturdivant v. Cook, 81 Ark. 284, 98 S. W. 966. He said: "But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case, by granting the relief asked."

Appellants contend the cases of Earle Improvement Co. v. Chatfield, 81 Ark. 296, 99 S. W. 84, and of Updegraff v. Marked Tree Lumber Co., 83 Ark. 160, 103 S. W. 606, are decisive of the present case. In the former case, the following language is used: "In the absence of some intervening equity calling for application of the doctrine of laches, equity by analogy follows the law and will not divest the owner of title by lapse of time shorter than the statutory period of limitation." In the Updegraff Case the court said: "The supervening equities referred to in that case (meaning the Earle Case) means some element of estoppel aside from the mere lapse

of time, payment of taxes and enhancement in value." It will be observed that both these cases were suits to quiet title; that the lands were unimproved and uninclosed, and therefore under the statute deemed to be in the possession of the parties who paid the taxes and against whom the doctrine of laches was sought to be invoked. There was no element of estoppel aside from the mere lapse of time, payment of taxes, and enhancement in value of the land.

The rule as applied to facts similar to those in the present case is aptly stated in the case of *Gallilher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, and approved by this court in the case of *Rhodes v. Cissel*, 82 Ark. 371, 101 S. W. 760. It is as follows: "The cases are many in which this defense (laches) has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to assert them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned, and that because of the changes in conditions or relations during this period of delay it would be an injustice to the latter to permit him to now assert them. Now, the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. When it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or when, by his conduct and neglect, he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance, of justice or injustice, in taking the one course or the other, so far as relates to the remedy." *Hall v. Otterson*, 52 N. J. Eq. 535, 28 Atl. 912.

In the present case, the parties invoking the doctrine of laches, under and by virtue of the decree of foreclosure, now sought to be annulled became the purchasers of the lands, and were placed in possession of them. They have sold large quantities of timber from them, changed the fences on the cleared lands, and in all respects used them as owners by purchase under a valid foreclosure decree. All these facts were known to appel-

lants. George Jackson, Sr., employed for appellants counsel to represent them in the foreclosure proceeding. He knew that their counsel agreed to a vacation decree. He was advised that this decree could be annulled, but would be valid unless appellants moved in apt time to set it aside. No effort was made to oppose the confirmation under the sale or the entry into possession by the purchasers by virtue of the deeds executed to them pursuant to the decree. They knew the lands were being sold off from time to time; for the knowledge of George Jackson, Sr., must be imputed to them, he being their agent in all respects concerning the lands. They made no effort to settle off the mortgage debt, or in any way to assert any rights to the lands. They did not move to set aside the decree until nearly five years after it was rendered. They do not claim to have been misled by any act of the parties to the suit, no excuse is given for the delay, which may be attributable to their own culpable negligence. These facts render appellants guilty of laches in not sooner moving to annul the foreclosure decree, and make it inequitable to divest the numerous purchasers of rights which they acquired under what purported on its face to be a valid decree, and which they were led to believe appellants had acquiesced in by their delay and negligence in moving to have it annulled and set aside.

Appellees insist that a husband does not have curtesy in the equity of redemption of the lands of his wife. In this, they are in error. It is now fully settled in equity that the husband shall have curtesy of trust as well as of legal estates and of an equity of redemption. *Davis v. Mason*, 1 Pet. (U. S.) 503, 7 L. Ed. 239; *Hart v. Chase*, 46 Conn. 212; *Robinson v. Lakeman*, 28 Mo. App. 135; *DeCamp v. Crane*, 19 N. J. Eq. 166; *Jones on Mortgages*, vol. 2, § 1067. "Where a woman, having issue, dies possessed of an equitable estate in land, of which her husband holds the legal title, the husband is entitled to curtesy therein." *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

The decree is affirmed for the reasons given in this opinion.

MCDONOUGH v. WILLIAMS.

(Supreme Court of Arkansas. May 18, 1908.
On Rehearing, July 13, 1908.)

1. FRAUD—ACTIONS—EVIDENCE—ADMISSIBILITY—DAMAGES.

In an action for fraud and deceit in the purchase of certain shares of corporate stock, evidence of the value of the physical property of the corporation is admissible, as tending to show the value of the stock.

2. APPEAL AND ERROR—HARMLESS ERROR—REJECTION OF TESTIMONY.

In an action for fraud and deceit in the purchase of corporate stock, rejection of evidence tending to show that the debts of the corporation equalled or exceeded the value of its

property was prejudicial, notwithstanding there was other similar evidence, where the witnesses as to such facts were not so numerous as to make the rejected evidence merely cumulative, and the verdict shows that their testimony was not accepted as true by the jury.

3. FRAUD — ACTIONS—INSTRUCTIONS — FAILURE TO SUBMIT ISSUES INVOLVED IN ISSUE SUBMITTED.

In an action for fraud and deceit in the purchase of corporate stock, where the issue whether the relation of trust and confidence existed between the parties was submitted to the jury, as was the issue whether defendant's purchase of stock was with a view to a resale at a higher price, the right to rely on defendant to disclose certain information was necessarily included, as was the materiality of the concealment, and failure to specifically submit those issues was not error.

4. SAME—DEFENSE—NOTICE PUTTING ON INQUIRY.

In an action for fraud, if a relation of confidence and trust existed, facts merely sufficient to cause an ordinarily prudent person to inquire are no defense, for under such conditions nothing short of actual knowledge will suffice.

5. TRIAL—REFUSAL OF INSTRUCTIONS SUFFICIENTLY GIVEN.

Where the law is sufficiently and correctly declared in instructions given, refusal of requested instructions is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 651-659.]

6. FRAUD—EVIDENCE—ADMISSIBILITY—SUBSEQUENTLY DISCLOSED DEFECTS.

In an action for fraud in the purchase of corporate stock, evidence as to defects in the property of the corporation, developed after the sale of the stock, was not admissible.

7. APPEAL AND ERROR — ABSTRACT — SUFFICIENCY.

Where an abstract on appeal states the substance of the pleadings, sets forth all the instructions and the evidence in printed form, and shows that the assignments of error were duly reserved in a motion for new trial, it sufficiently complies with rule 9 of the Supreme Court.

On Rehearing.

8. EVIDENCE—QUALIFICATION OF EXPERTS—VALUE OF COAL MINE.

Where one offered as an expert witness, to show the value of a coal mining property, was familiar with the property in a general way, was mining about a mile and a half distant on the same vein, knew from others the thickness of the vein of the company in question, was familiar with the price of coal throughout the section of the country, and had a fair knowledge thereof, but did not know the number of slopes or mines owned by the company, had never been underground in the mines, did not know the extent and cost of their development, but only pretended to be acquainted with the property in a general way, and did not claim familiarity with it in detail, he was not qualified to testify as an expert.

9. SAME—DETERMINATION OF COMPETENCY OF EXPERT WITNESS—DISCRETION OF COURT.

Whether a witness has shown sufficient knowledge, concerning the value of property, to give him a definite opinion on the subject is a matter to some extent, within the sound discretion of the trial judge, and in the absence of an abuse of discretion, his ruling thereon will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2363.]

10. APPEAL AND ERROR — REVIEW — SUBSEQUENT APPEAL—LAW OF CASE—SUFFICIENCY OF EVIDENCE.

Where the evidence on an appeal is substantially the same as that on a former appeal,

the former decision must be treated as conclusive of the question of its sufficiency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368, 4376.]

11. SAME — CONCLUSIVENESS OF VERDICT — CONFLICTING EVIDENCE.

The verdict of a jury on conflicting evidence will not be reversed on appeal, notwithstanding it appears to be against the preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

12. JUDGMENT—AMOUNT OF RECOVERY—DAMAGES—INTEREST ON AMOUNT.

In an action for fraud in effecting a purchase, judgment should be for the amount assessed by the jury, and it is error to render judgment for that amount, with interest from the date of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 400-403.]

Wood, J., dissenting in part.

Appeal from Circuit Court, Sebastian County; Daniel Hou, Judge.

Action by George T. Williams against James B. McDonough for fraud. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Instruction No. 6 was as follows:

"I charge you that, in order to render a transaction void on account of fraud, it must appear that the defendant intentionally and falsely misrepresented some material fact to the plaintiff, or intentionally concealed some material fact from plaintiff, when he knew plaintiff was relying on him to disclose same, or intentionally made some false or fraudulent statement to him, or intentionally caused some false or fraudulent statement to be conveyed to him, of a material existing fact, with a view to influencing him to enter into the transaction, and that such false and fraudulent statement was believed by the plaintiff and acted upon by him."

Requested instructions 14, 15, and 29 were as follows:

"(14) It is alleged in the complaint that the defendant misrepresented the financial condition of the Montreal Coal Company to the plaintiff and to Messrs. Ball and Boone. There is no evidence sufficient to sustain these allegations, and you will therefore disregard all of these allegations in the complaint.

"(15) It is also alleged in the complaint that the defendant misrepresented to the plaintiff and to Messrs. Ball and Boone the urgent attitude of the creditors of said corporation. There is no evidence of any such misrepresentation. You will therefore disregard all allegations with reference to this matter."

"(29) Even if the jury should find that the defendant made the alleged false representations set out in the complaint, if after said representations were made, if they were made, the plaintiff was informed by the defendant that he had a deal on hand concerning the sale of the stock, and that if said deal went through, he, the said defendant, would make \$5,000 or \$10,000, and if, after such

statement by the defendant to the plaintiff, the plaintiff then sold his stock to the defendant, it will be the duty of the jury to find for the defendant."

Jas. F. Read, F. A. Youmans, and B. R. Davidson, for appellant. Oscar L. and Lovick P. Miles, for appellee.

WOOD, J. This is the second appeal in this case, and the issues and facts are sufficiently set forth in the statement and opinion on the former appeal, to be found in 77 Ark. 261, 92 S. W. 783. As was stated in that opinion, the action is for damages, grounded on fraud and deceit, alleged to have been practiced by appellant upon the appellee in the purchase, by the former, of shares of corporation stock from the latter. The relation of trust and confidence is set up by the appellee as having existed between him and appellant at the time of the sale of the stock, and it is alleged that certain false and fraudulent representations were made by appellant, and certain false and fraudulent concealments were indulged in by him, on which appellee relied, and by which he was induced to sell \$12,500 shares of stock at its par value when it was worth more. Our former opinion narrowed the issues to the question of whether the alleged confidential relation existed between appellee and appellant at the time of the sale of the stock, and if so, whether appellant concealed the terms of the Bache option, which he should have disclosed. Judge McCulloch concluding the opinion for the court said: "It is therefore a question of fact for a jury to determine, under proper instructions, whether the confidential relation continued up to the time of the sale, and, if so, whether the plaintiff, on account of that relation, relied upon the defendant to disclose information concerning the prospective resale to Bache at a higher price than the par value, and whether the defendant, knowing of such reliance, concealed the information from plaintiff or from Ball and Boone, when he knew that they were the trusted advisers of plaintiff, and consummated a purchase of plaintiff's stock at par, in view of a certain resale at a much higher price."

On the second trial appellant introduced J. M. Spradling, who testified that he had been engaged in the coal mining business for 10 years; that he was familiar with the values of coal land in Sebastian county; was familiar with the Montreal Coal Company property, in a general way; knew the property very well, had not been under ground in the mines. He was mining coal about 1½ miles distant on the same vein. He knew of the thickness of the vein of the coal of the Montreal Coal Company from others, was familiar with the price of coal throughout that section of country, and had a fair knowledge of same. The appellant then offered to prove by this witness that the mines and property of the Montreal Coal Company on January 11, 1903,

were not worth over \$55,000. By the terms of the option, Bache paid appellant \$33,000 for the stock of the Montreal Coal Company. Bache was to pay the indebtedness of the corporation, which appellant guaranteed would not exceed \$50,000. There was evidence tending to prove that the indebtedness of the corporation, at the time of the option, was about \$53,500. In our former opinion we said: "The court erred in excluding evidence, offered by appellant, tending to show the value of the corporation stock at the time of the sale. The rule, hereinbefore declared, as to the measure of damages rendered it competent to show the value of the property sold. If the stock was worth no more than the price received by appellee for it, then he was not damaged." Evidence of the value of the physical property, the corpus, of the Montreal Coal Company at the time of the sale of the stock of appellee to appellant certainly tended to show what the value of the stock was at that time. On the former appeal we held that the measure of damages "would be the difference between the price paid to the plaintiff for his stock and the actual value thereof at the time, if the latter exceeded the former." Under this rule the testimony of J. M. Spradling, supra, was very important to appellant. For there was evidence tending to show that, if the debts were equal to the value of the property of the corporation, the stock would not be worth anything. One witness testified that if the debts were as much as \$50,000, the stock was not worth anything; that the property of the corporation did not exceed in value \$50,000. In view of this evidence, the refusal to allow the testimony of the witness above mentioned was exceedingly prejudicial. While there was other evidence to the same effect admitted, the jury did not accept it. We cannot say that this evidence was cumulative. The witnesses were not sufficiently numerous for that; and, if the jury had been given an opportunity to consider the testimony of Spradling, they might have given it more weight than the other testimony that was adduced to the same effect.

There are numerous assignments of error as to the giving and refusing of requests for instructions. But a majority of the court is of the opinion that the instructions of the court properly presented the law applicable to the facts. Appellant contends that the instructions took from the jury the question of appellee's right to rely on appellant to disclose information concerning the Bache option, also the materiality of the concealment of such option. But the issue as to whether the relation of trust and confidence existed was submitted. This necessarily included the question of the right to rely. The court also submitted the question as to whether or not appellant's purchase of the stock from appellee was in view of a resale to Bache for a substantially higher price. This necessarily included the question of the materiality of the concealments. Appellant complains that the

instructions did not submit the question as to whether appellee had notice of such facts, in regard to a proposed sale by appellant as would put a reasonably prudent man on inquiry. If the relation of confidence and trust existed, appellee was not put upon inquiry by notice of facts that would cause a reasonably prudent man to inquire. If the relation of trust and confidence existed, nothing short of actual knowledge would suffice. See *Mason v. Thornton*, 74 Ark. 46. A majority is of the opinion that, while some of the requests for instructions by appellant were correct, the court did not err in refusing them, because the law was sufficiently and correctly declared in those given.¹

The court properly excluded testimony as to defects in the property that were developed after the sale of the stock. Evidence of defects that were discovered after the sale of the stock, that were not known, and could not have been known, at the time of the sale, was not admissible. This did not tend to prove what was the actual market value of the stock at the time of the sale.

We do not deem it necessary to express any opinion on the alleged misconduct of appellee's counsel during the progress of the trial. We must assume that counsel in another trial will not indulge in any improper conduct.

The abstract of appellant is a sufficient compliance with rule 9 of this court. The substance of the pleadings is stated. The instructions are all set forth. The evidence is printed, and the abstract shows that the assignments of error were duly reserved in motion for new trial.

For the error indicated the judgment is reversed, and the cause is remanded for a new trial.

On Rehearing.

McCULLOCH, J. Upon further consideration of this case we are unanimously of the opinion that we reached the wrong conclusion as to the admissibility of the offered testimony of J. M. Spradling. After a more critical examination of the testimony, aided by argument of appellee's counsel on this important point, which was entirely ignored by appellee in the former presentation of the case to us, we think that the witness did not show sufficient familiarity with the conditions and value of the Montreal Coal Com-

pany property to qualify him to testify on the subject. He only pretended to be acquainted with the property in a general way, and did not claim familiarity with it in detail. He did not know the number of slopes or mines owned by the company, he had never been underground in the mines, and did not know the extent and cost of their development. In fact, the only special knowledge which the witness displayed was that concerning the value of coal lands generally in that locality. The question whether a witness has shown sufficient knowledge, concerning the value of property, to give him a definite opinion on the subject is a matter, to some extent, within the sound discretion of the trial judge, and this court will not reverse for alleged error in this respect, unless an abuse of such discretion appears. *St. L. & S. F. Ry. Co. v. Anderson*, 39 Ark. 167; 17 Cyc. 30. No abuse of the court's discretion is shown here.

It is announced in the former opinion that no other error was found by the majority of the court. Mr. Justice WOOD, who wrote the opinion, expressed the view that the court below erred in refusing to give the sixth, fourteenth, fifteenth, and twenty-ninth instructions requested by appellant. These were fully covered by instructions which the court gave. The court narrowed the issue to the question of fraudulent concealment of the prospective resale of the stock to Bache, thus excluding from the consideration of the jury all questions as to misrepresentation of the financial condition of the company. The court also instructed the jury that if appellee consummated the deal, and transferred his stock to appellant, after he had obtained knowledge of the alleged fraud and deceit, he could not recover; this fully covering the subject of the rejected twenty-ninth one.

The alleged misconduct of counsel consists of comments and remarks made during the progress of the cross-examination of appellant as a witness in his own behalf. It arose out of a controversy between opposing counsel, and the court seems to have done its best to restore order and remove any possible prejudice that might result from the incident. While the conduct of the attorney is not to be commended, we cannot see that appellee secured thereby any undue advantage over his antagonist, and we do not feel at liberty to disturb the verdict on that account. *K. C. S. Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428.

Learned counsel for appellant argue, with much zeal and plausibility, that the plaintiff did not make out a case to go to the jury, and that the findings of the jury as to the various essential elements of the alleged cause of action are not supported by evidence. The same question was argued with equal force and confidence when the case was before us on former appeal, but we decided that there was enough evidence to go to the jury. There is little difference in the evi-

¹In our former opinion we said that: "There was no evidence that the defendant misrepresented the financial condition of the company, either to the plaintiff or to Messrs. Ball and Boone, or that he misrepresented the urgent attitude of the creditors of the concern, and that issue should have been withdrawn from the consideration of the jury." This language is just as applicable to the facts of the present record as it was in the former case; and, in view of this, I am of the opinion that the court erred in giving its sixth instruction, and then, having given the sixth, the error was accentuated in refusing appellant's requests, numbered 14, 15, and 29. I am of the opinion that the error should be reversed also for these reasons. Reporter, copy instructions 6, 14, 15, and 29.

dence in the present record and in that presented on the former appeal, and we must treat the former decision as conclusive of the question.

We are free to say that the various questions of confidential relations between the parties, and of fraud and deceit practiced by the defendant, were decided by the jury against what appears to us to be the preponderance of the evidence; but, as there was a conflict in the evidence on these points, it is not within our province to reverse the case on that account. The issues were submitted to the jury on correct instructions, and as there was evidence to sustain it, the verdict must stand.

The verdict of the jury assessed the damages in the sum of \$1,575, and the court rendered judgment for that amount, with interest from the date of the sale of the stock. This was erroneous. The judgment should have been only for the amount assessed by the jury.

The rehearing is therefore granted. The judgment is modified to the extent of striking out interest, and affirmed as thus modified.

HILL, C. J., disqualified, and not participating. WOOD, J., dissents, on the ground that the court erred in refusing instructions requested by appellant, and that the evidence does not sustain the verdict.

ST. LOUIS, I. M. & S. RY. CO. v. MANGAN. (Supreme Court of Arkansas. June 8, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

A switchman who continues work with knowledge of the defective condition of the roadbed, but in reliance on the promise of the foreman to repair the defect as quickly as possible, where the danger from the defect is not so obvious, imminent, or glaring that an ordinarily prudent person would not continue in the work, does not as a matter of law assume the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

2. SAME—NEGLIGENCE.

A railroad company permitted a depression over two to four inches deep and a foot and a half across to remain at a switching place in a switching yard. In wet weather, the depression was filled with water and the place was rendered dangerous to switchmen because it made the ground slippery, and because the water concealed the condition of the surface. The condition existed for about a year. *Held*, that the company was guilty of negligence, it being required to maintain its tracks and appliances in its switching yards in a reasonably safe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 197, 218-223.]

3. SAME—ASSUMPTION OF RISK.

A servant is presumed to know the ordinary risks of his employment, but he is not presumed to know of risks caused by the negligence of the master after he enters the service which changes the condition of the service, and he does not

assume such risk in the absence of knowledge of the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

4. SAME.

A switchman continuing to work for about a year with knowledge of a defective condition of the roadbed at a switching place, assumed the risk in the absence of any promise to repair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 583.]

5. SAME.

Where a master promises to repair, the servant is relieved of the assumption of the risk for a reasonable time unless the danger is so imminent that no prudent person would continue in the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-640.]

6. SAME.

Where the danger is so obvious and imminent that a servant is not justified in continuing in his work, it is usually held that he is guilty of contributory negligence if he does continue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 708.]

7. SAME.

Whether the danger arising from a defect in a railroad roadbed, resulting from a depression at a switching place in a switching yard was so obvious that a switchman was precluded from relying on the promise of the foreman of the company to repair the defect as speedily as possible, *held*, under the facts, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1112.]

8. SAME.

Where a railroad yardmaster promised a third person who was an extra foreman of a switching crew, that a defect in the roadbed in the yard would be repaired as quickly as possible, and the third person informed a switchman of the promise, the switchman might rely on the promise and continue in the work for a reasonable time unless the danger was so imminent that no prudent person would continue therein.

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Action by Stella Mangan, administratrix of John Mangan, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. M. Mehappy and J. E. Williams, for appellant. Scott & Head and Smelser & Vaughan, for appellee.

HILL, C. J. John Mangan was a switchman in the employ of the appellant railroad company in its yards at Texarkana, and had been so employed for three years. His usual duties at the time of his injury were on the night crew. Prior to the 4th of November, 1905, he had been laying off for several days, the exact number not being shown. On said day, he was called upon as extra switchman to do day work, owing to the absence of some of the day crew. Passenger train No. 5 came in the yards, and some switching had to be done and a coach for negro passengers set out on track 21, and the train had to be prepared to go out within 10 minutes of its arrival. In the performance of his duties, Man-

gan rode upon a coach until near switch 22, when he alighted from the slowly moving train in order to throw said switch; and as he alighted from the train he slipped and fell under it and was run over and horribly mangled. Three days later, after enduring great mental and physical suffering, he died in the railroad hospital in St. Louis, to which place he had been carried to receive surgical treatment. He left a widow, who was appointed administratrix of the estate, and two children. This is an action by the administratrix to recover for the loss to the estate and to the widow and children. The jury returned a verdict for \$5,000 on the first count, and for \$12,500 on the second count. Judgment was entered thereupon, and from it the railroad company has appealed.

Negligence of the company was alleged to have been committed in failing to have a reasonably safe place for the performance of his duties as switchman. The facts in regard thereto, as established by the evidence which has been credited by the jury, were as follows: The yards of the appellant company as originally constructed were level, the surface of the ground being even with the ties. But depressions had occurred in different parts of the ground, one of which existed around the head block of switch 22. It was a kind of sinking slope, a low place in the ground probably a foot and a half across on each side, and two or three or four inches deep, shaped like a dish pan. This depression or worn places around the switch was caused by the switchmen stamping around it, and it would always be slippery when it rained. In wet weather it would be filled with water, and this rendered the place dangerous to the switchmen in the performance of their duties in that it made the ground slippery and muddy and the water concealed the exact condition of the surface underneath. This condition had existed for about a year. The proper care of the yard required that this depression be filled with cinders or gravel. The water also stood in wet weather along the track for some distance at this point, and the surface was so covered that a switchman alighting from a car could not make selection of a proper place to get off. There had been a heavy rain the day that John Mangan was injured, and the season had been very wet. William Mangan, brother of the deceased, was also a switchman, and was extra foreman of a switch crew, and John at times worked under him, and was doing so on the day he was killed. Several days before the injury, Mr. W. H. Saunders, the yardmaster, fell at this same switch and William Mangan told him that it was dangerous and ought to be fixed, and Saunders promised he would have it fixed as quick as he could get the cinders for it. Shortly after this, John Mangan complained to his brother about the danger at this switch, and Wm. Mangan told him of the promise of Saunders to him to

have it repaired. This conversation is not more definitely fixed than a few days before John's injury.

The only material conflict in the evidence is upon three points: First, whether this depression was filled with water at the time Mangan fell; second, whether this depression was filled up with cinders before or after the accident; and third, whether he had alighted from the train in a careful and orderly manner or whether he had recklessly leaped therefrom. All of these conflicts have been settled against the railroad company, and upon this hearing it must be taken that this depression was concealed by a thin sheet of water, that the cinders had not been placed in there at the time, and that Mangan descended from the coach in a careful manner and slipped on account of the slippery and muddy condition of the place where he was required by his duties to alight.

Three questions arise upon these facts: First, as to the assumption of the risk; second, as to the reliance upon a promise of repair; and, third, as to the contributory negligence of John Mangan. The latter proposition may be disposed of speedily, for it presented a question of fact which has gone to the jury upon appropriate instructions, and there was no contributory negligence per se which would call on the court to interfere with the finding of the jury upon that issue. The turning point of the case is presented in the eighth instruction, which is as follows: "The court instructs the jury that if you should find from the evidence that the deceased knew of the condition of the roadbed at the point where he was injured, still, if you should further find from the evidence that the deceased complained to the defendant or his immediate foreman under whom he was working of the condition thereof, and that the said foreman thereupon advised the deceased that the defendant had promised to repair the same as soon as it could get the cinders with which to do the work, and that, thereafter relying upon such promise, the deceased continued work in the employment of the defendant, and that the danger arising from the said condition of the said premises was not so obvious, imminent or glaring, that an ordinarily prudent person would not have continued in the said work, then it is for you to say, under all the facts and circumstances of the case, whether the deceased did in fact assume the risk arising from the said condition of said premises." This instruction and the other instructions in the case are in accord with the principles announced in *Patterson Coal Co. v. Poe*, 81 Ark. 343, 99 S. W. 538; *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210; *Louisiana & Ark. Ry. Co. v. Miles*, 82 Ark. 534, 103 S. W. 153, 11 L. R. A. (N. S.) 720; *C., O. & G. Ry. Co. v. Craig*, 79 Ark. 53, 95 S. W. 168; *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837. Is there sufficient evidence to sustain a

verdict under these instructions? Primarily the inquiry is whether the condition of the ground was one of the ordinary risks of the service assumed by the servant or whether it was due to a default in duty of the company.

The duty of the master in regard to a safe place to work in switchyards is thus stated by the Texas court: "As an incident to operating trains, cars must be coupled and uncoupled in placing them in or taking them from the train and moved from one track to another. In making up trains this is generally done in switchyards where switches, switch stands, frogs, side tracks, etc., are maintained for such purpose. In doing this work, which, under the most favorable conditions, is perilous, the duty of exercising ordinary care (which is gauged by the danger to the servant) is imposed upon the company to maintain the grounds, tracks and all appliances and instrumentalities in the switchyards for doing it in a reasonably safe condition"—citing authorities: *I & G. N. Ry. Co. v. Rieden* (Tex. Civ. App.) 107 S. W. 661. And in the same case the court further said: "The work of coupling and uncoupling cars, especially from the manner it was done before they were equipped with automatic couplers, requires the roadbed to be free from such defects or obstructions as might reasonably be supposed to unnecessarily increase the danger. Hence, the duty of the company to use ordinary care to keep that part of it designed for such work free from such defects and obstructions." In *Haggerty v. C., M. & St. P. Ry. Co.*, 73 C. C. A. 282, 141 Fed. 966 (in the Circuit Court of Appeals of this circuit), the negligence was predicated upon the existence of drains in the switching yards, into one of which a switchman fell. The courts said: "It was the duty of the railway company to use ordinary care to furnish Haggerty with a reasonably safe place in which to perform his duties, and it was also the duty of Haggerty to use ordinary care to not unnecessarily expose himself to dangers which he knew, or in the exercise of ordinary care might have known. He assumed, when he entered the employ of the company as switch tender upon the yards in question, the ordinary risks and hazards of the service in which he was engaged, which he knew or which a reasonably prudent and careful man might have known. This case is clearly distinguishable from those cases where a master has allowed holes or culverts to remain uncovered at and about the place where the servant is obliged to perform his duties. The small ditch or drain in question was not what is known as a culvert, but a part of a system found necessary for the carrying off of surface water from the yards into larger drains or culverts, which were covered."

It follows from these statements of the duty of the railroad company that it was negligence to allow the existence of such a de-

pression at a switching place where switchmen would have to perform their duties, for it was shown that such depression in wet weather was dangerous to them. This condition could have been known to the master in the exercise of ordinary care, and in fact was known to the yardmaster—the vice principal—and he was notified of its danger and promised to speedily repair it. It must be taken, then, that it was not a hazard of the employment, but a default of the master's which produced the injury. That Mangan's death directly flowed from this negligence is established by evidence stamped as true by the verdict. But that does not end the matter, for the negligence of the master may be assumed when known to exist as well as the ordinary hazards of the service.

What was said by Mr. Justice Riddick in *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, applies here: "In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them; and if he negligently fails to do so, he will still be held to have assumed them. * * * But the servant is not presumed to know of risks and dangers caused by the negligence of the master, after he enters the service, which changes the condition of the service. If he is injured by such negligence, he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent; but if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk"—citing authorities.

It must be held that continuance in the employ for about a year with knowledge of the condition of this place would be an assumption of its risk, and the case narrows to whether it falls within the exception based on the promise to repair, the rule governing it may be thus stated: Where the master promises to repair, then the servant is relieved of the assumption of the risk for a reasonable time for the master to make his promise good, unless the danger is so imminent that no prudent person would continue in it. *Gowen v. Harley*, 56 Fed. 963, 6 C. C. A. 190; *Patterson Coal Co. v. Poe*, 81 Ark. 343, 99 S. W. 538; *Mammoth Vein Coal Co. v. Bubliss*, 83 Ark. 567, 104 S. W. 210; *K. & T. Coal Co. v. Chandler*, 71 Ark. 518, 77 S. W. 912. Where the danger is so obvious and imminent that the servant is not justified

in continuing in the employ, it is usually held to be contributory negligence if he does so, and not an assumption of the risk, although, as stated by Judge Taft in *Narramore v. C. C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, "Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom." The distinction between the two becomes more theoretical than substantial, as pointed out by Mr. Justice Riddick in *Mammoth Vein Coal Co. v. Bubliss*, supra. Judge Sanborn for the Circuit Court of Appeals of this circuit, in *C. G. W. Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239, stated the kind of danger referred to, as follows: "The rule is that the danger from the defects of the railroad or machinery furnished the employé must have been so obvious and threatening that a reasonably prudent man in his situation would have avoided them, in order to charge the injured servant with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks"—citing many cases. It cannot be said as a matter of law under the facts here that the danger was so obvious that Mangan was precluded from relying upon the promise. It was a question of fact.

This brings finally to consideration the only sustaining proposition of the plaintiff's cause—the promise of the master to repair. Without this promise, the long continuance of John Mangan in the performance of his duties in this yard where he knew this depression existed, and the danger incident thereto in performing his duty as a switchman, would require the court to hold as a matter of law that he had assumed the risk of the existing condition. But the testimony discloses that he complained to his brother, who, on the day of his injury, happened to be his foreman, though he was not acting as such at the time of the complaint; and his brother told him of the promise of the yardmaster to fill this depression as soon as he could get the cinders. This occurred several days before the injury; and for some days prior to his injury John Mangan was not at work, so that there was no showing that he knew the promise was not fulfilled when he alighted in this depression. Even if he had known it, yet for a reasonable time to allow the redemption of the promise, the assumption of the risk was in abeyance.

It is said that this promise was not made to John Mangan, and that his complaint had been to Wm. Mangan, who was only foreman at times of a crew of switchmen, and that such foreman could not bind the company by a promise to repair. *Albrecht v. C. & N. W. Ry. Co.*, 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 657, is cited to sustain this contention. But the promise was not from William Mangan. He was a mere medium in conveying to John Mangan the promise of the yard-

master that this defect would be repaired, and it makes no difference that this promise from the yardmaster was not directly given to John Mangan but came through another servant. This point was thus decided by the Supreme Court of Illinois: "There was no error in admitting evidence of the promise made by Hawley to repair the appliances. The objection made to the evidence is that the promise was made to the machine runners who operated the machine and was communicated to the plaintiff by them, instead of being made to the plaintiff direct. It was proper to prove that the promise was made through other servants of the defendant who notified the machine boss of the defect. The promise to repair was made to the machine runners, and when the plaintiff complained of the condition of the appliances and said that he was not going to move the machine any more unless it was fixed, they told him of the promise and he relied on it. It was not necessary for him to go to Hawley and receive the promise personally." *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 75 N. E. 332. The promise emanated from the yardmaster in control of the yard: it was conveyed to the deceased by his brother, who sometimes acted as foreman, and it was a promise consistent with the usual and proper method of repairing the yards. It was not an unreasonable time which elapsed from the promise till John Mangan resumed work on the morning of the injury, and there is no evidence that he knew that the promise had not been redeemed at the time he was called upon to alight from this train at this particular place in the performance of his duty.

The court is of the opinion that the evidence sustains the verdict, and that the instructions are right. There has been some criticism of the instructions, but it would not be profitable to review them because they are drawn from the recent cases herein referred to, and contain no new principles or departures from established precedents. Every phase of the case that either party was entitled to have sent to the jury was sent to it under proper instructions.

The judgment is affirmed.

HENDERSON & CAMPBELL v. HALL & HUGHES.

(Supreme Court of Arkansas. June 29, 1908.)

1. PHYSICIANS AND SURGEONS—ACTIONS FOR COMPENSATION—RECOVERY ON QUANTUM MERUIT.

Where, in an action on contract by physicians for medical services, the answer admitted the employment and a contract for services, and alleged that the amount was not agreed on, but should be the usual fees for such services, it was competent for either party to give evidence of the value of the services, and for the court to submit the case as made by the answer.

2. SAME—EVIDENCE—ADMISSIBILITY.

In an action by physicians for the value of medical services in examining a person injured through the negligence of another, the admission

of evidence that the physicians brought about a compromise of the claim for the injuries was erroneous, as leading the jury to assume that they might find for the value of the services in negotiating a compromise, as well as for their medical services.

3. SAME.

A physician rendering services at the request of an attorney in physically examining a client injured through the negligence of another is entitled to compensation for the value of the services, but not for any possible incidents that may or may not follow from the services, and, after the settlement of the client's claim for the injuries, it was error to admit testimony of physicians that plaintiff's services were worth a specified sum because they were not ordinary services, and because plaintiff might have had to attend court as a witness.

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Action by Hall & Hughes against Henderson & Campbell. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Henderson & Campbell, for appellants. Geo. T. Black and H. M. Bishop, for appellees.

HILL, C. J. Hall & Hughes, two physicians, sued Henderson & Campbell, a firm of lawyers, alleging that said firm engaged the professional services of the plaintiffs to visit, examine, and report upon the physical condition of one Mrs. Caroline Wyse, a client of theirs, who was alleged to have been injured through the negligence of a railroad company, and that the plaintiffs performed such services, and for the same the defendants agreed that they would pay to them the sum of \$200. The answer admitted the employment for the purposes stated, but denied that they had agreed to pay the sum of \$200 or any other certain sum, but alleged that they had agreed to pay the sum that the services would reasonably be worth. They alleged that the services were worth \$34, but they tendered \$40 before suit, and continued the tender in their answer. The plaintiffs testified to facts which, if believed, would have sustained their allegation that the defendants had promised to pay them \$200 for their services. Dr. Hughes testified to the services rendered, and that thereafter he went to Jonesboro on private business, and while there saw Dr. Lutterloh (the physician for the railroad company), who stated to him that he thought the railroad company would pay \$1,000 to the injured woman and \$100 each to Dr. Hall and himself; that, on his return, he told Mr. Henderson that the case could be settled on these terms; and that Henderson approved it. He was further permitted to testify as follows: "I consider the services we rendered the defendants was worth \$200 to them because we made the case for them, and got the compromise for them." The defendants offered testimony which, if believed, would prove that there was no contract for a fixed sum, and that they were liable for reasonable services only. The plaintiffs in rebuttal offered testimony from

several doctors that the charge of \$200 was reasonable in view of the fact that the services rendered were not ordinary services, and the further fact that the doctors might be made to appear in court as witnesses. The defendants in rebuttal of this introduced testimony tending to prove that the amount tendered by them was full compensation for the services rendered.

The court gave two instructions to the jury. The first was that, if they found by a preponderance of the testimony that defendants agreed to pay plaintiffs the sum of \$200 for the services rendered, they should render verdict against the defendants for that sum. The second was to the effect that, if there was no contract for any certain amount entered into between the parties, then it was their duty to find for the plaintiffs in such sum as they found would be a fair and reasonable compensation for the services rendered by the plaintiffs to the defendants under the contract that was entered into between them; and, in arriving at their conclusion as to the amount that was due them, that they should weigh and consider all the facts and circumstances in the case. The jury returned a verdict for \$130, and therefore it must be taken that the jury found against the plaintiffs as to a contract to pay \$200. It is objected that the plaintiffs should not have recovered on a quantum meruit when they sued on a contract, and that it was error to give the second instruction and admit testimony of the value of the services. The answer admitted the employment and a contract for services, and alleged the amount was not agreed upon but should be the usual fees for such services. This made it permissible for either party to introduce evidence as to the value of the services, and the second instruction was proper in submitting to the jury the case as presented in the answer. This was the view which prevailed with the jury, although they fixed the compensation higher than defendants' witnesses put it, and less than the plaintiffs' put it. But the court erred in admitting testimony. In the first place, the testimony that the doctors brought about the compromise, and that their services were worth \$200 to the defendants because they made their case for them and got a compromise for them was without the issues, and highly prejudicial. The suit is solely for recovery of the value of medical services, and not for services as negotiators of a compromise; and, when the court admitted this testimony, the jury had a right to assume that they should find for the value of their services in this regard as well as their medical services. The court also erred in admitting testimony of several doctors to the effect that the plaintiffs' services were worth \$200 because they were not ordinary services, and the further fact that the plaintiffs might have had to attend court as witnesses. One of their witnesses was asked on

cross-examination if the case had been dismissed before the time for fixing a fee what his charge would be, and he replied that then the charge should be as for ordinary services; and this amount he fixed at less than the amount tendered. As the case of the client was settled before this controversy arose, it was pure speculation as to what the physicians might have been called upon to have done had not the case been settled. They were called to render professional services in a physical examination of a lady, and were entitled to pay for the value of those services, and not for any speculative incidents that might or might not have followed from this service.

Other matters are presented, but, as the judgment is reversed for the above errors, it is not necessary to consider them, as they will not occur in a second trial.

Reversed and remanded.

LEVY v. NASH.

(Supreme Court of Arkansas. June 29, 1908.)

WATERS AND WATER COURSES—SURFACE WATERS—RIGHT TO OBSTRUCT FLOW—RULE IN CITIES.

The rule which governs the right to dispose of surface water in agricultural districts does not apply to property located in the midst of a populous city, which, in order to make it useful, the owner is entitled to fill up, elevate, and construct buildings on in such a manner as to protect it against surface water on an adjoining lot, and hence, where a lot owner closed up an underground drain on discovering that it was carrying surface waters from other lots on to his lot, he was only exercising his legitimate rights of self-protection, and was not liable for damages nor subject to be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 128-130.]

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Suit by Walter Nash against M. Levy to restrain defendant from obstructing the flow of water through a drain. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss complaint.

John H. Cherry, for appellant. Marshall & Coffman, for appellee.

BATTLE, J. This suit was brought in the Pulaski chancery court by Walter Nash against M. Levy. He alleged in his complaint as follows: "That he is the owner of lot 6, in block 18, in Pope's addition to Little Rock, Ark., which is on the southwest corner of Fourth and Sherman streets; that he has built a house thereon fronting on Sherman street, and one on the alley, fronting Fourth street; that about one year ago Fourth street was graded between Sherman and Commerce streets, and at the end of said alley a large tile drain was placed under and across said Fourth street to carry off the water, said work of tiling and grading being done under the authority and direction

of the city of Little Rock; that running down said alley, and for quite a distance from the south, is a natural drain or water course or swale, which carries off large quantities of water, being the outlet for the water falling on several acres of ground; and that prior to the grading of said Fourth street said drain ran across the same in a northeasterly direction, where the drain pipe is now situated.

"That defendant owns the property on the northwest corner of said Fourth and Sherman streets, lying on the opposite side of Fourth street from plaintiff's property; and there is and has been for a long time a covered culvert running northeastwardly and under defendant's said property and the sidewalk adjoining, which for a long time carried off the water of said drain, whence it was carried across the adjoining property, and so on until it reached the town branch.

"That for about two months after the grading and tiling of Fourth street, as aforesaid, the water was carried off by said tiling and culvert when defendant closed the end of said culvert at the curb line where it joined the said tiling by placing plank across the same, thereby completely obstructing the flow of the water of said drain. That with heavy rains large quantities of water accumulate at and about the end of said alley on the South side of Fourth Street, submerging his sidewalk and backyard, and retaining wall and frequently standing for several days before it evaporates or soaks up in the soil, creating a nuisance and obstructing the travel on said sidewalk on that side, and often rising high enough to run across Fourth street and the north sidewalk thereof, thereby injuring and obstructing the same.

"The defendant refused and fails to open said culvert, though often requested to do so. Wherefore plaintiff prays for a mandatory injunction requiring defendant to remove said obstruction and open said drain for the free access and flow of the water through the same, and that he be permanently enjoined from again closing up or obstructing or in any way interfering with said drain or the water through the same, and for costs and all proper and general relief."

The defendant answered, and, among other things, said:

"(4) Defendant denies that there is any stream or channel or water course running across said block 18, or across the block on which defendant resides; but says that the only water flowing northwardly across or from said block 18 is surface water from rainfall or melting snows, and there is a slight depression through or near the center of said block 18, through and over which the greater portion of said surface water falling on said block 18 passes northwardly toward the town branch; that it flows through no channel, but spreads over the lower land in a northerly direction until it reaches the town branch.

"(5) It is true that there has been a small culvert or underground drain across the rear of defendant's lot, as well as the ground north of his, extending northwardly to Third street, which culvert was inadequate to carry off the surface water coming across the street from the block above, and which underground drain was made for the sole purpose of subdrainage, and to prevent the rear yards from being wet and marshy; but defendant says he is not obliged by law or otherwise to keep the same open to drain off the surface water that falls or flows upon plaintiff's land, and that he has closed and kept the same closed against said surface water, as he has a lawful right to do.

"(6) Defendant further says that the natural flow of said surface water would not be over or across the defendant's said land, but would be across the land in rear of his, which is lower than his; that he has done and is doing nothing in respect thereof except protecting his said land from being overflowed by the surface water falling upon the land of the plaintiff and other owners of lands in block 18, and this he has a lawful right to do."

After hearing the evidence, the court ordered the defendant to remove at his own expense any and all obstructions to the free passage of water through the underground culvert on his land, and perpetually enjoined him from closing the same.

The evidence shows that the defendant was forced to close the underground culvert to protect his own lot against overflows by surface water on account of the obstruction of water flowing through the same by the owners of lots below him.

The lot of the defendant is in the midst of a populous city. The rule which governs the right to dispose of surface water in agricultural districts does not apply to such property. It is set apart, held, and owned for building purposes. To make it useful for this purpose the owner has the right to fill it up, elevate it, to ditch it, to construct buildings on it in such a manner as to protect it against the surface water of an adjoining lot. If in so doing he prevents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. This is a necessary incident to the ownership of such property. A contrary rule would operate against the advancement and progress of cities and towns and to their injury, and would be against public policy.

Judge Dillon in his work on Municipal Corporations says: "On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their lawful powers in respect to the gradation, improvement, and repair of streets, without being impliedly liable for the consequential damages caused by surface

water to adjacent property." 2 Dillon's Municipal Corporations (4th Ed.) § 1040.

In *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, the syllabus is as follows: "The parties owned adjacent lots on a street near a village. The natural formation of the land was such that surface water from rain or melting snows would descend and accumulate in the street in front of plaintiff's lot, and in times of unusual accumulations would run off over a natural depression across defendant's lot and other low lands to a river. Defendant built a house on his lot, filled in the lot and graded up the sidewalk in front of it, so as to cut off the flow of the surface water, and thereafter, there being an unusually large accumulation in the street, it flowed upon plaintiff's premises and into his cellar. In an action to recover damages for the injuries, held, that defendant was not liable." *Vanderwiele v. Taylor*, 65 N. Y. 341.

In this case the defendant closed up an underground drain which he made on his own lot when he discovered it was injurious. He was in the legitimate exercise of his rights for his protection, and is not liable for damages.

Decree reversed and cause remanded with directions to the court to dismiss complaint for want of equity.

HART, J., being disqualified, did not participate.

STERNBERG v. FT. SMITH REFRIGERATOR WORKS et al.

(Supreme Court of Arkansas. June 29, 1908.)

1. MECHANICS' LIENS—ASSENT OF OWNER—AUTHORITY OF ARCHITECT.

A stipulation in building specifications, made a part of the contract, that should the contractor refuse or neglect to supply sufficient materials or workmen, the architect should have power to provide the same, the expense thereof to be deducted from the contract price, did not authorize the architect to bind the owner, or to create a lien, beyond the original contract price.

2. SAME—PRIORITY.

Persons who furnish a principal contractor with labor or material used in a building are entitled, on equal footing, to liens on the building, to an amount not exceeding the original contract price, or if the work is abandoned by the principal contractor, to the amount of the contract price less the cost of completing the building in accordance with the contract; and the owner cannot discriminate between persons performing labor or furnishing material, but must prorate the contract price between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, § 337.]

Appeal from Sebastian Chancery Court; J. V. Baurland, Chancellor.

Suits in equity by the Ft. Smith Refrigerator Works and by Kenney Bros. against M. Sternberg, to recover the price of material furnished for buildings, and to have liens declared thereon. The suits were consolidated, and there was a decree for plaintiffs and

defendant appeals. Reversed, with directions.

Winchester & Martin, for appellant. Brizakara & Fitzhugh, for appellees. Read & McDonough, for appellee Kenney Bros.

McCULLOCH, J. One S. K. Robinson entered into a written contract with appellant, Sternberg, to furnish material and construct two cottages, in the city of Ft. Smith, for the latter, at and for the sum of \$3,950. The contract provided that the houses should be constructed in accordance with certain plans and specifications prepared by Sullenger, an architect, which are referred to in the contract, and expressly made a part thereof. The specifications contained the following: "Supplying labor, etc. Should the contractor at any time during the progress of the work refuse or neglect to supply a sufficiency of materials or workmen, the architect will have power to provide materials or workmen after three days' notice having been given in writing to furnish said materials and workmen. In case of noncompliance the expense arising from such action shall be deducted from the contract price, the back percentage shall be forfeited, and, if necessary, the work re-let. The materials and implements on the premises shall hereby become forfeited and sold if necessary to finish the work." Robinson abandoned the work before completing the houses, and the same were completed by other parties employed by appellant, in accordance with the contract. At the time of the abandonment appellant had paid out, on certificates of the architect, for labor and material, the sum of \$2,913.33, and it cost him the additional sum of \$1,350 to complete the houses, making an excess, which he paid out over the contract price. Appellees, Ft. Smith Refrigerator Works and Kenney Bros., instituted suits in equity, to recover the price of material furnished for use in the buildings, and to have liens declared on the buildings and lot. The chancellor found in their favor, and entered a decree accordingly.

Robinson got sick during the progress of the work on the buildings, but the work was continued, for a time, under supervision of the architect. before final abandonment, when appellant re-let the contract for completing the buildings to other parties for the sum named above. During the time Robinson was sick and before he finally abandoned the work, appellees furnished the material in question upon orders given by the architect. The chancellor found that the orders were given without any authority from appellant, except the authority implied from the terms of the contract with Robinson, and we think the proof sustains the finding. Appellant expressly declined to bind himself to pay for material to be furnished by one of the appellees, and as to the other, he was not consulted. The chancellor decided that the contract itself constituted sufficient authority, from

appellant to the architect, to purchase the material for him, and to bind him for the payment thereof. The conclusion of the chancellor is stated in the following language: "The purchases thus made by the architect became a debt, in favor of Sternberg, against the contractor, and the claim must take its place, and assume the chances of payment, as if furnished by an independent materialman, but each is a basis for a lien against his building under the circumstances, the same as if there had been no contract between him and Robinson, or as if he had made a direct personal purchase of the material." We think that this interpretation of the contract was erroneous. The stipulation in question did not constitute the architect the agent of the owner for the purpose of procuring labor and material for the building. The builder obligated himself in the contract to furnish these, and to complete the building for a stated price; and, in this particular clause of the contract, he expressly agreed that if he failed to furnish sufficient labor and material, the architect might do so, and deduct the cost from the contract price. The statute would give a lien, as to subcontractors, to the extent of the original contract price, for labor or material furnished under these circumstances. But the clause of the contract in question did not authorize the architect to bind the owner, or to create a lien on the building, beyond the original contract price. This feature of the contract was manifestly inserted for the benefit of the owner, so that the architect could require the furnishing of labor and material pursuant to the contract; but, until work was abandoned by the contractor, and the owner took charge for the purpose of completing the building, or unless he authorized the architect to procure labor and material for the building, he cannot be held liable, nor can liens be asserted against his building beyond the original contract price. The contract did not constitute the architect the agent of the owner for the purpose of procuring labor and material, as that was within the obligation of the builder. We are therefore of the opinion that the chancellor erred in holding appellant liable, beyond the contract price, for material furnished.

Under the rule laid down by this court in *Long v. Abeles*, 77 Ark. 156, 93 S. W. 76, all who furnish, to a principal contractor, labor or material used in the construction of a building are entitled, on equal footing, to liens on the building, to an amount not exceeding the original contract price, or, where work has been abandoned by the principal contractor, to the amount of the contract price after deducting the cost of completing the building, in accordance with the contract; and the owner cannot discriminate between persons who perform labor or furnish material, but must prorate the contract price between them. To this extent the case of *Barton v. Grand Lodge*, 71 Ark. 35, 70 S. W. 305,

was overruled. The amount paid out by appellant for labor and material before Robinson abandoned the work, together with the amount necessarily expended in completing the building after abandonment, exceeded the original contract price. Appellee Ft. Smith Refrigerator Works, according to the proof in the record, received its pro rata of the amount paid by appellant, and is entitled to no more; but it does not appear that Kenney Bros. have been paid anything at all. So, under the rule in *Long v. Abeles*, they are entitled to their pro rata of the difference between the contract price and the amount paid out by appellant in completing the buildings after Robinson abandoned the work. We cannot, from the proof before us, ascertain precisely what their proper share is.

The decree is reversed, with directions to dismiss the complaint of Ft. Smith Refrigerator Works for want of equity, and to ascertain the amount of pro rata of the contract price due Kenney Bros., and decree a lien therefor, in accordance with this opinion.

INDUSTRIAL MUT. INDEMNITY CO. v. PERKINS.

(Supreme Court of Arkansas. June 29, 1908.)
INSURANCE — ACTIONS—EVIDENCE—PAYMENT OF PREMIUM.

Evidence in an action on a life policy held to show that the first premium had not been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1709.]

Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

Action by Alice Perkins against the Industrial Mutual Indemnity Company. Judgment for plaintiff, and defendant appeals. Reversed, and action dismissed.

Mechem & Mechem, for appellant. J. E. London, for appellee.

HART, J. This action was brought by appellee against appellant to recover upon a policy of life insurance. This is the second appeal of the case. The opinion on the first appeal is reported in 81 Ark. 89, 98 S. W. 709, and contains a full statement of facts. The same facts as reported there were adduced in evidence at the trial in the case below, and, in addition thereto, W. C. Nicholson, who was not a witness at the former trial, testified that he was the agent of appellant; that he gave the policy to Henry Howell and asked him to deliver it and collect the premium; that Howell reported to him that he had delivered the policy but failed to collect the premium; that afterwards he went to see Perkins, the person insured by the policy, for the purpose of collecting the premium; that Perkins did not pay him, and shortly afterwards died without paying it. There was a jury trial, and verdict for appellee. Appellant contends that there is no evidence on which to base a verdict for appellee.

We think the evidence now overcomes the prima facie case made by the delivery of the policy and receipt. The testimony adduced at the former trial has been re-enforced by that of Nicholson, the agent of the company, whose duty it was to collect the premium, and who was in a better position than any one else to know whether or not it had been paid. The testimony is uncontradicted and not weakened by cross-examination. It is reasonable, and leaves no room for doubt. It shows conclusively that the premium was not paid. Hence there was no issue of fact to submit to the jury, and the court should have directed a verdict for appellant.

Reversed and dismissed.

SHAFSTALL v. DOWNEY.

(Supreme Court of Arkansas. June 29, 1908.)

1. TRIAL — INSTRUCTIONS — REQUEST TO CHARGE.

It is not error to refuse defendant's requests to charge where defendant's theory of the case was fully covered by the court's instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

2. JURY — QUALIFICATION OF JURORS — PRESUMPTION—BURDEN OF PROOF.

A person selected and returned as a juror is presumed to be qualified and competent to serve, and the burden is on the challenging party to make out at least a prima facie case to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 584.]

3. SAME — CHALLENGE FOR RELATIONSHIP — PROOF.

Where a juror challenged for relationship under Kirby's Dig. § 4491, providing that no person shall serve as a petit juror who is related to either party within the fourth degree of consanguinity or affinity, testified that he was related to plaintiff, but did not know in what degree, defendant was bound to introduce proof in order to establish the challenge that the juror was related within the degree specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 584.]

4. COSTS—APPEAL—REVIEW OF DECISION OF JUSTICES OF THE PEACE—TENDER.

Where a justice's docket recited that the parties appeared on a specified date, and defendant in open court, after the cause was called, offered \$30 to plaintiff, and asked that it be accepted and the suit stopped, such entry was sufficient to show a valid tender of \$30, so that, on plaintiff's failure to recover more on appeal, costs should have been taxed against him from the date of the tender.

5. CHATTEL MORTGAGES — REPLEVIN — JUDGMENT.

Where, in replevin by a chattel mortgagee, plaintiff was entitled to possession only to foreclose the mortgage, and the jury found the balance due on the mortgage to be \$25, the court should have rendered judgment for the property or the balance due on the mortgage, as expressly provided by Kirby's Dig. § 6869.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 315.]

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Replevin by A. N. Downey against Frank

Shafstall. From a judgment for plaintiff on appeal from a justice of the peace, defendant appeals. Reversed and remanded.

Henderson & Campbell, for appellant. **Geo. T. Black**, for appellee.

HART, J. This was an action of replevin brought by **A. N. Downey** before a justice of the peace to recover a mare upon which he had a mortgage. He alleged that there was a balance due of \$104.83, a portion of which (\$18.48) was interest upon the purchase price of a span of mules. The object of the suit was the foreclosure of the mortgage. **Frank Shafstall**, the defendant, in his answer admitted that there was \$86.35 due on the original mortgage, but pleaded as an offset an account against plaintiff for nursing in his family during the illness of plaintiff and of his mother. He denied that he owed plaintiff any sum whatever for interest. Defendant gave a bond to retain the property. The judgment in the justice court was in favor of the defendant. Upon appeal to the circuit court, there was a trial de novo, and the jury returned the following verdict: "We, the jury, find in favor of the plaintiff a return of the property in question, to wit, one bay mare or its value \$105.00, and we further find that the defendant is due the plaintiff \$23.00." Judgment was rendered in accordance with the verdict, and the costs were taxed against the defendant. The defendant filed a motion to retax the costs and in support of it read from the docket of the justice of the peace the following (caption and style of the court omitted): "On this 11th day of February, 1907, comes the parties to this cause, and in open court, after court was called, the defendant **Frank Shafstall** offered thirty (\$30.00) dollars to **A. N. Downey**, and asked that it be accepted and the suit stopped." The court refused to retax the costs. Defendant then filed a motion for a new trial, and, upon it being overruled, appealed to this court.

His first contention is that the court erred in refusing to give to the jury the instructions asked by him. Without setting out the instructions given or refused, it is sufficient to say that we think the theory of the case contended for by the defendant was fully covered by the court's instruction to the jury. This is evidenced by the finding of the jury as to the amount due plaintiff by the defendant. In the selection of the jury to try this cause, **Dee Mack**, a member of the regular panel of petit jurors, was asked whether he was related to either party to the suit. He answered that he was related to the plaintiff, **Mr. Downey**, but that he did not know in what degree. The court pronounced him competent. The defendant excepted to the ruling of the court and upon his objection being overruled, peremptorily challenged the juror, and in so doing exhausted his peremptory challenges. A person se-

lected and returned as a juror is presumed to be qualified and competent to serve; and the burden is upon the challenging party to show to the contrary, who must at least make out a prima facie case. 24 Cyc. 846. Section 4491 of Kirby's Digest provides that "no person shall serve as a petit juror who is related to either party to a suit within the fourth degree of consanguinity or affinity." The examination of the juror did not disclose that he was related in the prohibited degree. The challenging party should have made out a prima facie case of the juror's relationship within the prohibited degree by questions asked the juror, or by the offer of other proof. Failing to do this, there was no error in the ruling of the court pronouncing him a competent juror.

We think the transcript from the justice's docket shows an offer to confess judgment. It is a matter of common knowledge that justices do not keep their records with that accuracy and familiarity that is generally observed in courts of record. The verdict of the jury in the circuit court is evidence that it was the intention of the defendant to confess judgment; for the amounts are nearly the same, and in either case is far below the amount claimed by the plaintiff. In *Petsinger v. Beaver*, 44 Ark. 562, this court held: "When, on appeal to the circuit court, plaintiff recovers less than defendant offered to confess judgment for in justice court, all cost subsequent to the offer should be adjudged against plaintiff." Therefore the court erred in not granting defendants' motion to retax the costs.

The court also erred in the form of the judgment. The plaintiff was entitled to the possession of the mare only for the purpose of foreclosing the mortgage. The jury found the balance due him on the mortgage to be \$25. The court then should have rendered judgment for the property or the balance due on the mortgage in accordance with the provisions of section 6869 of Kirby's Digest.

The cause is therefore reversed and remanded, with directions to the court to render judgment on the verdict found by the jury for the mare or the balance found due on the mortgage in accordance with the provisions of section 6869 of Kirby's Digest, and to adjudge all costs against the plaintiff after the refusal of the offer of the defendant to confess judgment in the justice of the peace court.

CHICAGO, R. I. & P. RY. CO. et al. v. LANNON.

(Supreme Court of Arkansas. June 29, 1908.)
1. RAILROADS—INJURIES TO PERSONS NEAR TRAINS—NEGLIGENCE—EVIDENCE.

In an action against a railroad for injuries to an employé of a third person while in the performance of his duty of directing the loading of a train, caused by a brakeman, in the employ of the railroad, disconnecting the hose

with which the air brake was operated, evidence held to show that the brakeman was negligent, after discovering plaintiff's peril, in failing to make any effort to avoid injuring him, authorizing a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 914, 915.]

2. DAMAGES — PERSONAL INJURIES — EXCESSIVE DAMAGES.

Plaintiff received an injury to his leg, and a physician treated him about three times. He was laid up about 14 days, and the remedies applied caused great pain. He was obliged to use crutches for about 4 weeks thereafter. He was not able to return to his former occupation of railroad braking. When injured, he received \$100 a month, and had a promise of a raise of \$25 a month. Held, that a verdict for \$1,112.50 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

3. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse requested instructions covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by James Lannon against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. L. Marsilliat and Paul W. Evans, for appellant. N. W. Norton, for appellee.

BATTLE, J. James Lannon sued the Chicago, Rock Island & Pacific Railway Company, and states his cause of action as follows: "On the 17th day of June, 1907, he was injured by the negligence and carelessness of a brakeman in the employ of the defendant, Chicago, Rock Island & Pacific Ry. Co.; that said injury was caused by the carelessness of said brakeman in disconnecting the hose with which the air brake is operated, between the car next to the caboose and the caboose itself; that in disconnecting the hose the said brakeman carelessly failed to shut off the air, with the result that the discharged air caused the end of the hose and heavy iron attachment thereon to be violently thrown against the leg of plaintiff, striking him between the knee and ankle, cutting through his clothing and the flesh on his leg to and injuring the bone; that from said injury plaintiff has suffered great pain, and has lost time from his employment, being as yet unable to work.

"That said train is what is known as a 'log train' and is operated by the defendant for the Forrest City Mfg. Co., the train being operated by the employés of the defendant, and the loading, handling and unloading of the logs being done by a crew in the employ of the Forrest City Mfg. Co., of which crew plaintiff was the foreman.

"Plaintiff, in the discharge of his duties as such foreman of the Forrest City Mfg. Co.'s hands, was at all times rightfully in and about said train, superintending the

loading and unloading of logs and the management of the loading machinery and tackle; and the injury to this plaintiff occurred while he was about said train in the discharge of his duties as foreman. By the injury above described plaintiff has been damaged in the sum of \$1,500."

Defendant, Chicago, Rock Island & Pacific Railway Company, answered and denied the material allegations of the complaint, and pleaded the contributory negligence of the plaintiff as a defense.

The jury in the case, after hearing the evidence and the instructions of the court, returned a verdict in favor of the plaintiff for \$1,112.50. Defendant appealed.

The question in the case is, was the verdict sustained by evidence?

The evidence tended to prove the following fact: The appellant railway company, in the year 1907, operated what is known as a "log train" for the Forrest City Manufacturing Company, in carrying logs. The loading, handling, and unloading of the logs were done by a crew in the employment of the Manufacturing Company, of which appellee was foreman. His duties as such foreman were to superintend the loading and unloading of the train, and to manage the loading machinery and tackle, and to direct where the train shall stop for the purpose of loading with logs and unloading the same, and when to move after such work has been finished. He had the right to be in and about the train whenever and wherever his duties called him.

On the 17th day of June, 1907, the train was standing, and the crew of the manufacturing company was engaged in loading it. About or near the time the loading was completed, appellee was standing between the caboose of the train and the car next to it, instructing a member of the loading crew as to how to do his work. While there, a brakeman of the railway company, engaged in operating the train, came within three feet of him, and without any warning disconnected the hose with which the air brake is operated, between the caboose and the car next to it, between which appellee was standing, and failed to shut off the air, with the result that the discharged air caused the end of the hose to be violently thrown against the leg of the appellee to his great injury.

It is said that appellee was guilty of negligence in being between the cars. This may be true. If so, it did not excuse the brakeman in injuring him. He saw him there; knew the danger of disconnecting the hose in the manner indicated; knew of the danger to which the appellee was exposed by his action; and did nothing to protect him. There was no necessity for hasty action. The train was not yet ready to leave. Under the circumstances the jury had reason to believe that appellee was in a "discovered peril," and that the brakeman failed to make any effort to avoid injuring him. There was evidence to sustain the verdict.

The appellant contends that the verdict was for excessive damages. The injury received caused the blood to run down appellee's leg. A physician treated him about three times. He testified: "I was laid up 12, 13, or 14 days. For the first 10 days I had to apply these hot turpentine bandages. The instructions were that my wife do this, and she kept it up until about 10 o'clock at night for about 10 or 12 days. It was very painful during that time, and then the turpentine got to blistering, and I would take them off, and then the pain would commence. Then the pain would strike me when I would go to move. It was great pain, and I was in misery. I was confined to my bed for about a week, before I even attempted to get up on a crutch.

"Mr. Abel loaned me some crutches, and after that I could hobble around the house in two or three days, and finally walked down town with these crutches. This was 12 or 15 days after the accident. I used the crutches something over 4 weeks, and then I used a walking cane up until about 6 weeks ago.

"I am not entirely free from pain yet. If I take a sudden step, I feel a soreness yet, and it is very sensitive. If I could find light employment where I could favor this limb, which I have been trying to do, I could go to work. I am not able to go to braking, or back into the railroad service. When injured I was receiving \$100 a month, and I had a promise of a raise of \$25 on the 1st of January."

According to this testimony, which the jury had a right to believe, the damages recovered was not excessive; the intensity and duration of the pain suffered being an important element thereof.

The instructions asked for by appellant and refused by the court were sufficiently covered by those given.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. INMAN.

(Supreme Court of Arkansas. June 29, 1908.)

1. APPEAL AND ERROR—DISPOSITION OF CASE ON APPEAL.

The Supreme Court, reversing a judgment for plaintiff for error in the admission of evidence will, on the evidence being insufficient to sustain a verdict, so declare and save the expense of a second trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4579, 4590.]

2. SAME—SECOND APPEAL.

Where a judgment for plaintiff is reversed on appeal because of error in the admission of evidence, but the evidence was not insufficient to sustain the verdict, and on second trial the verdict was again rendered for plaintiff, the trial being had in accordance with the principles laid down by the Supreme Court in reversing the case, and the evidence substantially the same as on the first trial, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4353-4358.]

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by Matilda Inman, administratrix of L. H. Inman, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 81 Ark. 591, 99 S. W. 832.

T. M. Mehaffy and J. E. Williams, for appellant. S. Brundidge, J. W. and M. House, for appellee.

HILL, C. J. Matilda Inman as administratrix of L. H. Inman, deceased, sued the railway company to recover damages occasioned by the death of said Inman, who left said Matilda Inman, widow, and two children, surviving him. The action was predicated upon the negligence of one Mars, an alleged vice principal, who was the foreman of a wrecking crew. Issue was taken upon the allegations of the complaint, and trial resulted in a verdict for \$5,000 for the plaintiff, and the defendant appealed. The case is reported in 81 Ark. 591, 99 S. W. 832, where it was reversed on the admission of incompetent testimony. It was insisted upon the former hearing that the plaintiff had not alleged in her complaint any negligence upon the part of the defendant in failing to furnish a safe place to work; and it was also argued that the suit could not be sustained because the risk was an assumed one, and that Inman was guilty of contributory negligence, and that there was no duty resting upon the railroad company to provide Inman with a safe place to work, owing to the character of the work performed. The court, not content with discussing the question of evidence upon which the case was reversed, considered that it was its duty to discuss the law controlling the questions which had been argued and which would necessarily arise in the new trial, in order that the case be properly retried. After the remand, the complaint was amended so as to make an additional charge of negligence predicated upon the failure of the company to use reasonable care in the adoption and use of reasonable means for the safety of deceased at the time of the accident, and that by reason of such failure his death had occurred. The defendant denied these allegations, and upon the issues in the original complaint and this amendment the case was again tried—this time in strict accordance with the principles announced by this court in the former opinion.

The plaintiff introduced testimony tending to show why the rope which Inman descended the last time was on the north side of the pier instead of being on the south side, as some of the witnesses said it had been at other times. This testimony tended to show that the rope was not used on the south side because of the presence of a bunch of willows and a quantity of mud and water

through which a person would have to wade to use it there. There was also testimony tending to show that, owing to the extension of the ties on the south side, it was more convenient to get up from the north side. The defendant strengthened its defense by the testimony of J. T. Brown, an eyewitness to the death of Mr. Inman. The substance of his testimony was that he had gone to the top of the pier on the same line that Mr. Inman came down on; that Inman used it a few feet distant from the place he used it when he came up, but that when he, Brown, used it he threw the line over, so as to throw himself beyond the beam that fell at the time Mr. Inman was under it; that in this way he would be out of the way of the beam should it fall. He did this because he considered it dangerous to use the line where Mr. Inman did; and that it could be conveniently used as he used it without being between the pier and the wreck. The other testimony in the case was in effect the same as given on the former trial. This trial resulted in another verdict in favor of the plaintiff in the sum of \$5,000, and the railroad company has again appealed. There is nothing left for discussion in the case. The effect of the evidence before was not discussed, because the case had to be remanded upon another proposition, and the evidence might be different on the second trial. But had it been insufficient to have sustained a verdict, the court would have so declared, and not put the parties to the useless expense of a second trial where the evidence showed no cause of action existing.

Counsel for appellant contend that they were not in any wise concluded upon the facts in this record by the former opinion, which is true; but the facts in this record are essentially the same as in the former record, so far as all material issues are concerned, and the same reasons which would have sustained the verdict then, had the case been properly tried, sustain it now.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. BAILEY. (Supreme Court of Arkansas. July 6, 1908.)

MASTER AND SERVANT—ACTION FOR WAGES—PENALTY FOR NONPAYMENT.

Acts 1905, p. 538, provide that when a railroad shall discharge an employé, his unpaid wages shall become due and payable on the day of such discharge, and he may request his foreman or the timekeeper to have the money, or a check therefor, sent to any station where a regular agent is kept, and if the money or the check does not reach such station within 7 days from the date of the request, then as a penalty his wages shall continue from the date of the discharge at the rate till paid. *Held*, that under this act the wages become due when a servant is discharged, and no penalty accrues, unless he requests to have the money or the check sent to a regular station where a regular agent is kept, and the money or check does not reach such station within 7 days thereafter, and hence it was error to render a judgment for

penalty, where the court did not submit the question as to whether plaintiff requested his money or check sent to any particular station, though the jury found that he applied for his money within 7 days after discharge.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by Robert Bailey against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed, on condition that defendant remit part of the judgment.

T. M. Mehaffy and J. E. Williams, for appellant. Stuckey & Stuckey, for appellee.

BATTLE, J. Robert Bailey alleged that he was in the employment of the St. Louis, Iron Mountain & Southern Railway Company, earning at the rate of \$1.40 a day; that there was due him \$28 for labor performed; that he was discharged by the railroad company on the 23d day of November, 1906; that, he having requested it at that time to send the amount due him to its agent at Newport, it failed to do so, and he is entitled to his wages until the same be paid. The railroad company denied these allegations.

Bailey was in the employment of the railway company, but the evidence is conflicting as to his having been discharged, or his having requested his wages sent to him at any particular station, or that he applied for his wages at any particular place after the expiration of 7 days after his discharge; one witness having testified that he issued to him a check for his wages when he quit work, which called for his pay if he presented it at the pay car.

The court instructed the jury as follows:

"Gentlemen of the jury, in this case the suit is for wages, which the plaintiff complains the defendant owes him for work and for penalty for not paying him when it should have been done, within 7 days, up until the time suit was brought. I instruct you, to start out with, that the verdict in this case should be for the plaintiff in some amount, and that amount is the actual time he worked, at the sum agreed to be paid him, less the board, which was the amount agreed upon should be for board. The next question is, after you find that amount, you want to further find and answer these questions, that will determine the question as to whether or not there will be a penalty: The first question is, how many days did plaintiff work? You must determine that in order to fix the amount due him for his actual work. What was the amount due plaintiff for such work? What was the actual amount due plaintiff for labor performed after all such credits were given? Did plaintiff voluntarily quit the service of the defendant? If he voluntarily quit, the penalty does not apply. It only applies when he was either refused work, or when they discharged him. When they did either of these, then it was their duty to pay him within 7 days by money or

check, which might be sent at his request to the agent at some station.

"The next question is, did plaintiff present to the agent at Newport a request for his pay within 7 days after quitting the service, or at any other time? If so, when?"

"Now you can answer each one of those questions, and it will be the form of the verdict."

The defendant objected to the giving of the following portions of the court's charge, as above set out, and saved its exceptions to the giving of same, to wit:

"When they did either of these, then it was their duty to pay him within 7 days by money or check, which might be sent at his request to the agent at some station."

"The next question is, did plaintiff present to the agent at Newport a request for his pay within 7 days after quitting the service, or at any other time? If so, when?"

The court propounded to the jury the following interrogatories to be answered in the verdict, to wit:

"(1) How many days did plaintiff work?"

"(2) What was the actual amount due plaintiff for such work?"

"(3) What amount was actually due plaintiff for labor performed after all just credits were given?"

"(4) Did plaintiff voluntarily quit the service of defendant?"

"(5) Did plaintiff present to the agent at Newport request for his pay within 7 days after quitting the service, or at any other time, and if at any other time, when?"

The jury returned the following verdict:

"(1) We, the jury, find that plaintiff worked 20 days.

"(2) Amount due plaintiff \$28."

"(4) That plaintiff was discharged.

"(5) The plaintiff applied within 7 days after being discharged at proper place for his money."

Upon the reading of the verdict, before it was accepted, and before the jury was discharged from the case, defendant objected to the verdict, and to the form thereof, upon the grounds that it was not responsive to the questions propounded to the jury, and not responsive to each of said questions, and because the verdict did not respond in any manner to the third interrogatory; but the court overruled the objections, and discharged the jury, to which defendant saved its exceptions.

The court rendered a judgment for plaintiff for \$28 debt, and \$92.50 penalty; and the defendant appealed.

The statute provides that when any railroad corporation shall discharge or refuse to further employ any servant or employé thereof, "the unpaid wages of any such servant or employé then earned at the contract rate, without abatement or deduction, shall be and become due and payable on day of such discharge or refusal to longer employ; and any such servant or employé may re-

quest of his foreman, or the keeper of his time, to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within 7 days from the date it is so requested, then, as a penalty for such nonpayment the wages of such servant or employé shall continue from the date of the discharge or refusal to further employ, at the same rate, until paid." Acts 1905, p. 538. Under this act the wages of the discharged servant become due when he is discharged, and no penalty accrues unless he requests his foreman, or the keeper of his time, to have the money due him, or a valid check therefor, sent to a specified station where a regular agent is kept, and the money or check does not reach such station within 7 days from the date it is requested. *Wisconsin & Arkansas Lbr. Co. v. Reaves*, 82 Ark. 377, 102 S. W. 206.

The court, in this case, did not submit to the jury the question as to whether plaintiff requested his money or check sent to any particular station. The law allows 7 days after the request for the railroad company to have the money or check at the specified station. The jury found that he applied within 7 days after being discharged. The court erred in rendering judgment for the penalty.

If the appellee will remit within two weeks from this date, so much of the judgment as was rendered for the penalty, the remainder thereof, will stand affirmed; otherwise the entire judgment will be reversed, and the cause will be remanded for a new trial.

BRIZZOLARA et al. v. CITY OF FT. SMITH et al.

(Supreme Court of Arkansas. July 6, 1908.)

1. INJUNCTION — GROUNDS OF RELIEF — ILLEGAL SALE OF LAND — PREVENTING CLOUD ON TITLE.

Equity, though it has jurisdiction to enjoin an illegal sale of land to prevent a cloud on the title, will not interfere where the proceeding, judgment, or instrument in writing on which a claim is asserted is void on its face, or where a threatened proceeding will necessarily show on its face that it is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 91-95.]

2. EQUITY — GROUNDS OF JURISDICTION — MULTIPLICITY OF SUITS.

A suit by property owners, on behalf of themselves and all others interested, to restrain the enforcement of a city ordinance requiring property owners to construct sidewalks, curbing, and guttering, and on their failure to do so authorizing the city to construct the same at the expense of the property owners, which should be a lien thereon, and declaring it a misdemeanor to fail to comply with the ordinance, is within the rule that equity will, in a single suit, take cognizance of a controversy, determine the rights of the parties, and grant the requisite relief, to prevent a multiplicity of suits, where a number of persons have separate and individual claims and rights of action against the same party, but all arise from the same common cause, are gov-

erned by the same legal rule, involve similar facts, and the whole matter may be settled in one suit.

3. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—GUTTERS.

Incorporated cities and towns have no power to compel property owners to construct gutters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 745.]

4. SAME.

An ordinance requiring property owners to construct sidewalks, curbing, and guttering is not invalid because failing to provide for proper filling, ditching, excavating, and grading before the curbing and guttering is placed, since in such failure it does not require property owners to do such work, which they may not lawfully be required to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 745.]

5. SAME.

Kirby's Dig. § 5462, providing that the ordinances of a municipality may be enforced by the imposition of fines and penalties, and section 5466, providing that, if a thing prohibited or rendered unlawful is in its nature continuous in respect to time, a fine or penalty for allowing the continuance thereof in violation of an ordinance shall not exceed a designated amount for each day that the same may be unlawfully continued, authorize the provisions of an ordinance, requiring property owners to construct sidewalks, curbing, and guttering, which make it a misdemeanor for them to fail to do so, impose a fine therefor, and declare each day's delay to be a separate offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 745.]

6. SAME—ORDINANCES—INVALIDITY IN PART.

The invalidity of an ordinance requiring property owners to construct sidewalks, curbing, and guttering, as to the guttering, does not render the remainder of the ordinance invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 248-251.]

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Action by James Brizzolara and others against the city of Ft. Smith and others to restrain the enforcement of an ordinance requiring property owners to construct sidewalks, curbing, and guttering, and providing that, on their failure to do so, the city may construct the same at the property owners' expense. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

Jas. Brizzolara and T. S. Osborne, for appellants. J. F. O'Mella and F. A. Youmans, for appellees.

BATTLE, J. On the 16th day of October, 1906, the city council of Ft. Smith, Ark., passed an ordinance, No. 737, section 1 of which is as follows:

"Section 1. That section 1978 of Read & McDonough's Digest of the Ordinances of Ft. Smith, Arkansas, be amended to read as follows:

"Owners or Occupants Compelled to Build. The owners, occupants or agents of all lots or part thereof, blocks or parts thereof in the city of Ft. Smith, Arkansas, and all other real property in said city abutting on any

street or streets or parks or squares in said city, shall be required and hereby compelled to build and construct permanent sidewalks and curblings and guttering, or repair the same, on all said lots and blocks or part thereof in said city and on all real property in said city not subdivided into lots and blocks according to the specifications and out of the material hereinafter prescribed."

Section 9 of the ordinance is in part as follows: "When required, said owner, occupant or agent is required to construct, rebuild or repair any foot pavement or sidewalk improvement or curbing or guttering within thirty days from and after the service of notice of the passage by the city council of any resolution requiring any such foot pavement or sidewalk improvement or curbing or guttering to be constructed, rebuilt or repaired. The notice herein required shall be given and served as follows," etc.

Section 10 of the same ordinance is as follows:

"The said city after the expiration of thirty (30) days from the giving of the notice as aforesaid in section 2016 shall have the right to do and perform said improvement or repair, and said city shall have a lien for the costs thereof upon said property and shall have the right to enforce the same as provided in section 5542 of Kirby's Digest of the statutes of the state of Arkansas."

Section 11 is as follows: "Any owner, occupant or agent who fails to build, construct or repair his sidewalk improvement or curbing and guttering after thirty (30) days notice as provided in section 2016 shall be guilty of a misdemeanor and shall be fined for each offense the sum of fifteen dollars (\$15.00) and each day's delay shall be a separate offense."

On the 25th day of October, 1907, the same city council passed a resolution, in part, as follows:

"Be it resolved by the city council of the city of Ft. Smith, Arkansas, that the owners, occupants and agents or owners, of real property in said city, adjoining the streets and portions of streets hereinafter named, be and they are hereby required within thirty (30) days from and after the service upon them respectively of a copy of this resolution, to construct curbing and guttering along the street frontage of the lots and parts of lots and other real property owned or occupied by them, respectively, adjoining said streets and portions of streets, in conformity with Ordinances No. 705 and 737, of said city."

On the 17th day of December, 1907, James Brizzolara and others brought suit in the Sebastian chancery court for the Ft. Smith district; and alleged in their complaint, in part, as follows:

"Now come said plaintiffs on behalf of themselves and on behalf of all others interested, and who may desire to become parties herein, and for cause of action against said defendants, said mayor and aldermen

representing said defendant city in their official capacity, allege:

"That said plaintiffs are citizens of the city of Ft. Smith, Ark., and owners of real property therein; that they own property abutting on the streets and highways of said city, and are taxpayers on said real property; that said defendants are endeavoring to enforce illegal exactions and liens against these plaintiffs and against their said property, and against the inhabitants of said city, by threatening, demanding, and compelling said plaintiffs to lay, build, and construct in front of their said property on the streets of said city, beyond the curb line on said streets, a concrete gutter 30 inches in width, as provided and required by Ordinance Numbered 737 of the Ordinances of the city of Ft. Smith, Ark., a true, full, and complete copy of which said ordinance, including its title and caption, is hereto attached, marked 'Exhibit A,' and made part of this complaint; that in aid of the enforcement of said ordinance the city council of said city on the 5th day of October, 1907, passed and adopted a resolution, a true, full, and complete copy of which resolution is hereto attached, marked 'Exhibit B,' and made part of this complaint.

"That said ordinance and resolution, or so much thereof as require the property owner or the occupant of property thereby affected, to lay, build, and construct a concrete gutter in the street beyond the curb line in front of said property, and permitting and empowering the city, on failure of the property owner so to do, to lay, build, and construct said gutter, making the expense and costs thereof a lien on said property abutting on said streets, are illegal and void.

"That said ordinance is unreasonable.

"That said city purported to pass said ordinance and resolution, not being invested with power so to do, and without any authority of law.

"That, by the terms of said ordinance, the owners of real estate are required and compelled to construct on the streets in front of their property a curb and gutter, and the specifications for the construction of the same are set forth in the aforesaid ordinance for guttering and curbing. It is further provided by said ordinance that the city should have the right to make said improvement, rebuild, or repair the same, and should have a lien on the property of these plaintiffs for the costs thereof, the said lien being assignable and enforceable as liens upon real estate for the condemnation and sale of said real estate, for the payment of costs so paid by the city, together with interest, penalty, and costs, in the manner and under the terms provided by law for the foreclosure of liens upon real property by local improvement districts, so far as applicable. It is further provided by the aforesaid ordinance that a failure to comply with the terms thereof is also made a misdemeanor, and subjects

each of these complainants to a fine for each offense in the sum of \$15, and each day's delay, after expiration of notice provided for, constitutes a separate offense. * * *

"That the said defendant the city of Ft. Smith, through its officers, agents, and employes, has threatened and is about to attempt to proceed, and is proceeding, to construct and put in the aforesaid curbing and guttering, and thereby acquire a lien for the costs thereof and penalty and to have such purported lien enforced, together with interest, penalty, and costs, against the property of each of these plaintiffs, and to sell said property under such purported claim or lien. That, by so doing apparently upon the face of the proceeding of said foreclosure and sale, the same will apparently vest the legal title to said property in the purchaser, and will thereby cast a cloud upon the title to the real property owned, respectively, by these plaintiffs and of which these plaintiffs are severally seised; and that by such acts and proceedings the said defendants, without right, power, or authority of law to so proceed, and, as they are in fact now proceeding, to enforce the aforesaid void and illegal ordinance, are about to deprive these plaintiffs and each of these plaintiffs of their liberty and property without due process of law, and that the said defendants are about to proceed, and are in fact now proceeding, to enforce the aforesaid void and illegal ordinance.

"That if the defendants proceed, and they are now in fact proceeding, to enforce the aforesaid ordinance, that such course and conduct will involve plaintiffs in a multiplicity of suits and actions both civil and criminal.

"That when the city of Ft. Smith shall have made or constructed, or caused to be made or constructed, the curbing and guttering aforesaid, the cost thereof will constitute a lien on the real property of each of these plaintiffs, and will cast a cloud upon their title to the same; and that, if said defendants are not restrained from so doing, plaintiffs will be involved in a multiplicity of suits.

"Wherefore defendants' said threatened acts aforesaid will lead to a multiplicity of suits, and cause irreparable injury to plaintiffs and to their property by subjecting them to fines and penalties, by casting a cloud upon the title to their property, and by totally depriving them of said property."

And they asked that "the defendants, and each of them, their agents, servants, and employes, be restrained and enjoined from in any way or manner enforcing or attempting to enforce or carry out any of the terms or provisions of the aforesaid void and illegal ordinance; and, on final hearing thereof, that said defendants, and each of them, their agents, servants, and employes, and their successors in office, be forever enjoined from enforcing or attempting to enforce any of the terms or provisions of said illegal and void

ordinance; and for other and further relief."

The defendants demurred to the complaint, and the court sustained the demurrer. The plaintiff refusing to plead further, the court dismissed the complaint; and plaintiff appealed.

A court of equity has jurisdiction to enjoin an illegal sale of land to prevent a cloud being thrown upon its title. But no cloud is or can be thrown upon the title if the proceeding, judgment, decree, or instrument of writing upon which a claim is asserted is void upon its face. Neither can a proceeding threatened be a cloud if it will necessarily show on its face that it will be void. In neither of these cases will equity interfere to prevent a cloud, as none will arise. *Beardsley v. Hill*, 85 Ark. 4. According to this rule, it does not appear that there would necessarily be any cloud upon the title of plaintiffs if defendants should be left unrestrained in the enforcement of the ordinance.

A court of equity will, however, in a single suit, "take cognizance of a controversy, determine the rights of all parties, and grant the relief requisite to meet the ends of justice, in order to prevent a multiplicity of suits, where a number of persons have separate, and individual claims and rights of action against the same party, but all arise from the same common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action"; there being a community of interest between them in the question at issue and in the remedy. 1 *Pomeroy's Equity Jurisprudence* (3d Ed.) §§ 255, 269. The cause of appellants comes within this rule.

Incorporated towns and cities have no power to compel property owners to construct gutters. The laws of this state give them none; and they have no power except that given them. *Morrilton Waterworks Improvement Dist. v. Earl*, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666; *Tuck v. Waldron*, 31 Ark. 462, 465.

Appellants say: "Said ordinance is further invalid because it is unreasonable in failing to provide for proper filling, ditchings, excavating, and grading before requiring said curbs and guttering to be placed." But this does not affect the ordinance. In such failure it does not require property owners to do such work. *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 S. W. 32, 23 L. R. A. 496.

Again appellants say: "This ordinance is further unconstitutional as it makes it a misdemeanor for any owner, occupant, or agent who fails to build, construct, or repair his curbing and guttering after 30 days' notice, * * * and punishes by fine for each offense in the sum of \$15, and each day's delay is made a separate offense. The act of April 8, 1903, does not authorize this." But sections 5462 and 5466 of Kirby's Digest do.

So much of the ordinance in question as

requires property owners to construct guttering and repair the same is invalid. But as it is "separable from, and not necessary to the efficiency of, the other provisions of the ordinance," it will be treated as stricken out, and, for the present and until it otherwise appears, the remainder of the ordinance will be treated as valid. *Rau v. Little Rock*, 34 Ark. 303; *Eureka Springs v. O'Neal*, 56 Ark. 350, 19 S. W. 969.

In this opinion we have treated the curbing as a part of the sidewalk. It is made for the protection and good appearance of the sidewalk, and is more appropriately a part of it than any other part of the street.

Judgment reversed and cause remanded, with directions to the court to overrule the demurrer and for further proceedings.

HILL, C. J., did not participate.

HANDS et al. v. HAUGHLAND.

(Supreme Court of Arkansas. July 6, 1908.)

1. JUDGMENT—CONCLUSIVENESS—COLLATERAL ATTACK.

A judgment of the circuit court affirming a probate judgment adjudging a guardian to be indebted to his ward, not having been appealed from, cannot be attacked collaterally on his appeal from a judgment of the circuit court on his bond superseding the probate judgment.

2. APPEAL AND ERROR—SUPERSEDEAS BONDS—PARTIES FROM WHOM REQUIRED—GUARDIANS—APPEALS FROM PROBATE COURT.

Kirby's Dig. § 1349, providing that guardians, etc., shall not be required to give supersedeas bonds on appeals from probate orders against them "as such," does not apply to an appeal from a probate judgment adjudging a guardian to be indebted to his ward; that being a judgment against him individually.

3. SAME.

Though a guardian could have appealed from a probate judgment adjudging him to be indebted to his ward, without supersedeas, the appeal would not have stayed the enforcement of the judgment; and hence it is no defense to liability on a supersedeas bond that he could have appealed without giving it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4727.]

4. EVIDENCE—PROBATE PROCEEDINGS—METHODS OF PROVING.

On a hearing of a motion for judgment on a bond given by a guardian to supersede a probate judgment adjudging him to be indebted to his ward, he could not show by oral testimony that the probate court directed the sheriff to take him into custody for contempt in failing to comply with an order directing him to pay the money over, and that he was held in custody until he executed the bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 536-545.]

5. APPEAL AND ERROR—SUPERSEDEAS BOND—DEFENSE.

Since the probate court can enforce its orders for payment or distribution of funds in a guardian's hands by imprisonment for contempt, that, after a guardian failed to pay money over as ordered, the probate court directed the sheriff to take him into custody for contempt, and he was held until he gave a bond to supersede the judgment, affords no defense to liability on the bond.

Appeal from Circuit Court, Clark County; J. M. Carter, Judge.

The probate court adjudged that A. W. Hands owed Florence Hands Haughland a specified balance on a settlement of his account as her guardian, and he and J. J. Pannell appeal from a judgment of the circuit court on a supersedeas bond given on his appeal from the probate court judgment. **Affirmed.**

McMillan & McMillan, for appellants. Jos. E. Calloway, for appellee.

McCULLOCH, J. This is an appeal from a summary judgment rendered by the circuit court of Clark county in favor of Florence Hands Haughland against A. W. Hands, her guardian, and J. J. Pannell, the surety on his supersedeas bond. The probate court in adjusting the settlement account of said guardian adjudged him to be due his ward the sum of \$177.25, and ordered him to pay said sum over to her. He took an appeal to the circuit court, and executed a supersedeas bond conditioned that he would "pay all costs of said appeal, and such damages as may be adjudged against him on said appeal, and perform the judgment of the circuit court, or abide or perform the judgment of said probate court, if the same is affirmed or the appeal dismissed." On trial of the case in the circuit court the judgment of the probate court was affirmed, with costs. No appeal has been prosecuted upon that decision. On a subsequent day of the same term of the circuit court the judgment on the bond appealed from was rendered. In response to appellee's motion for judgment on the bond, appellants set forth the following defenses: "First. That the statute of Arkansas expressly provides that guardians have the right of appeal from all orders of the probate court, and cannot be required to execute a supersedeas bond. Second. Respondent had the right of appeal without the orders of said probate court being superseded. Third. That said bond was obtained by means of duress, and is therefore void." We will discuss and dispose of the alleged defenses in the order thus presented by appellants.

As the judgment of the circuit court affirming the judgment of the probate court has not been appealed from, it cannot be questioned collaterally, and it need not, therefore, be further mentioned.

The statute of this state regulating the giving of supersedeas bonds on appeals from probate courts is as follows: "Administrators, executors, and guardians shall not be required to give bond, but all orders against them as such shall be superseded by the appeal. In all other cases where the appellant desires a supersedeas he shall give bond in a

sufficient sum, to be settled by the court, conditioned that he shall pay all costs of the appeal and such damage as may be adjudged against him in the appeal, and will perform the judgment of the circuit court, or abide and perform the judgment of the probate court, if the same is affirmed or the appeal is dismissed, and judgment may be rendered on said bond in the circuit court." Section 1349, Kirby's Digest. Appellants contend that this statute exempted the guardian from giving bond. It will be observed that the statute only exempts administrators, executors, and guardians from requirement to give bond on appeals from "orders against them as such." A judgment against a guardian in favor of his ward adjudging an amount to be due and directing payment thereof is not a judgment against him as guardian, but it is against him individually. The liability grows out of his office, but the judgment is an adjudication of individual liability. It is a judgment against him for the amount of his ascertained liability. We hold, therefore, that the appeal taken by the guardian from the judgment of the probate court did not operate as a supersedeas of the judgment. He could, of course, have appealed without supersedeas, but the appeal did not stay the enforcement of the judgment. Therefore it is no defense to liability on the bond to urge that he could have appealed without executing the bond. He gave the bond to prevent enforcement of the judgment while the appeal was pending.

On hearing of appellee's motion for judgment on the bond, appellants proved by oral testimony that, after the guardian had failed to pay over the money to his ward pursuant to the order of the probate court, the court directed the sheriff to take him into custody for contempt of court in failing to comply with the order, and that he was held in custody until he executed the supersedeas bond. These are the facts upon which appellants base their defense of duress. It was not proper to establish proceedings of the probate court in this way. But, conceding them to be properly established, they afford no defense against liability on the bond. The probate court has power to order the payment or distribution of funds in the hands of an administrator, executor, or guardian, and to enforce its orders by imprisonment for contempt where the money is shown to be in the hands of such functionary. *Meeks v. State*, 80 Ark. 579, 98 S. W. 378. Of course, the administrator, executor, or guardian can purge himself of contempt by showing that the funds were not in his hands at the time, or by taking an appeal and giving bond to supersede the judgment.

We see no grounds for awarding liability on the bond, and the judgment is therefore affirmed.

**ST. LOUIS SOUTHWESTERN RY. CO.
et al. v. ADAMS.**

(Supreme Court of Arkansas. July 6, 1908.)

1. RAILROADS—ACCIDENT AT CROSSING—ACTION FOR INJURIES—COMPLAINT—SUFFICIENCY TO SHOW CONCURRENT NEGLIGENCE.

A complaint against a railroad company and a conductor of a freight train to recover for being knocked down by moving cars alleged that the individual defendant was a conductor on a freight train which inflicted the injury, and had charge thereof when plaintiff was injured while attempting to drive some calves across the track, and that defendants were negligent in failing to ring the bell or sound the whistle of the locomotive, or to place some person in charge of the car keeping a lookout which was being "kicked" backward on the switch and caused the injury to plaintiff. *Held* that, though the cause of action was imperfectly stated, yet it stated a cause of action against both defendants for joint or concurrent negligence.

2. PLEADING—STATEMENT OF CAUSE OF ACTION—METHOD OF QUESTIONING.

A defective statement of a cause of action can only be questioned by motion to make the complaint more definite and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1193.]

3. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—RAISING ISSUE OF FACT IN PETITION.

Where a complaint on its face states a cause of action against both defendants which can be properly joined in one action, the cause cannot be removed on the ground that it is a separable controversy merely by raising an issue of fact in the petition for removal as to whether or not a joint cause of action exists.

4. SAME—DEFEATING BY FRAUD—STATING CASE OF JOINT LIABILITY.

The jurisdiction of the federal court cannot be defeated by plaintiff's fraud in stating a case of joint liability against two or more defendants for that sole purpose.

5. SAME—QUESTION FOR STATE OR FEDERAL COURT.

A state court has no jurisdiction to try an issue of fact properly raised on a petition for removal, but that can only be done by the federal court on motion to remand after removal, and so, where a petition alleges fraud in wrongfully joining two parties as defendants solely to defeat removal, the state court cannot inquire into and determine for itself the issue thus presented.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Silas Adams, by next friend, against the St. Louis Southwestern Railway Company and another. From a judgment for plaintiff against the railway company, the latter appeals. Reversed, with directions to order removal of the cause to the federal court.

S. H. West and J. C. Hawthorne, for appellant. H. A. Parker and G. F. Chapline, for appellees.

McCULLOCH, J. The plaintiff, Silas Adams, a lad of about 11 years of age, instituted, by next friend, this action in the circuit court of Monroe county against the St. Louis Southwestern Railway Company and Otto Smith, one of its conductors on a freight train, to recover damages caused by his being knocked down and injured by mov-

ing cars. Damages are laid in the sum of \$9,500. It is alleged in the complaint that defendant Smith was conductor on the freight train which inflicted the injury to plaintiff and had charge of the train at that time; that plaintiff was injured while attempting to drive some calves across the railroad track at the town of Clarendon, Ark.; and that the defendants were negligent in failing to ring the bell or sound the whistle of the locomotive, or to place some person in charge of a car keeping a lookout which was being "kicked" backward on the switch and which caused the injury to plaintiff. Defendant railway company in apt time filed its petition and bond in due form for removal of the case in the Circuit Court of the United States. The petition states, among other things, the diverse citizenship of plaintiff and the defendant; that "the plaintiff has, for the fraudulent purpose of preventing this defendant from removing this cause to the federal court, and for the fraudulent purpose of defeating the federal court of jurisdiction, joined in his complaint one Otto Smith as a party defendant; that said Otto Smith, while he was conductor on the train by which the plaintiff is alleged to have been injured, was not in charge of said train at the time of the accident, and under the rules of the company he was not required to be in charge of said train; that, among other duties that he had to perform, he had to look over the bills for outgoing freight from such stations as Clarendon, Ark., at the place the injury is said to have taken place; that at the time of the injury defendant Smith was inside of the depot building in the office of the agent, engaged in the work of getting the waybills for outgoing freight; * * * that he is not in any way, by the rules of the company or by custom of the management of the road, required to look after or be present in the movement or setting of freight cars or in switching same; that all these facts are well known to plaintiff's attorney, who joined the said Otto Smith as a party defendant for the sole and only purpose of preventing the removal of this cause." The petition was duly verified by the affidavit of the attorney for the railway company and also by the affidavit of defendant Smith. The court overruled the petition for removal, and retained jurisdiction of the case. Both defendants filed separate answers, denying all allegations of the complaint as to negligence. The case proceeded to trial, resulting in verdict and judgment for plaintiff against the railway company alone, and the latter appealed to this court.

It is contended that the complaint does not on its face set forth facts sufficient to constitute a cause of concurrent negligence on the part of the railway company and its co-defendant Smith, and that the case was, on the face of the complaint, removable. We do not agree to this construction. The cause of action is imperfectly stated in the complaint, but it is nevertheless a statement of a cause

of action against both defendants for joint or concurrent negligence. The defective statement of the cause of action could only be questioned by motion to make the complaint more definite and certain. *C. O. & G. R. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *Roberts & Schaeffer Co. v. Jones*, 82 Ark. 188, 101 S. W. 165. As the complaint on its face states a cause of action against both of the defendants which can be properly joined in one action, the cause cannot be removed on the ground that it is a separable controversy merely by raising an issue of fact in the petition for removal as to whether or not a joint cause of action exists. This is settled by repeated decisions of the Supreme Court of the United States. The latest utterance of that court on the subject is in the case of *Alabama Great So. Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 181, 50 L. Ed. 441. The court in that case quotes with approval the following statement of the law by Mr. Justice Gray in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." The court in the *Thompson Case* added this: "The question of removability depends upon the state of the pleadings and the record at the time of the application for removal, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, determines the separable character of the controversy for the purpose of deciding the right of removal." But in that and previous cases in the Supreme Court of the United States there was no question raised, such as we have in the present case, of fraud on the part of the plaintiff in stating a case of joint liability against two or more defendants for the sole purpose of defeating jurisdiction of the federal courts. The opinion in the *Thompson Case* expressly excludes any intention to decide that in such a case jurisdiction

could be thus defeated. "It is to be remembered," said the court, "that we are not now dealing with joinders, which are shown by the petition for removal or otherwise to be attempts to sue in the state court with a view to defeat federal jurisdiction. In such cases entirely different questions arise, and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in federal courts of the protection of their rights in those tribunals."

The precise question did, however, arise and was decided by the court in the later case of *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430. The plaintiff sued two defendants, a corporation and one of its employes, alleging in his complaint joint acts of negligence which constituted the cause of action. One of the defendants, the corporation, filed its petition for removal, as in the present case, alleging that there was no joint liability, and that the other party was not joined as defendant in good faith, but for the purpose of fraudulently and improperly preventing or attempting to prevent that defendant from removing the cause to the federal court. The record was lodged in the Circuit Court of the United States, and that court and also the Supreme Court on hearing of a writ of error held that the case was removable, and that the motion to remand the case to the state court should be overruled. Mr. Justice Day, who had delivered the opinion of the court in the *Thompson Case*, supra, speaking for the court in the *Wecker Case*, said: "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be just, it is equally true that the federal courts should not sanction devices to prevent a removal to a federal court when one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." The only difference between the *Wecker Case* and the one now before us is that there the state court relinquished jurisdiction and the question of removability arose on a motion to remand it to the state court. Here the state court refused to relinquish control over the case, and decided for itself that it had the right to retain jurisdiction.

The only remaining question, therefore, for us to decide, is whether in this state of the record, where the petition for removal alleges fraud in wrongfully joining two parties as defendants solely for the purpose of defeating removal, the state court can inquire into and determine for itself the issue of fact thus presented. It has been repeatedly held by this court and by the Supreme Court of the United States that the state court has no jurisdiction to try an issue of fact properly raised on the petition for removal, but that that can only be done by the federal court on motion to remand after removal. L. R. M.

R. & T. Ry. Co. v. Iredell, 50 Ark. 388, 8 S. W. 21; *Texarkana Telephone Co. v. Bridges*, 75 Ark. 116, 86 S. W. 841; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 199, 29 L. Ed. 962; *Burlington, etc., Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Kansas City, Ft. S. & M. R. Co. v. Daugherty*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963. These cases are, we think, decisive of the question now presented. Upon the question of fact presented in the petition for removal as to whether or not the two defendants have been joined in one action solely for the purpose of defeating removal to the federal court the Circuit Court of the United States must pass, and not the state court. The petition setting up that fact states grounds for removal, and it is the duty of the state court, pursuant to the mandate of the federal statute, "to accept said petition and bond and proceed no further in said suit." The provision of the statute which authorizes the federal court to remand the cause to the state court if "it shall appear to the satisfaction of said Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court" affords an exclusive remedy and a forum for determining a disputed question of fact raised by the petition. *Moon on Removal of Causes*, § 131; *Plymouth Gold Mining Co. v. A. & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1134, 30 L. Ed. 232. This view of the statute is expressed by the United States Circuit Court of Appeals for the Sixth Circuit in *McAllister v. Chesapeake & O. Ry. Co.* (C. C. A.) 157 Fed. 740. It follows that the circuit court of Monroe county had no authority to inquire into the truth of the allegations of the petition for removal and lost jurisdiction of the case on the filing of the petition and bond. Therefore all subsequent proceedings are void.

The judgment is reversed, and the cause remanded, with directions to enter an order for removal of the cause in accordance with the prayer of the petition.

BILLINGSLEY v. BENEFIELD.

(Supreme Court of Arkansas. July 6, 1908.)

1. PRINCIPAL AND AGENT—AGENT FOR COLLECTION—UNAUTHORIZED ACT—RATIFICATION.

Where an agent for collection takes notes in his own name in settlement, their subsequent acceptance by his principal amounts to a ratification of his unauthorized act, and the maker of the notes cannot complain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, *Principal and Agent*, §§ 644-655.]

2. BILLS AND NOTES—RENEWAL NOTES—FALSE REPRESENTATIONS—EFFECT AS TO VALIDITY OF NOTES.

When an agent represented that he owned a note which he held for collection, and the debtor gave new notes, payable to him personally in part payment thereof, which were accepted by the principal in place of the old note, the false representation did not affect their validity.

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by J. F. Billingsley against B. H. Benefield in justice court. On appeal to the circuit court and trial de novo, the court gave a peremptory instruction for plaintiff, and defendant appeals. Affirmed.

J. F. Billingsley, for appellant.

MCCULLOCH, J. This is an action instituted by appellee, Billingsley, against appellant, Benefield, before a justice of the peace to recover the amount of two negotiable promissory notes, each for \$40, with interest, executed by the latter to the former. The facts are undisputed, and in the trial in the circuit court on appeal the court gave a peremptory instruction to the jury to return a verdict in favor of the plaintiff for the amount of the notes and interest.

The notes bear date of April 24, 1900. A few months prior to that date, one Blackwell was the legal owner of a promissory note for the sum of \$90.51 executed by appellant, one Smith, as administrator of a certain decedent's estate. Blackwell turned the note over to appellee, who went to see appellant at his house and demanded payment, representing that he was the owner of the notes. A settlement of the matter was made between the two, whereby appellant delivered to appellee a cow valued at \$20, and executed to him the notes sued on, and appellee surrendered to appellant the original note executed to Smith. Appellee did not have the note with him at the time, but caused the cashier of a bank where he had previously placed it for collection to deliver it to appellant. Appellee then delivered the two notes in suit to Blackwell, his principal, without indorsing an assignment thereon. Subsequently, and before the commencement of this action, Blackwell sold the notes to appellee and delivered the same to him. Blackwell did not authorize appellee to accept the new notes from appellant in discharge of the original note, but his subsequent conduct in accepting the new notes from appellee amounted to a ratification of this act. Appellant is in no position to complain because appellee exceeded the authority conferred by his principal, when the latter has since ratified the act.

Nor is the fact material that appellee falsely represented to appellant that he was the owner of the original note. Appellee denies that he made any such representation; but, as the court gave a peremptory instruction, we must in testing its correctness treat it as established that he did make the representation as claimed by appellant. Appellant owed the debt evidenced by the original note, and the fact that he executed the new notes under a false representation as to the ownership of the old one is not material, and does not affect the validity of the notes. It was not material as to what particular individual owned the original note if the new ones were

accepted by the owner of the old one in satisfaction of it. These new notes, as we have already shown, were accepted by Blackwell. Of course, if Blackwell had not accepted the new notes, then they would have been void, for want of consideration, at least while in appellee's hands.

There was, therefore, no material disputed fact to go to the jury, and the court properly gave a peremptory instruction in favor of the plaintiff.

Affirmed.

CHEROKEE CONST. CO. v. BISHOP et al.
(Supreme Court of Arkansas. May 25, 1908.)

1. EQUITY—FORFEITURE.

Equity will enforce a forfeiture which works equity and protects the rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 69-76.]

2. MINES AND MINERALS—LEASES—FORFEITURE.

A coal lease provided that the lessee, his successors and assigns, should operate the mines opened on the land with due diligence, and that at no time during the term should the mine be idle for more than 30 consecutive days in any one year, unless caused by strikes, etc., and provided for forfeiture in case of breach of such requirement. *Held*, that the only mine on the land having remained unoperated for 10 consecutive months in 1904, and for three or four months in 1905, the lease was forfeitable at the option of the lessors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 189.]

3. SAME—IMPROVEMENTS.

A mining lease required the lessees to pay taxes on the improvements which were not to be removed until full royalty had been paid, the lessors being given a first lien on all such improvements and machinery to secure the royalty, and further provided that the lessee might remove the building, machinery, etc., subject to the conditions of the lease. *Held*, that such machinery, buildings, etc., were not fixtures, and that the only interest of the lessors therein was a lien for unpaid royalty.

Appeal from Sebastian Chancery Court;
J. V. Bourland, Chancellor.

Action by Araminta D. Bishop and others against the Cherokee Construction Company and another. Judgment for complainants, and the construction company appeals. *Affirmed in part, and reversed in part.*

Ira D. Oglesby, for appellant. Miles & Miles, R. A. Rowe, T. B. Pryor, and J. N. Rachels, for appellees.

BATTLE, J. On the 26th day of February, 1901, Araminta D. Bishop and others leased certain lands to Jerry M. Cravens for the period of thirty years.

The lease is as follows:

"This contract and agreement made and entered into this 26th day of February, A. D. 1901, by and between Araminta D. Bishop, widow of R. A. Bishop, deceased, Tilula W. Hocott and Thomas Hocott, her husband, Lee B. Bishop and wife, May Bishop, Almira T.

Shelton and her husband, John H. Shelton, Ben Bishop and wife, Minnie Bishop, of Sebastian county, Arkansas, parties of the first part, and Jerry M. Cravens, of Sebastian county, Arkansas, party of the second part,

"Witnesseth: That the parties of the first part for themselves, their heirs, executors, administrators and assigns, in consideration of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration and covenants hereinafter mentioned, have leased and do hereby lease and let to the party of the second part, his heirs, executors and assigns, the following described lands for the purpose hereinafter named, situated in the Greenwood district of Sebastian county, state of Arkansas, to wit:

"The northeast quarter section thirteen and north half of northwest quarter and north half of the southeast quarter of northwest quarter, section thirteen, township five, range thirty-two, northeast quarter, section thirteen and north half of northwest quarter and north half of southeast quarter of northwest quarter of section thirteen, township five north, range thirty-two west, except one acre of said land in square form upon which the said parties of the first part's dwelling and adjoining buildings are now situated which is strictly understood is reserved from the operation of this lease, and no coal is to be mined or taken therefrom.

"With the sole and exclusive privilege of mining for coal and operating coal mines thereon and taking and selling coal therefrom for the term and period of thirty years from this date, hereby given to the party of the second part the exclusive right to mine coal on said premises and to remove and sell the same for the term aforesaid, hereby giving the party of the second part, for the consideration aforesaid, the privilege of taking sufficient coal out of said premises for stationary machinery necessary for conducting said mining operations free of charge, and said party of the second part shall have the right free of charge to take from premises all such timber and stone as may be necessary to be used to conduct said mining business; that is to say, all such material as may be necessary to be used in constructing and maintaining said mine or mines, but not to include such timber as is used in building houses, tipples, railroad bridges, and railroad ties, and all timber so used for said purpose shall be paid for at the price of two dollars per thousand feet, standard measure.

"And the said party of the second part shall also, for the consideration aforesaid have the right to erect on said premises all necessary buildings for the purpose of carrying on said coal mining business, including dwellings for miners and other employes of said second party, and said second party of the second part, his successors or assigns,

shall have the right to build and maintain roads and railways to and from all shafts, slopes, or strip pits now on said premises, or that may hereafter be put thereon for the use of said mine or mines, and said party of the second part, his agents, successors or assigns, shall fence all the aforesaid railroad tracks and build and maintain suitable stock gaps thereon, and it is further understood and agreed that said party of the second part, or his legal representative, shall build and maintain gates on all dirt roads made by them as aforesaid when said roads enter upon any of the inclosure of said party of the first part.

"It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on said premises by the party of the second part and the taxes on the realty are to be paid by the party of the first part.

"It is further understood and agreed that the party of the second part shall enter upon said land within ninety days from date hereof, and begin sinking slope or shaft, and, in event it is not commenced in the time specified, then the party of the second part forfeits this lease and all privileges thereunder, and all improvements made thereon to the parties of the first part.

"The party of the second part agrees and binds himself, his successors or assigns, that, should he elect to sink shaft or slope upon the line running east and west between the southeast quarter and the northeast quarter of said section thirteen, township five north, range thirty-two west, he will have on or before the first day of July, 1902, in place upon said premises, for the operation of said slope or shaft, not less than two boilers of 60 horse power each and hoisting engine of not less than 100 horse power, and all other necessary appliances for the successful operation of said mine or mines.

"It is further understood and agreed that said party of the second part his successors or assigns shall pay to the party of the first part the following royalty, to wit: For mine run coal the sum of five cents per ton, 2,000 pounds to constitute a ton (bulletin weights to govern settlement), the minimum royalty to be \$500.00 per year during the period of this lease, or until the coal shall be worked out, and, should all of the said coal be mined from said land before the expiration of this lease, then said minimum royalty shall cease, and, in case the royalty on coal mined shall exceed in any one year the said sum of \$500.00, then the excess of royalty of previous years shall be applied to the deficiency. The royalty as aforesaid to be paid on the 20th day of each month for the coal mined the previous month; i. e., coal mined in March, 1901. The royalty on same would be due and payable April 20 of same year, and, in the event that said royalty is not paid as aforesaid within ninety days from the date it becomes due, then said

party of the second part, his successors or assigns, shall forfeit this lease and all privileges thereunder, and in no case shall any machinery or other improvements be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises, or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid.

"Said party of the second part, his successors or assigns, shall furnish the parties of the first part, or their legal representatives, a statement on the 15th day of each month for all coal mined the previous month, said statement to be made from bulletin weights, and the parties of the first part or their legal representative shall at all reasonable hours have access to the weigh books, bulletin sheets, and other records of the coal mined and kept in his office.

"It is further understood and agreed by the parties hereto that said mines or mine shall be operated by the party of the second part, his successors and assigns, with due diligence, and at no time during the period of this lease shall said mine or mines be idle for more than thirty consecutive days in any one year, unless same is caused by strikes, labor troubles, shortage in cars, floods, explosions, fires, shortage in orders, or other unavoidable circumstances not within the power of the party of the second part to prevent.

"It is further understood and agreed by the parties hereto that the party of the second part, his successors or assigns, may, at such times as he or they may deem best, move or cause to be moved any buildings, machinery, railroad tracks, or materials which he or they have put upon said premises without force or process of law; provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid.

"It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purposes of mining coal as aforesaid, subject to all the conditions of this lease.

"It is hereby agreed by the parties of the first part, or their legal representatives, that said party of the second part, his successors or assigns, shall have the sole and exclusive right to locate, own, or conduct a mercantile business on said premises for the period of this lease.

"It is further understood and agreed that said parties of the first part, or their legal representatives, shall at all times during reasonable hours have the right to enter said mine or mines for the purpose of investigation.

"In witness whereof, we have hereunto set our hands and seals, in duplicate, on this the day and date first above written.

"Araminta D. Bishop. [Seal.]
 "Tahillah W. Hocott. [Seal.]
 "May Bishop. [Seal.]
 "John H. Shelton. [Seal.]
 "Minnie Bishop. [Seal.]
 "Thomas Hocott. [Seal.]
 "Lee S. Bishop. [Seal.]
 "Almira Shelton. [Seal.]
 "Ben B. Bishop. [Seal.]
 "Jerry M. Cravens. [Seal.]"

Cravens assigned the lease to the Montreal Coal Company, and it assigned the same to the Cherokee Construction Company. A mine was opened on the leased land, and machinery of the description stated in the lease was placed therein for the purpose of operating it. On the 3d day of July, 1905, the lessors brought a suit in the Sebastian chancery court, for the Greenwood District, in Sebastian county, against Cravens and Cherokee Construction Company to cancel the lease and for other relief. After setting out the terms of the lease, the plaintiffs alleged in their complaint as follows:

"That the lessees have failed and refused to pay to the lessors the minimum royalty provided by the terms of the lease for a period of time much longer than provided in the lease contract, and plaintiffs further charge that the lessees have moved away from the premises the machinery placed thereon for the purpose of mining coal, and have thus destroyed security out of which the lessors had the right, according to the terms of the lease, to secure the payment of the minimum royalty aforesaid.

"The plaintiffs further charge that the defendants have failed to furnish to the lessors on the 15th day of each month a statement of all the coal mined during the previous month according to the terms of the contract.

"The plaintiffs further charge that the lessees have violated their contract, in that they have failed to operate the mine with due diligence, and have permitted the same to stand idle for more than 30 consecutive days in one year.

"Plaintiffs further charge that all the acts, conducts, failures, and forfeitures hereinbefore complained of have destroyed the rights of the lessees with respect to the contract and to remain in possession of the premises.

"And plaintiffs, further complaining of the defendant the Cherokee Construction Company, allege that they have been, by the wrongful acts and conduct of the defendant, its agents, and employes, in violation of the terms and conditions of the lease, damaged in the sum of \$15,000 as follows:

"For destroying and cutting timber upon the leased premises in the sum of \$1,500; for removing tippie, machinery, and all other equipment for the operation of the mine, and for pulling the pillars and destroying the un-

derground work of the mine in the sum of \$13,500."

And asked as follows: "Wherefore, the premises considered, these plaintiffs pray that the lease herein set out shall be by the court canceled; that the defendants and their agents or assigns shall be forever enjoined from setting up any claims to said premises, or from going upon the same for the purpose of mining coal, or for other purposes, and shall be perpetually enjoined from setting up any claim or right of title to said premises under the aforesaid lease, and that they have judgment against the Cherokee Construction Company for damages as aforesaid in the sum of \$25,000, and for all other and further relief to which in equity and good conscience they are entitled."

And the defendants, admitting the execution of the lease and the terms thereof so far as stated in the complaint, answered as follows:

"Defendants deny that the lessees have failed to pay lessors the minimum royalties provided by said lease contract for a period of time much longer than provided in said lease; and they also deny that the lessees have moved away from said premises the machinery placed thereon for the purpose of mining coal, and have thus destroyed security out of which the lessor had a right, according to the terms of said lease to secure payment of said royalties.

"Defendants also deny that they have failed to furnish the lessors a statement of all coal mined during the previous month on the 15th day of each month, according to the terms of said lease contract, and also deny that the lessees have violated their contract by failing to operate said mine with due diligence, and that they have permitted same to stand idle for more than 30 days of any one year, when within their power to prevent; and further deny that, by reason of anything alleged in the complaint, defendants have in any manner forfeited or destroyed their rights under said lease, or their right to remain in possession of said premises and further operate said mine.

"Further answering, defendants say that at expense of large sums of money, to wit, \$50,000, said lessees have opened up a coal mine upon the premises described in the complaint, and have developed said mine and operated the same with due diligence down to this day, and have not allowed same to remain idle for more than 30 consecutive days in one year, except when such idleness was enforced by labor troubles, shortage in cars, floods, shortage in orders, and other circumstances unavoidable and not within the power of defendants to prevent, and that most of the time during which said mine has remained idle has been caused by shortage of orders, shortage in cars, and shortage in orders for coal produced from said mine, more especially the latter cause."

And denied the other allegations of the

complaint so far as stated in this opinion.

The machinery in the mine was moved out by the Cherokee Construction Company on the 2d day of February, 1904. After its removal the pillars of the mine were pulled down, and the mine was virtually abandoned. All this was caused by the discovery of a fault of the depth of 18 feet and 4 inches, which made the operation of the mine impracticable. It (mine) was idle from January 16, 1904, until October of the same year, and was idle three or four months before the bringing of this suit. There was no evidence that any effort was made to open a mine on other parts of the land.

The court canceled the lease and rendered judgment against the Cherokee Construction Company for \$3,167 for the value of the machinery; and it appealed.

As a rule equity will not enforce a forfeiture; but there are exceptions to this rule. In cases where the forfeiture works equity and protects the rights of parties equity will in effect enforce it. Courts of equity will not reject it when it becomes a means of enforcing equitable rights.

Pomeroy's Equity Jurisprudence says: "It is well settled that, where the agreement secured is simply one for the payment of money, a forfeiture either of land, chattels, securities, or money, incurred by its nonperformance will be set aside on behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on payment of the debt, interest, and costs, if any have accrued, unless, by his inequitable conduct he has debarred himself from the remedial right, or unless the remedy is prohibited, under the special circumstances of the case, by some other controlling doctrine of equity. Where the stipulation, however, is intended to secure the performance or nonperformance of some act in pais, it is impossible to lay down any such general rule with which all the classes of decisions shall harmonize. It is certain that, if the act is of such a nature that its value cannot be peculiarly measured, if the compensation for a default cannot be ascertained and fixed with reasonable precision, relief against the forfeiture incurred by its nonperformance will not, under ordinary circumstances, be given. The affirmative of this proposition cannot be stated as a rule with the same generality. It has, indeed, been said that equity would relieve against forfeitures in all cases where compensation can be made; but this is clearly incorrect. It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty." 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 451.

Again, he says: "It is a well-settled and familiar doctrine that a court of equity will

not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few apparent exceptions to this doctrine are not real exceptions, since they all depend upon other rules and principles. The reasons of the doctrine are to be found in the universal principle that a court of equity refuses to aid any party who, by the remedy which he seeks to obtain against his adversary, is not himself doing equity, or who does not come before the court 'with clean hands,' the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incidents." Id. §§ 459, 460, and notes. From this we (this court) understand the author to mean that a court of equity will enforce a forfeiture where its enforcement involves equitable rights and principles, and in that case it would not be the enforcement of the forfeiture as such, but of the equitable rights and principles.

The law of insurance affords examples of the necessity of forfeitures, the enforcement of which would be consonant with equity. In *New York Life Insurance Company v. Statham et al.*, 93 U. S. 24, 23 L. Ed. 789, Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. * * * Delinquency cannot be tolerated nor redeemed, except at the option of the company. * * * Time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract. * * * Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662, it was said: "If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on the failure of the insured to pay the premiums when due, is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payments of the premiums, is to destroy the substance of the contract."

Brown v. Vandergrift, 80 Pa. 142, is a case wherein equity enforced a forfeiture based upon the same reason and principle as the forfeiture of a policy of insurance. The syllabus in that case is as follows: "Brady leased to Lambing a lot of land, to have the sole right to bore for oil, etc., for 20 years, Lambing to commence operations in 60 days, and continue with due diligence. If he should cease operations 20 days at any one time, Brady might resume possession. There were other covenants in the lease, and it was then stipulated that a failure of Lambing to comply with any one of the conditions should work a forfeiture, and Brady might enter and dispose of the premises as if the lease had not been made. It was further agreed that, if Lambing did not commence operations at the time specified, he should pay Brady \$30 per month until he should commence. Held, that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent.

"(2) Lambing did not commence operations. He paid four months' rent. He omitted payment for 11 months, and then tendered the amount for that time. Held, that the lessor might refuse the tender and insist on the forfeiture.

"(3) In such case time is of the essence of the contract, and equity follows the law, and will enforce the covenant of forfeiture as essential to do justice.

"(4) Equity abhors a forfeiture when it works a loss that is contrary to equity, not when it works equity and protects the lessor against the laches of the lessee."

Chief Justice Agnew, speaking for the court, said: "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results, when attended with success, while these results led to great speculation by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the landowner as well as public interests by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases, incompatible with the right of alienation and the use of the land. * * * Hence covenants became necessary to regulate the boring of wells, their number and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance and put an end to the lease in case of injurious delay or want of success. These leases were not valuable, except by means of development, unlike the ordinary terms for the cultivation of the soil, or for the removal of fixed minerals. A forfeiture for nondevelopment or delay therefore

cut off no valuable rights of property, while it was essential for the protection of private and public interest in relation to the use and alienation of property. * * * That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture, but this is when it works a loss that is contrary to equity; not when it works equity and protects the landowner against the indifference and laches of the lessee and prevents a great mischief, as in the case of such leases."

It is said that it is common for leases of land for the purpose of sinking wells for oil to contain covenants for diligent operation and for forfeiture in case of suspension, and such forfeitures are sometimes enforced in equity because the oil is a fluid likely to flow a considerable distance through the crevices and loose sand where it is found, and, if not removed, may be wholly lost to the owner of the land by reason of wells on land adjoining, and because its enforcement is essential to the protection of the rights of the owner, and because the lease yields nothing when idle, and is an incumbrance on the lands of the owner, tying his hands against selling or leasing to others. *Munroe v. Armstrong*, 96 Pa. 307.

In *Harper v. Tidholm*, 155 Ill. 370, 40 N. E. 575, Tidholm entered into a written contract with Harper, by which he bound himself, in consideration of a certain sum paid as earnest to bind the contract and of a certain other sum to be paid as purchase money, to convey certain lands to Harper when the stipulated price was paid; and provided that if Harper failed to pay the purchase money, at the time and in the manner specified in the contract, the money paid as earnest should, at the option of the vendor, be forfeited as liquidated damages, and the contract should be null and void. The contract was recorded. The purchase money not being paid at maturity, upon demand, the vendor, upon tender of a deed for the land to the purchaser, and his refusal to pay, declared the contract void and the earnest forfeited, and filed his bill in equity to cancel and remove the agreement and record as a cloud upon his title. The court, finding that the contract was null and void, and, being recorded, was a cloud upon the title of the vendor, decreed that it be canceled and removed, and that the earnest was forfeited.

In this case it was stipulated in the lease that the lessee, his successors and assigns, shall operate the mine or mines opened upon the land with due diligence, and that at no time during the term of the lease shall it or they remain idle for more than 30 consecutive days in any one year, unless the same was caused by strikes, etc. The only mine upon

the land remained idle about 10 consecutive months in the year 1904, and three or four months in 1905. The lease thereby became forfeitable at the option of the lessors (Barringer and Adams on the Laws of Mines and Mining, p. 148; 20 Am. & Eng. Encyclopedia of Law [2d Ed.] pp. 778-780, par. 7b, and cases cited), and they have so elected, and the enforcement of the forfeiture thereby created is necessary to protect them against unnecessary and injurious delays, and to protect them against an unprofitable lease being perpetuated by laches and kept hanging over their property like clouds upon titles; and to relieve their land of a burden.

"The finding of the court in favor of the plaintiffs for the value of the machinery is based on the theory that it was a fixture, became and was a part of the realty; and, defendant having removed the same, plaintiff could recover its value." This is error. Whether it was a fixture is determined by the intention of the parties expressed in clear and unambiguous language. *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108; *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920. The lease clearly shows that the machinery was to remain the property of the lessees. After stipulating that the lessees should have the right to make certain improvements, it then provides: "It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on the said premises by said party of the second part and the taxes on the realty are to be paid by the party of the first part."

After stipulating that royalty shall be paid, and that the lease shall be forfeited if it is not paid in 90 days after it is due, it then provides:

"And in no case shall any machinery or other improvements be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid."

And then this stipulation follows:

"It is further understood and agreed that the party of the second part, his successors or assigns, may at such times as he or they may deem best move or cause to be moved any buildings, machinery, railroad tracks, or materials which he or they have put upon said premises without force or process of law, provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid. It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purpose of mining coal as

aforesaid, subject to all the conditions of the lease."

The only interest the lessors were to have in the machinery was a lien for unpaid royalty.

The decree as to the cancellation of the lease is affirmed; and the judgment for \$3,167 is reversed.

REAVES et ux. v. COFFMAN et al.

(Supreme Court of Arkansas. June 29, 1908.)

1. TRUSTS—FOLLOWING TRUST FUNDS.

Trust funds wrongfully converted may be followed into other property as far as they can be identified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 514.]

2. WITNESSES—COMPETENCY—HUSBAND AND WIFE.

In view of Kirby's Dig. § 3095, subd. 4, disqualifying the husband and wife as witnesses for or against each other, declarations of a husband are not competent testimony against his wife in an action wherein they are defendants.

3. HOMESTEAD—LIABILITIES ENFORCEABLE AGAINST—JUDGMENTS AGAINST GUARDIAN.

In view of Const. art. 9, § 3, exempting the homestead from the lien of judgments, etc., except judgments for moneys collected by guardians and certain other persons in a fiduciary capacity, a guardian could not claim his homestead as exempt from judgments obtained against him by his wards, and such judgments are a lien on his interest therein.

4. SUBROGATION—RIGHTS OF SURETIES OF A GUARDIAN.

Sureties of a guardian who have paid off judgments obtained against him by his wards are entitled to be subrogated to the rights of the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 17.]

5. LIS PENDENS—BONA FIDE PURCHASERS.

A notice of the pendency of a suit affecting lands having been filed as required by the statute (Acts 1903, p. 118) before a purchase thereof, the purchasers are not bona fide purchasers entitled to protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lis Pendens, §§ 38-62.]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Action for subrogation by M. R. Coffman and another against D. M. Reaves and wife. From a decree in favor of plaintiffs, defendants appeal. Reversed and remanded, with instructions to enter a modified judgment.

This was an action in equity commenced on the 29th day of November, 1905, by M. R. Coffman and J. M. Gramling, administrators of the estate of M. C. Gramling, deceased, as plaintiffs, against D. M. Reaves and Mollie C. Reaves, as defendants. Several amended complaints were afterwards filed, and finally F. E. Graves and Susie Graves, his wife, and Edgar Graves and Tillie Graves, his wife, who had purchased the property since the institution of the action, were also made parties defendant. M. R. Coffman and M. C. Gramling in his lifetime were sureties upon the bond of D. M. Reaves as guardian of the estate of Hattie Reaves and Myrtle Reaves,

minors. The record does not disclose the date of the granting of the letters of guardianship; but that they were issued several years prior to 1900 is fully established. On the 21st day of April, 1903, the probate court for the Eastern district of Clay county found that D. M. Reaves, as guardian of Hattie Reaves, was due his ward the sum of \$336.69, and ordered the same paid to her. This order of the probate court was not complied with. On the 23d day of August, 1905, a judgment was rendered in the Clay circuit court for the Eastern district in favor of Hattie Wooten, formerly Hattie Reaves, for \$336.69, with interest at the rate of 10 per cent per annum from April 21, 1903, until paid, against D. M. Reaves, M. R. Coffman, and J. M. Gramling, as administrator of the estate of M. C. Gramling, deceased. On the 31st day of October, 1902, the said probate court found that D. M. Reaves, as guardian of Myrtle Reaves, was due her the sum of \$236.71, and ordered that sum paid to her at once. This order not having been complied with, suit was instituted against him and his aforesaid sureties in the circuit court, and judgment recovered on the 23d day of August, 1905. An execution was issued on these judgments against D. M. Reaves and there was a return of nulla bona thereon. Appellees herein then paid the judgments. These facts are alleged in the complaint, and it was further alleged that during the existence of the guardianship that D. M. Reaves purchased lots 9 and 10, in block 9, in the town of Rector, in Clay county, Ark., with the funds belonging to the estate of said minors, and, in order to defraud said minors, caused the deed to said lots to be made to his wife, Mollie C. Reaves; that he improved said lots by erecting a house which became his homestead. The prayer of the complaint is that plaintiffs be subrogated to the rights of said minors. A notice of the filing of the suit was filed in compliance with the act of March 7, 1903 (Acts 1903, p. 118). The defendants filed separate answers, which were in substance a general denial of the allegations of the complaint. Other facts are sufficiently stated in the opinion. The chancellor found in favor of the plaintiffs, rendered judgment in their favor against D. M. Reaves in the sum of \$805.81, and, in default of the payment thereof, ordered the premises in controversy sold. An appeal was granted to this court.

L. Hunter, for appellants. Johnson & Hudson and Moore, Spence & Dudley, for appellees.

HART, J. (after stating the facts as above). It is a well-settled principle of equity that trust funds wrongfully converted may be followed into other property as long and as far as they can be identified. *Dyer et al. v. Jacoway et al.*, 42 Ark. 186. But we do not think that the testimony establishes that the

lots in question in the present case were purchased with the funds belonging to the minors' estate. The testimony adduced by the defendants shows that the lots in question were given to the defendant Mollie C. Reaves in 1900 by her father, Robert H. Krantz, and that he afterwards, on the 3d day of February, 1903, executed a deed to her for the same. The testimony also shows that, while the consideration recited in the deed was \$200, the real consideration was the love and affection he bore his daughter. To overcome this positive testimony, the plaintiffs introduced proof of declarations of D. M. Reaves, the husband of Mollie C. Reaves, made in 1905, to the effect that he had purchased the lots in question in 1900, and had had the title to the same made in the name of his wife. Mollie C. Reaves was a party to the suit, and the declarations of her husband were not competent testimony against her. *Kirby's Dig. § 3095, subd. 4; Hamby, Adm'r, v. Brooks, etc.* (Ark.) 111 S. W. 277. The burden of proof was upon the plaintiffs, and they have failed to establish that the lots in controversy were purchased by the defendant D. M. Reaves.

A preponderance of the testimony does establish that in 1900, while the guardianship was pending in the probate court, D. M. Reaves built a house upon the lots with the consent of his wife, and that thereafter it became their homestead. Plaintiffs contend that the whole of the means with which the house was built was furnished by D. M. Reaves. But the uncontradicted testimony shows that Robert H. Krantz furnished a part of the lumber, that a son of D. M. Reaves did most of the carpenter work, and that D. M. Reaves only furnished materials of the value of \$450. The evidence establishes the fact of his indebtedness to his wards at that time and to the extent of the \$450 there is a charge upon the lots in question in their favor. *Morris v. Fletcher*, 67 Ark. 105, 56 S. W. 1072, 77 Am. St. Rep. 87.

The present case is distinguished from that of *Pullen v. Simpson*, 74 Ark. 592, 86 S. W. 801. In that case, at page 596 of 74 Ark., and page 802 of 86 S. W., the court said: "As Simpson had a perfect right to devote this money to homestead purposes, the creditors have no complaint that it is put into a homestead in which he had a right of occupancy, instead of one in which he had title." Section 3, art. 9, Const., is as follows: "The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express

trust for moneys due from them in their fiduciary capacity." It follows, then, that D. M. Reaves could not claim his homestead, whether one by right of occupancy or one in which he had title, as exempt from the judgments obtained against him by his wards, and that the judgments obtained by them in the circuit court were a lien on his interest in the homestead. Appellants as his sureties, having paid off the judgments, were entitled to be subrogated to the rights of the wards. *Carroll County Bank v. Rhodes*, 69 Ark. 43, 63 S. W. 68; *Meyer Bros. Drug Co. v. Davis*, 68 Ark. 112, 56 S. W. 788. The testimony shows that the notice of the pendency of the suit was filed as required by statute before the purchase by the defendants Graves. Hence they are not bona fide purchasers, and are not entitled to protection. *Acts 1903*, p. 118. The chancellor erred in finding that the lots in controversy were the property of D. M. Reaves, and in rendering a decree fixing a lien on them for the amount of the judgment of the plaintiff. His decree should have been to fix a charge on them for the \$450 furnished by D. M. Reaves and used in erection of the house.

The decree is reversed, and the cause remanded, with direction to enter a decree in accordance with this opinion.

TEBBS v. WISEMAN.

(Supreme Court of Arkansas. July 6, 1908.)

1. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.

The sufficiency of evidence to sustain the verdict is the sole question in the Supreme Court, and it has nothing to do with the weight or preponderance thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3923-3934.]

2. EJECTMENT—INSTRUCTIONS.

Where adjoining owners' deeds called for property, one for a part of lot 3 and the other for lot 4, and the only issue was whether a fence built by the owner of lot 4 extended beyond lot 4, an instruction that, if the property sued for was in lot 3 as originally platted, the verdict should be for the owner of that lot, sufficiently stated the issue.

3. BOUNDARIES—EQUITABLE ESTOPPEL—PREJUDICE TO PERSON SETTING UP ESTOPPEL.

Estoppel cannot be invoked against an owner because of a conversation between him and an adjoining owner, wherein he pointed out a different line between their lots than that he thereafter claimed, where no action was taken on account of the conversation; the same having been after such adjoining owner's purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 230.]

4. EJECTMENT—EVIDENCE—ADMISSIBILITY.

In an action to recover a strip of land as part of a lot, evidence showing the dimensions of the adjoining lots, was a circumstance tending to throw light on which party was entitled to the strip, and was admissible.

Appeal from Circuit Court, Ashley County; H. W. Wells, Judge.

Action by J. Wiseman against W. H. Tebbs to recover a strip of land 3 feet wide and 125 feet long alleged to be a part of the west part

of lot 3, in block 8, of the town of Hamburg. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Norman, for appellant Robt. El Craig, for appellee.

HILL, C. J. Battle Eatman owned lots 3 and 4, in block 8, in the town of Hamburg. In the year 1888 he sold to Wiseman a certain tract which was a part of lot 3, and described as 20 feet by 125 feet. They did not know where the line between lots 3 and 4 ran, and an arbitrary line was agreed upon between them, and the property which they agreed passed by the purchase was inclosed by Wiseman with a fence, and within the inclosure he built a small house. This was in 1888, and the fence remained as built until 1901, when it was destroyed by fire. In 1897 Battle Eatman sold to Tebbs lot 4, in block 8, and executed a bond for title; and, after the death of Eatman and by order of the probate court, his executor performed the condition of the title bond by executing a deed upon the receipt of the purchase money, and conveyed said lot 4 to Tebbs in 1900. Shortly before this suit Tebbs built a fence which he claims was upon the line of the old fence, and which Wiseman claimed was three feet on his side of the line, and it was to settle this controversy that this suit was brought. Much testimony was adduced to sustain the contentions of the respective sides, and the jury found in favor of Wiseman. Tebbs has appealed.

The first question presented is the sufficiency of the evidence to sustain the verdict; or, rather, it is argued that the testimony is so overwhelmingly against the preponderance of the evidence as to shock the sense of justice. But the court has nothing to do with the weight or preponderance of the testimony. The sole question here is as to the sufficiency of the evidence to sustain the verdict. There can be no doubt of the sufficiency of the evidence to sustain this verdict. There was positive testimony on each side sufficient to sustain a verdict, and the verdict of the jury is the ultimate conclusion in such a state of the record.

Appellant objects to the second instruction, which, in effect, told the jury that, if the property sued for is in lot 3 as originally platted by the owner, then their verdict should be for the plaintiff. This instruction was correct. Wiseman's deed called for property in lot 3, and Tebbs' deed called for lot 4, and the only issue was whether the fence built by Tebbs extended beyond lot 4. If it did, he had no title to the property inclosed beyond the line of lot 4, and Wiseman did have title. If it did not extend beyond the line of lot 4, then Wiseman had no title thereto. While this issue might well have been phrased differently, as it was in other instructions, there was nothing improper in so expressing it.

Appellant complains of the refusal to give an instruction which sought to invoke the doctrine of estoppel against Wiseman, based upon an alleged conversation between Wiseman and Tebbs wherein Tebbs said that Wiseman, after he (Tebbs) had purchased lot 4 pointed out the line thereof different from what he now claims. But no action was taken on account of this conversation, which was had after Tebbs' purchase, and the doctrine of estoppel cannot be invoked.

Appellant also complains of the refusal to give an instruction excluding from the consideration of the jury evidence as to the dimensions of lot 4. Testimony was introduced showing the dimensions of lots 3 and 4; and, while this testimony was not specially important, yet it was a circumstance tending to throw light upon which party was right in the controversy.

No other questions arise in the case; and the judgment is affirmed.

STRICKLAND v. STRICKLAND.

(Supreme Court of Arkansas. July 6, 1908.)
DIVORCE—PROCEEDINGS—APPEAL—DETERMINATION OF CAUSE—EFFECT OF REVERSAL.

Reversal on appeal of a decree in a suit for divorce sets aside a provision in the decree inserted by consent of the parties making the children of the parties beneficiaries in a policy of insurance.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by Mrs. William Strickland, guardian, against Pearl Strickland. Judgment for defendant, and plaintiff appeals. Affirmed.

See 80 Ark. 451, 97 S. W. 659.

C. P. Hornwell, for appellant. Mehaffy, Williams & Armistead, for appellee.

BATTLE, J. William Strickland brought suit in the Pulaski chancery court against Eddie Strickland, his wife, for a divorce. A decree was rendered in favor of the plaintiff for a divorce, and an appeal was taken by the defendant to this court, and the decree of divorce was reversed.

The decree appealed from, after providing that the bonds of matrimony between the plaintiff and defendant should be dissolved and awarding the custody of the children Carl and Darwin Strickland to the defendant, their mother, and providing for their maintenance and support by the plaintiff, their father, declares "that by consent of parties hereto the Maccabees policy of insurance for \$3,000 shall be so changed as to make the four children, Pearl Strickland, Roy Strickland, Carl Strickland, and Darwin Strickland, the beneficiaries." This policy was an insurance on the life of William Strickland and was issued to him by the Society of the Maccabees, and, it seems, the beneficiaries of it were subject to his control. All these provisions for the support or benefit

of the children of the parties were a part of the decree of divorce and an incident to the divorce, and were set aside by the reversal of the decree of divorce by this court.

The consent to change the beneficiaries of the policy as a contract was executory, and without consideration, and not binding upon William Strickland. Pearl Strickland and the Society of the Maccabees were not parties to or affected by it. The policy never became the property of any of the children, except Pearl. Mrs. Strickland, as guardian of Carl and Darwin Strickland, is not entitled to enforce the decree by consent.

The decree of the Pulaski chancery court in this suit, which is to the effect we hold, is affirmed.

HART, J., being disqualified, did not participate.

LONDON & LANCASHIRE FIRE INS. CO. v. LUDWIG, Secretary of State.

(Supreme Court of Arkansas. June 15, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—FILING CHARTER—FEES—"CAPITAL STOCK."

The words "capital stock," in Laws 1907, p. 744, requiring foreign corporations seeking to do business in the state to pay for filing the articles of incorporation a fee of \$25 where the capital stock is \$50,000 or under, \$75 where the capital stock is over \$50,000 and not more than \$100,000, and \$25 additional for each additional \$100,000 of capital stock, do not include authorized stock not subscribed, but include unpaid subscribed stock, and a foreign corporation must pay fees on a basis of its authorized and unpaid subscribed stock.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

2. SAME—PAYMENT OF FEES—RECOVERY—COMPLAINT.

A complaint, in an action by a foreign corporation against the Secretary of State for fees paid under protest and claimed by the Secretary of State to be due under Laws 1907, p. 744, imposing fees on foreign corporations, which alleges that it was forced by the demand of the Secretary of State to pay a specified sum in fees when a less sum was demandable, and that it made such payment under protest, but which fails to state to whom it paid the fees, is bad on demurrer, for it will be presumed that the fees were paid into the treasury of the state, or, if paid to the Secretary of State, that he turned them over to the treasurer, as required by Kirby's Dig. §§ 3447-3449.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the London & Lancashire Fire Insurance Company against O. C. Ludwig, Secretary of State. From a judgment of dismissal rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Rose, Hemingway, Cantrell & Loughborough, for appellant. Wm. F. Kirby, Atty. Gen., and Dan'l Taylor, Asst. Atty. Gen., for appellee.

BATTLE, J. The London & Lancashire Fire Insurance Company sued O. C. Ludwig.

The complaint in the case, omitting the caption, is as follows:

"The plaintiff states: That it is a corporation which was duly organized under the laws of Great Britain in the year 1861, for the purpose, among others, of writing policies of insurance against loss by fire; and the defendant is at present the Secretary of State of Arkansas.

"That on the 25th day of March, 1905, and for a number of years prior thereto, it was conducting a part of its business within the state of Arkansas, and under its charter had the power so to do.

"That on the date last aforesaid it ceased to do business in the state, and since that time has done none. That during the time when it did business in the state it built up and established a profitable business, and on June 4, 1907, desiring to re-enter the state for the purpose of carrying on business, it applied to the defendant, as Secretary of State, for leave to file the documents required by an act (Laws 1907, p. 744) entitled, 'An act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations.' That in connection with such application it tendered to the Secretary of State a copy of its charter, duly authenticated and certified as required by law, together with a statement of its assets and liabilities and the amount of its capital employed in this state, also designating its general office or place of business in this state, and naming an agent upon whom process may be served. It also offered to file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any of its agents in the state, or upon the Secretary of State of this state in any action brought or pending in the state, shall be valid service upon it, and it offered to pay to the Secretary of State at the same time the fees required by the said act to be paid.

"That the capital authorized by its charter is the sum of \$15,000,000, of which \$11,400,000 and no more has been subscribed, and of the amount so subscribed only 10 per cent. has been paid up. That the Secretary of State declined to file the papers tendered unless the plaintiff would pay a fee based upon the authorized capital of \$15,000,000, and declined to permit them to be filed upon the payment of a fee based upon the capital paid up or the capital subscribed, which was all that could be legally demanded.

"Plaintiff was entitled, by the terms of its organization under the laws of the state, to enter the state to do business upon the compliance with the law. It had within the state many former customers and patrons who desired to renew their business relations with it, and with whom it desired to renew such relations. It could not do this without first filing the papers aforesaid, and in all respects complying with the act of the General Assembly. In order to enjoy this right,

it was forced by the demand of the Secretary of State to pay \$3,706 in fees, when but \$306 was demandable, being \$3,400 fees in excess of what was due from it under the terms of the said act, and it made such payment under protest and with notice that it did so merely as a means of enjoying its right to do business within the state.

"By reason of the premises, the plaintiff says that an action has accrued to it to recover of and from the defendant the difference in the amount paid by it and the amount which it was required to pay under the terms of the said act, to wit, the sum of \$3,400.

"Wherefore it prays judgment against the defendant in the sum of \$3,400, with its costs."

The defendant demurred to the complaint, which the court sustained, and, the plaintiff refusing to plead further, dismissed the action, and plaintiff appealed.

Section 3 of the act (Laws 1907, p. 744) entitled, "An act to permit foreign corporations to do business in Arkansas and fixing the fees to be paid by all corporations," approved May 13, 1907, is involved in this action. It is as follows: "That all corporations hereafter incorporated in this state and all foreign corporations seeking to do business in this state shall pay into the treasury of this state for the filing of said articles (articles of incorporation or association) a fee of \$25.00 where the capital stock is \$50,000.00 or under; \$75.00 where the capital stock is over \$50,000.00 and not more than \$100,000; and \$25.00 additional for each \$100,000.00 of capital stock."

The question is: What it meant by "capital stock"?

In *Commercial Fire Insurance Co. v. Board of Revenue of Montgomery County*, 99 Ala. 9, 14 South. 494, 42 Am. St. Rep. 17, Chief Justice Stone, delivering the opinion of the court, said: "We have shown by the highest legal authority that the capital stock of a corporation is a trust fund for the security and benefit of the creditors of the corporation, and that the managing board fills the relation of trustee for its preservation and administration. Corporations, acting within the scope of corporate powers, fix no liability on their officers, or any one else. They charge only the corporation. Hence the purpose and policy of requiring a capital stock as security and indemnity of persons who become its creditors. The lawmaking power confers upon them privileges—a franchise, a right to make contracts in its artificial name without fastening a liability on any natural person—and it exacts from them as a condition on which it grants this franchise this privilege and power: That they place a capital stock in safe pledge for the security of their creditors. And this capital stock is a permanent instrument, with no power in the shareholder to withdraw it, until the corporation is wound up and all its debts paid, and no power in the managing board to permit it to be

withdrawn, at the expense of creditors. It is a trust fund in the corporation's treasury, to be used only in its interest, and whatever of profit or emolument it may yield belongs of right to the corporation, its creditors and shareholders. It must be kept within the corporation and under its control, to meet the purpose for which it was required to be raised and paid in. It is not materially unlike any other pledge that is placed as a guaranty of faithful performance of debt or duty. It is a fixed pledge until the debt is paid, or the duty performed."

In *Sturges v. Stetson*, 1 Bliss. (U. S.) 246, 248 Fed. Cas. No. 13,568, Mr. Justice McLean said: "The corporate powers of the company were conferred for the express purpose of creating stock as a means of constructing the railroad. As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock, stock. * * * Stock can be created only by contract, whether it be in the simple form of a subscription, or in any other mode. There must be an agreement to take the stock, and nothing short of this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called 'capital stock' in the charter, because the corporate capacity to create it is given. The term 'stock,' as used in the charter, before it is taken by subscription, means nothing more than a power in the directors to receive subscription for stock."

In *Sanger v. Upton*, 91 U. S. 60, 23 L. Ed. 220, it is said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demand, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

It is therefore evident that capital stock cannot include authorized stock which has not been subscribed. Such stock cannot be an asset and cannot be used for any purpose, and no one is liable for it, the corporation or any one else.

The act of May 13, 1907, does not require all corporations to pay the same fee, but fixes it according to the capital stock; the greater the capital stock, the greater the fee. This difference is evidently based upon the business the corporation will be able to transact, the benefits it may receive, and upon the presumption that the larger the capital stock the larger the business the corporation will do. If this be not true, why not require all corporations to pay the same fee? Upon the theory suggested as to the basis upon which the fees are fixed, it is plain to be seen that the authorized but unsubscribed stock is not, but unpaid subscribed stock is, a part of the capital stock within the meaning of the act, and we so hold.

Appellant stated in his complaint that "it was forced by the demand of the Secretary of the State to pay \$3,706 in fees, when but \$306 was demandable, being \$3,400 fees in excess of what was due from it under the terms of said act, and it made such payment under protest and with notice that it did so merely as a means of enjoying its right to do business within the state." But it does not state to whom it paid the fees. The presumption is it paid them according to law, into the treasury of the state, or, if to the Secretary of the State, that he did so; the presumption being that he did his duty, and the law requiring all such fees to be paid directly to the treasurer of the state. Kirby's Dig. §§ 3447-3449.

The appellant fails to state a cause of action against appellee.

Judgment affirmed.

GRAND LODGE K. P. v. WHITEHEAD. (Supreme Court of Arkansas. July 6, 1908.)

INSURANCE—MUTUAL BENEFIT INSURANCE— ACTIONS FOR BENEFITS—PRESUMPTIONS AND BURDEN OF PROOF.

In an action on a benefit certificate issued by the grand lodge of a secret organization, the defendant, in its answer, admitted all the allegations of plaintiff's petition, but alleged that the policy contained a stipulation that the benefit should not be paid unless the insured was a member of the lodge in good standing at the time of his death, and that fact was shown by the records of the lodge, that plaintiff's decedent was not a member of the lodge in good standing at the time of his death, and that the records of such lodge do not sustain the fact of such good standing. *Held*, that the burden of proving that decedent was not a member of the lodge in good standing at the time of his death was on defendant; and, where plaintiff introduced the policy in evidence, and defendant admitted that insured was dead, and that plaintiff was duly appointed his administrator, a verdict was properly directed for plaintiff on defendants refusing to introduce any testimony, since the policy itself established the fact that decedent was a member in good standing at the time of its issuance, and his good standing would be presumed to continue to his death in the absence of evidence to the contrary.

Appeal from Circuit Court, Dallas County;
H. W. Wells, Judge.

Action by C. W. Whitehead, as administra-

tor of the estate of O. D. Wright, deceased, against the Grand Lodge of the state of Arkansas, Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Jones, for appellant. T. B. Morton, for appellee.

HILL, O. J. This is an action by O. W. Whitehead, as administrator of the estate of O. D. Wright, deceased, against the "Grand Lodge of the state of Arkansas, Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia," to recover upon an endowment policy issued to the said O. D. Wright. It is alleged that O. D. Wright died on the 27th of December, 1906, and Whitehead was, on the 15th of April, 1907, appointed administrator of his estate by the probate court of Dallas county, and duly qualified as such; and that O. D. Wright was, on the 27th of October, 1905, a member in good standing of Sprig of Myrtle Lodge No. 30, of Fordyce, one of defendant's subordinate lodges, and as such member was entitled to take out an endowment policy of the defendant benefit society; and that the defendant on said day issued to him its endowment policy, by which it agreed to pay an endowment of \$300 at the death of said Wright to his personal representative; and that the defendant had been duly notified, and refused to make payment of said \$300, as promised and agreed in the policy. The answer admitted the death of Wright, and, sub silentio, that he was in good standing when the policy was issued to him, and that the defendant had been duly notified of his death, and alleged that it was not indebted to the administrator on account of said policy, because it contained a stipulation reading as follows: "Provided that the said knight is in good standing in his lodge at the time of his death, and the records of the said grand lodge sustain that fact"; that the said Wright was not in good standing in said lodge at the time of his death, and that the records of said grand lodge do not sustain the fact of such good standing. Upon the trial the policy was introduced into evidence, and it was admitted that Wright had died, and that Whitehead had been appointed and qualified as administrator of his estate before the bringing of this suit. No other evidence was introduced, and the court directed the jury to return a verdict for the plaintiff, which was done, and from the judgment entered thereupon the benefit society appealed.

The court was right in directing a verdict for the plaintiff in this state of the evidence. A certificate issued to a member of a benefit society is evidence that the member is in good standing, and such good standing is presumed to continue until there is proof that it no longer exists; and the burden of establishing that the member is not in good

standing must be assumed by the association. *Royal Circle v. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Ind. Order Foresters v. Zak*, 136 Ill. 185, 29 Am. St. Rep. 318; *Siebert v. Sup. Council*, 23 Mo. App. 268; 25 Cyc. 925, subd. "g." It will be seen from the foregoing statement of facts that, either by failure to deny allegations of the complaint or positive admission, all the facts necessary to a recovery were shown, except the fact that the member was in good standing at the time of his death, as shown by the books of the grand lodge; and under the authorities above cited, the burden of proof as to this matter rested upon the defendant, as good standing once being shown, there was a presumption of its continuance.

No other questions arising in the case, the judgment is affirmed.

HOME FIRE INS. CO. v. DRIVER.

(Supreme Court of Arkansas. July 13, 1908.)

1. INSURANCE — FIRE POLICY — IRON-SAFE CLAUSE—COMPLIANCE.

Proof that insured, in a fire policy covering a stock of merchandise, took an inventory of the stock on removal to another town, that the inventory was complete, that he kept the same until after the fire and produced it at the trial, that he kept a pocket memorandum book in which itemized accounts of all credit sales and the amount of daily cash sales were kept, which book was preserved until after the fire, and that its contents were then copied into another book produced at the trial, authorized a finding that insured complied with the clause with reference to keeping a set of books and preserving the same in an iron safe or other safe place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 853.]

2. SAME—BREACH OF WARRANTY AGAINST INCUMBRANCES.

A stock of merchandise was mortgaged with other property, and when the owner moved the stock to another town the mortgagee released it from the mortgage and consented to the removal. There was no consideration for the release, but the owner acted on the agreement, removed the stock, and insured it as his own, free from incumbrance, and proceeded to dispose of it in the usual course of trade. *Held*, that insurer could not plead want of consideration for the release and claim a breach of warranty in the policy against incumbrances.

3. SAME—FAILURE TO FURNISH PROOF OF LOSS —WAIVER.

A failure of insured in a fire policy to furnish proof of loss, as required by the policy, is fatal to a recovery, unless the failure was waived by insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1333.]

4. SAME.

Insured, under a fire policy requiring proof of loss, wrote to insurer giving notice of a loss and demanding payment of the full amount of the policy. The communication did not purport to be proof of loss in compliance with the policy. Insurer made no response to it. *Held*, that insurer had the right to treat the letter as a mere notice of the loss and demand for payment, and its silence did not amount to a waiver of proof of loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1385.]

Appeal from Circuit Court, Madison County; J. S. Maples, Judge.

Action by I. D. Driver against the Home Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Harris & Ivie and C. P. Harnwell, for appellant. Walker & Walker, for appellee.

McCULLOCH, J. This is an action to recover the amount of loss under a fire insurance policy issued by appellant company to appellee on his stock of merchandise situated in the village of Witter in Madison county. The policy is a standard form. Appellant relies on three grounds of defense, viz.: (1) A breach of warranty in the iron-safe clause with reference to keeping a set of books and preserving the same in an iron safe or other safe place; (2) a breach of the warranty against incumbrances of the insured property; and (3) failure to furnish proof of loss within 60 days after the fire. The evidence establishes the fact that the insured property formerly composed a part of a stock of merchandise at Aurora, Ark., which appellee purchased and removed to Witter about two months before the issuance of the policy sued on. The policy was issued July 21, 1906, and the fire occurred in September of the same year.

Appellee's bookkeeper testified that, when the goods were moved from Aurora to Witter, an inventory of same was taken and afterwards added thereto, from time to time as goods were purchased and placed in the store. He further testified that said inventory was a complete one of all goods placed in the store at Witter, and that he kept the same until after the fire, and produced it at the trial. He testified that he kept a pocket memorandum book, which was preserved until after the fire, in which itemized accounts of all credit sales and the amount of each day's cash sales were kept. This book, it appears from the evidence, had become worn out from use after the fire; but its contents were copied in full into another book, which was produced at the trial. This evidence, according to recent decisions of this court, warranted a finding by the jury that appellee had complied with the terms of the policy with reference to keeping books. *People's Fire Ins. Ass'n v. Gorham*, 79 Ark. 160, 95 S. W. 152; *Security Mutual Ins. Co. v. Woodson*, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75; *Ark. Mutual Fire Ins. Co. v. Stuckey*, 85 Ark. 33, 106 S. W. 203; *Ins. Co. v. McManus (Ark.)* 110 S. W. 797. It was not essential that the identical book of account should be presented at the trial. Preservation until after the fire and production on demand of the company was all that was required by the terms of the policy. *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103; *Ark. Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226.

The record shows that the stock of merchandise at Aurora was mortgaged, with other property, to the Madison County Bank, and it is proved by oral testimony that when appellee moved the stock to Witter the bank, by oral agreement made by its president, consented to the removal and released it from the mortgage. Under this state of facts, there was no breach of the warranty against incumbrances. No consideration for the release is shown to have passed from appellee to the bank, but that was not necessary. Appellee acted on the agreement of release and removed the property, insured it as his own free from incumbrance, and proceeded to dispose of it in the usual course of trade. The bank would have been estopped to plead want of consideration for the release, and the insurance company cannot take advantage of it. There is, however, no evidence whatever in the record that any proof of loss was furnished as required by the terms of the policy, or that the failure to do so was waived, and this is fatal to appellee's right to recover. *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484, 82 S. W. 840; *Arkansas Mut. Fire Ins. Co. v. Clark*, 84 Ark. 224, 105 S. W. 257.

After the fire, appellee wrote the company a letter giving notice of the loss and demanding payment of the full amount of the policy, but this communication did not purport to be proof of loss in compliance with the terms of the policy, and the company made no response to it. We have held that where an incomplete proof of loss is accepted by the company without objection, or where all liability under the policy is denied, it amounts to a waiver of the requirement of proof of loss. *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Planters' Mutual Ins. Ass'n v. Hamilton*, 77 Ark. 27, 90 S. W. 283; *Hartford Fire Ins. Co. v. Enoch*, 79 Ark. 475, 96 S. W. 393. In the opinion in the case last cited it said, quoting from a decision of the Supreme Court of Pennsylvania, that: "If the insured in good faith and within the stipulated time does what he plainly intends as a compliance with the requirements of his policy in respect to proof of loss, good faith requires that the insurer shall promptly notify him of objections thereto, and mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel." *Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717. But in the present case appellee's letter is insufficient to manifest that it was intended as a compliance on his part with the requirement of the policy with respect to proof of loss. Therefore the company was not called upon to treat it as such and point out objections to it. The company had the right to accept and treat it as what it purported to be—a mere notice of loss and demand for payment.

Reversed and remanded for new trial.

ST. LOUIS, I. M. & S. RY. CO. et al. v. CATES.

(Supreme Court of Arkansas. July 13, 1908.)
CARRIERS—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages for failure by an initial carrier to return to a passenger that part of his ticket entitling him to transportation over the line of a connecting carrier is the extra fare demanded, where he had sufficient money with him to pay it, and could thereby have avoided ejection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1082.]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by J. M. Cates against the St. Louis, Iron Mountain & Southern Railway Company and another. Judgment for plaintiff against the railway company and for such other, and the railway company appeals. Reversed and remanded for a new trial, unless remittitur be filed.

On the 10th day of October, 1905, J. M. Cates, the plaintiff, purchased from the ticket agent of the defendant St. Louis, Iron Mountain & Southern Railway Company a first-class passenger ticket, entitling him to passage from Coffeyville, Kan., to Hot Springs, Ark. On the same day he took passage on one of said defendant's passenger trains at Coffeyville for Hot Springs, and was conveyed to Benton, Ark., at some point between Little Rock and Benton, Ark., the servant of the railway company whose duty it was to take up tickets failed to return to him that part of the ticket which entitled him to transportation on the line of the Little Rock & Hot Springs Western Railway from Benton to Hot Springs, Ark. Plaintiff had no knowledge or information as to the change of roads or of conductors, and, upon his arrival at Benton, became a passenger on a regular passenger train of said Little Rock & Hot Springs Western Railway from Benton to Hot Springs. The conductor on this train asked him for his fare or ticket. He thereupon told the conductor that he had given his ticket to the servant of the St. Louis, Iron Mountain & Southern Railway Company, whose duty it was to take up tickets, and that said agent had failed to return him a coupon or ticket from Benton to Hot Springs. He told the conductor that he had purchased a ticket to Hot Springs, and that he took passage on the train in ignorance of the mistake made by the former conductor or servant whose duty it was to take up tickets. The conductor told him that he would have to pay his fare or be put off of the train. When the train arrived at Lonsdale, plaintiff was ejected from the train for the nonpayment of his fare. He states that the conductor was very nice about it, and said that his duty required him to do it. It was raining at the time. Plaintiff states that he was sick at the time, and that he went at once into the depot. Then he went up to a store, and

inquired if there was a hotel or other place of accommodation for travelers. Upon being told there was none, he spent the time before the arrival of another train in the stores and the depot; that he was put off the train in the morning; that he bought some cheese and crackers for dinner, and, upon the arrival of the evening train, took passage on it for Hot Springs; that the fare was 65 cents, and that he paid it by giving the conductor 40 cents and a coin made in 1820, which he had been keeping for several years, and which was all the money he had with him. Plaintiff further states that he had a chill that afternoon at Lonsdale; that he was sick for two or three weeks after his arrival at Hot Springs, and did not resume work for two or three months. This action is brought against the defendants to recover damages for negligently failing to return to plaintiff that part of his ticket which authorized and entitled him to transportation over the line of railroad of the defendant Little Rock & Hot Springs Western Railroad Company from Benton to Hot Springs. The court gave a peremptory instruction in favor of the Little Rock & Hot Springs Western Railroad Company. A jury returned a verdict for plaintiff for \$200 against the St. Louis, Iron Mountain & Southern Railway Company, and judgment rendered accordingly. The latter company has appealed.

T. M. Mehaffy and J. E. Williams, for appellant. Wood & Henderson, for appellees.

HART, J. (after stating the facts as above). In this case the appellee made a contract with appellant to furnish him transportation from Coffeyville, Kan., to Hot Springs, Ark. A part of the journey was to be made over the line of a connecting carrier, the Little Rock & Hot Springs Western Railway Company. The auditor of appellant company, by mistake, took up that part of the ticket which entitled appellee to be transported over the line of the connecting carrier. In ignorance of this mistake, appellee took passage over the line of the connecting carrier to his destination. For nonpayment of his fare he was ejected from the train of the connecting carrier. The appeal here is by the initial or contracting carrier. The action against it has no element of tort, but is an action for failure to perform its agreement of carriage. The undisputed testimony shows that appellee had sufficient money with which to pay his fare. Appellee could not increase his damages for a breach of contract by neglecting or refusing to do that which would lessen them. By refusing to pay his fare, he contributed to his injuries, which are the direct result of his own conduct, and not the breach of the contract for his carriage.

In the case of St. L. S. W. Ry. Co. v. Reagan, 79 Ark. 484, 96 S. W. 168, 7 L. R. A. (N. S.) 997, which was an action against the railway company for damages alleged to have

resulted from delay in the company furnishing free transportation to its hospital to its employé in violation of its agreement, the action was held to be one on contract, and the court said it had none of the elements of a tort. On the measure of damages, at page 489 of 79 Ark., page 169 of 96 S. W., 7 L. R. A. (N. S.) 997, the court said: "When a party has the money with which to purchase a ticket, the natural and ordinary damages which would result from a breach of a contract to give him free transportation would be the price of the transportation agreed to be furnished. If plaintiff in the case had the money with which to have purchased a ticket, we see no reason why he should be allowed to recover damages for failing to furnish a ticket beyond the price of the ticket." If appellee had been ejected from the train of the carrier with whom he made the contract, he would have had a right of action against it for breach of duty as a carrier, and his measure of damages, unless there was an element of malice, recklessness, or wantonness, would have included the humiliation that resulted from his expulsion from the train. Hot Springs Railroad Company v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913. But, where the eviction was made by the connecting carrier, the question is one of contract only, and appellee can recover only the extra fare demanded by the payment of which all other damages could have been prevented. The undisputed testimony shows that appellee paid the sum of 65 cents to complete his journey, and this is all that he is entitled to recover under the contract.

A remittitur will cure this error, and, if appellee will within two weeks remit the excess of the judgment over 65 cents, judgment will be entered here for that amount; otherwise the cause will be remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. MYZELL.

(Supreme Court of Arkansas. July 6, 1908.)

1. APPEAL AND ERROR—OBJECTIONS IN TRIAL COURT—EXCLUSION OF TESTIMONY—OFFER OF PROOF—NECESSITY.

Error cannot be predicated on the refusal of the court to permit witnesses to answer as to a particular matter where no offer was made to show what the witnesses would answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1282.]

2. EVIDENCE—ADMISSIBILITY—SIMILAR ACTS.

In an action by a passenger for injuries alleged to be due to the misconduct of the defendant's train auditor toward him when he gave evidence of being intoxicated, evidence that his conduct was boisterous or dangerous on other occasions would not be pertinent, where it was not shown that the auditor knew that he was in the habit of so conducting himself.

3. DAMAGES—INSTRUCTIONS—EXEMPLARY AND COMPENSATORY DAMAGES.

In an action for injuries to a passenger alleged to be due to the misconduct of defendant's

train auditor toward him, the jury were instructed that, if they found for plaintiff, they should assess his damages in any sum not exceeding \$500 as they might believe from the evidence would compensate him for the physical pain and mental anguish and humiliation they might believe from the evidence he had suffered, and, if they further found that the auditor acted willfully and maliciously when he inflicted the injuries, they might give additional exemplary damages in any sum which they believed proper, not exceeding \$1,400. Held, on objection, that the instruction told the jury that they might award damages in any sum not exceeding the respective amounts sued for, that in so far as the instruction related to compensatory damages it was not objectionable, but that as to exemplary damages it was erroneous, because it put the assessment of such damages at large, restrained only by what the jury might deem proper, when their assessment "must be commensurate with the wrong done as shown by the evidence adduced."

4. SAME—PUNITIVE DAMAGES—BASIS OF ACTION.

The element of willfulness or conscious indifference to consequences from which malice may be inferred is necessary to sustain an action for punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 193-198.]

5. CARRIERS—INJURIES TO PASSENGER—MISCONDUCT OF TRAIN AUDITOR—EXEMPLARY DAMAGES.

In an action by a passenger for injuries alleged to be due to the misconduct of defendant's train auditor toward him, evidence examined, and held to show that the auditor's conduct, while a natural, though improper, result of plaintiff's behavior, fell short of the elements of wantonness or willfulness from which malice is inferred as the basis of an action for exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1341-1343.]

6. SAME—COMPENSATORY DAMAGES—EXCESSIVENESS OF VERDICT.

In an action for injuries to a passenger alleged to be due to the misconduct of a train auditor toward him, it appeared that an altercation arose between them over the fare, the auditor used considerable force in setting him down in his seat, and as a result thereof he was somewhat injured and caused to suffer pain in his hand, and was otherwise bruised, that the auditor talked roughly to him, and, as he got off, grabbed him by the arm and told the town marshal that he wanted him to take charge of him as being drunk and disorderly. Held, that a verdict for \$500 as compensatory damages was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1344, 1345.]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by R. P. Myzell against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, and reversed in part.

S. H. West and Bridges, Wooldridge & Gantt, for appellant. Jas. B. Gray and Trimble, Robinson & Trimble, for appellee.

HILL, C. J. Myzell was in Pine Bluff, having his hand treated for a cancer thereon, and took a train on appellant railroad from that city to his home at England. He paid the train auditor a cash fare, as he thought, to England, the auditor thought to Sherrill,

an intermediate station; and after passing Sherrill an altercation arose between him and the auditor as to whether he had paid to England or only to Sherrill. The count of the money showed the auditor was right in this controversy. The occurrence after he had paid a second time was thus described by Mr. Myzell: "I said: 'I want to drop a thought with you. If you have pulled me for two fares, somebody will think of this some other time'—and he said, 'Sit down,' and I said, 'All right,' and he put his hands on me, and I sat down; but I said, 'I want to jog your memory about this,' and he jammed me down and set me down wrong." The auditor evidently used considerable force in "setting him down," and as a result of this violent seating of him he was somewhat injured and caused to suffer pain in his afflicted hand and otherwise bruised, from all of which he suffered considerable pain for some time. The auditor also talked roughly to him. Myzell describes himself as being "gentlemanly funny" from the effect of drink which he had imbibed in Pine Bluff, and, as some of the witnesses said, which he continued to imbibe on the train. Some of the witnesses say that he was bolsterous, while others say that he was not. It is undisputed that he gave evidence of being in an intoxicated condition. When Mr. Myzell got off the train at England, the auditor grabbed him by the arm, and told the town marshal there that he wanted him to take charge of him as being drunk and disorderly on the train. The marshal asked him if he had a warrant, and he said no, and that ended the matter. Myzell brought an action for compensatory and punitive damages and recovered \$500 for compensatory and \$800 punitive, and the railroad company has appealed.

The first error that the appellant urges is the refusal of the court to permit witnesses to answer as to what Myzell's conduct was when he was drinking. In the first place, there was no offer made to show what the witnesses would have answered had the court permitted them to have done so; and, in the second place, if it was shown that the witnesses would have testified that his conduct was bolsterous or dangerous on other occasions, it would not have been pertinent here as it was not shown that the auditor knew that he was in the habit of conducting himself in such a manner. The offered testimony was wholly foreign to the issue.

The next objection is to instruction No. 3, which is as follows: "If you find for the plaintiff, you will assess his damages in any sum, not exceeding \$500, as you may believe from the evidence will compensate him for the physical pain and mental anguish and humiliation you may believe from the evidence he has suffered; and, if you find for the plaintiff and further find that the auditor on the train acted willfully and maliciously when he inflicted the injuries (if any were inflicted), you have a right to give the plain-

tiff exemplary damages in addition to compensatory damages, in any sum which you believe proper, not exceeding fourteen hundred dollars." The objection is that it tells the jury that they may award damages in any sum not exceeding the respective amounts sued for. In so far as the instruction relates to compensatory damages, it is not objectionable, as it plainly tells the jury that their assessment must be for such amount, not exceeding \$500, as they believe from the evidence will compensate him for his physical pain and mental anguish and humiliation which they may believe from the evidence he has suffered. This form of instruction has been before the court several times. *For-dyce v. Nix*, 58 Ark. 136, 23 S. W. 967; *St. L., I. M. & S. Ry. Co. v. Boyles*, 78 Ark. 374, 95 S. W. 783; *St. L., I. M. & S. Ry. Co. v. Snell*, 82 Ark. 61, 100 S. W. 67. But the instruction as to exemplary damages is erroneous. It tells the jury that they have the right to give the plaintiff exemplary damages in addition to compensatory damages in any sum which they believe proper, not exceeding \$1,400. This is putting the assessment of exemplary damages at large, restrained only by what the jury may believe proper, when their assessment "must be commensurate with the wrong done as shown by the evidence adduced."

The next error alleged is that there was no evidence to sustain the verdict for punitive damages. The court fails to find "that element of willfulness or conscious indifference to consequences from which malice may be inferred," which is a necessary basis to sustain an action for punitive damages. *Railway Co. v. Hall*, 53 Ark. 7, 13 S. W. 138; *St. L., I. M. & S. Ry. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 1114. Giving to appellee's testimony its strongest probative force, and the utmost that can be found is that the train auditor unnecessarily used some force with Mr. Myzell, both at the time he seated him and at the time he grabbed his arm, and tendered him to the town marshal. But unquestionably Mr. Myzell gave the auditor cause for irritation, and his conduct through the influence of drink was such as would in a measure excuse the auditor's conduct, viewing Myzell's conduct solely in the light of his own testimony. The auditor's conduct was a natural, although improper, result of Myzell's insulting and inebriate behavior, but fell short of containing those elements of wantonness or willfulness from which malice is inferred, which constitutes the basis of an action for exemplary damages.

It is urged that the verdict for each kind of damage is excessive. So far as the verdict for compensatory damages is concerned, the court is satisfied that it does not exceed a proper limit. Mr. Myzell was evidently hurt. He was in a condition where an injury to his afflicted hand would become very painful, and might become serious. The auditor publicly humiliated him, which he would natural-

ly feel; an element to be considered as well as the actual pain inflicted.

The judgment for compensatory damages is affirmed. The judgment for exemplary damages is reversed, and the cause as to that dismissed.

UNION SAWMILL CO. v. FELSENTHAL LAND & TOWNSITE CO.

(Supreme Court of Arkansas. July 6, 1908.)

1. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—OBLIGATION TO CONVEY—CONDITION PRECEDENT—RIGHT OF WAY.

Where the owner of land agrees to convey a right of way for a tramroad, and the second party to the agreement acts upon it and constructs the tramroad, the second party becomes entitled to a deed to the right of way; but if, as a condition precedent to receiving such deed, the right of way was to be located by the party, the right to a conveyance does not accrue until performance of such condition precedent.

2. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—FINDING OF COURT.

A finding on conflicting evidence gives credence to the contention of the party in whose favor the finding is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

3. EJECTMENT—SUFFICIENCY OF EVIDENCE.

Evidence in an action of ejectment considered and held to support the finding for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 277-298.]

4. SAME—ISSUE.

In an action of ejectment against a sawmill company to recover possession of land occupied by the company with a tramroad, the defense was an agreement by plaintiff to convey a right of way for the tramroad, and plaintiff attempted to show a condition precedent to such conveyance which was not performed. Held, that it was immaterial whether the conveyance was to be made to plaintiff or another company owned by practically the same persons and having the same officers, as the nonperformance of the condition precedent would entitle neither to the conveyance.

5. SAME—DEFENSES.

A landowner who stands by and sees a railroad constructed on his lands by a company having the power of eminent domain, without preventing the construction, acquiesces in such use of his land and cannot recover the land in ejectment, but is remitted to an action for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 114.]

6. SAME—GROUNDS OF ACTION—LAND OCCUPIED BY TRAMROAD.

Where land is taken by a private corporation not possessing the right of eminent domain, and a tramroad is built thereon to be used in the private business of the corporation, possession of the land may be recovered on nonperformance of a condition precedent to conveyance of the land by the owner.

Appeal from Union Chancery Court; E. O. Mahoney, Chancellor.

Action by the Felsenthal Land & Townsite Company against the Union Sawmill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bunn & Patterson, for appellant.

HILL, C. J. This is a controversy over a strip of land used as a right of way for a tramroad from Grand Marie Lake to a railroad in the town of Felsenthal. It is in use by the Union Sawmill Company, and claimed by it under promise of a deed thereto by the Felsenthal Land & Townsite Company, and occupancy of it under such promise. The townsite company says the promise was conditional and the condition was not performed.

The Union Sawmill Company and the Little Rock & Monroe Railway Company were owned by practically the same parties and managed by the same officers. The townsite company, the appellee, owned property in the town of Felsenthal, near which, at Huttig, the sawmill company was located. The said railroad company constructed a line of railroad from Huttig to Monroe, La.; "it being designed mainly as a feeder to the sawmill." In the summer of 1903 the railroad company began to extend its road northward to the El Dorado & Bastrop Railroad, upon which road Felsenthal is situated, apparently to cross the said railroad at a point a few miles west of Felsenthal. This brought on negotiations between the townsite company and the railroad and sawmill companies, which resulted in a written agreement between the townsite company and the railroad company, containing, among other things, an agreement to give a right of way through the lands of the townsite company, which right of way was given and the road constructed thereupon; but that did not cover the right of way now in controversy. In 1904 the work on the right of way for a tramroad, the property in controversy, was begun, either by the railroad company or the sawmill company. As these companies were managed by the same persons, it did not appear upon which account the work was done; but the secretary of the sawmill company says the railroad company built part of it, and the sawmill company extended it afterwards. While this work was progressing, the manager of the townsite company directed that the work be stopped, which was done for a day, and as a result of this stoppage a meeting was brought about between representatives of the townsite company and of the sawmill and railroad companies, which meeting was held at Camden at the office of attorneys who represented both companies except where their interests were adversary. The testimony conflicts as to whether a positive agreement was reached at that time for a conveyance of the land to the railroad company or the sawmill company for the tramway in controversy by the townsite company, or whether an agreement was reached that the conveyance would be made after the location of the tramway was agreed upon by Mr. Ramsey, representing the townsite company, and the engineer of the railroad company. The testimony is in irreconcilable conflict on this point, doubtless due to a misapprehension of what actually occurred. One of the attorneys who was called by appellant, and who

was probably in a position to be more unbiased than some of the other witnesses, stated: "The proposition in its simple form was simply this: The Felsenthal Land & Townsite Company agreed to give the right of way. There was no definite time fixed when the deed should be executed. It was agreed that the track should be located down near the lake by Mr. Ramsey and the engineer of the Little Rock & Monroe Railway Company. While there was a great deal of discussion, that was the conclusion of it." Mr. Ramsey says: "It was fully understood that they were to have a right of way of 25 feet, parallel with the right of way of the El Dorado & Bastrop Railway, and joining it down to the east end of the corporate limits, from that point, and as far as they wanted to go down the lake. The right of way was to be settled by myself, representing the townsite company, and the engineer of the Little Rock & Monroe Railway Company." And, furthermore, he says that he was never called upon by the engineer or any one else to select the route. He says further that the representatives of the townsite company distinctly declined to make any deed until the right of way had been agreed upon by the engineer and himself. On the other side, Mr. Scott, who was secretary and treasurer of the sawmill company, testifies that an agreement was reached to give the right of way for the proposed tramway, and the making of the deed deferred only because Mr. Felsenthal had to make some further adjustments with the El Dorado & Bastrop Railroad about changing their right of way before he could make this deed. He says that after the meeting was adjourned he showed Mr. Ramsey a plat of the line which had been proposed, and Mr. Ramsey agreed that it would be all right for them to go ahead and build the line to the lake and along its west bank, as proposed, and cautioned them to so construct the same that it would not interfere with wagons getting to and from the landing.

This summary of the testimony of these witnesses represents the varying views that were given of the result of the conference. If Mr. Ramsey agreed to the line as prepared on paper, and the company acted upon his agreement and constructed it, then it would certainly have been entitled to a deed to the right of way, and an equitable title would have been conferred without the deed. If Mr. Ramsey's and the engineer's agreement to the location of the tramroad was a condition precedent to the railroad or sawmill company obtaining title to the right of way for the tramroad, then no title passed until that condition was performed.

The finding in favor of the townsite company gives credence to the latter version of the agreement, and it cannot be said to be against the preponderance of the evidence. It is immaterial whether the deed was to be made to the railroad company or to the sawmill company. There is much testimony on

this point; but it is unimportant, for, if the condition precedent was not performed, neither acquired title to the property. After the Camden conference, the tramroad was constructed. It extended from the Little Rock & Monroe Railroad to the Grand Marie Lake, and along the bank of the lake for a short distance, affording a connection with the lake, an arm of the Ouachita river, to haul logs therefrom to the mill. In 1905 the parties owning the railroad company sold their entire interest in it to the St. Louis, Iron Mountain & Southern Railway Company, which took over the property; but in that sale it was stipulated that the tramroad in controversy should remain the property of the sawmill company. The steel for it had been furnished by the railroad company, and in adjusting the accounts this and whatever rights the railroad company had in the tramway passed to the sawmill company. The railroad company has passed entirely out of the matter, and was dismissed from the suit, in which it had been joined. Taking the finding of the chancellor as settling the conflict in the evidence that neither the railroad company nor the sawmill company became entitled to a deed to the right of way, then the sawmill company's use of this tramroad was unauthorized, and that leaves only the question of whether the townsite company can recover the land, or whether it is remitted to an action for damages; the appellant insisting that the townsite company cannot recover the land, and relying upon *W. & O. V. Ry. Co. v. Garrison*, 74 Ark. 136, 85 S. W. 81, to sustain this contention.

The road considered in the *Garrison Case* was first a wooden tramway, but afterwards the right of way was conveyed to a railway company, and it laid an iron and steel track in place of the wooden tramway, and the tramroad was converted into a railroad, a public carrier. The court held that the conveyance for the right of way for a wooden tramway did not convey an easement for a railroad, but held that, as it was a railroad which was constructed, and the owner had stood by and acquiesced, she was estopped from maintaining ejectment for the entry, and was restricted to a recovery for damages sustained. That a landowner who stands by and sees a railroad constructed on his land, without enjoining or otherwise preventing the construction, acquiesces in such use of his land, and is remitted to an action for damages, is well settled. It was fully discussed in *Reichert v. Railway Co.*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183, and applied in *Organ v. M. & L. R. Ry. Co.*, 51 Ark. 235, 11 S. W. 96, and again in *McKennon v. St. L., I. M. & S. Ry. Co.*, 69 Ark. 104, 61 S. W. 383, and next in the *Garrison Case*, supra. Again it received application and explanation in *A. L. & G. Ry. Co. v. Kennedy*, 84 Ark. 364, 105 S. W. 885. The principle is thus succinctly stated by the Su-

preme Court of the United States: "It has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." *Roberts v. Northern Pac. Ry. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873. An examination of the authorities above cited will show that it is, owing to the public nature of the enterprise and the right of the railroad company to take the land under the power of eminent domain and the statutory remedies afforded a landowner, that this principle was worked out. In the absence of these elements—that is, where the land is taken by a private corporation not possessing right of eminent domain—it is not different from the taking of land by any other private person or corporation, and is mere trespass.

In this case, part of the tramway was built by the railroad company. Its extension and completion, however, was done by the sawmill company. It has never been used by the railroad company other than the railroad company may have permitted the use of its locomotives and rolling stock to haul logs to the sawmill; but in so doing it was not acting as a public carrier. The railroad company was owned and controlled by the sawmill company, and it is undisputed that the sole use of this tramway has been as a passage to haul logs from the lake to the sawmill. It has been devoted to no public use.

The judgment is affirmed.

BROWN et al. v. FRENKEN.

(Supreme Court of Arkansas. July 13, 1908.)

1 JUSTICES OF THE PEACE—APPEALS—"PARTY AGGRIEVED"—TRUSTEE IN BANKRUPTCY.

A party aggrieved within Kirby's Dig. § 4665, authorizing any person aggrieved by a judgment of a justice to appeal, is one whose pecuniary interest is affected by the judgment or whose right of property may be established or devested thereby, and a trustee in bankruptcy of a defendant in replevin may appeal from an adverse judgment.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 759-7570.]

2 BANKRUPTCY—TRUSTEE IN BANKRUPTCY—TITLE TO PROPERTY.

A trustee in bankruptcy holds the title to the bankrupt's property in trust for those beneficially entitled to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 193.]

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Action by Nick Frenken against the Harden-

Dunham Lumber Company. From a judgment dismissing an appeal to the circuit court, taken by Ben A. Brown, trustee in bankruptcy of defendant, he appeals. Reversed and remanded.

Henderson & Campbell, for appellant. Nick Frenkin, for appellee.

HART, J. On June 6, 1906, Nick Frenken instituted a replevin suit against the Harden-Dunham Lumber Company before Jno. F. James, a justice of the peace in Randolph county, Ark., to recover the possession of one circular saw and one rip saw. The case was continued from time to time until September 6, 1906, when judgment by default was rendered in favor of the plaintiff. On the 24th day of September, 1906, the following affidavit for appeal was filed in the cause (caption omitted):

"Affidavit for Appeal. Comes now Ben A. Brown, who states to the court that he is the regularly qualified and appointed trustee in bankruptcy of the estate of George W. Harden and A. M. Dunham, partners as Harden-Dunham Lumber Company, which said firm was adjudged to be bankrupt in the United States court for the Northern Division of the Eastern District of the state of Arkansas; that he has filed his bond as such trustee aforesaid, and is now acting in such capacity. He states that as such trustee he has succeeded to all the rights, privileges, and equities of the said firm in this suit, and that he believes that he, as trustee, has a meritorious defense to this suit. He therefore prays that he, as such trustee, be permitted an appeal in this case to the circuit court of Randolph county, Ark., and states that such appeal is taken, not for the purpose of vexation or delay, but that justice may be done. [Signed] Ben A. Brown, Trustee in Bankruptcy of Estate of Harden-Dunham Lumber Co.

"Subscribed and sworn to before me on this the 24th day of September, 1906. John F. James, J. P."

Indorsed:

"Filed, examined, found regular and appeal granted on this 24th day of September, 1906. John F. James, J. P.

"Filed October 24, 1906. J. W. Goling, Circuit Clerk."

Transcript was properly made and filed in office of the clerk of the circuit court October 24, 1906. At the July term, 1907, of the circuit court, appellee moved to dismiss the appeal because said Ben A. Brown was not a party to the suit at the time the judgment was rendered by the justice of the peace. Thereupon the court dismissed the appeal, to which appellant saved exceptions and prayed an appeal.

Section 4665 of Kirby's Digest provides that any person aggrieved by any judgment rendered by a justice of the peace may take his appeal therefrom to the circuit court. "A party aggrieved is one whose pecuniary interest is directly affected by the decree or one

whose right of property may be established or divested by the decree." *Wiggin v. Swett*, 6 Metc. (Mass.) 197, 39 Am. Dec. 716. The party aggrieved is the person who would have had the property if the judgment alleged to be erroneous had not been rendered. *Adams v. Woods et al.*, 8 Cal. 306; *Veazle Bank v. Young*, 53 Me. 560; *Betts v. Shotton*, 27 Wis. 667; *Estate of Jacob Girard Koch, Deceased*, 4 Rawle (Pa.) 268; *Jenkins v. International Bank*, 97 Ill. 568. The trustee in bankruptcy is not a stranger, but holds the title to the bankrupt's property in trust for those beneficially entitled to it. It is clearly established by the authorities, *supra*, that a party aggrieved by a judgment has a right of appeal, though he is not a party to the record. If denied the benefit of an appeal by their trustee, the persons beneficially interested in the estate of the bankrupt would be concluded by a judgment from which they had no opportunity to appeal.

Reversed and remanded.

DONIPHAN LUMBER CO. v. CASE.

(Supreme Court of Arkansas. July 13, 1908.)

1. ADVERSE POSSESSION—ACQUISITION OF TITLE BY PRESCRIPTION.

Actual adverse possession of land for about 12 years is a complete investiture of title under the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

2. SAME.

The high bluff of a river, fixed in low places so as to turn stock, is a natural barrier, and, where completing the inclosure in connection with fences, is sufficient evidence of adverse possession to support title by limitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 101.]

3. TRESPASS—CUTTING AND REMOVAL OF TIMBER—EVIDENCE—SUFFICIENCY.

Evidence in an action for cutting and removing timber, variously estimating the value thereof from \$2 to \$7 per 1,000 feet, was sufficient to support a verdict, the amount of which shows that the jury either fixed the value at \$2 per 1,000 and allowed treble damages for willful trespass, or at \$6 per 1,000, and allowed single damages.

Appeal from Circuit Court, Cleburne County; Brice B. Hudgins, Judge.

Action by Ella A. Case against the Doniphan Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Action instituted by Ella A. Case against Doniphan Lumber Company to recover damages for cutting and removing growing timber from plaintiff's land. The complaint alleges willful trespass by defendant, and claims treble damages under the statute. Defendant in its answer denied that the trespass had been willfully committed, and denied plaintiff's alleged title to or possession of the lands in question. The plaintiff re-

covered judgment for \$162.86, and defendant appealed.

Mitchell & Thompson, for appellant. Geo. W. Reed, for appellee.

McCULLOCH, J. The court refused to give the instruction requested by appellant, and submitted the case to the jury upon the following instruction: "The court instructs the jury to find for the plaintiff and to assess her damages at three times the value of the timber in the tree cut by the defendant herein, unless you further find that at the time the timber was cut the defendants or their agents had probable cause to believe and did believe at the time the timber belonged to the defendant, in which event you will assess the damage at the value of the timber cut by the defendants."

Appellee introduced in evidence a deed in proper form executed to her in the year 1891 by one Moore purporting to convey the land from which the timber was cut, and she testified that she at once took possession of the land so conveyed and fenced it, and that her actual occupancy continued up to about four years before the trial of the case. She testified that she inclosed the land with other lands owned by her by running fences from the main farm on which she resided to Little Red river, and by fixing the low places on the bluff of the river so as to prevent the passage of stock. This testimony was not contradicted, and stands undisputed in the record. Another witness introduced by appellant testified that the fences were so constructed, but the witness did not know that the low places in the river bluff were fixed so as to turn stock. He said that that might be true but he did not know. According to this undisputed testimony, appellee was in actual adverse possession of the land for about 12 years, and that amounted to complete investiture of title under the statute of limitations. The high bluff of the river, repaired in low places, constituted a natural barrier completing in connection with the fences, the inclosure, and was sufficient evidence of adverse possession so as to ripen the title by limitation. *Dowdle v. Wheeler*, 76 Ark. 521, 89 S. W. 1002. The court was therefore correct in treating appellee's title to the land as beyond dispute and in submitting to the jury the sole question as to the amount of damages. It was also undisputed that appellant cut and removed a certain quantity of timber from the lands. The witnesses estimated the value of the timber variously from \$2 to \$7 per 1,000 feet. The amount of the verdict of the jury shows that they either fixed the value at \$2 per 1,000 and allowed treble damages for willful trespass, or at \$6, and allowed single damages. The evidence was sufficient to justify either conclusion.

Affirmed.

IRWIN v. NICHOLS, DEAN & GREGG.

(Supreme Court of Arkansas. July 6, 1908.)

1. CONTRACTS—CONSTRUCTION—CONSTRUCTION AS A WHOLE.

A contract must be construed as a whole and read so as to make it intelligible, if it can be done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11. Contracts, § 743.]

2. SAME—OMISSIONS—SUPPLYING WORDS.

Words omitted by inadvertence from a written contract may be supplied by construction, if the context shows what words are omitted.

3. SAME.

Where a letter relied on as a contract of employment stated: "We are willing to allow you 10 hours for each day that we work a full day both winter and summer but we can promise to give you work at \$2.50 per day when the mill is not running as we cannot afford it however we do not expect for the mill to stand much of the time"—the omission of the word "not" before the word "promise" is a plain inadvertence which the contract itself readily supplies.

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Action by Fred Irwin against Nichols, Dean & Gregg. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action brought by appellant to recover from appellee \$189.75 as balance due him under a contract for labor. He alleges in his amended complaint: That defendant is a Minnesota corporation doing business in this state, having its principal place of business for this state at Pocahontas, in Randolph county. That defendant is engaged in sawmilling and allied businesses. That in October, 1906, plaintiff was in the employ of a sawmill company at Knobel, Ark., getting \$3 a day for each day he worked. That on October 15, 1906, he received from defendant, through their Pocahontas office, a proposition in writing whereby defendant proposed to employ plaintiff at their Pocahontas sawmill and pay him \$2.50 a day straight time. A copy of defendant's written proposition was filed with complaint as "Exhibit A." That plaintiff immediately accepted said proposition by means of a letter written and deposited by him in the post office at Knobel inclosed in an envelope sealed and sufficiently stamped for carriage to defendant's Pocahontas office, known as "Pocahontas Bending Works," to whom the letter was plainly addressed. That said letter of acceptance is not in plaintiff's possession. That pursuant to the contract thus made plaintiff gave up his employment at Knobel, and at great expense to himself moved to Pocahontas, where he offered himself ready at all times to perform the duties assigned him by the defendant from November 1, 1906, until July 3, 1907. That during a large portion of this time defendant's mill was not run, and, although he held himself ready at all times to perform such duties as defendant should assign him, yet defendant has refused, and still refuses, to pay him for any of the time defendant's sawmill has been idle. Plaintiff further alleged:

That it was the promise of steady employment, whereby he would not have to lose his wages during breakdowns or times of high water, that induced him to accept defendant's offer of employment; that he was receiving a greater price per day at Knobel than he was promised by defendant, but because at Knobel he had to lose the time the mill was idle, while he was promised straight time by defendant, he left his job at Knobel and accepted defendant's offer; and that he has been paid for all his time while in defendant's employ \$335.25, while he was in such employment for 210 working days for which he is entitled to \$2.50 a day, making a total of \$525, leaving a balance due him by defendant of \$189.75, for which he prayed judgment.

Exhibit A to the amended complaint is in words and figures as follows: "Pocahontas Bending Works. Manufacturers of Wooden Wagon Stock, Oak and Hickory Spokes, Gum and Hardwood Lumber. J. C. Miller, Manager. Pocahontas, Arkansas, Oct. 15, 1906. Fred Irwin, Knobel, Ark.—Dear Sir: We have your letter of the 14th and note that you have decided to come back and work for us, and we are willing to allow you 10 hours for each day that we work a full day both winter and summer but we can promise to give you work at \$2.50 per day when the mill is not running as we cannot afford it however we do not expect for the mill to stand much of the time. Please answer this and let us know about what time to expect you. Yours truly, [Signed] Pocahontas Bending Works, By J. C. M."

Defendant demurred to the amended complaint on the grounds: First, "that it states no cause of action against defendant"; and, second, "that the action being founded on an alleged written contract for straight time, and a copy of the alleged contract being filed, defendant submits that said contract so pleaded shows on its face that plaintiff has no cause of action, and that no breach of such contract is shown by complaint." The court sustained the demurrer, and dismissed plaintiff's amended complaint and adjudged the costs against plaintiff. To this ruling, plaintiff saved due exceptions and appealed to this court.

Henderson & Campbell, for appellant. Witt & Schoonover, for appellee.

WOOD, J. (after stating the facts as above). The letter which appellant exhibits and makes the basis of his complaint is fatal to his cause of action. We must construe it as a whole, and, considering all of its parts, read it so as to make it intelligible, if it can be done. Kelly v. Dooling, 23 Ark. 582; Railway v. Williams, 53 Ark. 58, 13 S. W. 796. For we must assume that the author of the letter intended that it should convey some meaning. "Words which are omitted by inadvertence from a written contract may be supplied by construction at law, without resort to reformation, if the context shows what words are omitted."

2 Page on Contracts, § 1125; *Richellen Hotel Co. v. Inter M. E. Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234.

The omission of the word "not" before the word "promise" is a plain inadvertence or clerical misprision which the contract itself readily and naturally supplies. Otherwise the different parts of the letter are not only contradictory, but absurd and meaningless. No one could read the letter without seeing that the word "not" was intended to be used before the word "promise." *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Slisson v. Donnelly*, 36 N. J. Law, 432; 9 Cyc. 585, note 30.

The court did not err therefore in sustaining the demurrer, and, as appellant did not offer to amend, the judgment dismissing the complaint is affirmed.

SIBLY v. THOMAS.

(Supreme Court of Arkansas. June 29, 1908.)

TAXATION—SALE—EXCESSIVE AMOUNT—EFFECT.

Where land is sold for taxes, penalty, and costs, but an item not warranted by the law is included in the costs, the sale is void, and one claiming thereunder cannot recover from another holding a title, which is prima facie valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1351.]

Appeal from Lonoke Chancery Court; Jesse C. Hart, Chancellor.

Action by George Sibly against H. Thomas for possession of certain land and to quiet the title thereto, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

"The appellee, H. Thomas, claims title to the land in controversy under a donation deed executed by J. F. Richie, commissioner of state lands, on the 10th day of March, 1898, the statute of limitation of two years' actual possession, and the statute of limitation of seven years. The undisputed facts are:

"The N. W. $\frac{1}{4}$ of section 11, 1 S., 8 W., situated in Lonoke county, Ark., was by the collector of said county sold to the state at the delinquent tax sale of June 10, 1878, for the taxes of 1877, and the same, not having been redeemed within the time required by law, was certified by the clerk to the commissioner of state lands as state land under the law existing and in force at that time.

"That afterwards, to wit, on the 9th day of January, 1882, under a certain proceeding (commonly known as a suit under the overdue tax law) then pending in the Lonoke chancery court, viz., *Lonoke County v. N. E. S. E. section 27, 5 N., 8 W.*, and other lands embracing the N. W. $\frac{1}{4}$ of section 11, 1 S., 8 W., a decretal judgment was rendered in said cause, and, among other things, it was decreed that the sale to the state of the N. W. $\frac{1}{4}$, section 11, 1 S., 8 W., for the taxes of

1877, was null and void, and all certificates and evidences of title made to the state for said lands was annulled, and the taxes accrued thereon was declared a lien on said land.

"It was further decreed that, if said taxes were not paid within 20 days, Wm. Goodrum, commissioner appointed for that purpose, was ordered to sell the same. That said lands were not redeemed, and they were afterwards sold by the said Wm. Goodrum, commissioner, as directed under said decree, to the state of Arkansas. That Wm. Goodrum made his report of said sale to the court, and the same was by the court duly approved and affirmed.

"On January 10, 1895, the commissioner of state lands for the state of Arkansas issued his donation certificate No. 3,441 to the appellee for the N. W. $\frac{1}{4}$, section 11, 1 S., 8 W., the same having been sold to the state at the overdue tax sale of March 30, 1882. That after H. Thomas had procured said certificate he immediately went upon said land, built a dwelling house thereon, and began to clear up and improve the same. That he afterwards filed the certificate of the county surveyor, and the proof of the improvements in the manner and form required by law in the office of the commissioner of state lands within the time provided by law, and the commissioner of state lands executed to him a deed on the 10th day of March, 1898. After he had procured his deed, he leased the land—in 1898—to his son for a period of three years. During the year 1898 the house he had built was destroyed by fire. Later the fence around the place was destroyed by fire. Mr. Boyne, witness for appellant, states that for two years the land was not in cultivation. Appellee states that only one year it was not cultivated, after the house and fence were destroyed by fire, while it was in charge of his son. Be that as it may, there was no abandonment of the possession of this property, and not a particle of proof upon which to base such an argument. Appellee returned and took actual possession of the premises at the expiration of the three years, to wit, on March 5, 1901, and has continuously resided with his family on the same, during which time he has cleared up 50 acres of land, built another dwelling house, refenced the premises, built corncribs, stable, and other necessary outbuildings.

"The appellant, Geo. Sibly, claims title under a tax deed executed by W. H. Lowman, county clerk of Lonoke county, Ark., on the 14th day of March, 1894; that the said tract of land was sold on the 13th day of June, 1892, for the taxes of 1891, at which tax sale one S. B. Webster became the purchaser, and a certificate of purchase was issued to him by the collector, which was afterwards assigned by him to the said George Sibly, and a deed to said land was executed to him as the assignee of the said Webster; that at the tax sale of 1892, exclusive of the taxes, the

costs charged against the said land, and for which it was sold amounted to 85 cents.

"Upon this testimony alone appellant asked that appellee be dispossessed, made to pay him damages; that he be put in possession and his title under his tax deed be quieted."

After hearing the evidence, the court held and decreed that appellee was the owner of the land in controversy, and that the sale for taxes of 1891 was illegal and void, and canceled the same. Defendant, Sibly, appealed.

Geo. Sibly, for appellant. Trimble, Robinson & Trimble, for appellee.

BATTLE, J. (after stating the facts as above). The title of appellee to the land in controversy was at least prima facie valid. The appellant, Sibly, claims title to it under a sale made on the 13th day of June, 1892, for the taxes of 1891 and penalty, and costs aggregating 85 cents. It was so sold before the enactment of the act of April 7, 1893, allowing 25 cents for certificate of purchase to be taxed as costs of sale and was sold for 25 cents too much costs (Sibly v. Cason [Ark.] 109 S. W. 1007), and is void (Goodrum v. Ayers, 56 Ark. 97, 19 S. W. 97; Salinger v. Gunn, 61 Ark. 414, 33 S. W. 959; Cooper v. Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Darter v. House, 63 Ark. 475, 39 S. W. 358; Kirker v. Daniels, 73 Ark. 263, 83 S. W. 912).

Decree affirmed.

HART, J., being disqualified, did not participate.

TERRELL et al. v. WRIGHT.

(Supreme Court of Arkansas. July 13, 1908.)

1. NUISANCE—PUBLIC NUISANCE—NATURE OF INJURY—INJUNCTION.

Where the prosecution of a lawful business in the neighborhood of a dwelling house renders the enjoyment of it materially uncomfortable by smoke and cinders or noise or offensive odors, though not injurious to health, the carrying on of the business there is a nuisance, and it will be restrained; but a lawful business will not be interfered with on account of trifling or imaginary annoyance such as offend the taste or disturb the nerves of a fastidious person.

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to enjoin the operation of a planing mill on the ground that the same is a nuisance rendering the home of plaintiff uncomfortable, evidence held to justify a finding that the noise and smoke and cinders from the mill were no more than a mere inconvenience or a trivial annoyance, justifying the denial of relief.

Appeal from Ouachita Chancery Court; E. O. Mahoney, Chancellor.

Suit by R. H. Terrell and another against Jas. P. Wright. From a decree for defendant, complainants appeal. Affirmed.

H. S. Powell and Campbell & Stevenson, for appellants. Gaughan & Sifford, for appellee.

HILL, C. J. Terrell and Watts brought suit in chancery to enjoin Wright from operating a planing mill situated upon a lot owned by him, near which the plaintiffs had their residences, alleging that it was a nuisance, and rendered their homes uncomfortable by reason of its noise, smoke, soot, and cinders. The planing mill was located on the block between Jefferson and Jackson streets in the city of Camden. The Iron Mountain railroad is operated across the block, and the electric light plant is also on the same block, immediately west and adjoining the mill. California street is west of the electric light plant, and adjoins it. Plaintiff Watts lives on the block north of Jefferson street. Plaintiff Terrell lives on California street. One is north of the planer, and the other west. The railroad crosses California street at the electric light plant, and is between the residences of the plaintiffs. Near their residences is a place where locomotives take water from a water tank. There is a spur track from the railroad to the block where the planer is located. The planing mill is operated with steam furnished from the electric light plant. This suit was one against the owner of the planer, and did not include the electric light plant. The ground upon which the planer was built was used as a lumber yard by Mr. Wright before he built the planer. The mill is a comparatively small one, and the machines were not placed on floors, but upon the ground, upon concrete foundations, so as to make as little noise as possible. No whistle was used, and the machinery was operated not earlier than 7 o'clock in the morning, and not later than 6 in the evening. A large number of witnesses testified, on behalf of the plaintiffs, tending to support the allegations of the complaint, and quite as many, if not more, testified, on behalf of the defendant, tending to support the answer, which denied the allegations of the injurious effects of the planing mill on plaintiff's homes, and alleged it was no more noisy or objectionable than the electric light plant and the water tank where the locomotives frequently made much noise in blowing off steam, cleaning out cinder boxes, etc. The chancellor refused an injunction, and the plaintiffs appealed.

In *Powell v. Bentley & Gerwig Furn. Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53, the court said: "According to our settled notions and habits, there are convenient places, one for the home, and one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. The law cannot take notice of such inconvenience, if slight or reasonable, all things considered, but applies the common-sense doctrine that the parties must give and take, live and let live, for here extreme rights are not enforceable rights—at any rate, not by injunction." This defines the situation here. That this planing mill is highly objectionable to plaintiffs and their families is unquestion-

ably true; but that its operation is of such a nature as to deprive a normal person, living where plaintiffs live, of the comforts of home, or render living in such homes a positive discomfort, is not established by a preponderance of the testimony, and this is required before a lawful and useful business can be destroyed by a perpetual injunction. This subject was recently considered here in *Durfey v. Thalheimer*, 109 S. W. 519. The court approved this statement by Chancellor Zabriskie: "The law takes care that a lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person; but, on the other hand, it does not allow any one, whatever his circumstances or conditions may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, 'sic utere tuo ut alienum non lædas,' expresses the well-established doctrine of the law." After a review of the authorities upon the subject, he further said: "The law, then, must be regarded as settled that when the prosecution of a business, of itself lawful, in the neighborhood of a dwelling house, renders the enjoyment of it materially uncomfortable, by the smoke and cinders, or noise, or offensive odors produced by such business, although not in any degree injurious to health, the carrying on of such business there is a nuisance, and it will be restrained by injunction." *Ross v. Butler*, 19 N. J. Eq. 204, 97 Am. Dec. 654. Judge Cooley said, in *Gilbert v. Showerman*, 23 Mich. 448: "We cannot shut our eyes to the obvious truth that, if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. * * * Courts interfere by injunction against establishments such as mills and manufactures with great caution, and only in cases where the facts are weighty and important, and the injury complained of is of a serious and permanent character."

Numerous witnesses testified, with evident sincerity and conviction, that the noises were of such a persistent and unpleasant nature as to bring positive discomfort to persons living in homes situated as those of the plaintiffs, and to material discomfort and inconvenience from smoke and cinders, and, in short, testified to facts, which, if the true situation as felt by the normal person, would render a home situated as those of the plaintiffs uncomfortable and unbearable by reason of the noise and soot and smoke, thereby entitling the plaintiffs to their injunction. On the other hand, were as many or more witnesses, apparently of equal sincerity and conviction, who testified that the noise and smoke and cinders would not be more than a mere inconvenience or trivial annoyance, at

most, which is too slight a cause for the law to make the basis for abating a useful business. The chancellor found that the latter view of the controversy was sustained by the evidence, and it cannot be said that his finding is against the preponderance of the evidence. In fact, it is in accordance therewith, and with the principles announced in *Durfey v. Thalheimer*, *supra*.

The judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. RICHARDSON.

(Supreme Court of Arkansas. July 6, 1908.)

1. APPEAL AND ERROR—REVIEW—WEIGHT OF EVIDENCE.

The Supreme Court cannot pass upon the weight of evidence on a given issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. CARRIERS — PASSENGERS — PERSONAL INJURIES—QUESTION FOR JURY.

In an action for injury to a passenger caused by a jerking of a caboose as she was re-entering it, whether she was injured by a jerk or jar of great, unusual, and unnecessary violence, *held*, under the evidence, a jury question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1243, 1315.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injury to a passenger caused by a jerking of a caboose as she was re-entering it, whether she was guilty of contributory negligence on leaving her seat and going out on the back platform in the circumstances *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375, 1376.]

4. TRIAL — OBJECTION TO INSTRUCTIONS — WAIVER.

By confining an objection to an instruction to a specific ground, one waives all other objections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 691.]

Appeal from Circuit Court, Nevada County; J. M. Carter, Judge.

Personal injury action by Minnie Richardson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 6th day of November, 1906, plaintiff, a colored woman about 22 years old, took passage on defendant's local freight train at Gurdon to go to her home at Prescott. Beirne was a small station between these two places. The train stopped at Beirne, and plaintiff heard one of the train crew say to another that they would stop there about 30 minutes for the trainmen to get dinner. Plaintiff remained in the caboose 10 or 15 minutes after the train stopped, and then walked out upon the back platform. Plaintiff testified: That, after remaining on the platform a short time, she noticed that the train began to move, "ease off," as she expressed it; that she started back into the caboose; that, just as she turned and caught hold of the door, there

was a quick jar or jerk of the train, which threw her against the door, and she fell in the middle of the floor; and that she laid there a few minutes, then got up all out of breath, laid down on the seat, and remained there until they reached Prescott. She afterwards brought this action to recover damages for the injury. There was a trial and verdict for her in the sum of \$500. The other facts are sufficiently stated in the opinion. Defendant has appealed.

T. M. Mehaffy and J. E. Williams, for appellant. McRae & Tompkins and D. L. McRae, for appellee.

HART, J. (after stating the facts as above). There are three propositions presented for our consideration.

First. Was the appellee injured by a jerk or jar of great, unusual, and unnecessary violence?

A drummer named Hawley and plaintiff were the only persons in the car at the time the injury was received by the plaintiff. Hawley testified: That he was in the habit of riding on local freights, and that it was the heaviest jolt he ever got on a car; that it jarred the papers and a pencil off of the desk onto the floor, and threw him against the wall; that he saw plaintiff fall; that she scrambled around and managed to get upon the seat and lay down; and that the jar was caused by the engine backing cars to which it was attached against cars to which the caboose was attached. Appellee testified that she had never ridden on a freight train before, but that she knew that, when one began to move, the movement was always accompanied by a jerk or jar, and on this account she started into the caboose. The jar came after she had caught hold of the door, and it came with such violence that, although expecting it, she was thrown to the floor with great force. Appellant adduced testimony tending to show that there was not an unusual violence, but it is not our province to pass upon the weight of the evidence. Taking into consideration the testimony of Hawley, who had had considerable experience riding upon freight trains, and especially the one in question, coupled with the testimony of appellee that, although expecting a jar, she was jerked loose from her hold on the door and thrown with great violence on the floor, we are of the opinion that there was sufficient testimony to submit the question to the jury.

Second. Was the appellee guilty of contributory negligence in leaving her seat and going out on the back platform of the caboose at the time and under the circumstances under which it was done?

In the case of *Pasley v. St. L., I. M. & S. Ry. Co.*, 83 Ark. 22, 102 S. W. 387, the court said: "It cannot be said as a matter of law that every time a passenger on a freight train arises from his seat he is guilty of contributory negligence. It is only when his

standing is so protracted or uncalled for that it is unnecessary and imprudent that the question of his negligence will be taken from the jury." In the present case, appellee had heard one of the trainmen say that they would stop at the station for 30 minutes. The crew had left the train, and before hardly more than half the time before she expected them to return had elapsed, and before she had in fact seen any of the men come back to the train, it was suddenly started. Under these circumstances, the appellee being a young able-bodied woman, the question of her contributory negligence was, also, properly left to the jury.

Third. At the request of appellee, over the objections of appellant, the court gave the following instruction: "The care required by passengers is such as reasonably prudent persons exercise under the same circumstances. A passenger on a freight train is not absolutely required to sit at all times, and especially while the train is not in motion. They are, when the train is not in motion, entitled to notice of the starting of the train. So, in this case, if you believe from all the facts and circumstances in evidence the plaintiff was acting as a reasonably prudent person, she would be entitled to recover, although she was standing." Counsel for appellant now object to this instruction, because the court told the jury that appellee was entitled to notice of the starting of the train.

The objection is well taken had it been made at the trial in the court below, but appellant made a specific objection to the instruction in the trial court, as follows: "Because it was in direct violation of defendant's printed rules, and because the proof does not show that the plaintiff was on the platform through necessity or for convenience." Counsel for appellant, having confined his exception to the grounds specified by him, has waived all other grounds. *Kahn v. Lucchesi*, 65 Ark. 371, 46 S. W. 729; *Stein v. Ashby*, 30 Ala. 363. Having already determined that the question of contributory negligence of the plaintiff in going out on the platform was properly submitted to the jury, it is sufficient here to say that appellant's specific objection to this instruction is not tenable.

The judgment is affirmed.

EOFF v. CITIZENS' BANK OF HARRISON.
(Supreme Court of Arkansas. July 13, 1908.)
PRINCIPAL AND AGENT—AUTHORITY OF AGENT
—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to support a finding that a party had authority to sign defendant's name to a promissory note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 420-429.]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Action by J. F. Eoff against the Citizens'

Bank of Harrison to cancel a note. Defendant filed a cross-complaint asking judgment on the note. Judgment for defendant, and plaintiff appeals. Affirmed.

Pace & Pace, for appellant. Crump, Mitchell & Trimble (J. W. Story, of counsel), for appellee.

HILL, C. J. On the 4th of January, 1904, there was presented to the Citizens' Bank of Harrison a note signed by Luther Eoff, D. A. Eoff, J. F. Eoff, and J. W. Ingram, for \$1,550, which was accepted by it. Various payments had been made upon said note, reducing it to about one-half of its face when this litigation began by J. F. Eoff filing suit to cancel the note, and the bank filing a cross-complaint asking judgment upon it. The sole question in the chancery court and on this appeal is whether D. A. Eoff had authority to sign the name of J. F. Eoff to said note.

D. A. Eoff was sheriff of Boone county for eight years, and then went into the business of buying and selling cattle with his uncle, J. F. Eoff, and continued to carry on the business in the name of said J. F. Eoff for four years. In 1900 he was re-elected sheriff, and when he again went into office he wound up his partnership with J. F. Eoff. There were 36 notes in the Citizens' Bank with J. F. Eoff's name signed upon them. The first was dated the 5th of March, 1898, and the last was the note in controversy. Upon 10 of these notes appeared the names of J. F. Eoff and D. A. Eoff. The others bore the names of J. F. Eoff and other members of the Eoff family, either B. B. Eoff, J. T. Eoff, L. F. Eoff, Flem Eoff, or J. J. Eoff, and in some instances some other parties besides members of the Eoff family were also upon the notes. They ranged in amounts from \$32 to \$1,550—the note in controversy. The next largest one was for \$1,365. The largest other one which D. A. Eoff was upon was for \$800, dated the 5th of August, 1901. The last one before the one in controversy upon which D. A. Eoff appeared with J. F. Eoff was the 20th of August, 1903, for \$315.

D. A. Eoff testified, in the Indian Territory, in two depositions. In the first one he said: That he had signed the name of J. F. Eoff to the note in controversy by his authority; that he had for years signed his name, and there had never been any question about his authority to do so; and that he frequently signed his name to notes in the Citizens' Bank and drew checks against his account there with his knowledge and consent. He gave a second deposition, which in a measure weakened the force of his former one; but in this he said he signed the name of his uncle, J. F. Eoff, to the note thinking he had permission to do so, but that he could not say whether he had specific permission to sign the particular note in controversy or not, as he did not remember the circumstances. Mr. O. M. Greene, president of the bank, testified: That the Eoffs had done business with

the bank since it started, in 1898. Several notes were presented containing the name of J. F. Eoff which had been signed by D. A. Eoff, and Mr. Greene spoke to J. F. Eoff about it, who said that that was all right, that both D. A. Eoff and his son L. F. Eoff were authorized to do so, and probably his nephew, B. B. Eoff, was likewise authorized to sign his name. That he never told him anything different, and the notes continued to come there signed, some by D. A. Eoff, and some by L. F. Eoff. The checks and notes were not signed "by" any one, but these different members of the family merely signed his name. They did it sometimes when he was present. Frank Greene, the cashier of the bank, testified to the custom of the different members of the Eoff family bringing in notes with J. F. Eoff's name signed there-to, which the bank always accepted, and all of which, except the note in controversy, had been paid. On the other hand, Mr. J. F. Eoff testified: That he did not sign the note in controversy, and never authorized it to be signed by D. A. Eoff. The only authority he ever gave D. A. Eoff to sign his name was when they were partners, and then only for it to appear that it was done by him. That the only note of which he had any knowledge that his name was signed by D. A. Eoff after he ceased to be a partner with him was the one for \$800, given in 1901. This he had authorized. Some of the other notes in the bank he says that he never went on. He admits that L. F. Eoff had authority to sign his name to checks and notes. He denied having a conversation with Greene in which he stated that D. A. Eoff had authority to sign his name, and he denied that he had received a message through any one telling him of notes bearing his name being in the bank.

This is the state of the testimony regarding all of the salient facts. The chancellor found in favor of the bank, and the question is whether his finding is contrary to the preponderance of the testimony. On the turning point of the case, there are really two witnesses to one: Mr. Greene as to the admission of J. F. Eoff's authority to D. A. Eoff to sign his name several years prior to the note in controversy, and Mr. D. A. Eoff's testimony that he had authority to sign his uncle's name to this particular note, as well as general authority to sign his name to notes and checks. It is true that Mr. D. A. Eoff's testimony is weakened by the second deposition, but still he does not withdraw the former statement. He says he cannot recollect the circumstances, but says that he thought he had authority when he did so. There is no explanation given of the preceding deposition, or the reason why his memory had so failed between the two depositions. The fact that 10 notes, at different times, bearing the name of J. F. Eoff, were tendered by D. A. Eoff and accepted by the bank where both of them did business, and in due time paid by D. A. Eoff, has more or less probative

force in deciding whether the note in controversy was signed under a general or special authority, or whether it was a forgery. The fact that his son and other members of his family were also in the habit of signing his name to checks and notes may have little force in this controversy, but still it shows a course of conduct not inconsistent with that testified to by D. A. Eoff in his first deposition.

The court is satisfied that the chancellor's finding is not against the preponderance of the testimony, and the judgment is affirmed.

GRIGGS v. SCHOOL DIST. NO. 70, RANDOLPH COUNTY, et al.

(Supreme Court of Arkansas. July 6, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—TEACHERS—CONTRACTS OF EMPLOYMENT.

Under Kirby's Dig. § 7615, providing that school directors shall hire teachers "and shall make with such teachers a written contract," the directors are not authorized to make any but written contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 296.]

2. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS OF EMPLOYMENT.

Parol evidence cannot be introduced to show a contract between school directors and a teacher different from a written contract authorized by Kirby's Dig. § 7615, providing that school directors shall make written contracts with teachers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1766.]

3. SAME—AMBIGUITY.

A written contract with a teacher specified that the teacher was engaged to teach "for a term of three months commencing on the 4th day of March, 1907," and was to be paid "the sum of \$40 for each school month." Held, that the contract was unambiguous, and in an action by the teacher to collect his wages evidence of prior propositions or contemporaneous agreements which tended to vary or conflict with the written contract was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030-2047.]

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Action by Jake Griggs against school district No. 70 of Randolph county and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for new trial.

Appellant sued appellees in justice court for breach of the following contract: "Teacher's Contract. State of Arkansas, County of Randolph. This agreement between C. H. Meridith, Samuel Fluke and J. H. Hatfield, as directors of school district No. 70, in the county of Randolph and state of Arkansas, and Jake Griggs, a teacher who holds license of the third grade, and who agrees to teach a common school in said district, is as follows: The said directors agree upon their part, in consideration of the covenants of said teacher hereinafter contained, to employ the said Jake Griggs to teach a common school in said district for a term of three

months commencing on the fourth day of March, 1907, and to pay therefor in the manner and out of the funds provided by law the sum of \$40.00 for each school month. Said directors further agree that all the steps required or allowed by law to be taken by said district and its officers to secure the payment of teacher's wages shall be so had and taken promptly, and the requirements of the law, in favor of the teacher, complied with by said district. The teacher on his part agrees to keep said school open six hours each school day; keep carefully the register required by law; preserve from injury, to the uttermost of his power, the district property; give said school his entire time and best efforts during school hours; use his utmost influence with parents to secure a full attendance of scholars; and generally to comply with all the requirements of the laws of this state in relation to teachers to the best of his ability. [Signed] C. H. Meridith, Samuel Fluke, J. H. Hatfield, Directors. Jake Griggs, Teacher. Place: Meridith District. Date: March 4, 1907."

Appellant in his complaint sets up the contract; alleged that he taught one month for which he was paid by appellees; that he began on the second month, taught two days, and was then locked out by appellees and compelled to discontinue the school, although he was at all times ready to carry out the contract on his part, and continued to attend at the place where the school was to be taught from day to day till the end of the term of three months in order to perform his duties under the contract, and that at the end of the three months he demanded of appellees \$80 for the two months' salary due him, which they refused to pay. Appellees filed no written pleading, but their contention in both the justice and circuit courts, as stated by them in their brief, was: That the contract sued on was not the contract made with the appellant; that such contract did not embrace the agreement that was really made; that the contract under which the appellant was to teach the school required that he should teach one month, or until the children of the district should be needed in the crops, whichever should first happen; that they had paid him for the one month, and were not liable further; that they had fully complied with their agreement with the appellant; and that he had no legal contract with the school district. The appellant adduced evidence tending to support the allegations of his complaint. The appellees directors admitted that they had each signed the contract, in evidence, that appellant had taught one month under it, and that they had accepted his services, and paid him for same, and, over the objection of appellant, they were then permitted to show "that the real agreement was that the appellant was to teach one month, or until the children were needed in the crops, and then was to

suspend the school until after the crops were laid by."

The court, over the objection of appellant, declared the law as follows: "Defendants aver that at and before the execution of the written contract there was a parol agreement between plaintiff and defendants that he should begin his school at the time set out in the written contract, but that it was further agreed that at the end of one month, or when the patrons needed their children at home to assist in farm work, plaintiff should take a vacation till July 1st following, all of which was a condition attending and a part of said written contract, and it is a duty of defendants to establish this contention by a preponderance of the testimony. Should you find from the testimony that it was agreed between the parties hereto, at or before the execution of the written contract, that plaintiff should take a vacation when the children were needed at home, and should you find that, acting under this agreement, two or more of the directors consulted together and decided that under said agreement school should stop temporarily at close of first month, and one or more of them so notified plaintiff, then you should find for defendants; otherwise you should find for plaintiff." The appellant duly saved his exceptions to the court's ruling. The court refused to give the following prayer asked by appellant, to wit: "You are instructed that you are not to consider in this cause any of the oral testimony adduced in regard to the alleged vacation in the term of school, but that you should be governed exclusively by the written contract between the parties as to the length of school term and all other matters set out in said contract." These rulings are sufficient to present the theory upon which the cause was tried. The verdict was in favor of appellees, and judgment was entered accordingly. A motion for new trial presenting the assignments of error reserved at the trial was overruled, and this appeal was taken.

Henderson & Campbell, for appellant. Witt & Schoonover, for appellees.

WOOD, J. (after stating the facts as above). The law did not authorize any but a written contract to be made with appellant (section 7615, Kirby's Dig.), and the written contract in evidence, made presumably under the above section, could not be changed or contradicted by parol testimony. Parol evidence could not be adduced to show a different contract from that authorized by law. Section 7615, *supra*. The contract which appellant introduced, and upon which his suit was grounded, was unambiguous as to the time for which appellant was employed and the wages to be paid him. Any prior propositions or contemporaneous agreements which tended to vary or conflict with the written contract the court should have excluded.

The court erred in its rulings, both in the

admission of testimony and the declaration of law. The appellant's prayer for instruction should have been granted. See *Barry-Wehmiller Mach. Co. v. Thompson*, 83 Ark. 287, 104 S. W. 137; *Soudan Planting Co. v. Stephenson*, 83 Ark. 171, 102 S. W. 1114; *Arden Lumber Co. v. Henderson Iron Works Supply Co.*, 83 Ark. 240, 108 S. W. 185; *Johnson, Berger & Co. v. Hughes*, 83 Ark. 105, 103 S. W. 184; *Lower v. Hickman*, 80 Ark. 505, 97 S. W. 681; *Thomas v. Johnston*, 78 Ark. 574, 95 S. W. 408; *Anderson v. Wainwright*, 67 Ark. 62, 53 S. W. 566; *Rector v. Bernaschina*, 64 Ark. 650, 44 S. W. 222; *Jenkins v. Shinn*, 55 Ark. 352, 18 S. W. 240; *Ritchie v. Frazier*, 50 Ark. 393, 8 S. W. 143. Here the contract was complete in itself, and there was nothing about it that needed to be explained.

The judgment is therefore reversed, and the cause is remanded for a new trial.

MITCHELL et al. v. MOORE.

(Supreme Court of Arkansas. July 13, 1908.)
SET-OFF AND COUNTERCLAIM—CLAIMS ARISING FROM SAME TRANSACTION.

Plaintiff and defendant, tenants in common of land occupied by plaintiff under a lease from defendant, providing that plaintiff should keep up the improvements and surrender the premises at the end of the term, partitioned the land; plaintiff by a collateral contract agreeing to pay defendant \$280, as the estimated difference in value of their shares, and it being stipulated in the partition that the division should not affect the lease contract. *Held*, in an action for the \$280, that defendant could not counterclaim for damages because of plaintiff's leaving the premises out of repair; Kirby's Dig. § 6099, requiring a counterclaim to be a cause of action either arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 49, 50.]

Appeal from Faulkner Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by H. O. Moore against Davie E. Mitchell and others. Decree for plaintiff. Defendants appeal. Affirmed.

Chas. C. Reid, for appellants. G. W. Bruce and J. G. Lille, for appellee.

McCULLOCH, J. Appellant and appellee were owners, as tenants in common, of certain lands in Faulkner county, and divided them, executing deeds to each other. By a collateral written contract appellant agreed to pay appellee the sum of \$280 as the estimated difference in valuation between the two shares. At the time of the division there was an unexpired contract between the parties, whereby appellee leased the lands from appellant and agreed to pay a certain amount of annual rent and to keep up all the improvements on the farm and surrender it at the expiration of the term in good repair and in good state of cultivation. In the partition it was stipulated that the division should not cancel or affect the lease contract,

except as to payment of taxes. After the expiration of the term of lease appellee commenced this suit in equity to recover said sum of \$280 and to enforce a vendor's lien on the lands which fell to appellant in the partition. Appellant filed an answer and counterclaim alleging: That appellee had failed to maintain the improvements, as agreed in said lease contract, on the lands which fell to her in the partition; that when the premises were surrendered to her the improvements had deteriorated until they were worthless, and the place was not tenable, and that, in order to put the place in repair, as provided in the contract, she was compelled to expend sums of money in excess of \$280. She claimed damages in that sum on account of appellee's alleged nonperformance of the contract. The court sustained a demurrer to the answer and counterclaim, and, upon appellant's failure to plead further, rendered a decree against her for the amount of the debt sued for. She appeals to this court.

The statute provides that a defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off as he shall have. Kirby's Dig. § 6098. The counterclaim is defined by the statute to be "a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." Kirby's Dig. § 6099. There is no relation between the two causes of action set forth in the complaint and in the counterclaim. The counterclaim does not arise out of the contract, or transaction set forth in the complaint, nor is it connected with the subject of the action. *Hays v. McLain*, 66 Ark. 400, 50 S. W. 1006; *Barry-Wehmiller Co. v. Thompson*, 83 Ark. 283, 104 S. W. 137; *Daniel v. Gordy*, 84 Ark. 218, 105 S. W. 256. The only connection between the two causes of action is that they each grew out of transactions concerning the same tract of land. This is not sufficient connection to make one the proper subject of counterclaim in an action to recover, on the other.

Affirmed.

UNITED STATES v. FLINT LUMBER CO.
(Supreme Court of Arkansas. July 6, 1908.)

1. PUBLIC LANDS—TRESPASS—CUTTING TIMBER—DAMAGES.

An employé of a lumber company and the company formed a scheme, whereby he should enter on government land for the ostensible purpose of acquiring title as a homesteader, but in reality to denude the land of its timber for the benefit of the company. The company furnished the money for making the homestead entry, and the employé abandoned the land as soon as it was stripped of the timber. Held, that the company was liable to the government for the full value of the lumber received, and not only for the value of the lumber in the trees, since its conduct was willful.

2. INSOLVENCY—CLAIMS—PRIORITIES—CLAIMS IN FAVOR OF UNITED STATES.

Under Rev. St. U. S. § 3466, 3467 (U. S. Comp. St. 1901, p. 2314), providing that debts due to the United States from an insolvent shall be first satisfied, etc., the claim of the United States against an insolvent, based on the insolvent trespassing on government land and cutting and removing the timber thereon, is prior to other claims against the insolvent.

Appeal from Yell Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by J. W. Eldridge against the Flint Lumber Company to wind up its affairs on account of its insolvency, in which the United States of America intervened. From a decree granting insufficient relief to the intervenor, it appeals. Reversed and remanded.

Proceedings were instituted in the Yell chancery court for the Danville district by J. W. Eldridge against the Flint Lumber Company to wind up its affairs on account of its insolvency, and W. J. Kelley was appointed receiver. Afterwards, on the 6th day of August, 1906, appellant was allowed to intervene in the suit. The intervention alleges: That the S. W. $\frac{1}{4}$ of section 30, township 6 N., R. 22 W., on and prior to the 10th day of June, 1902, were vacant lands of the United States and subject to homestead entry at the land office of the United States at Dardanelle, Ark.; that on said day, one George Gamey, at the instance and request of said Flint Lumber Company, with the intent of defrauding the United States out of the pine timber growing upon said lands, duly filed as required by law, his application, under section 2289 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1388), to enter said lands; that said George Gamey and said lumber company, in violation of the laws of the United States regulating homestead entries, cut and removed from said lands 350,000 feet of pine logs, which were cut into lumber by the said lumber company; and that the lumber was sold and the proceeds appropriated to the use and benefit of the said lumber company. The lumber company filed its answer, which, in substance, was a general denial of the allegations of the intervention.

The facts are as follows: Dailey B. Henson testified: That he was acquainted with John W. Eldridge, Harry B. Daniels, J. W. Whitehead, and George Gamey; that he heard both Eldridge and Daniels speak of getting timber from Gamey; and that he heard Daniels say that the Flint Lumber Company had furnished Gamey the money with which to make his homestead entry with a contract or understanding that the lumber company was to get the timber off of the land. J. M. Hall testified: That he was acquainted with the persons mentioned by the witness Henson; that he heard Whitehead say that the Flint Lumber Company had furnished Gamey the money to make his homestead entry; that it was his understanding from Whitehead that the lumber company

had bought the timber, and it had it cut and hauled to the mill; that, while the timber was being cut, he understood from Gamey that he stayed on the land, and he worked at the mill of the lumber company; that Gamey also told him that the lumber company furnished him the money to make the homestead entry; and that the lumber company bought the timber on the land and had it cut and taken to its mill. A. R. Stafford testified: That he knew all the above-named persons; that he lived on the adjoining tract to the Gamey homestead; that a short time after Gamey made his homestead entry he moved in a small house that Majors, who formerly homesteaded the land, had built; that all the merchantable timber was cut off of the land; that, as soon as the timber was cut and removed from the land, Gamey left and has never returned; that Gamey had two pieces of ground fenced, where he had some truck patches; and that he judged they contained five or six acres. J. A. Caldwell testified: That he was acquainted with all the above-named persons and worked at the mill during the time the logs were cut and removed from the Gamey homestead; that he thinks Gamey and his brother cut the timber, and Gamey's brother, Levy Bryant, and Marion Crowder hauled the logs to the mill; and that he understood that Gamey's brother, Crowder, and Bryant were at the time working for the Flint Lumber Company. E. E. Weir testified: That he knew all the parties above named; that he was manager of the Flint Lumber Company; that he never heard Eldridge say anything about the timber from the Gamey homestead; that Eldridge sold out his stock before much of the timber was taken from it; that after the Flint Lumber Company purchased the mill, both Daniel and Whitehead looked over the timber they owned, and also other timber in the vicinity of the mill that they expected to saw; and that in doing this, they looked over the timber on the Gamey homestead. Whitehead was the president of the Flint Lumber Company. The testimony, also, shows: That 225,000 feet of pine logs were cut and removed from the said land to the mill of the Flint Lumber Company; that it saved the logs into lumber; that the value of the logs in the tree was \$1 per 1,000; that it cost \$1.75 per 1,000 to haul the logs to the mill of the said company; and that the market value of lumber at the time the timber was taken was \$7 per 1,000. This was all the evidence. The court rendered a decree in favor of the intervenor for the sum of \$225, the value of the logs in the tree, with interest thereon at the rate of 6 per cent. from the 1st day of January, 1903, and found that it had priority over any other claim allowed in the case. The intervenor has appealed.

Jas. K. Barnes and L. W. Gregg, for the United States. Priddy & Chambers, for appellee.

HART, J. (after stating the facts as above). The amount of the liability in this case depends upon the fact of whether or not George Gamey and the Flint Lumber Company were willful trespassers acting in bad faith, and for that reason ought to suffer some punishment for their depredations. *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49. In the cases of *Pine River Logging & Improvement Co. v. United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164, and of *the Woodenware Company v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, the rule is thus stated: The court held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, and that, upon the other hand, if the trespass be willfully committed, the trespasser is liable for the full value of the property. This rule was approved and followed in the case of *United States v. St. Anthony Railroad Co.*, 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548; the court saying that, under the facts of that case, the defendants, although they did not act under a mistake, meaning that the facts touching the status of the timber were known to them, yet that what was done was in the belief that the cutting was legal, after having taken the advice of counsel on the question.

In the present case there is no attempt to justify the acts done. None of the persons who were guilty of the trespass were witnesses in the case. No excuse is given, or attempted to be given, for not taking their testimony. A careful consideration of the testimony impels us to the conclusion that a clear preponderance of the evidence shows that the homesteader and the lumber company deliberately formed a design to enter the lands ostensibly for homestead purposes, but in reality for the purpose of denuding the land of its timber for the benefit of the Flint Lumber Company, and that such design was carried out. The lumber company furnished the money for making the homestead entry. Only two little patches comprising five or six acres were cleared, and this was only cultivated for one season. No other permanent improvements were made. There was a small box house already on the land. It was moved to the point nearest the mill site of the lumber company. Gamey abandoned the land as soon as it was stripped of the timber. He was in the employment of the lumber company during the whole time he resided upon the land. All the facts and circumstances adduced in evidence show a concerted plan between him and the lumber company to get possession of the timber and the lands by a pretended entry of Gamey for homestead purposes.

The decree of the chancellor was correct in so far as it holds that the claim of the intervenor was prior to the other claims allowed. Sections 3466, 3467, Rev. St. U. S. (U.

S. Comp. St. 1901, p. 2314); *United States v. Barnes* (C. C.) 31 Fed. 705; *Field et al. v. United States*, 9 Pet. (U. S.) 182, 9 L. Ed. 94; *In re Vetterlein* (D. C.) 44 Fed. 57.

Reversed and remanded, with directions to enter a decree in accordance with this opinion.

KEMPNER, Mayor, et al. v. BROYLES et al.

(Supreme Court of Arkansas. July 13, 1908.)

APPEAL AND ERROR—RECORDS—ABSTRACTS—SUFFICIENCY OF COMPLIANCE WITH COURT RULES.

An abstract of evidence stated that appellant had shown certain matters by 55 witnesses, designating some of them by official title, and others by occupations, etc., in a general way; but it was a mere statement of what counsel conceived was shown by the evidence, and that principally in the form of conclusions, which evidently did not agree with the court's conclusions. The abstract did not purport to set out the substance of the testimony of more than one of the witnesses. No page of the abstract was referred to so that the testimony of the respective witnesses designated might be turned to by the judges. *Held*, that it was the duty of counsel to show in the abstract that the trial court was in error, by a succinct statement of the facts as shown by the evidence, rather than by his own opinion of what was shown, and, as it did not relieve the judges of the time and labor of exploring the transcript to ascertain the facts, the judgment should be affirmed for failure to comply with rule 9.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2618, 2787.]

Appeal from Benton Chancery Court; Jas. F. Read, Special Chancellor.

Injunction by S. Broyles and others against L. P. Kempner, mayor of the city of Siloam Springs, and others. From a decree for plaintiffs, defendants appeal. Affirmed.

This suit was brought by appellees in the Benton chancery court against appellants to restrain them from obstructing a certain street in the city of Siloam Springs, by "erecting, maintaining, and continuing to maintain an alleged eight-foot cement sidewalk in the center of the street." Appellees allege: That they are abutting owners; that the sidewalk as constructed and maintained is an irreparable hindrance and damage to the property of the appellees; that it is without authority of law, and in violation of the ordinance of the city of Siloam Springs; that by the maintenance of the sidewalk as alleged the convenient use of appellees' property is materially impaired, and the market value depreciated. Appellees prayed that appellants be restrained from completing and maintaining the sidewalk in the center of the street, and prayed for an order to have same removed to the east side and placed as provided by the ordinance of the city of Siloam Springs. Separate answers were filed by the city and other appellants who were made parties defendant to the suit, in which, among other things, the appellants denied that appellees were abutting owners, denied that the

sidewalk was constructed and maintained without authority of law, and in violation of the ordinances of the city, denied that it was an obstruction to any part of the public street, denied that appellees had any special interest in the matter, and that their property or any other property has been impaired, or its value depreciated. On the other hand, it is alleged that the pavement is a public necessity, and was constructed at the request of a large number of the property owners who had no safe way of traveling the street from the southwestern part of the city down to the business section. It is alleged that the street, by the laying of this pavement, is more accessible to teams as well as foot passengers, and that it was calculated for the travel of wagons as well as foot passengers. It is not denied that the sidewalk was laid and being laid in the center of the street, but it was alleged that the eight-foot sidewalk or pavement as constructed, and to be constructed, was on a level with the grade of the street for the general good, etc. The decree recites that the cause came on to be heard upon the complaint, the answers, the depositions, and exhibits, "and the court finds the sidewalk so laid to be a nuisance, and orders the removal of the pavement already constructed and enjoins its further construction."

Tom Williams, for appellants. R. F. Forrest and Walker & Walker, for appellees.

WOOD, J. (after stating the facts as above). We are confronted in limine with the question raised by appellees as to whether the judgment should be affirmed by a failure to comply with rule 9 of this court. It can readily be seen from so much of the pleadings as we have set forth that the issues involved were mainly of fact. The court found that the pavement, as already constructed, and as contemplated, and in process of construction "was a nuisance." It is impossible for this court to determine whether the court erred in this finding without a complete abstract of the evidence, or the facts upon which the finding was based. The appellants abstract the evidence as follows: "Appellant has shown by 55 witnesses that the pavement as laid does not obstruct the street for the free use of foot passengers, teams, and vehicles of all kinds or any part thereof; the witnesses being competent to testify, showing a full knowledge of that of which they speak. They include the mayor of the city, street commissioner, the city marshal, road overseer of the township, chief of the fire department, draymen, liverymen, teamsters, and all of the property owners living in the vicinity of the street in controversy, save the two plaintiffs, and the testimony of all these witnesses shows, without exception: That the pavement is not an obstruction, and it does not damage any person or property; that it is a necessary improvement; that the hill upon which the pavement is laid is much more convenient for the safe

travel of foot passengers, buggies, and wagons, loaded teams, and fire department than it could possibly have been made without the construction of the pavement; that the street is so situated and the lay of the ground in that part of the city is such as to make it absolutely necessary that it be retained to the safety and convenience of the general public."

We call special attention to the evidence of Connelly Harrington, chief of the fire department, who states that he has been chief of the fire department ever since the water-works were put in, and that it is a part of his duties to make a study of the proper means and ways to quickly go to any part of the city in case of fire, with the fire wagon, and that the pavement upon this hill is perfectly safe to travel over with wheeled vehicles of all kinds, going either up or down and to take the fire department over, and that the pavement is not an obstruction to travel of any kind upon that hill. We also call attention to the evidence of C. R. Stout, street commissioner of Siloam Springs, whose testimony is practically the same, also, N. C. Moore, road overseer, Dr. J. T. Clegg, Dr. H. H. Canfield, drayman L. D. Leflar, J. E. Warnick, B. D. Beshear, R. J. Allen, Fred Bartell, J. E. Porter, city marshal, and Mrs. Jennie Sparks, the testimony of which is complete, and shows that there is no obstruction, and that there is no damage to any property, and their testimony is fully corroborated by the testimony of the remainder of the witnesses. This abstract only purports to set out what one witness states, to wit: "That the pavement upon this hill is perfectly safe to travel over with wheeled vehicles of all kinds, going either up or down, and to take the fire department over, and that the pavement is not an obstruction to travel of any kind upon that hill." This testimony is rather the conclusion of the witness, than a statement of the facts upon which the conclusion was reached. It does not describe how the sidewalk was constructed, give dimensions, location, etc. The residue of the abstract is the mere opinion of counsel as to what the evidence shows, without giving an abstract of any facts testified to by the witnesses, by which we may determine whether or not the conclusion of counsel is correct. No page of the abstract is referred to where the judges may readily turn to the testimony of the witnesses designated.

The conclusion of the court below on the facts differs from the conclusion of counsel here, and it is the counsel's duty in the abstract of the facts to show that the court was in error, by a succinct statement of the facts themselves, rather than by his opinion of what the facts show. This abstract does not relieve the judges of the time and labor of exploring the transcript of the record in order to ascertain the facts. We have decided, in many recent cases, under rule 9, that we would not do that. *Carpenter v. Hammer*, 75 Ark. 347, 87 S. W. 646; *Kock v. Kimberling*,

55 Ark. 547, 18 S. W. 1040; *Ruble v. Helm*, 57 Ark. 304, 21 S. W. 470; *Rosewater v. Schwab C. Co.*, 58 Ark. 448, 25 S. W. 73; *Savage v. Lichlyter*, 59 Ark. 1, 26 S. W. 12; *Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776; *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, 974; *St. L., etc., R. R. Co. v. Boyles*, 78 Ark. 377, 95 S. W. 783; *St. L., I. M. & S. Ry. Co. v. Evans*, 80 Ark. 23, 96 S. W. 616; *Jonesboro, Lake City & Eastern R. R. Co. v. Chicago Portrait Co.*, 81 Ark. 327, 99 S. W. 75; *Stewart v. Bobo*, 81 Ark. 66, 98 S. W. 682; *O'Neal v. Parker*, 83 Ark. 133, 103 S. W. 165; *Wallace v. St. L., I. M. & S. Ry. Co.*, 83 Ark. 359, 103 S. W. 747.

The abstract of appellants in the particular indicated is fatally defective.

The judgment must therefore be affirmed for a failure to comply with rule 9.

BONNETTE v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. July 13, 1908.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Where a stranger was struck by a train, and required immediate medical attention, and the principal office of the railroad was many miles distant, the conductor in charge of the train had implied authority to do what might be necessary to lessen the damages in the event it should be subsequently ascertained that the railroad was liable, and could bind the company by employing a surgeon to treat the stranger, but he could not bind the company for the surgeon's contract with others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 276.]

Appeal from Circuit Court, Drew County; H. W. Wells, Judge.

Action by J. V. Bonnette against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment of dismissal after sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

The appellant sued the appellee, alleging in his complaint: "That on or about the 15th day of January, 1907, the said defendant, the St. Louis, Iron Mountain & Southern Railway Company, by its employees operating and running a locomotive engine or train of cars over its railroad track through Montrose, a station of said line of its railroad, then and there ran or backed said locomotive, engine, or train of cars against and over one Fred Ross, a stranger, and then and there, and thereby, seriously or fatally injured him by then and there crushing, under its wheels, both thigh bones, etc.; that the injury occurred in the nighttime, and that it was of a character so serious and that the emergency was so great as to require immediate surgical or medical attention; that the necessity and emergency of the occasion authorized the conductor to contract for medical services; that the said station of Montrose is many miles distant from the principal offices of the defendant and from the residences of its principal officers, and that the conductor

in charge of said train, and as the agent of the defendant, employed the plaintiff, who as aforesaid was a resident surgeon at said station, to render professional services to the said Ross, and that he, in accordance with said request and employment, rendered the said Ross surgical aid and attention; that plaintiff, assisted by Dr. W. H. Shipman, acting at the request and under the employment of said conductor, took charge of said patient, Ross; that it became and was necessary to amputate both thighs; that the plaintiff, assisted by Dr. W. H. Shipman, performed said operations or amputations; that services so rendered, and money expended for unskilled labor, medicine, etc., were of the value of \$124.50; that said conductor was the highest representative of the defendant and superior officer present when the accident or injury occurred, and when said employment was made; that the defendant refused and still refuses to pay said claim notwithstanding repeated demands have been made therefor, wherefore plaintiff prays judgment," etc. The appellee demurred as follows: "Comes the defendant, the St. Louis, Iron Mountain & Southern Railway Company, by its attorney, E. A. Bolton, and demurs to the complaint herein, and for cause states that said complaint fails to state facts sufficient to constitute a cause of action against the defendant herein; that said complaint fails to state that the conductor of freight train 156 had any authority to contract for the services alleged to have been contracted for with plaintiff herein, and fails to state any facts that would bind defendant for the contract of said conductor in employing the plaintiff herein; that said complaint is otherwise informal and insufficient in law to constitute a cause of action against the defendant." The court sustained the demurrer and dismissed the complaint, and this appeal followed.

R. W. Wilson, for appellant. T. M. Mehaffy and J. E. Williams, for appellee.

WOOD, J. (after stating the facts as above). This court in *Railway Company v. Loughbridge*, 65 Ark. 300, 45 S. W. 907, held (quoting syllabus): "Where a railway employee is injured while in the discharge of his duties at a point distant from the company's chief offices, and there is urgent necessity for the employment of a surgeon to render professional services, the conductor, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency." This is the language of the court in *Railway v. Hoover*, 53 Ark. 377, 13 S. W. 1092, a case in which a doctor sued the railway company for surgical attendance upon and board of a passenger injured by the company's train. In the latter case the court held the company not liable, for the reason that "the emergency, which alone could have given the conductor

implied authority," had terminated before the doctor was employed. This court further said: "The authority existing in such cases is exceptional. It grows out of the present emergency, and the absence and consequent inability to act of the railway's managing agent. Its existence cannot extend beyond the causes from which it sprang."

In *Railroad Co. v. State*, 29 Md. 441, 96 Am. Dec. 545, a stranger was injured in a collision, and the court said: "We are next brought to the question whether the defendant be liable for the negligence of its agents in their treatment and disposition of the deceased subsequent to the collision. This, we think, free from doubt or difficulty. From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of defendant's engine, in a helpless and insensible condition, and it thereupon became the duty of its agents in charge of the train to remove him and do it with proper regard to his safety and the laws of humanity. If, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby death was caused, there is no principle of reason or justice upon which defendant can be exonerated from responsibility." To contend that the agents were not acting in the scope of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive, or, if alive, whether his life could be saved by reasonable assistance timely rendered. In *Clyde Dyche v. Vicksburg, Shreveport & Pac. R. R. Co.*, 79 Miss. 361, 30 South. 711, Dyche was a trespasser, and was run over by the company's train. The company was not negligent in running its train over him, but after the injury the company's agents took charge of him, and undertook to administer to his needs in his wounded condition. The court said: "Assuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury should have been allowed to pass upon whether or not it performed this duty. It is to be charged with no higher degree of duty than that of ordinary humanity, but the jury must settle that on the facts."

In *Marquette & Ontonagon R. R. Co. v. Taft*, 28 Mich. 289, 297, Judge Cooley said: "There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case, and if no one is authorized to do so much for the faithful servant of the company who is in like manner injured, but all persons in its service are impliedly forbidden to incur on its behalf any expense beyond what may be necessary to remove him out of the way of their trains

or machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then, if such is the law, the courts must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty, which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law." In *Railroad Co. v. Byrd*, 89 Miss. 321, 42 South. 288, it is said: "Railroads owe to their passengers the consideration and care of ordinary humanity. It matters not how negligent a passenger may have been in producing the injury for which he sues, * * * and if, when injured, the railroad company neglects this care which common humanity would dictate, and the passenger suffers damage, he may recover against the railroad company for its dereliction."

I have quoted liberally from the above cases to show that the authorities whether in the case of a stranger and trespasser or of an employé and passenger hold the company liable for failing to exercise ordinary care to administer to the absolute needs of the ones whose unfortunate injury it has produced, notwithstanding it may have been without fault in producing such injury, and notwithstanding the injury may have been the direct result of the party's own negligence. In so holding the company liable in such an emergency, it will be observed that the rationale of the doctrine, whether in the case of a stranger and trespasser, or of an employé or passenger, is found in the duty imposed by the dictates of common humanity. The authorities stress the moral obligation, and find from that the legal duty to alleviate as far as possible the suffering and to administer to the necessities which the company has contributed, however innocently, to produce. We confess, if the duty and the consequent liability for failure to discharge that duty grow out of the obligations which the impulses of our common humanity would suggest and impose, under such circumstances, then we do not see that the status or relationship of the party injured to the party producing the injury could affect the question of the appellee's right to recover; for, from the humane viewpoint, clearly it could make no difference whether the helpless and unfortunate victim of the accident were trespasser, employé, or passenger. We do not here either controvert or approve the doctrine of the above cases, but merely cite them to show the extent to which the authorities have gone. The doctrine of our own court in the cases cited, *supra*, although announced in cases where an employé and passenger were injured, applies here. It is a question of the authority of the conductor to act for his company. The emergency creates that authority. Some one, as Judge Cooley holds,

must have authority to represent the company under such circumstances. The conductor is the highest agent on the ground, and is in command of the train that did the injury. Before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterwards ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon, but not for the surgeon's contract with others.

The judgment is therefore reversed, and the cause is remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

ST. LOUIS, I. M. & S. RY. CO. v. BRABBS-SON.

(Supreme Court of Arkansas. July 6, 1908.)

1. APPEAL AND ERROR—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

In testing the sufficiency of the evidence as a whole to sustain a verdict, the court must view it in the strongest light favorable to the findings of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3912-3943.]

2. CARRIERS—INJURY TO PASSENGERS—QUESTION FOR JURY.

In an action for personal injuries received by plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train while moving on after it had stopped near plaintiff's destination, and while she and other passengers were standing, preparatory to alighting, evidence of defendant's negligence held sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1322.]

3. SAME—PASSENGERS ON FREIGHT TRAINS—CARE REQUIRED.

Though passengers riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such train, the carrier owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train; its duty being modified only by the nature of the train and necessary difference in its mode of operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1098.]

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injuries to plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train, while moving on after it had stopped near plaintiff's destination, and while she was standing, preparatory to alighting, holding to the knob of the door of the car, held, that plaintiff's contributory negligence was a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1386.]

5. SAME—EVIDENCE—SUFFICIENCY.

In an action for injuries to plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train, while plaintiff was standing, preparatory to alighting at her destination, evidence examin-

al and held sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1309, 1310, 1314.]

6. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.

In an action for personal injuries, it appeared that plaintiff's head, shoulder, back, and one of her thumbs were hurt, and two of her teeth were loosened. She was confined to her bed two or three weeks. At the time of the trial, about a year later, she still complained of the trouble in her back and shoulder, and that her hearing was defective. The physician who treated her, both before and after the injury, who saw her and prescribed for her the same cure, but prior to the injury, testified that the effect in hearing was probably caused by catarrh of the ear, and that the continued pain in her back was attributable to kidney disease, with which she had been afflicted before the injury and for which he was treating her at the time. *Held*, that a verdict for damages in any sum over \$1,000 was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357–371.]

Hill, C. J., dissenting.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by Ada Brabbzson, by her next friend, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, unless plaintiff remits part of the damages recovered.

This is an action instituted by an infant, suing by next friend, against the railway company for damages for personal injuries received while she was a passenger on a local freight train which carried passengers regularly. She was a passenger enroute from Newport, Ark., to Tuckerman, and received the alleged injuries complained of when she was about to debark from the train at her destination. It is alleged in the complaint that, "upon the arrival of said train at Tuckerman, the same was stopped at the usual place for passengers to debark from said train, and the servant, agent, and employees of defendant upon said train called out the name of the station, Tuckerman, whereupon the passengers on said train began to debark therefrom, and this plaintiff also started to get off of said train, and, when she had reached the door of the car in which she was riding, the said train was again negligently and suddenly started, and pulled up a short distance, and was then negligently, recklessly, and suddenly stopped with a jerk and jar. Plaintiff, who was standing at the door holding to the knob to brace herself, not having time to again take her seat, was by said jerk and jar pitched out of the door onto the platform of said car, striking her head on the railing of the platform, and raising a concussion thereon, injuring her shoulder, and bruising her back and leg, and hurting her left ear, causing her to lose the hearing thereof and mashing off thumb." The answer denied each allegation of the complaint, and averred that plaintiff had been warned to keep her seat until the train reached its

proper place for her to alight, and that she would be notified as to the proper time and place to alight from the train. It further charged that she assumed the risks incident to riding on a freight train, and further charged contributory negligence. A jury trial resulted in a verdict in favor of the plaintiff for the sum of \$2,000, and the defendant appealed.

T. M. Mehaffy and J. E. Williams, for appellant. O. W. Scarborough and Stuckey & Stuckey, for appellee.

McCULLOCH, J. (after stating the facts as above). Appellant challenges the sufficiency of the evidence, and contends that a peremptory instruction should have been given. The testimony introduced on behalf of appellee tends to show that, when the train reached Tuckerman, the caboose came to a standstill near a certain road crossing where it was accustomed to stop, or where it sometimes stopped (there being no regular stopping place for local freight trains), and all the passengers walked forward to the door preparatory to alighting, and some of them did alight at that time; that the train was then put in motion slowly and moved a very short distance, when it came to a stop with a sudden and unusually violent jerk, which threw appellee down, as described in the complaint, and inflicted the injuries complained of. She was standing at the door, holding to the door-knob, when the injury occurred. There was also testimony to the effect that, when the passengers went forward and reached the door, the conductor, who was standing on the ground near the caboose, called out to them telling them to stop; that the caboose would be pulled up to the crossing; that the train began moving just at that time, and appellee did not have time to take a seat before the violent jerk came and threw her down. Appellee testified that she did not hear the admonition of the conductor, and the evidence does not show that it was given so loud, or that he was so close to her that she must have heard it. She testified that she arose from her seat, and went forward because the other passengers did so, and that she did not have time, after the train began to move again, to take a seat before the jerk came. She was 14 years old when the injury occurred. The evidence of several witnesses tended to show that the jar caused by stopping the train the second time was sudden and an unusual and extraordinary one even for a freight train. The testimony of witnesses introduced by appellant tended to establish facts sufficient to exonerate the company entirely from the charge of negligence, but in testing the sufficiency of the evidence as a whole we must view it in the strongest light favorable to the findings of the jury. We are of the opinion that the evidence made out a case of negligence sufficient to go to the jury, and that the peremptory instruction was properly refused.

It is well settled that, though a passenger riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such trains, yet, where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on passenger trains. *Rodgers v. C. O. & G. Ry. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; *Pasley v. St. L., I. M. & So. Ry. Co.*, 83 Ark. 22, 102 S. W. 387. But, as it is not practical to operate freight trains without occasional jars and jerks calculated to throw down careless and inexperienced passengers standing in the car, "the duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated; and, while the general rule that the highest practicable degree of care must be exercised to protect passengers holds good, the nature of the train and necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practicably exercised and consistent with the operation of a train of that nature." 4 Elliott on Railroads, § 1629. If the sudden stopping of the train, at the time and under the circumstances it is shown to have occurred, was accompanied by a jerk or jar as violent and extraordinary as is described by some of the witnesses, then the servants of the company were guilty of culpable negligence which rendered the company liable for damages to a passenger injured thereby. Appellee did not assume the risk of danger from such acts of negligence, and whether or not she was guilty of contributory negligence was a question for the jury. *Pasley v. Railway*, supra; *St. L., I. M. & So. Ry. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295. We conclude that there was sufficient evidence to sustain a verdict for damages, and that the case was submitted to the jury upon correct instructions. We are of the opinion, however, that the amount of the verdict is excessive.

The evidence shows that appellee was pitched forward through the door of the caboose, and that she fell on the platform; her head striking the railing as she fell. Her head, shoulder, back, and one of her thumbs were hurt, and two of her teeth were loosened. She was confined to her bed two or three weeks. A physician prescribed treatment once for her injuries. Her shoulder was swollen and she suffered considerable pain. At the time of the trial, about a year later, she still complained of the trouble in her back and shoulder, and that her hearing was defective. There is nothing to indicate from the character of the injury that it was calculated to cause a defect in her hearing, and a physician who treated her both before and

after the injury, who saw her and prescribed for her the morning of the day on which she was injured, testified that the defect in her hearing was probably caused by catarrhal trouble with which she was afflicted before and after the injury, and that the continued pain in her back was attributable to disease of the kidneys with which she had been afflicted before the injury, and for which he was treating her at the time. There is no tangible or substantial evidence that the continued pain in her back and shoulder or that the defect in her hearing was caused by the fall; while, on the contrary, there is positive and uncontradicted evidence that these troubles were attributable to other causes. The jury had no right to speculate upon the possibility of these injuries being caused by the fall when there was no evidence directly to that effect. The result is that we see no evidence of a permanent injury to appellee from the fall. It was of a temporary nature, and, according to the evidence, the elements of damage were confined to pain and suffering for a period of two or three weeks. The shock at the time of the fall must have been quite severe, but the suffering for the next two or three weeks is not shown to have been acute.

We think that an assessment of damages at any sum over \$1,000 is excessive, but the evidence sustains a recovery of that amount. If the jury had assessed the damages at that or a less sum we would let it stand. *St. L., I. M. & So. Ry. Co. v. Snell*, 82 Ark. 61, 100 S. W. 67. If, therefore, appellee will within 15 days remit the amount of damages down to \$1,000, the judgment will stand affirmed; otherwise the judgment will be reversed and the cause remanded for a new trial.

HILL, C. J. (dissenting). This case presents a close question as to right of plaintiff to go to the jury on the facts, and the verdict is grossly excessive as pointed out in the opinion of the court. It is thoroughly established that the court may affirm a judgment where the damages are excessive after the excess has been remitted, but that power should be sparingly exercised, and only where there is some substantial basis for the amount sustained, and some tangible way of reaching a conclusion as to how much is excessive. In cases of damages for a death loss with expectancy of life estimated and present value of revenue calculated, an approximation may be made as to the probable pecuniary loss, but even this contains many elements of speculation. In cases of compensation for purely mental or physical suffering, it seems to me that, where the verdict is so excessive that it appears to "have been given under the influence of passion and prejudice," a new trial should be granted pursuant to the fourth paragraph of section 6215, Kirby's Dig., instead of reducing the amount here.

**KANSAS CITY, to Use of KANSAS CITY
HYDRAULIC PRESS BRICK CO. et al.,
v. YOUMANS et al.**

(Supreme Court of Missouri. June 28, 1908.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — SEWER CONSTRUCTION CONTRACT — GUARANTY CLAUSE — CONSTRUCTION.

The guaranty clause in a sewer construction contract provided that: "Said parties of the second part hereby guaranty that said party of the first part will well and truly perform the covenants hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials used therein, * * * but said second parties shall not be liable on this guaranty on account of the materials used and labor done upon said work beyond the sum of eighty-three thousand five hundred and forty (\$83,540) dollars, the estimated cost of material used, and labor done upon said work." *Held*, that this was a continuing guaranty, and one which attached to each item of labor and material furnished in constructing the sewer, and that in that sense it was unlimited, but that the ultimate amount of the guarantors' liability alone was limited, and in such case the guarantors were not released till all labor and material was paid for by their principal, and, on his failure, the guarantors were liable.

2. SAME — CHARTER PROVISIONS — CONSTITUTIONALITY.

Kansas City Charter, art. 9, § 20, provides that: "Contracts for making city improvements on streets, sidewalks, avenues or alleys, or for constructing sewers, let to the lowest bidder, shall contain a covenant on the part of the contractor, or contractors with the city, to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the job and for all materials used therein, and performance of such covenant to be guaranteed by two or more sureties signing the contract, whose sufficiency shall be approved as provided by ordinance, but who shall not be liable beyond the estimated cost of the materials used and labor done upon the job, to be stated in the contract: Provided, that the city shall not be liable for the sufficiency of the contractors or sureties, nor for any failure to comply with or irregularity in complying with this provision." *Held*, that this violated no constitutional provision.

3. PLEADING — GROUNDS OF DEMURRER — WAIVER.

The question whether suit can be maintained in the manner in which it was brought is the subject of demurrer, and is waived by answer to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1355, 1364.]

4. MUNICIPAL CORPORATIONS — CONSTRUCTION OF SEWERS — GUARANTY TO PAY FOR "MATERIALS" — CONSTRUCTION.

Blasting powder, dynamite, fuse, and caps, necessarily used by contractors in building a sewer, are "materials," within the meaning of a guaranty that the contractors would pay for material used in the work.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4409-4413.]

5. SAME — "MATERIALS."

Tools, implements, and appliances are not "materials," within the meaning of a guaranty that contractors would pay for material used in the work of building a sewer; and the fact that they were entirely consumed therein, being worn out and broken, does not change the rule.

Valliant, P. J., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Kansas City, to the use of the

Kansas City Hydraulic Press Brick Company and others, against F. C. Youmans and others, in which intervening petitions were filed by the Ashgrove White Lime Association and others. From a judgment in favor of all relators and intervening petitioners, except the R. J. & W. M. Boyd Construction Company, defendant United States Fidelity & Guaranty Company appeals. Reversed, with directions.

The following is the opinion of GRAVES, J., in division No. 1:

"Action by relators and intervening petitioners, in the name of Kansas City, on a contract entered into for the construction of a sewer in said city. By ordinance No. 19,459 the city of Kansas City provided for the building of a sewer in sewer district No. 218 of said city. Having been the lowest bidder for the work required by said ordinance, the defendant F. C. Youmans was awarded the contract. He entered into such contract, and one Geo. J. Baer, now deceased, and defendant United States Fidelity & Guaranty Company signed as his sureties or guarantors. In said contract, which is the contract sued upon herein, F. C. Youmans is designated as party of the first part, these sureties or guarantors as parties of the second part, and the city of Kansas City as party of the third part. By the contract the first party was to be paid for his work in tax bills against the property in the district. This contract was drawn in form as prescribed by section 20 of article 9 of the Kansas City Charter, and this suit now before us was instituted in the manner provided for in said section, so that we quote it in full, as follows:

"Contracts for making city improvements on streets, sidewalks, avenues or alleys, or for constructing sewers, let to the lowest bidder, shall contain a covenant on the part of the contractor or contractors with the city, to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the job and for all materials used therein, and performance of such covenant to be guaranteed by two or more sureties signing the contract, whose sufficiency shall be approved as provided by ordinance, but who shall not be liable beyond the estimated cost of the materials used and labor done upon the job, to be stated in the contract: Provided, that the city shall not be liable for the sufficiency of the contractors or sureties, nor for any failure to comply with or irregularity in complying with this provision. Laborers and teamsters and owners of teams and wagons who may do work, and parties who may furnish materials, stipulated for by any such contract, may recover in an action in the name of the city for their use, in which no costs shall be adjudged against the city, and all costs not adjudged against the defendant shall be adjudged according to equity against the persons for whose use the suit may be prosecuted, all money due them for labor and materials, or

either, not exceeding the estimated cost of the labor and materials as stated in the contract; and such recovery may be had against the contractor and sureties, or either, as in chancery; but it shall not be necessary to file with the petition the original contract. Suit may be brought for the benefit of all laborers, teamsters and owners of teams and wagons on the job, and for materials used in the performance thereof, and the amount due them be ascertained by the court or referee, unless the court direct an issue as to the amount due one or more laborers or others, or for materials, to be tried by a jury; pending the suit, laborers, teamsters and owners of teams and wagons, and parties who have furnished materials for the performance of the contract, not mentioned in the petition, whether they have done work or furnished materials before or after the commencement of the suit, may become parties to the proceedings by appearing and filing in the action a written statement of their demand. Such notice thereof as the court may direct shall be given to the defendants and reasonable opportunity to defend shall be given. The proceedings shall, as far as practicable, be governed by the rules and principles of courts of chancery, so as to afford speedy and adequate relief according to the spirit and letter of this section. Judgment shall be rendered for the estimated cost of labor and materials as stated in the contract, and execution be awarded and issued for the aggregate amount found due the laborers, teamsters, and owners of teams and wagons, and the parties who have furnished materials, not exceeding the estimated cost in the contract, which shall be collected with the costs. The money shall, after paying costs, be divided and paid pro rata among those for whose use the judgment may be rendered. The court shall decide all questions as to distribution summarily on motion. No action shall be brought or prosecuted for the benefit of laborers, teamsters or owners of teams and wagons, or parties who have furnished materials on the contract, unless the suit be commenced within three months after the completion of the work to be done under the contract and acceptance thereof by the city, nor shall such action be brought before such completion and acceptance, unless the court find good cause therefor, according to the averments in the petition. Suits shall be brought in some court of competent jurisdiction in Jackson county, if jurisdiction of proper parties can be obtained in the county.'

"The contract thus entered into was duly confirmed by the city, in an ordinance numbered 19,915. When this suit was originally instituted, the relators were the Kansas City Hydraulic Press Brick Company, Kansas City Paving Brick & Tile Company, the R. J. & W. M. Boyd Construction Company, corporations, and Lynch-Watkins Lime & Cement Company, and the Builders' Sand Company,

copartnerships, and John Kingston, an individual. Later, under the provisions of said section 20 of article 9 of the charter above quoted, intervening petitions in said suit were filed by Ashgrove White Lime Association, Richards & Conover Hardware Company, and the Halliwell Cement Company, a corporation. Relators and intervening petitioners claimed to have furnished labor and material used in the construction of the sewer. By their petition and intervening petitions they set out the items of their respective accounts, and plead nonpayment as to certain balances due thereon, and they pray judgment for the full amount of the guaranty contract—i. e., \$83,540,—to be satisfied upon the payment of their aggregate claims, which amount was something near \$13,000. The contract sued upon provided for the mode and manner of and the time within which said sewer was to be constructed by Youmans, as it did also provide for the prices for the different kinds of work to be paid, full details of which contract are not necessary, but the contested and vital portion thereof is paragraph 29, which is as follows:

"29. (a) It is further agreed and stipulated by the said party of the first part, that in the construction of the sewer to be built under this contract, he will use only brick of Kansas City manufacture, unless otherwise authorized by permission in writing by the city engineer, on account of the insufficiency of brick made in Kansas City to meet the needs of this contract, or inability to obtain such brick at a price not greater than that to be paid for brick of foreign manufacture, and for such reasons only. (b) The special tax bills to be issued for the work and improvements herein provided for shall be made payable in four (4) equal installments, payable and collectible in all respects in compliance with the provisions of section (23), article 9, of the amended charter of Kansas City. (c) Provided, that nothing herein contained shall be construed to affect the rights of Kansas City, hereby reserved, to reject, the whole or any portion of the work aforesaid, should the measurement of computation before mentioned by found or known to be improperly made, or to be inconsistent with the terms of this contract. (d) It is further expressly agreed that in no event will Kansas City be liable or responsible to the contractor or to any other person for or on account of any stoppage or delay of the work herein provided for, by injunction or other legal, or equitable proceedings, or for, or by or on account of any delay from any other cause whatsoever. (e) Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials used therein (and if the cost of such work and labor and materials is not paid in full by said party of the first part,

then the said parties of the second part hereby agree to pay for said work, labor and materials or any part thereof which shall not be paid by said first party within ten [10] days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any and all laborers and teamsters, and owners of teams and wagons who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, by said first party); but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of eighty-three thousand five hundred and forty (\$83,540) dollars, the estimated cost of material used, and labor done upon said work. (f) And the said parties of the second part hereby agree with Kansas City that the said party of the first part will well and faithfully perform each and all of the terms, and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of one hundred and four thousand four hundred (\$104,400) dollars. (g) And the said parties of the second part hereby further agree with Kansas City that, if the work embraced in this contract be not begun within ten (10) days after this contract binds and takes effect, and prosecuted regularly and uninterruptedly thereafter in accordance with the terms and provisions thereof (unless the city engineer shall specially direct otherwise in writing) with such force as to secure its full completion within two hundred and forty (240) days from the date of its confirmation, they will pay to Kansas City the sum of ten thousand four hundred and forty (\$10,440) dollars as liquidated damages for such breach of this contract. (h) In witness, whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and Kansas City executed this contract by her city engineer.'

'Defendants, by way of answer, denied generally each and every allegation of the petition and intervening petitions, and specially pleaded paragraph 29 above, and averred that their principal, Youmans, had paid, on work done and materials furnished and used in said sewer, more than \$83,540, to wit, \$100,000; that by reason thereof defendants, as guarantors, were not further liable on their said contract of guaranty. Replies were general denials. Upon motion the circuit court referred the case to Hon. Henry L. McCune, as referee, and he found in favor of all the relators and intervening petitioners, except R. J. & W. M. Boyd Construction Company, the aggregate finding being \$12,182.15. Upon the filing of this report of the referee the appealing defendant, United States Fidelity & Guaranty Company, filed its exception to said report, which said ex-

ceptions were heard and overruled, and judgment entered as per report of the referee. Motions for new trial and in arrest of judgment were likewise filed and overruled, and defendant above named appealed to this court. The defeated relator took no further steps. If there is liability at all, it is practically conceded that the only questionable account is the one filed by and allowed to the intervening petitioner, Richards & Conover Hardware Company. The referee further found that Youmans had paid out of his own pocket about \$115,000 in the construction of the sewer, and, further, 'of this sum over \$95,000 was paid for labor, materials, and teamsters before the suit was instituted, and this was a reasonable and necessary expenditure.' For convenience of reference we have lettered the clauses of paragraph 29 of the contract. These letters do not appear in the original.

'There are three questions presented by the record, as follows: First. Under the facts found, and the contract pleaded, and the breaches of the contract alleged in the pleadings, is there any liability upon the part of the appealing defendant? Second. (a) Is section 20 of article 9 of the charter of Kansas City in violation of section 16 of article 9 of the state Constitution, or violative of chapter 8, Rev. St. 1899, entitled 'Code of Civil Procedure'? (b) Was this question timely raised, being raised for the first time in motion for new trial? Third. If there is liability, should the claim of intervening petitioner, Richards & Conover Hardware Company, be disallowed in toto or in part? Of these in their order. We are not without briefs on the questions, there being six in number.

"1. The appealing defendant claims that the contract sued upon is what should be called a limited contract of guaranty; that the breach alleged is the failure to pay for the work done and material furnished and used in the construction of the sewer; that as to those items the limit of defendant's liability is \$83,540; and that it stands undisputed that its principal, Youmans, had, at the institution of this suit, necessarily expended and paid for these items an amount greater than the amount which it guaranteed that he would pay—i. e., \$83,540—for such items of construction; that it is thereby discharged from any and all further liability upon this contract. This is the position of the defendant. Respondents contend that the contract is one of guaranty, but unlimited and continuing as to guaranty, and limited only as to defendant's liability. Stated otherwise, they claim that defendant guarantees that its principal will pay for all labor and material used, whether it be in excess of \$83,540 or not, and thus the guaranty is unlimited and continuing, and is not satisfied, except upon and by a full payment by the principal, although the amount of work and material might be greatly in ex-

cess of the sum last named, but they aver the amount of the ultimate liability of the guarantors is fixed at \$83,540. To illustrate their contention. Suppose the work had cost \$200,000, and the principal had paid nothing, then the defendant could be required to pay only \$83,540 of the unpaid \$200,000, but if the work had cost \$200,000, and the principal had paid thereon \$116,460, leaving a balance due of \$83,540, the defendant would still be liable for the full face of the contract of guaranty. In the illustration it will appear that the guaranty is unlimited and continuing, and runs with all items of labor and material used, but the amount of ultimate liability of the guarantor is limited. In other words, they contend that the contract of guaranty goes to the full amount of the labor and material used, but in no event can the liability of the guarantors be greater than the amount fixed in the contract.

"The question is not one without difficulties. That contracts of this character must be strictly construed goes without citation of the cases. But this rule of strict construction does not preclude the courts from applying to the contract the rules and tests applied in the construction of other contracts, when undertaking to determine the real meaning of the contract and the language used. This is what we did in *Binz v. Hyatt*, 200 Mo. 299, 98 S. W. 637. See, also, *Jewelry Co. v. Bertig*, 81 Mo. App. 393. To our mind the true rule is so aptly stated in *London and S. F. Bank v. Parrott*, 125 Cal., loc. cit. 481, 482, 58 Pac. 164, 165, 73 Am. St. Rep. 64, that we quote it. 'When it is said that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other subjects than those expressed in the instrument of guaranty. But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied. If this language is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he is not at liberty to say that the person to whom it is given was not justified in acting upon either, or that he should have acted upon one rather than the other.' See, also, *Morgan v. Boyer*, 39 Ohio St., loc. cit. 326, 48 Am. Rep. 454, where it is said: 'The rule that the language

of a promise is to be construed most strongly against the promisor cannot properly be applied to the construction of a guaranty. A guarantor, like a surety, is bound only by the precise words of his contract. Other words cannot be added by construction or implication, but the meaning of the words actually used is to be ascertained in the same manner as the meaning of similar words used in other contracts. They are to be understood in their plain and ordinary sense, when read in the light of the surrounding circumstances and of the object intended to be accomplished. The rule that a guarantor is held only by the express words of his promise does not entitle him to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed.' The rule in this state, as stated by Smith, P. J., in *Smith v. Van Wyck*, 40 Mo. App., loc. cit. 525, is: 'It is held in this state that when it is doubtful from the language contained in the contract whether the guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if, in fact, he did accept it. *Boehne et al. v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485; *Shine's Adm'r v. Bank*, 70 Mo. 524. Extrinsic evidence cannot be received to contradict, add to, subtract from, or vary the terms of a guaranty; but as has been stated, when its meaning is doubtful, or obscurely expressed, parol testimony in relation thereto, requisite to a clear understanding of its purport, is admissible.'

"The real question is, did the guarantors by the instrument before us guarantee that their principal would pay for all labor (including men and teams) and material used, or did they guarantee that their principal, Youmans, would pay for all such labor and materials used up to \$83,540, and no more? The appealing defendant says that the contract is a limited contract of guaranty, and means that the guarantors vouched for the faithfulness of their principal in paying \$83,540, and no more; and, where it appears, and it does so appear in this case, that their principal had paid, under clause 'e' of paragraph 29, more than \$83,540, then there is no further liability upon the part of these guarantors. Respondents, as elsewhere suggested, say that the guarantors have, by this clause of the paragraph, guaranteed that their principal will pay for all such work and material, even though such items sum up into the millions, but that the contract simply limits the total sum for which the guarantors shall be liable, in the event their principals fail to pay the whole or any part of such items of work and material; that the guaranty is a continuing one, and goes throughout, from the first to the last item

used, but the liability is limited to \$83,540.00.

"The cases are by no means harmonious as to what state of facts or language used constitute a continuing guaranty. To better enable us to apply the case law to the language of this contract, an elimination of a part of the clause involved can be had to an advantage. The part thus eliminated relates to the time in which an action may be begun, and who can bring it, and as to when the money is due from the guarantors. Eliminating these matters, which in no wise affect the guaranty part of the clause, we have the guaranty reading thus: '(e) Said parties of the second part hereby guarantee that the said party of the first will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials used therein, * * * but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of eighty-three thousand five hundred and forty (\$83,540) dollars, the estimated cost of materials used, and labor done upon said work.' Had the portion just preceding the stars, quoted hereinabove, been followed by the words 'to the extent of \$83,540 and no more,' instead of by the portion following the stars, then we take it that there would be no question of there being a limited guaranty, in which case the payment by the principal of the sum so guaranteed would discharge the guarantors. The guaranty would then read: 'Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials used therein, to the extent of \$83,540 and no more.' The guaranty would then obligate the guarantors to see that their principal paid that sum on such items of construction, and would be limited; and, when the principal had paid on such items that sum, the guarantors would be discharged. Such is the prevailing rule in contracts of limited guaranty.

"But is the guaranty last quoted the guaranty contained in the instrument sued upon in this case? It largely depends upon the construction to be given to the language following the stars, as above quoted, and what effect that language has upon the preceding language. The reported cases, while enlightening us upon the general principles of liability under limited and continuing guaranties, aid us but little in determining the meaning of the words of this contract. Had the guaranty stopped with the language: 'Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenant hereinbefore contained; to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work, and for all materials

used therein * * *"—it would have been unlimited, and no question about the liability of defendant could arise. Now do the words, 'But said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of eighty-three thousand five hundred and forty (\$83,540) dollars, the estimated cost of material used, and labor done upon said work,' undertake to limit the general guaranty that the principal would pay for all labor and materials used, or do they simply limit the amount of money for which the guarantors shall be liable in case of a total or partial failure upon the part of the principal? Some light may be thrown upon the question by a glance at the ordinance under which the contract was drawn. The contract is presumed to have been made in view of existing ordinances, but in this case we do not have to indulge the presumption, because the contract upon its face shows that it was drawn under the terms of the ordinance, and for that reason the parties, when contracting, had the ordinance in mind. This ordinance says: 'Contracts for making city improvements on streets, sidewalks, avenues or alleys, or for constructing sewers, let to the lowest bidder, shall contain a covenant on the part of the contractor or contractors with the city to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the job and for all other materials used therein, and performance of such covenant to be guaranteed by two or more sureties signing the contract, whose sufficiency shall be approved as provided by ordinance, but who shall not be liable beyond the estimated cost of the materials used and the labor done upon the job, to be stated in the contract.'

"It will be observed that the contract follows the wording of the ordinance. The ordinance requires the contract to contain (1) a covenant that the contractor shall pay for all labor and material; (2) a guaranty by two or more sureties that such covenant shall be performed; and (3) a clause limiting the total liability of the guarantors. The contract in this case is in strict accordance with the ordinance. A reading of the ordinance and contract shows that it was contemplated that there might be more labor and materials required than was estimated. Yet with this in contemplation, both the ordinance and contract, in effect, say that the covenant of performance in this respect shall be 'to pay for the work and labor of all laborers and teamsters, teams and wagons, employed on the job and for all materials used therein, and performance of such covenant to be guaranteed.' The language used is 'all,' not up to a given amount. The guaranty under the ordinance must go to all work and material to be used in the course of construction, and not to the limited amount of \$83,540 of such work and material. In our judgment this is a continuing guaranty, but has affixed thereto a limited liability. In other words, the guaranty to

pay attaches to each and every item of labor and material used, as from time to time the same is used, but there is a limitation in the total amount which the guarantors may be required to pay. It is clear that it was contemplated that the amount required might exceed the estimated cost, and if the guarantors had desired to limit their guaranty, as well as their liability, they could have done so by appropriate words, as we have indicated hereinabove, but this they did not do, and, no doubt, for the reason that to do so would be violative of the ordinance. They chose rather to follow the language of the ordinance providing for such contracts, and gave an unlimited guaranty, but added a clause limiting the liability. This makes what is denominated a 'continuing guaranty,' with a limited liability; and, in such case, payments made by the principal do not, pro tanto, discharge the guarantors, but their liability remains to the full amount named in the contract, if it requires that sum to make good the default of their principal. This being a contract somewhat out of line with the ordinary commercial guaranties, it is difficult to find any exact precedent.

"However, this contract comes nearer falling into that class of cases on commercial guaranties where the liability is limited, but the time is not expressly limited, than in any other class, unless it be that class wherein the object is to give standing and credit to the principal, either indefinitely or until expiration of a fixed period. Here the evident object of the guaranty was to give credit to the contractor, and security to the laborers and materialmen, until such time (a fixed time in the contract) as the contract was completed. It contemplates numerous dealings with divers persons. The general rules in such cases, as stated in 20 Cyc. 1440, 1441, are: 'When the amount of the liability is limited, and the time is not expressly limited, the courts lean towards construing the guaranty as a continuing one. The liability under the guaranty will be regarded as continuing, when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor, to be used from time to time, either indefinitely, or until a certain period. So a guaranty may be construed as continuing where attendant circumstances strongly indicate that more than a single transaction was contemplated, especially if the right to recall the guaranty is expressly reserved.' Likewise the use of the word 'all,' with reference to laborers, teamsters, teams, and material used, is indicative of a continuing guaranty. This word is much stronger than words which have been held to indicate a continuing guaranty. The law is thus stated, by the same authority, on page 1441: 'The use of the word "may," with reference to the proposed transactions between the principal parties, is held usually to indicate a continuing guaranty. So words guarantying payment for "any goods" which may

be purchased by the third person, or the payment of "any debts" which may be contracted up to a certain amount, are almost invariably held to indicate that the liability is intended to be continuing.' See, also, discussion of the word 'all' in case of *Lewis et al. v. Dwight*, 10 Conn. 95.

"In the case of *Trustees of the Presbyterian Board of Publication and Sabbath-School Work v. Gilliford et al.*, 139 Ind. 524, 38 N. E. 404, the following contract was under review: 'We hereby jointly and severally guarantee to the Presbyterian Board of Publication payment for all sales which may be made by them to Rev. William A. Patton, but our liability on this guaranty not to exceed, in any event, \$3,000.' Under this contract Patton purchased goods aggregating over \$10,000, during years from 1881 to 1889. He paid for all, except \$1,600; and the action was to recover that sum. Of this contract the court said: 'In the contract before us there is no limit expressed as to the amount of the sales, or the time during which the guaranty should continue. Indeed the amount of sales guaranteed seems to be expressed as unlimited. Guaranty is expressly made of "payment for all sales which may be made." The only limitation named in the contract is as to the ultimate liability of the guarantors, and that is fixed at "not to exceed in any event \$3,000." So in the case at bar. The guaranty is "to pay for the work and labor of all laborers, teams and wagons, employed on the work and for all materials used therein," but the ultimate liability only is fixed and limited. The amount of labor and material to be used is not limited, for that is only estimated.

"In *Mathews v. Phelps*, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581, the following contract was considered: 'It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savanac to James L. Mathews, for the sale of cigars, to the extent of two hundred dollars.' Of this contract, the court said: 'The record further shows that Savanac failed to return to the plaintiff money received by him, on the sale of cigars, to the amount of \$189.04. It also appears that the sales made by Savanac for the plaintiff amounted to more than \$1,000, and defendant's counsel contend that the contract of suretyship did not extend beyond the sale of \$200 worth of cigars, and was not continuous; and, plaintiff having received returns exceeding \$200, the defendants are not liable in this action. This would be a narrow construction to place upon the terms of the contract. It is the extent of the liability, and not the extent of the sales, that is limited to \$200.' So in the case at bar, it is the extent of liability that is limited, not amount of labor and material to be used.

"It would require a volume to review the cases wherein is discussed the question as to what words do or do not constitute a con-

encing guaranty. A great number of them are reviewed in Brandt, Suretyship Guaranty (3d Ed.) § 178 et seq., and are cited by counsel for the respective parties in this case. Whether or not the contract is to be declared a continuing guaranty or a limited guaranty must be determined by the language under review in each particular case, as well as by such circumstances as are permissible under the rules for the construction of contracts. Whilst the courts differ as to what words do or do not constitute a continuing guaranty, they seem to agree upon the question that if the contract is found to be a continuing guaranty, the payments by the principle do not discharge the guarantor, unless such payments discharge the full debt to which the guaranty attached. We have read each and every case by counsel cited, as well as such others as we could find, and, applying to the contract in this suit the usual rules of construction, we conclude that the guaranty herein contained is a continuing guaranty, and one which attached to each item of labor and material furnished in the construction of the sewer, and that the guaranty in that sense was unlimited, but that the ultimate amount of the guarantor's liability alone was limited. In such case the guarantors are not released from liability until all labor and material is paid for by their principal, and upon his failure the guarantors are liable.

"2. It is urged that section 20, art. 9, of the Kansas City Charter is violative of the state Constitution, and also in conflict with the state laws pertaining to civil procedure. This complaint is directed to that portion of the section which undertakes to establish a court procedure in cases arising on contracts of this character. A discussion of this question is not necessary to a determination of this case. It was first lodged in the case on a motion for new trial, and thus after issues had been joined, and a trial had upon the merits. It is clear that the first portion of the challenged section violates no constitutional provision. And we do not in this case undertake to pass upon the latter portion, or that portion prescribing a method of procedure in the courts. In the record before us no demurrer was filed to the petition, and no motion made to strike out the intervening petitions. Under such circumstances the question raised for the first time in motion for new trial is unavailing. The question as to whether or not the city could maintain the suit in manner in which it was brought was the subject of demurrer, and is waived by the answer being filed to the merits. Rankin v. Real Estate Co., 199 Mo. 345, 97 S. W. 877; Kansas City ex rel. v. Surety Company, 198 Mo., loc. cit. 300, 93 S. W. 405. The latter case is an action similar, in many respects, to the one at bar, and involving the identical charter provision, and in disposing of the matter, Burgess, J., said: 'Defendants claim that the court erred

in permitting the McTernan-Halpin Rock Crushing Company, Stewart-Peck Sand Company, and Halliwell Cement Company to file intervening petitions; such permission being without authority of law. The record shows that while appellants did move the court to strike out the intervening petitions of respondents, the motions were overruled; that defendants then answered, and went to trial upon the merits, and in this way waived the questions. Rinard v. Railroad, 164 Mo. 270, 64 S. W. 124; Llese v. Meyer, 143 Mo., loc. cit. 556, 45 S. W. 282; Cofer v. Riesling, 153 Mo. 633, 55 S. W. 235; Springfield E. & T. Co. v. Donovan, 147 Mo. 622, 49 S. W. 500. The objection might have been raised by demurrer, upon the ground that there was defect of parties plaintiff, that several causes of action were improperly united, or that the parties plaintiff—i. e., the interveners—were not necessary parties to a complete determination of the action. Had objection to the petition, for the cause intimated, been made, either by motion or demurrer, the petition could only have been sustained, if at all, under section 20 of article 9 of the city charter, under which the interveners were permitted to intervene, the validity of which section would necessarily have been involved. But as this was not done, and as objection to the action of the court in overruling the motion to strike out said intervening petitions was waived, as aforesaid, that section of the charter is not before us for review.' So, in this case, the question of the constitutionality of this charter provision is not necessarily before us. When it becomes a live issue, it will be time enough to make a disposition thereof. However, this city charter provision for procedure in the state courts is a little singular, to say the least of it. This leaves but one question remaining in the case, and to that we next proceed.

"3. The referee, as to Richards & Conover Hardware Company, found the facts thus: 'Seventh. The sewer was built by the defendant Youmans. In the work of construction, material and labor was furnished and was used therein as follows: * * * "(h) By claimant Richards & Conover Hardware Company, a corporation, blasting powder, dynamite, fuse, caps, rope, nails, spikes, buckets, rubber boots, hose and tools, as shown by Exhibit 4 of the transcript, and on which there remains due the sum of \$678.29. Items of this account were used on the work, but did not go into or become a part of the work. All of these items, however, were consumed on the work, except a few hundred feet of wire rope, which was badly worn.'" His conclusion of law on this claim is stated in this language: 'Eighth. The claimant Richards & Conover Hardware Company is entitled to recover from the defendants the sum of \$687.29, with interest from the date of the filing of its demand herein, January 22, 1904, at the rate of 6 per cent. per annum.' The defendant excepted to these con-

clusions in this manner: '(15) This defendant excepts to the eighth conclusion of law contained in said report, for the reason that, upon the law as applied to the facts found by the referee in said report, the claimant Richards & Conover Hardware Company is not entitled to recover any sum whatever, either of principal or interest, against this defendant, but, on the contrary thereof, the judgment, upon the facts as found and the law as applied thereto, should be in favor of this defendant and against said claimant. (16) This defendant further excepts to said eighth conclusion of law, for the reason that the undisputed evidence shows that the account sought to be recovered by said Richards & Conover Hardware Company, in its written statement of claim and demand filed herein, the amount of \$382.86, was and is claimed for the price of articles such as manilla rope, wire rope, wire-rope clamps, washers, wooden buckets, shovel handles, railroad spikes, hatchets, chains, wire nails, hoop pails, cedar buckets, hose couplings, etc., which did not enter into the construction of said sewer, and became no part thereof, and are not within the description of any of the articles for which this defendant became in any way liable by the terms of contract of guaranty signed by defendant and sued upon herein. The specific items of said account and the amounts thereof, above referred to, are as follows, to wit: [Here follows list and date of articles.] And said referee finds that a part of the claim of said claimant is for "rope, nails, spikes, buckets, rubber boots, hose and tools, as shown by Exhibit 4 of the transcript," and that "items of this account were used on the work, but did not get into or become a part of the work," and that under the law, as applied to the undisputed evidence and said findings, this defendant is in no way liable for that part of said claim set out above.'

"Defendant contends that its fifteenth exception, as above set out, should have been sustained. And it further insists that even if the claim as to powder should be allowed, yet its sixteenth exception as to other items should have been sustained. We think the fifteenth exception was properly overruled. In the account were items for blasting powder, dynamite, fuse, and caps. This exception struck at the whole account. When the contract to build this sewer was entered into, it must have been considered that blasting rock would be a necessary part of the work, and to that end the use of such material as above named would be required and used. Under the lien laws pertaining to railroads it has been held that such items were recoverable. *Rapauno Chem. Co. v. Ry. Co.*, 59 Mo. App., loc. cit. 12; *Zipp v. Fidelity & Deposit Company*, 73 App. Div. 20, 76 N. Y. Supp. 386; *Powder Co. v. Ry. Co.*, 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751; *Hazard Powder Co. v. Byrnes*, 21 How.

Prac. (N. Y.) 189; *Giant Powder Co. v. Oregon Pacific Ry. Co. (C. C.)* 42 Fed. 470, 8 L. R. A. 700. In *Rapauno Chem. Co. v. Ry. Co.*, supra, the court says: 'The rule to be deduced from the foregoing authorities is that, in order to maintain a lien for materials furnished, it is not necessary in all cases that such materials should actually have gone into the structure and formed a part thereof. It is sufficient if their use was necessary, and they were in fact used or consumed in the making of the improvements. Hence we think that the argument is unsound; that the lien in the case here must fail because the powder was entirely consumed, and therefore could not have been actually incorporated in the work. Such a construction of the statute we conceive to be a strained one, and not within its equity or spirit. What was said on this subject by the Supreme Court, in the case of *Simmons v. Carrier*, 60 Mo. 581, must be read in the light of the particular facts of that case. There the claim was for lumber. The court held that a lien could not be maintained for such material, unless it actually entered into the construction of the building. This was undoubtedly a proper construction of the statute as applicable to lumber and such like materials to be used in or on the improvements; but in our opinion it is unreasonable to apply such a test to powder, which is entirely consumed in its use.' What is there said as to powder applies with equal force to dynamite, fuse, and caps, likewise used and for like purpose. In *Powder Co. v. Ry. Co.*, 183 N. Y. 306, 76 N. E., loc. cit. 155, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, in discussing powder used for blasting in the construction of a railroad, the Court of Appeals of New York says: 'The argument that dynamite is not a material, but a part of the contractor's plant, which, like picks and shovels or mechanical appliances, are used in the performance of work, but are not considered materials furnished within the purview of the statute, seems to us inherently unsound. A steam shovel, an engine and boiler, picks, shovels, crowbars, and the like are tools and appliances, which, while used in the doing of the work, survive its performance, and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work, and are therefore invisible, except as they survive intangible results. We think that explosives, when used as substitutes for other recognized "materials," are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts, and bridges that we can see and feel.' So that, as to the articles mentioned aforesaid, we hold that they are materials used in the sewer built, and for which the defendant is liable. There was no error in overruling the fifteenth exception.

"Exception No. 16 raises quite a different question. By this exception the defendant

leaves out the items in the account of powder, dynamite, fuse, and caps used in blasting rock, but attacks the remaining items of the account, covering such things as rope, picks, pick handles, chains, buckets, spades, shovels, track spikes, rubber boots, etc. This exception is quite different from exception No. 15, wherein was attacked the whole account, including powder, dynamite, fuse, and caps. There was error committed in overruling this exception No. 16. The articles therein named are such as constitute a part of the contractor's plant, or his tools and implements with which to do the work. Such articles, although worn out in the service, should not and do not fall within the term of 'materials used in the construction of a sewer' or like work. Such articles have usually been classed, in the contractor's plant, as tools and implements of work, and not as materials used. *Powder Co. v. R. R.*, 116 Mo. App., loc. cit. 369, 92 S. W. 150; *Rapanno Chem. Co. v. R. R.*, supra; *Basshor & Co. v. R. R.*, 65 Md. 99, 31 Atl. 285; *Beals et al. v. Fidelity & Deposit Co.*, 76 App. Div. 52, 78 N. Y. Supp. 584; *Allen v. Elwert*, 29 Or., loc. cit. 443, 44 Pac. 823, 48 Pac. 54. It is urged by the intervening petitioner, Richards & Conover Hardware Company, that the evidence shows that the articles were entirely consumed in the work on this job, and for that reason they fall within the term 'materials used therein,' as found in the contract. There are some loose expressions in several cases that lend color to the contention made by this respondent, but we are not impressed therewith, and will not follow such cases. Tools, implements, and appliances, used by the contractor in the prosecution of the work, are not materials used therein in any reasonable sense of the term. If a pick, shovel, pair of boots, hoisting rope, or any other implement, tool, or appliance used by the contractor on the work is worn out or broken, it does not follow that such article thus becomes material used therein within the meaning of the contract. The contract presupposes that the contractor has and will furnish, upon his own account, the necessary tools, implements, and appliances with which to perform the work. It follows that the court erred in overruling the sixteenth exception of defendant. The items, thus erroneously placed in the judgment appealed from, aggregate \$382.86. The judgment allowed to Richards & Conover Hardware Company, \$87.29, when it should have allowed to said intervening petitioner only the sum of \$304.43. In all other respects the judgment of the trial court is correct. To obviate the issuance of process from this court, although legal and proper, and often done, instead of modifying the judgment of the circuit court and entering judgment here, we will reverse and remand the cause to the circuit court, with directions that said court modify its former judgment to the extent herein indicated; i. e., by allowing Richards & Conover

Hardware Company \$304.47, instead of \$687.29, and that it enter such modified judgment as of the date of the original judgment. The costs of this appeal should be and will be taxed to intervening petitioner Richards & Conover Hardware Company.

"It is therefore ordered that the cause be reversed and remanded, with the directions aforesaid, and that the costs of this appeal be taxed to respondent Richards & Conover Hardware Company."

WOODSON, J., concurs. LAMM, J., concurs in a separate opinion. VALLIANT, P. J., dissents in a separate opinion.

Frank P. Sebree & Peak & Strother, for appellant. Botsford, Deatherage & Young, Johnson & Lucas, R. F. Field, Chas. B. Adams, M. A. Fyke, Rees Turpin, Williams & Hunter, and Henry S. Conrad, for respondents.

PER CURIAM. This cause having been transferred to the court in banc and having been reargued, the foregoing opinion of Judge GRAVES in division No. 1 is adopted as the opinion of the court in banc.

GANTT, C. J., and BURGESS, FOX, and WOODSON, JJ., concur therein. LAMM, J., concurs in separate opinion. VALLIANT, P. J., dissents.

LAMM, J. (concurring). Not only do the precedents cited, the reasons employed, and the grammatical construction and analysis made of the contract signed by appellant as guarantor abundantly sustain the conclusion reached in the opinion to the effect that the guaranty was a continuing one (covering each and every item of labor, material, etc., used in the construction of the sewer), and that the limitation was on appellant's liability alone, but additional observations seem in order. For instance, it is not plain to me that the guarantor or surety, becoming such for gain and mere hire (such as appellant is), is entitled to invoke the doctrine that sureties are favorites of the law, or the doctrine of very strict construction. It seems to me those doctrines are fictions of the law, invented as a shield for those persons who, for sentimental reasons, stand sponsor for others in their undertakings. For this reason the law holds them in tender regard. Why should a mere hireling stand in their shoes or wear their livery?

Furthermore, the plain justice and good sense of the thing run with the opinion. It has been said the laborer is worthy of his hire. It may be said the materialman is worthy of his pay. Common honesty says as much as that. Now Kansas City, with these ends in view, prescribed by ordinance that all laborers and all materialmen should be paid. Such end is a proper municipal purpose. *St. Louis, to Use, etc., v. Von Phul*, 133 Mo. 561,

34 S. W. 843, 54 Am. St. Rep. 695. The ordinance does not say that part shall be taken and the rest left. It does not say that one group, A., B., and C., shall be paid, leaving another group, D., E., and F., unpaid. It does not say the contractor may pick and choose whom he would pay, and thereby relieve his guarantor. Nor does it say that the vigilant, the strenuous, the persistent, shall be paid, and the meek, the patient, and the confiding may whistle for their pay. In fine, the ordinance would not be met in its spirit by paying the first, the last, or the middle group of laborers or materialmen. It would only be met by paying each and every one of them. The contractor was bound to subserve the full ordinance purpose—an honest and self-evident purpose. Therefore, when appellant signed the contract as guarantor, *prima facie* (absent clear words to the contrary) it stood sponsor for the carrying out of that very purpose; for, by inexorable implication, in the absence of a contrary intent appearing, the ordinance purpose was carried over into the contract, and shines there in every line of it. This would be true even if the doctrine, *strictissimi juris*, is applied. In discussing that doctrine in *State ex rel. v. Rubber Mfg. Co.*, 149 Mo., loc. cit. 212, 50 S. W. 321, 330, Valliant, J., said: "When parties execute a statutory bond, they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions." The view there announced met with the entire approval of this court, in banc, in *Henry County v. Salmon et al.*, 201 Mo., loc. cit. 162, 163, 100 S. W. 20. In that case the sureties of Salmon & Salmon invoked the doctrine of strict construction. The case calling for it, the doctrine of *State ex rel. v. Rubber Mfg. Co.*, supra, was relied upon in determining the scope and intent of the bond in suit, and it was said: "This (view) does not strike down the hornbook propositions that the obligation of the surety should not be stretched or swollen by mere implication, and that sureties are favorites of the law, and are entitled (subject to some qualifications) to stand on the terms of the bond, construed *strictissimi juris*. It merely puts the matter on a common-sense footing, as between man and man, by reading the written law into the bond, discerning the objects to be subserved by the bond, and getting at the true intent and meaning of the bond by applying its terms to the objects sought. The general language of the bond must be interpreted in the light of these considerations."

Furthermore, in the eye of the law, when A., B., and C. contracted to furnish material to construct the sewer and furnished it, they did so on the strength of the protection of appellant's guaranty. They were as much entitled to that protection as D., E., and F. Nay, more; appellant intended that A., B., and C. should rely upon the protection of

the guaranty. It signed one, by its words inevitably luring A., B., and C. into relying thereon. It established the contractor's credit. This being so, how comes it that A., B., and C. stand to lose that protection? Certainly it is by no act of theirs. No more should it be by the act of the law, unless the law is constrained to so act. No more should it be by the act of D., E., and F. Appellant contends that A., B., and C. lost their protection because D., E., and F. absorbed the fund, covered by the guaranty, in full. If appellant had paid D., E., and F., it might well answer A., B., and C. that it had filled the measure of its guaranty. But appellant paid never a kopek, sou, or ha'penny. The contractor paid, and, in so doing, did precisely right, as far as he went. But because he paid D., E., and F., and chose to leave A., B., and C. in the lurch, that self-serving and capricious act on his part ought not to strip A., B., and C. of their protection under the guaranty, unless it was the obvious intention of the materialmen, the contractor, and the guarantor, when they started out on their joint venture, that it should have that result. Obviously, no such result was contemplated at the beginning, or it would have been plainly so set down; therefore no such result should be reached at the end. All's well that ends well—not otherwise. How could A., B., and C. protect themselves against the contractor's paying whom he chose? How could they keep alive a valuable right, once theirs, viz., the security of appellant's guaranty, except as they have done? Therefore, as this guarantor induced A., B., and C. to contract with the contractor on the theory that it was bound to them, it ought not to escape through the loophole of a theory falling short of compliance, so long as they are without fault, and so long as appellant has paid nothing on its liability. Reduced to simple elements, appellant agreed, in effect, to pay a balance not to exceed \$83,540. It is the same form of a guaranty, in final analysis, as if A. agreed with B. that C. would pay for all goods C. purchased of B., provided that if A. be called on to pay aught, he should not be liable to an extent beyond \$500.

VALLIANT, P. J. (dissenting). To the extent that the words in which a contract is expressed leave its meaning in doubt it must be interpreted in the light of the circumstances surrounding the parties at the time it was made. When this contract of guaranty was made Youmans was about to enter into a contract with the city for the construction of a sewer. The city required that he should give bond and security for the faithful performance of his contract, particularly that he would pay for all labor and materials that went into the construction of the work. An estimate of the probable cost of the work was made by the city engineer. This estimate was \$83,540. But it was contemplat-

ed that the work might exceed the estimated amount, and that fact was in the minds of the parties when they made this contract. When the sureties were asked to go on this bond and guaranty that the contractor would pay for all the labor and materials used, the natural inquiry would be, what is the extent of the undertaking, to what extent are we to be obligated? To this the obvious answer was it is estimated that the cost will be \$83,540, but it may go beyond that—how much, no one can say. In the face of that uncertainty the sureties had this clause limiting their liability inserted, and in my opinion it was intended to mean that “we guarantee that the contractor will fulfill his obligation to the amount of the estimated cost, but not up to an indefinite beyond.” In entering into contracts of this kind men must be credited with some degree of care and foresight. When one goes security for another, especially when the going of security is in itself a business transaction, he usually takes means to ascertain what the man is worth, and what are his means of fulfilling his engagement, and he circumscribes his guaranty to that estimated capacity. Suppose that, instead of a contract worded as this is, a contract had been presented to these sureties, saying in plain terms: “It is estimated that this work will cost only \$83,540, but it is liable to go much beyond that, and though in the course of its performance the contractor should faithfully pay for labor and materials consumed sums aggregating \$83,540, yet the sureties on this bond are bound to the further extent of \$83,540, for other labor and materials, beyond that so paid for by the contractor”—can we conceive a sane business concern signing such a guaranty? Yet by interpretation that is what this contract is said to mean. Of course, if that is what this contract means, we have not to enforce it, regardless of what we may think of the wisdom of the men who signed it, but if it is a question of construction, we have not to give it that construction if there is more in line with usual business thought.

The evidence shows that the contractor paid an amount far in excess of the \$83,540, and therefore, in my opinion, the sureties are not bound for anything remaining unpaid.

PORTER v. R. J. BOYD PAVING & CONSTRUCTION CO.

Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. SIGNATURES—REQUISITES—MODE OF AFFIXING.

The general rule is that, when a document is required by the common law or by statute to be signed by any person, a signature of his name in his own handwriting is not required, but he may request another to sign his name for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Signatures, § 6.]

2. MUNICIPAL CORPORATIONS—ORDINANCES—APPROVAL BY MAYOR—SIGNATURE—SUFFICIENCY.

Under Rev. St. 1899, § 4160, cl. 7 (Ann. St. 1906, p. 2253), declaring that, where the written signature of any person is required, the proper handwriting of such person shall be intended, and a city charter providing that an ordinance shall be presented to the mayor, who, if he approve the same, shall sign it, the signature of the mayor affixed to an ordinance by a third person under the immediate direction of the mayor and by his authority is nevertheless sufficient, especially where it purports to be signed by the mayor, and is authenticated by the city clerk under the seal of the city.

3. SAME — IMPROVEMENTS — BIDS — NOTICE—PUBLICATION—“TEN SUCCESSIVE DAYS.”

The words “ten successive days,” in a city ordinance providing for the publication for “ten successive days” of a notice for bids for a public improvement, mean publication on 10 successive days when a newspaper may be published without the publisher running the risk of violating Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1420), prohibiting labor on Sunday, and a publication in a daily newspaper not published on Sunday of a notice in each successive issue from April 5th and ending April 17th is sufficient though there was no publication on the two Sundays intervening.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 856.]

4. TIME—DAYS—SUNDAY.

In computing time within which an act must be done, Sundays will not, as a general rule, be counted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Time, §§ 34–52.]

5. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—NONCOMPLIANCE—EFFECT.

A contractor for the construction of a sewer omitted to build four catch-basins called for by the contract. The city engineer authorized by the contract to decide questions relative to its execution directed the omission for the reason that the street was not on grade. The cost of the basins was not included in the final estimate. *Held*, that owners of land assessed for the payment of the sewer could not complain because of the failure to construct such basins.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1066.]

6. SAME—TAX BILLS—ISSUANCE.

In determining whether a sewer has been completed within the charter of a city providing that tax bills for a sewer shall not be issued until the same shall have been completed, and providing that, in a suit on tax bills, defendant may plead and prove in reduction a failure to perform the work in accordance with the contract, etc., the test is whether the sewer is completed, and not whether a detail of the work is in accordance with the contract, and proof that every foot of the pipe of the size required by the ordinance has been laid on the proper grades, and that the work has not been done in accordance with the contract, does not show a failure to complete the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1066.]

7. WORK AND LABOR—CONTRACTS—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE—LIABILITY OF OWNER.

A contractor, though not doing the work in exact accordance with the contract, may recover what the work is reasonably worth to the owner, not exceeding the contract price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 27.]

8. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—TAX BILLS—ACTIONS.

A city charter providing that, in an action on tax bills, defendant may plead and prove in reduction that the work was not done in a workmanlike manner according to the contract, etc., though applying on its face only to actions on tax bills, applies when the owner takes the initiative and brings a suit in equity to cancel a tax bill, and either tenders or offers in his bill to pay the actual value of the work done.

9. SAME.

An owner, whose property has been assessed for the construction of a sewer, cannot maintain a suit to cancel tax bills issued therefor pursuant to the city charter authorizing the issuance of tax bills on the completion of the work, and declaring that, in an action on tax bills, defendant may plead and prove a non-compliance with the contract on tendering the value of the work done, on proof that the contractor, though substantially complying with the contract, did not perform all the work in a workmanlike manner, and omitted certain work by order of the city engineer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1066.]

10. SAME.

The levying of special assessments is an exercise of the taxing power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1001.]

11. TAXATION—COLLECTION OF TAX—INJUNCTION—CONDITION PRECEDENT.

Equity will not enjoin the collection of a tax because it is excessive, unless plaintiff tenders the amount actually due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1244.]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by J. L. Porter against the R. J. Boyd Paving & Construction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Ball & Ryland, for appellant. William R. James, for respondent.

GANTT, J. This is an action in equity against the defendants, as owners and holders of certain tax bills issued against the appellant's property, some 83 lots in J. L. Porter's second subdivision and addition to Kansas City, by which it is sought to have said bills canceled by the decree of the court, and the apparent lien of said tax bills removed from the title to said lots. The defendant construction company had let to it a contract for the construction of a sewer in sewer district No. 227, which was confirmed by an ordinance of the council of Kansas City on the 13th of May, 1901, and proceeded with the execution of the work provided for in said contract, and the ordinance under which it was let and claimed to have completed the same in accordance with its said contract on the 14th of September, 1901. On which date the city issued and delivered to the company the tax bills, which are the subject of complaint, and thereupon the plaintiff brought this action for the cancellation of said bills against the said property on September 10, 1902. The grounds as set forth in the petition on which the said bills are assailed were: First, that the ordi-

nance No. 16,521, which provided for the construction of the sewer and the letting of the contract for that purpose, and No. 16,915, confirming the contract with the defendant company, were not enacted pursuant to the charter provisions in that behalf, in that, while purporting to have received the signature and approval of the mayor of the city, they in fact had not been signed by the mayor, but were signed and approved by his private secretary. Second. That the notice of the letting of the contract was not published 10 successive days within the 20 days next preceding the time for opening the bids, in that said publication was omitted from the newspapers during the period of publication on the 7th and 14th of April, which were Sundays. Third. That the defendant company never completed the construction of said sewer prior to the issuance of the bills in question, and such completion of said work has never been done, and the particulars in which it is claimed that the contractor failed in completing the sewer are as follows: "(a) That the contract required the construction of seventeen (17) catch-basins, and the contractor only constructed thirteen (13). (b) That the contract provided that where any part of the sewer was to be built on or above the surface, and any other foundation is required than embankment, such construction and sewer built thereon shall be covered with an earth embankment carried to a height of not less than one foot above the top of the sewer, and the top width of such embankment shall not be less than the greatest external diameter of the sewer, and that the contractor had failed to cover with an embankment, as required, a portion of about 1,000 feet in length of said sewer, which portion was required to be laid on a wall of rubble masonry. Fourth. (a) That said contract provided that the excavation shall be done by open cut from the surface, except where tunneling is expressly permitted or directed by the city engineer, and that no tunneling was in any manner permitted or directed by the city engineer; but notwithstanding the contractor, in all parts of the work which was done in earth excavation, adopted the method of tunneling by alternating a section of tunnel with open excavation, instead of doing said work by open cut from the surface as required; and that, by reason of such manner of doing said work, it was impossible to fill said trenches and tunnels in a compact manner, as required, and the same was not, in fact, done. (b) That, when a trench is in rock formation, the filling required by the contract was that the same be filled with clay to a point two (2) feet above the top of the sewer, provided that the rock from the trench might be used with an equal amount of earth; but no stones of greater dimensions than six (6) inches should be used, and that the filling was required to be rammed and tamped; and that 3,258 feet of said sewer was laid in trenches and excavated

through rock, in which the contractor did not use earth or clay, as required, but, on the contrary, the rock taken from the trench was dumped into the trench as filling material. (c) That said contract further provided that all surplus materials from the trenches should be hauled away to such places within a distance of six hundred (600) feet as might be designated by the engineer, and deposited according to his directions; and, if no such place was designated, the contractor should be bound to remove the surplus at his own risk and cost, and said contractor in violation of said requirement, failed to remove the surplus material, but left large quantities thereof dumped upon plaintiff's lands, situated in the neighborhood of said sewer works. (d) That the contractor further failed to complete said contract, in this: That manholes were required to be built in the line of said sewer at designated heights, and that the outside of all manholes should be thoroughly plastered with cement mortar; that twenty-nine (29) of such manholes were provided to be built by said contract and ordinance, and the contractor omitted to finish and complete any of them, in that none of these manholes were plastered outside, as required. (e) That it was required that rubble masonry in the construction of said sewer should be built of the best quality of limestone, laid in cement mortar, the stone to be of uniform size, generally not less than two (2) feet square in area and six (6) feet in thickness; that each stone should be laid on its natural bed, with its face down, and should have uniform bearing and be well-bedded in mortar, the work to be so laid as to secure a thorough bond throughout. And the charge is that no such rubble masonry was constructed at all; no such stone or quality of stone as required was used. It was omitted to lay it in cement mortar. All that was done was to use mortar on the outside; and that all of such part of said work was wholly inferior and in every respect failed to comply with the contract in that regard. (f) That said contract required, in joining the sections of sewer pipe, that the joints should be filled with mortar, one part Portland cement, two parts sand, and the joint all thoroughly cleaned on the inside and plastered externally, at least three (3) inches beyond the rim of the socket; and that, in fact, the contractor wholly failed to complete said work in this particular, in that the plastering of each joint was never completed, but for about a fourth of the rim of each socket at the bottom of the pipe was entirely without any mortar, and the work in that regard was left wholly incomplete." Briefly stated, the above are the propositions on which relief by cancellation of the bills is asked. The defendant's answer denies generally and specially all of the foregoing charges, and concludes with an allegation that "in all things in the execution of said contract it acted in good faith and under the direction of the city engineer or the inspector

from his office; that if in any material matter an error has been made and the plaintiff has been damaged thereby that these defendants would surrender and cancel the said tax bills for the payment of such sum as the court may find the plaintiff should justly pay." Upon a trial in the circuit court, the plaintiff's bill was dismissed, and from that judgment the plaintiff has appealed to this court in due form of law. So much of the evidence as is necessary to a proper understanding of the respective contentions of counsel will be noted in the course of the opinion.

1. The first proposition upon which these bills are attacked is that Ordinance 16,521 is void because it was not signed by the mayor of the city in person, but by his secretary. The testimony of Mayor Reed on this point was to the effect that the signature to this ordinance bore a close resemblance to his handwriting; that he thought without question that either Mr. Harvey, his secretary, signed the signature of the mayor to the ordinance, or he did it himself, but his best judgment was that Mr. Harvey wrote it under his immediate direction. As to the other ordinance, 16,915, he was very positive that the signature was in his own handwriting. On cross-examination by counsel for the city, he was asked: "Q. You think, Mr. Reed, that, if Mr. Harvey signed that other ordinance or either of these ordinances, he did it under your immediate direction? A. Yes, sir; and after I had examined the ordinance and told him to sign it for me. Q. You approved the ordinance yourself? A. Oh, yes; always. Q. You simply used him for your hand, that is all? A. By the way, that is the way it is done very likely; but in a general way it is this: Mr. Harvey will bring me the ordinances, and I will examine them, and, if there is a great bunch to sign, I tell him to sign them, sometimes he signs them in my room in my presence, and sometimes he takes them into the other room. As to these two ordinances, the first, my best judgment is that Mr. Harvey probably wrote my name under my direction, as to the other I wrote it myself." Conceding that Mayor Reed did not affix his own signature to the Ordinance 16,521, but that it was signed under his immediate direction by his secretary, Mr. Harvey, would that fact alone render the ordinance void? Section 6 of article 3 of the charter of Kansas City provides that after passing the council ordinances shall be "presented to the mayor. If the mayor approve any ordinance he shall sign it; if not he shall return it to the city clerk with his objection, and the city clerk shall at the next session of the house in which it originated return it to such house." It is also provided by section 8 of article 3: "If any ordinance shall not be returned by the mayor within five days (Sunday excepted) after it shall have been presented to him for his approval, the same shall become a law in the same manner as if he had approved and signed it,

and said ordinance shall be authenticated as having become a law by a certificate signed by the city clerk indorsed thereon as follows: "This ordinance having remained with the mayor five days (Sunday excepted) has become a law this _____ day of _____ 18—, _____, City Clerk, and said ordinance shall be filed, recorded, and preserved in the office of the city clerk as other ordinances." Unquestionably it has been generally held by the courts of England and of this country that, when a document is required by the common law or by statute to be "signed" by any person, a signature of his name in his own proper or personal handwriting is not required. Thus in the execution of wills it has often been decided that the testator need not sign his own name, but might request another to sign his name for him. 4 Kent's Com. 514, note; 1 Jarman on Wills, 77, 78; Williams' Executors, 63-67; Nickerson v. Buck, 12 Cush. (Mass.) 332; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565; Vernon v. Kirk, 30 Pa. 218; Jesse v. Parker's Adm'rs, 6 Grat. (Va.) 57, 52 Am. Dec. 102; Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102; Compton v. Mitton, 12 N. J. 70; Jenkins v. Gaisford, 32 L. J. Probate Div. & Adm'r. 122. And the same ruling obtained in the interpretation of the statute of frauds. Schneider v. Norris, 2 Maule & S. 286; Durrell v. Evans, 1 Hurl. & C. 174; Tourrett v. Cripps, 48 L. J. Ch. 567; Brayley v. Kelly, 25 Minn. 160; Sanborn v. Flagler, 9 Allen (Mass.) 474; Browne on Stat. Frauds, §§ 355, 356.

In the construction of statutes requiring the signature, different statutes have received different constructions, some receiving a strict construction, from the obvious intent of the Legislature, and others, a more liberal one, for a like reason. In *Finnegan v. Lucy*, 157 Mass. 439, 32 N. E. 656, this subject received an exhaustive examination by the Supreme Court of Massachusetts in a case arising under a statute of that state forbidding the sale of liquor to a husband after "notice" by the wife "in a writing signed by her." In that case the notice bore the wife's name, but signed by another person at her request, and in her presence, and it was held sufficient. In the case counsel for the defendant relied upon the rule for the construction of statutes given in Pub. St. Mass. 1882, c. 3, § 3, cl. 25, which provided that: "The words 'written' and 'in writing' may include printing, engraving, lithographing or any other mode of representing words and letters, but when the written signature of a person is required by law, it shall always be the proper handwriting of such person or in case he is unable to write his proper mark." It was said by the court "that the first portion of this statute had its origin in *Henshaw v. Foster*, 9 Pick. (Mass.) 312 (1830), in which it was held by Chief Justice Parker that printed votes are written votes within the meaning of the Constitution of that state requiring members of the House

of Representatives to be chosen by "written votes." In *Finnegan v. Lucy*, supra, it was ruled that the statutory rule of construction did not have the effect of setting aside the established doctrines of law as to signatures, and to require in all cases where a document is to be signed by a person a signature in his own proper handwriting, but to require the same only in those cases where, by express language or usage or by implication arising from the nature of the document to be signed, a written signature is required by law as the direct personal act of the person whose name is to be signed. Counsel for plaintiff in this case have invoked clause 7, § 4160, Rev. St. 1899 (Ann. St. 1906, p. 2253), which is an exact rescript of the Massachusetts statute above quoted. This section in our laws was first enacted in 1855, and was evidently adopted from the Massachusetts Revised Statutes of 1836. The charter provision plainly requires the mayor to sign all ordinances which meet his approval as an evidence of that approval. Being a member pro tanto of the lawmaking power, the ordinance would not be valid without his approval, unless passed over his veto. Had the charter contained the provision or a similar one to that found in section 37 of article 4 of the Constitution of this state which ordains that: "No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session and before such officer shall affix his signature to any bill, he shall suspend all other business, declare that such bill will now be read and that if no objection be made, he will sign the same to the end that it may become a law"—we should have no hesitancy in holding the provision mandatory, and that nothing less than his signature by his own hand would suffice. *State ex rel. v. Mead*, 71 Mo., loc. cit. 271. But the charter simply provides that the mayor shall sign the ordinance if it meets his approval. In *The Queen v. Justices of Kent*, L. R. 8 Q. B. 305, the statute required a notice of appeal to a Court of Quarter Sessions "shall be in writing signed by the persons giving the same or by his attorney on his, her, or their behalf." And it was held by the Court of Queen's Bench that a notice of appeal signed on the appellant's name by the clerk to his attorney with the appellant's authority was sufficient. Blackburn, J., said: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless there may be cases in which a statute may require personal signature"—the other judges saying: "We ought not to restrict the common-law rule *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable," and "there is nothing in the statute to qualify the operation of that maxim." The object of the charter provision is to authorize the approval of the mayor, and

we find nothing in the charter to indicate that the well-settled doctrine of the common law that what one may do by himself he may do by another was intended to be abrogated, and the evidence being that the signature of the mayor was affixed to this ordinance under his immediate direction and by his authority, we are unwilling to declare the ordinance void because the mayor did not with his own hand affix his signature to the ordinance. The authorities relied on by plaintiff with the exception of *Chapman v. Inhabitants of Limerick*, 56 Me. 390, can we think be readily distinguished from the facts of this case. Fully recognizing the force of the reasoning of the Supreme Court of Maine in *Chapman's Case*, supra, we cannot bring ourselves to the same conclusion upon the facts of this case, in view of the authorities we have cited to the contrary.

There are, moreover, other considerations which lead us to the view we have adopted. In this case the ordinance was in due form, it had been signed by the presiding officers of both houses of the municipal assembly in accordance with the provision of section 6 of article 3 of the charter. It purported to be signed by the mayor in accordance with that section, and was authenticated by the city clerk under the seal of the city. The ordinances of the city can be proved by the seal of the city. Section 12, art. 3, Charter. To hold that the citizens of the city and the contractors doing work under these ordinances must in every case ignore the authentication of the clerk and determine for themselves the genuineness of the mayor's signature would be a harsh rule. It is conceded by learned counsel for plaintiff that their contention is highly technical and formal, and we are constrained to hold that it smacks more of form than substantial justice, and hence we must refuse to adopt it.

2 It is next insisted that the tax bills in suit are invalid because the advertisement for bids for the contract was not published upon two Sundays. It is admitted that the newspaper at that time doing the city printing and the only paper in which the advertisement could lawfully be printed and published was not published on Sunday. By section 12 of article 17 of the charter contracts of this character are required to be let "to the lowest and best bidder as shall be prescribed by ordinance." By section 811 of the Revised Ordinances of Kansas City of the year 1898, it was required that "the city engineer shall cause to be published for ten successive days within the twenty days next preceding the time for opening bids, in the newspaper doing the city printing or if there be none in such daily newspaper published in the city as he may select, a notice of the letting of a contract for such work to the lowest and best bidder." In the instant case the notice was published in each successive issue of the paper beginning April 5, 1901, and ending April 17, 1901, making 11 publica-

tions, but there was no publication of the said notice on April 7th and April 14th, because those were Sundays, and the "Mail," the newspaper in which the notice was published, was not published on Sundays. The contention of the plaintiff is that, under the charter and the ordinance quoted, it was essential that the notice should be published every day, whether Sunday or not. The argument is that, according to the definition of the word "successive," an uninterrupted course of publication was required by the charter and ordinance, and the failure to publish on two Sundays rendered the notice insufficient. Counsel also rely upon the decisions of the appellate court of this state to the effect that in computing statutory time Sundays will not be excluded. So far as the time of notice only is concerned, no doubt whatever exists that such is the rule. *State v. Green*, 66 Mo. 631; *St. Joseph ex rel. v. Landis*, 54 Mo. App. 315. But it is conceived that, in computing time within which an act must be done, these cases do not govern. Thus it is a familiar rule in this state, as well as at common law, that Sunday will not be counted in the construction of statutes giving four days within which to file motions for new trials and in arrest of judgment. *Bank v. Williams*, 46 Mo. 17; *Cattell v. Pub. Co.*, 88 Mo. 356; *Hales v. Owen*, 2 Salk, 625; *Rex v. Elkins*, 4 Burr. 2130. In *Thayer v. Felt*, 4 Pick. (Mass.) 354, the Supreme Court of Massachusetts in construing a statutory provision that a sheriff might adjourn a sale three days, excluding Sunday, and made no distinction between a long period and one wherein the time limited is less than a week. Counsel in that case had contended that Sunday is dies non juridicus only in regard to those things which are to be transacted in court, but the court did not so confine it, but held that the sheriff might adjourn three secular days although an intervening Sunday might make it four days in all. The precise question presented here was passed upon in *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310. In that case the objection was made that a certain ordinance was not published according to law, and the court answered the proposition by saying: "We see no force in the objection that the ordinance was not published according to law. A provision requiring a publication for five successive days in a daily newspaper is complied with by such publication for five successive week days, although a Sunday intervene on which there was no issue of the paper." When we take into consideration that the publication of a newspaper on Sunday necessarily involves labor, and there being no evidence that the publication on Sunday of a newspaper is a work of necessity or charity, if the construction given to the ordinance contended for by counsel for the plaintiff should be adopted, the result would be that the ordinance would override the statute of the state forbidding labor on Sunday. Section 2240, Rev. St. 1899 (Ann.

St. 1906, p. 1420). We think the California case was correct, and that "ten successive days," in section 811 of the Revised Ordinances, means publication on 10 successive days when the paper can be published without the publisher running the risk of being indicted for violation of the Sunday statute of this state. We think the publication was well enough.

3. The last contention of the plaintiff is that the work has never been completed. By section 10, art. 9, Charter, the tax bills for the building of a sewer are not to be issued until the sewer shall have been completed. As to the failure to complete the contract for building the sewer no complaint is made that the whole amount of pipe required by the ordinance was not laid on the proper lines and at the grade shown by the plans, neither is it contended that all of the flush tanks, manholes, and catch-basins were not built with the exception of four catch-basins at the four corners of Twenty-Sixth and Campbell streets. The testimony disclosed that these were omitted by the express direction of the city engineer, for the reason "that the street was not on grade and it would be a needless expense. When the street was graded, the city would put them in." The cost of these catch-basins was not included in the final estimate. By the terms of the contract the authority was given to the city engineer to decide all questions which might arise relative to the execution of the contract. The city engineer directed that these four useless catch-basins should be omitted, and that the contractor should not be paid for them. Their omission could not in any possible way affect the usefulness of the sewer; and, considering the fact that the street was not graded, it would appear to have been a perfectly reasonable exercise of his authority for the engineer to dispense with these catch-basins at the time the sewer was built. Certainly the landowners whose property was to be assessed for the payment of the sewer could have no ground of complaint if this useless expenditure was not charged up to them in the final estimate of the cost of the work.

The main insistence is that the contractor failed to carry out that particular provision of the contract which required that, where a sewer is built above the ground and any other foundation than embankment is used, there shall be a covering of earth of the construction and sewer built thereon to a height of one foot above the sewer, with a width at the top of not less than the greatest external diameter of the sewer. It appeared that in this case, instead of laying the sewer pipe on top of a masonry wall, it was laid in the wall, the masonry extending above the top sewer pipe. The city engineer testified that the pipe was covered with masonry, and for that reason he did not require the earth embankment, as the masonry was much more lasting and much less liable to wash off; and it was also

shown that the contractor had the express permission of the city engineer to substitute the masonry over the sewer pipe in lieu of the loose dirt. The evidence definitely shows the amount of dirt which would be required to make the embankment over the stone walls to be 3,430 yards, and the cost of making this embankment 25 cents a cubic yard. The evidence further showed that the walls were practically all built in streets and alleys upon which the plaintiff's property fronted. The total amount of the work was \$16,261.47. The total cost of masonry was \$2,061.30. There was also evidence in regard to the workmanship and material of the walls and of some leakage through the walls, and some testimony as to the method of back filling the trenches and plastering the manholes. Upon the main proposition that the sewer was not completed and for that reason the tax bills were prematurely issued, we think the testimony is against the plaintiff on this proposition. The sewer was completed as a sewer. Every foot of the pipe of the size required by the ordinance was laid and on the proper lines and grades as shown by the plans. We think that the defendant is right in insisting that the test is whether the sewer was completed, and not whether some of the details of the work were not strictly in accord with the specifications and the contract. The city engineer accepted the work and the city issued the tax bills, and, while this does not estop the plaintiffs from complaining of the manner in which the work was done under the provisions of the Kansas City charter, we think it falls far short of showing that the work was not completed within the meaning of the charter as to the issuance of the tax bills. This charter provision must be kept in view in the determination of this question. Section 19 of article 9 of the charter provides: "Every tax bill shall in any suit thereon be prima facie evidence of the validity of the bill of the doing of the work and of the furnishing of the material charged for and of the liability of the land to the charges stated in the bill; provided that nothing in this section shall be so construed as to prevent any defendant from pleading and proving in reduction any allegation of any bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner, and provided further that if any party shall plead any mistake or error in the amount of the bill, or that the work was not done in a workmanlike manner and that such party before the commencement of the suit tendered to the contractor or holder of the bill the full value of the work done and shall establish the same on the trial, the recovery shall only be for the amount so tendered and judgment for cost shall be rendered against the plaintiff, and provided further if it shall be pleaded and proved that the work for which the bill

was issued was not done according to the terms of the contract made by the contractor with the city, then the plaintiff or plaintiffs shall recover thereon only the actual value of the work done, if of any value, and if not of any value, the judgment shall be for the defendant." It is true that this provision upon its face applied to actions upon the tax bill, but, as the principle announced in the charter is in entire harmony with the just and equitable rule so often applied to other building contracts by this court, notably in *Yeats v. Ballentine*, 56 Mo. 530, to wit, that although the work has not been done in exact accordance with the terms of the contract, still a contractor will be permitted to recover what the work is reasonably worth to the owner not exceeding the contract price, we see no reason why it should not apply where the landowner takes the initiative and brings a suit in equity to cancel the bill, and either tenders or offers in his bill to pay the actual value of the work done. In *Quest v. Johnson*, 58 Mo. App. 54, the Kansas City Court of Appeals recognized the change made in the law by the charter provision above quoted, and for that reason distinguished the case from that of *Trader's Bank v. Payne*, 31 Mo. App. 512. And the same conclusion was reached by this court in *Asphalt Paving Company v. Ullman*, 137 Mo. 543, 38 S. W. 458, and *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800. In *Steffen v. Fox*, 124 Mo., loc. cit. 635, 28 S. W. 71, it was said by this court: "A strict and literal compliance with ordinances, and contracts thereunder, prescribing the manner in which public street improvements shall be made, has never been required as a condition to the acceptance of the work by the city or to the validity of the tax bill, for the cost thereof charged against the property of individuals." The ordinance under which the work in question was done was general in its application, and, to require literal compliance therewith, under very exceptional circumstances, would be unreasonable and in instances might work great hardship and injustice upon a contractor or property owner or both. Indeed, the charter itself, in recognition of this difficulty, secures to the property owner the right to reduce the recovery of a special tax bill, by showing that "the work, therein mentioned, was not done in a good and workmanlike manner." Charter, art. 6, § 25. Now it appears in this case from the testimony that, in order to build this sewer upon the grade determined by the city engineer, it was necessary to build up a wall of masonry in the street and alleys in front of plaintiff's lots upon which to lay the sewer pipe, and this was done, and, then the sewer pipe was laid on the top of this wall of masonry in the bed prepared for it, and then the wall built around and over the pipe so as to protect it, and this was done by the special permission of the inspector and city engineer, and all the

testimony on the part of the defendant tended to show that this would offer a much safer protection to the sewer pipe than would have been accomplished by merely piling up the embankment of dirt around it, as the dirt would soon wash away from the sewer thus left in the streets and alleys. This proof simply tended to show that the contract had not been observed literally by the contractors, but they had adopted, by the consent of the city engineer and inspector, a different mode of securing and protecting the sewer pipe, but this did not in our opinion show that the sewer was not completed, but simply that it was completed in a different manner in the details of protecting the sewer after it was completed. And the circuit court evidently found that, although there had been a departure in the details of this latter work from those specified in the contract, no injury had occurred to the plaintiff therefrom. It would serve no good purpose to review all the cases on this subject cited by the respective counsel, as in our view of the charter provision cited and the cases construing the same the plaintiff cannot defeat the whole assessment for the sewer, but, at most, could only be entitled to a reduction from the cost of the work and the bills to the amount of the cost of the omitted embankment; the engineer having in the first instance taken out the cost of the catch-basins, which by his directions were omitted. Neither would the fact which the evidence for the plaintiff tended to show that in some instances the joints of the pipe were not cemented in a workmanlike manner and that some of the manholes were not plastered properly entitle plaintiff to a cancellation of the tax bills. The circuit court evidently reached the conclusion that there was a substantial compliance with the contract and ordinance for the building of the sewer, and, upon a careful reading of the testimony, we think there was sufficient evidence to justify its finding and judgment.

We are not, however, prepared to say that, if the plaintiff had proceeded in its bill upon the principle of the ordinance quoted, and have tendered the full value of the work done and asked for a reduction of the bills to the amount of the cost of the embankment, but what he should have been credited with the latter sum. But the plaintiff has not proceeded upon that theory, but demands the cancellation of the tax bills entirely. It must be borne in mind that this is a bill to enjoin the collection of a tax, as these special assessments have often been ruled to be the exercise of the taxing power and the rule in equity has often been announced, that before a court of equity will enjoin the collection of the tax on account of its being excessive that the plaintiff should tender the amount which he conceives to be actually due and just. *Johnson v. Duer*, 115 Mo., loc. cit. 379, 21 S. W. 800; *Arnold*

v. Hawkins, 95 Mo., loc. cit. 572, 8 S. W. 718; Overall v. Ruenzl, 67 Mo. 203. Under the state of the pleadings in this case, we think the plaintiff cannot complain that the circuit court made no deduction from the amount of the tax bills, but dismissed the petition. As to the other items of which plaintiff complained other than the failure to cover the sewer with an embankment of dirt, we think that the testimony disclosed no actual or appreciable damages of which plaintiff can complain.

Accordingly the decree of the circuit court must be and is affirmed.

FOX, P. J., and BURGESS, J., concur.

DONALDSON BOND & STOCK CO. v. HOUCK.

(Supreme Court of Missouri, Division No. 1. July 3, 1908.)

1. APPEAL AND ERROR—QUESTIONS OF FACT—FINDINGS OF COURT—PRESUMPTIONS.

Where a jury is waived, and the issues are submitted to the court, all presumptions are in favor of the correctness of its findings on the questions of fact involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3955.]

2. BROKERS—COMMISSIONS—CONTRACT—EVIDENCE—FINDING.

In an action for broker's commissions in procuring a purchaser for the bonds and stock of a projected railroad, evidence held to sustain a finding that plaintiff's contract was with a railroad corporation, and not with defendant individually.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Brokers, § 118.]

3. CONTRACTS—CONSTRUCTION.

Plaintiff and defendant having had negotiations as to the sale of stocks and bonds of a projected railroad, and plaintiff having agreed to find a purchaser therefor, a written agreement was made, reciting that it was entered into between the railroad company, a corporation, and plaintiff company; that the corporation was constructing a railroad between certain termini, and for means to carry out the project authorized plaintiff to sell for it certain described bonds, which plaintiff did sell to the Missouri Trust Company; that the contract had been delivered and accepted, both by the railroad company and the trust company; that plaintiff had carried out the contract of sale, and fulfilled its obligation entitling it to compensation for services consisting of a transfer to plaintiff of a certain proportion of the bonds, etc.; and that if the trust company failed to carry out this contract, the bonds delivered to plaintiff should be returned to the railroad company. The contract was signed and attested by the seal of the railroad company by defendant, its president, etc., and was subsequently modified, so as to require the railroad company to give plaintiff the railroad's notes for all coupons maturing on bonds delivered to plaintiff, etc. Held, that such agreement was the written contract between the railroad company and plaintiff for plaintiff's services, and not a mere order for bonds, which the railroad company and defendant personally had previously agreed to transfer to plaintiff under a former contract.

4. BROKERS—RIGHT TO COMMISSIONS—PROCURING OF SALE.

Where plaintiff was not the procuring cause of the sale of defendant's system of railway to

a syndicate, plaintiff was not entitled to commissions on such sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]

5. APPEAL AND ERROR—PREJUDICE.

Where defendant was not liable on the cause of action alleged, the exclusion of evidence, with reference to plaintiff's damages, was without prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4193.]

Appeal from St. Louis Circuit Court; Robt. W. Foster, Judge.

Action by Donaldson Bond & Stock Co. against Louis Houck. Judgment for defendant, and plaintiff appeals. Affirmed.

Thos. K. Skinker and Wm. R. Donaldson, for appellant. Elenelous Smith, for respondent.

LAMM, J. Plaintiff is a domestic corporation, doing business in St. Louis as a buyer and seller of bonds, stock, and other securities, to wit, a broker. Defendant is a railroad builder and promoter living in Cape Girardeau. This is an action to recover the aggregate sum of \$175,000, for services alleged to have been rendered defendant personally in plaintiff's capacity as broker. The petition is in two counts, as follows: "The plaintiff states that it is a corporation, organized and existing under the laws of the state of Missouri concerning business corporations, and authorized by its charter to negotiate loans of money and to sell bonds and corporate stocks; that in the year 1900 the defendant was desirous of building a railroad in the state of Missouri, between the city of Cape Girardeau, in the county of Cape Girardeau, and the city of Perryville, in the county of Perry, but defendant was without the means of building the same; that thereupon defendant proposed to plaintiff a plan, whereby defendant would be enabled to build said railroad, as follows: That defendant should cause a railroad company to be organized for the purpose of building the same, and should cause stock and bonds to be issued by said company, and should cause the bonds to be guaranteed by a railroad corporation organized under the laws of the state of Missouri, known as the Chester, Perryville & Ste. Genevieve Railroad Company, which company was then operating a railroad in the state of Missouri, and should cause \$25,000 of such bonds and \$50,000 of such stock to be given to the plaintiff, provided plaintiff would negotiate a sale of other bonds and stock of said company for money to be used by defendant and the company so to be organized in building said railroad. Plaintiff states that plaintiff accepted defendant's said proposal, and thereafter defendant caused a corporation to be incorporated for the purpose of building said railroad, known as the St. Louis, Cape Girardeau & Southern Railroad Company; that thereupon plaintiff negotiated a sale of bonds and stock of said railroad company to the Missouri Trust Company, and procured said trust

company to agree, in writing, to take such bonds and stock of said railroad company, and to pay for them in installments as the work of constructing said railroad should progress, provided that the said company should complete said railroad on or before the 1st day of July, 1902; and said railroad company, by the same agreement, on its part agreed to deliver to said trust company its said bonds and stock to be so paid for, and agreed to construct its said railroad, and to complete the same by the 1st day of July, 1902. Plaintiff states that the defendant has at all times been the controlling spirit in the enterprise of building said railroad, and has at all times managed the same through persons put into said company, as its stockholders, directors, and officers, by his advice and influence, and that he has at all times been the real owner of said company; and that defendant and said railroad company have not built said railroad or any part thereof, and have abandoned the scheme of building the same, and have not caused said bonds to be guaranteed by the Chester, Perryville & Ste. Genevieve Railroad Company, whereby the bonds and stock of said St. Louis, Cape Girardeau & Southern Railroad Company have never attained any value, and that defendant has never caused any of such bonds or stock to be delivered to the plaintiff, wherefore plaintiff says that it is damaged in the sum of \$25,000, for which sum, with costs, it prays judgment. For another and further cause of action plaintiff states that heretofore, to wit, in the fall of the year 1901, the defendant, being the holder, legal and equitable, of all the stock in certain railroad corporations then building, owning, and operating a system of railroads in Southeast Missouri, known as the St. Louis, Kennett & Southern Railroad, the Clarkton Branch of the St. Louis, Kennett & Southern Railroad, the St. Louis, Morehouse & Southern Railroad, the Pemiscot Southern Railroad, the Chester, Perryville & Ste. Genevieve Railroad, Houck's Missouri & Arkansas Railroad, the Cape Girardeau, Bloomfield & Southern Railroad, the St. Louis, Cape Girardeau & Southern Railroad, and other railroads, all commonly called the Houck Roads, employed the plaintiff to find for him a purchaser of said railroads, and the stock of the said railroad corporations, and agreed to pay plaintiff a reasonable consideration if he would find such a purchaser; that plaintiff proposed the purchase of said railroads and stock to several persons, among whom was one Samuel W. Fordyce; that said persons took up and considered said proposals, and negotiated with plaintiff concerning them, and eventually the said Fordyce, in consequence of said proposals, and acting upon them, concluded a negotiation with plaintiff and defendant, whereby he purchased said roads and stocks for himself and others, at a large price, to wit, \$2,000,000 and more; that defendant has refused to pay plaintiff for its service in finding for him said purchaser;

that the service so rendered by plaintiff to defendant was reasonably worth \$100,000, wherefore plaintiff prays judgment against defendant for the sum of \$100,000, with its costs." The answer was a general denial.

The trial was without the aid of a jury. Plaintiff asked two declarations of law—the first on the first, and the second on the last count. The court gave the first and refused the second. These declarations follow: "(1) The court declares the law to be that if the court shall find from the evidence that defendant planned to build a railroad between the cities of Cape Girardeau and Perryville in Missouri, though the instrumentality of a railroad company to be incorporated for that purpose, and, in order to enable him to carry out his said plan, employed the plaintiff to negotiate and sell bonds and stock of the company so to be incorporated, and, for services to be rendered in making such negotiation and sale, agreed to pay and deliver to plaintiff \$25,000 of the bonds and \$50,000 of the stock of such company, and if the court shall further find that the defendant did cause a railroad company to be incorporated for said purpose, by the name of the St. Louis, Cape Girardeau & Southern Railroad Company, and thereafter plaintiff did negotiate a contract with the Missouri Trust Company of St. Louis, whereby said trust company did agree to take and pay for bonds and stock of said company on terms approved by defendant, and if the court shall further find that, among other things, it was provided by said contract that the bonds to be issued by said railroad company should be secured by a first mortgage on all of the property of said company, and also by the guaranty of the Chester, Perryville & Ste. Genevieve Railroad Company, a corporation then owning a railroad in Missouri, and also by a second mortgage on the property of the latter company, and that the money should be paid by said trust company for said bonds as sections of 5 miles of the road of said St. Louis, Cape Girardeau & Southern Railroad Company should be built, and that the whole of said road should be completed by the 1st day of July, 1902, and if the court shall further find that said railroad was not completed, and no section thereof was built, by the 1st day of July, 1902, and that said St. Louis, Cape Girardeau & Southern Railroad Company has abandoned the construction of said road, and that none of said bonds or stock have ever been paid or delivered to the plaintiff, then the court will find for the plaintiff, and will assess his damages at such sum as the court may believe from the evidence the bonds and stock the plaintiff was to have received would have been worth in the market when they should have been delivered to him. (2) The court declares the law to be that if the court shall find from the evidence that defendant employed plaintiff to find for him a purchaser for a system of railroads in southeast Missouri, known as the Houck Roads, and prom-

ised to pay plaintiff a reasonable compensation for such service; that thereafter plaintiff disclosed to defendant the names of Fordyce and Guy as persons likely to buy said roads, and opened negotiations with Fordyce for the sale of said roads, and shortly thereafter, in consequence of such disclosures and negotiations, defendant was enabled to sell and did sell his said roads, or an interest in them, to said Fordyce, Guy, and their associates—then the court will find for the plaintiff, and will assess its damages at such sum as will be reasonable compensation to it for the service so rendered." The judgment was for defendant on both counts, and plaintiff appeals.

The motion for a new trial assigned for grounds (now pressed) the following: "(1) That the finding of the court was against the evidence, and against the weight of the evidence, and against the law under the evidence; (2) that the court erred in refusing to give the plaintiff's second declaration of law; (3) that the court erred in excluding evidence offered by the plaintiff." Any fact vital to a just determination of errors assigned will appear in the opinion. Counsel in their briefs have treated the case as naturally dividing itself into two parts—the first relating to the first count, the second to the last. We shall preserve that line of demarcation.

1. It will be seen that the trial court agreed with plaintiff's counsel on the law applicable to the first count, if the facts therein hypothecated were found to exist. Evidently the court found the facts against plaintiff, otherwise judgment would have gone in its favor. There are two main propositions plaintiff must maintain in order to convict the trial court of error in its finding on the first count, viz.: (1) It must show it contracted (to the effect stated in that count) with defendant individually; and (2) it must show it performed the contract. If there was substantial evidence tending to show either of these propositions not true, plaintiff must be cast. In determining either we must be guided by the stiff rule of law thus aptly formulated by defendant's counsel: "Where a jury is waived, and the issues of fact are submitted to the court, all presumptions are in favor of the correctness of the findings of the court upon the questions of fact involved." In *Hamilton v. Boggess*, 63 Mo., loc. cit. 252 et seq., Napton, J., said: "When a case is submitted, a court and a jury dispensed with, the facts upon which the court bases its judgment are incontrovertible here. This court has only the power to review the law declared by the court below, and when that court is intrusted with both the facts and the law, we must assume the facts to be as that court finds them." Judge Napton adding that he made the observation because "we wish it to be understood that it is not our province to determine facts or review the findings of juries or courts on them, except in chancery cases." Keeping that proposition constantly

in mind as a guiding pole star, we come to the first proposition discussed by plaintiff's counsel, viz.: That a contract, as alleged in the first count, was made individually with defendant.

(a) To maintain that proposition great reliance is put on the phrasing of many letters from defendant during the years 1900, 1901, and 1902. Later a formal written contract, relating to the same subject-matter, was made between plaintiff and a certain railroad corporation, to be noticed further along. Defendant's counsel insists said formal written contract was the only contract, and that defendant was no party to it. Plaintiff's counsel, per contra, insist that such written contract was a mere order for bonds. Their theory is that defendant's position on the written contract is merely invoking the doctrine of novation—a doctrine (they say) inapplicable under the facts of this case. They say the real contract is evidenced by the antecedent letters. Attending, then, to the letters, we shall not incur this opinion with them, for they are many, and some of them are voluminous in detail. To understand them an outline of the situation surrounding the writers and their relation to each other is necessary. Letters, intended to be private, not infrequently change their whole character when made public, and when a third person attempts to interpret doubts and ambiguities, unless unmentioned details, serving to give the right meaning to the words (and which details are understood by the addressee) are supplied. "The relation between two persons forms a key to their correspondence, for which nothing else can be substituted." Lieber's *Hermeneutics*, p. 145; *Evans v. Evans*, 196 Mo., loc. cit. 20 et seq., 98 S. W. 969. In brief, the situation surrounding, and the relations between, Donaldson, president of the plaintiff corporation, and defendant were these: In past years, from time to time, defendant had caused to be organized a group of allied railroad corporations in southeast Missouri, and, as a contractor, had built a half dozen short lines (aggregating 200 miles or so) for such corporations, forming a gridiron on the map of southeastern Missouri. He had taken his pay in bonds and stocks. Through the ownership of a majority of the stock, he was the controlling and moving spirit in these enterprises. Through Donaldson, as president of plaintiff brokerage company, he had negotiated such bonds in St. Louis. Hard times had depressed these enterprises. Rival lines were threatened. We infer some of the bonds had been hypothecated as collateral for loans then pressing payment. The situation was such that the future of the bonds already sold, and others about to be issued (or issued and hawked on the market), for the completion of lines already building, was somewhat uncertain. At the times in hand defendant is shown to have been in sharp financial

straits. We pause to point out that this very fact is not without significance in determining the question whether plaintiff was relying on Mr. Houck's personal obligation at the outset. Be that as it may, the correspondence covered the whole situation. It pointed to the sale of some of the foregoing bonds. It pointed to a general scheme of sustaining the value of the bonds secured on the roads then built and being completed, in all of which plaintiff, as a broker, had a live interest to protect its customers who had bought them. In this condition of things, in letters dealing with the general situation outlined above, defendant introduced into the correspondence the idea of connecting the "lower system," of what may be called the "Houck Railroads," with the "upper system" by building a line of a few miles (say 45) from Cape Girardeau north to Perryville, with the ultimate intention of bridging the Mississippi in the neighborhood of Ste. Genevieve, crossing into Illinois and getting into St. Louis through the American Bottom. Mr. Houck signed his letters as an individual. He used the pronouns "I" and "me" copiously. He spoke of the roads built or building as "my" roads, of the contemplated line from Cape Girardeau to Perryville as "his," and plaintiff relies strongly on such twist of phrase, as tending to show a contract between plaintiff corporation and defendant as an individual. But we cannot allow this view controlling force for several reasons. One reason is that a little subconscious egotism is allowable, as a trick of speech, to a man who has achieved some greatness (not from things merely said but) on the arduous plane of things actually done. It must be remembered that Mr. Houck was speaking of things not inaptly described by the phrase of the old worthy (Cæsar, maybe): "All of which I saw and much of which I was." There is no pretense that Donaldson was misled by the ego. Another reason is that, while Mr. Houck signed his letters as an individual and freely used pronouns in the first person singular, yet he also addressed his letters to "J. W. Donaldson" individually. He used the address "My dear Mr. Donaldson," "Dear Sir," etc. Mr. Donaldson was an old business friend of his. In turn, the letters written to Mr. Houck are signed, in one or more instances, by Mr. Donaldson individually, but mostly by "J. W. Donaldson," with such several addenda as "Pst," "Pres.," "Pt.," "Prest."

Now, if we are to narrowly interpret the letters from an individual standpoint, they would, if held contractual, bind Donaldson individually, as well as Houck, and the suit would be between the man Donaldson and the man Houck; but the truth is that, while Houck wrote to Donaldson as an individual, he knew that Donaldson was the titular and actual head of plaintiff corporation, and did business through that corporation. So, too, Donaldson knew that plaintiff's plan was to do this business through the medium of a

railroad corporation. Neither party had the advantage of the other in that respect. The eyes of both were wide open, and their minds met on that proposition. But as the letters show Houck to be in financial straits, so they also show that the contemplated scheme (one of several described in the letters) for a railroad from Cape Girardeau to Perryville could not be carried out, except the contemplated corporation was put on its feet by the sale of its bonds. Everything hinged on that fact. Houck told Donaldson that the road was to be built by a corporation not in existence, and it will not do to say that Donaldson, an experienced broker, did not know that, before the end was consummated, his company would have to contract and deal with a corporation in this "hazard of new fortune." He is presumed to know that under our statutes an individual did not possess the right of eminent domain for railroad building in Missouri. He knew that a corporation would have to spring into existence to build that road, issue the stock and bonds, and secure the latter by a mortgage. Accordingly, we are of the opinion that the circumstances surrounding all the parties, and throwing light on the verbiage of the letters, were of such sort that the court could well find that Houck never intended to be bound personally, and that Donaldson had notice of that fact; that their minds never met on any such proposition, as will further appear later, when the written contracts are considered. The very letter on which plaintiff chiefly relies to establish the contract sued on shows it was not intended as a contract. It was in the nature of a preparatory negotiation, a tentative suggestion—"a feeler"—to see what Donaldson could do to better the whole Houck system, the success of which, as shown allunde, Donaldson's company was already interested in. That letter is as follows:

"Cape Girardeau, Mo., Aug. 27, 1900.

"J. W. Donaldson, Esq., Third and Olive streets, St. Louis, Mo.—My Dear Mr. Donaldson: Inclosed I send you a statement of the indebtedness of my several roads and earnings of the same from July, 1899, to the end of June, 1900. Also in brief words an outline of my scheme to connect roads, which I explained to you verbally. The map I will try and send up some time during the week, as quick as Major Brooks can finish it. Other information that you may want, please write me, and I will furnish it. In regard to the extension north, will say that I expect to sell, to the people along the line, bonds at par, to the amount of \$40,000 or \$50,000, so that if you can make a sale of \$175,000 of the bonds, at 80 cents on the dollar, I could put that road through. This would leave \$25,000 of bonds as a bonus for you, and to that I would also add a bonus of \$50,000 of the stock of the line between Cape Girardeau and Perryville. In order to connect the Bloomfield road with my roads from Cape

Girardeau south, I would have to build from Zeta to Vanduser. [Vanduser is a station about 6 miles southwest of Morley.] That distance is about 11 miles. And I also want to put in the extension between Bloomfield and Dexter, about 8 miles. Total distance 19 miles. This additional road I will want to bond for \$100,000; and if you can place the bonds, selling \$90,000 at 80 cents on the dollar, it will give you a bonus of \$10,000 in bonds and \$25,000 in stock. As soon as these several links are built, we will have over 300 miles of road, and a total indebtedness, on all this line, of but little over \$1,400,000. The earning capacity of the property will be unequaled, and I am sure that we will make the stock earn dividends shortly after we have got the lines combined. Of course, after these connections are built, the next thing will be to construct 35 miles into St. Louis, and get a bridge across the Mississippi somewhere above Ste. Genevieve. I believe that would be a comparatively easy proposition for us to carry through. In three or four years, if we all live, we ought to be able to see daylight, and in some way or other, I ought to be, as you put it, 'easy with regard to construction of road, and not always in hot water.' Wish you would see what you can do now, first, with reference to securing me the money on \$175,000 of bonds at 80 cents, on line between Cape Girardeau and Perryville. I want to get that line under construction quick, if possible. After we have got that fairly under way, I think you can easily, perhaps, arrange to get what small amount I want to construct a connection to Bloomfield and Dexter. In the meantime do not neglect to try and sell \$4,000 or \$5,000 of bonds for me of the Perryville road. I want, of course, one half to be applied to pay note, and the other half, I need not say, I need just now. I am out of pocket money and everything else.

"Very truly yours,

"[Signed] Louis Houck."

Presently a railroad corporation was organized, styled the "St. Louis, Cape Girardeau & Southern Railroad Company," to build a line from Cape Girardeau to Perryville, and plaintiff was instrumental in procuring a contract between that corporation and the Missouri Trust Company to float the bonds. Plaintiff's written proposition to the trust company (accepted by it) contained the following: "We will join you in the subscription to the issue, taking the \$225,000 at 80 equals \$180,000, and getting, as a bonus, a portion of the capital stock amounting to \$112,500, or 1,125 shares." Subsequently it was agreed that the bond issue should be increased from \$225,000 to \$250,000, and the final contract includes that sum. Though plaintiff did not sign the contract between the trust company and the railroad company, yet the record shows that, as a sort of underwriting side partner, it was jointly interested with the trust company in the scheme to float the bonds, and was to share in its afore-

said stock bonus. We may say in passing that the scheme had developed and changed from time to time; and, after the letter of August 27, 1900, supra, we find nothing more in the correspondence relating to the \$50,000 stock bonus suggested in that letter. It is a fair inference, therefore, that the new scheme, whereby plaintiff was to share in the trust company's stock, bonus and profits, took the place of the original tentative suggestion relating to stock, and is the only stock bonus finally provided for. The aforesaid contract between the trust company and the railroad company is long, and need not be reproduced. Shortly, it narrates that the railroad company contemplates constructing a line of railroad from Perryville to Cape Girardeau, about 45 miles, and, to obtain part of the money required, proposes to sell its stock and bonds; that the bonds are to an amount of \$250,000; that the stock consists of 4,500 shares full paid up common stock of the par value of \$100 each, and no more; that the trust company is to be trustee in the mortgage, and the bonds are to be secured by the guaranty of another little railroad (naming it) then subject to a prior mortgage, securing \$140,000. The railroad company sells and the trust company buys \$225,000 in bonds, and \$112,500 in stock, for \$180,000, in installments, as certain sections of the road are built; the road to be completed by the 1st of July, 1902. On a record thus outlined, the trial court could well find that Louis Houck never contracted, and never intended to contract, with plaintiff brokerage company in his individual capacity, as alleged in the first count of the petition. The court could well find, and presumably did find, that there was an implied term in all the antecedent preparatory negotiations between Houck and Donaldson, to the effect that when the plan developed sufficiently to take form and substance, the promoting brokers would deal directly with a railroad corporation.

(b) The conclusion reached in paragraph "a" is much strengthened by after events. At a certain time plaintiff caused to be sent to defendant an agreement in writing for execution by him and the railroad company. Its draft follows: "St. Louis, Mo., July 31, 1901. This agreement entered into this day by and between Louis Houck for himself and also the St. Louis, Cape Girardeau & Southern R. R. Co., a corporation duly organized under the laws of the state of Missouri and the Donaldson Bond & Stock Company of St. Louis, witnesseth: That said L. Houck and the St. Louis, Cape Girardeau & Southern R. R. Co. are constructing a railroad from Perryville in Perry county, Mo., to Cape Girardeau City, Mo., and for means to enable them to carry out the project and construct the road, authorized the Donaldson Bond & Stock Company to sell for them \$225,000 of first mortgage 5 per cent. bonds secured by first mortgage on said road which the said Donaldson Bond & Stock Company did, and

sold to the Missouri Trust Company said bonds, and contracts signed in duplicate as to the delivery of bonds, and payment of moneys therefor have been delivered and accepted under seal by said St. Louis Trust Company. And the said Donaldson Bond & Stock Company having carried out their contract of sale and fulfilled their obligations are entitled to their compensation for services rendered, namely, upon the execution of the bonds by the railroad company and viséing of the same by the trust company, said Donaldson Bond & Stock Company are to receive \$10,000 in bonds, and upon completion of the first 10 miles of said roads, they are to receive \$5,000 in bonds more of said first mortgage bonds, for the next 10 miles \$5,000, and when the line is completed from Perryville to Cape Girardeau, the balance \$5,000 in full, making a total of \$25,000 in bonds out of a total of \$250,000 in bonds issued by the railroad company, and of which issue the Missouri Trust Company bought \$225,000 in bonds." The scheme had been brewing, in sundry phases of development, for nearly a year, when the foregoing proposed agreement was forwarded to defendant. When he received it, he changed its terms so as to strike out all provisions and narrations binding himself. He drafted a new contract, and forwarded it to Mr. Donaldson. The record shows that Mr. Donaldson was advised fully in the premises. He well knew the significance of the alterations made. Neither of these men were novices. To the contrary, they were alert and seasoned veterans in business. Referring to the proposed agreement forwarded by him to defendant, Mr. Donaldson testified in part as follows: "Q. You say in there you tried to put the name of Louis Houck as a party to the contract? A. Yes, sir. Q. And you notice we struck it out? A. Yes, sir. Q. And we sent you that contract? A. Yes, sir. Q. And you got it? A. Yes, sir. Q. And what did you object to in it? simply the two clauses, and not that the defendant had not signed it? A. I did." Evidently the time to speak was ripe. Instead of speaking, plaintiff company, through Donaldson, raised other objections to the submitted draft, but entirely acquiesced (by silence) in the elimination of defendant as a contracting party, and actually signed a contract with the railroad company, which Donaldson on the stand interprets as a mere order for bonds, but which we do not think can be justly reduced to any such narrow limits. To our minds it is the very contract contemplated from the start, and which gives plaintiff his right of action, if any, on the facts of this record. That contract, as licked into shape by negotiation (omitting signatures), follows:

"Agreement. This agreement, entered into this day by and between the St. Louis, Cape Girardeau & Southern Railroad Company, a corporation duly incorporated and organized under the laws of the state of Missouri, and

the Donaldson Bond & Stock Company, of St. Louis, witnesseth:

"Section 1. That the said St. Louis, Cape Girardeau & Southern Railroad Company are constructing a railroad from Perryville, in Perry county, Missouri, to Cape Girardeau, in Cape Girardeau county, Missouri, and for means to enable them to carry out the project and construct the road authorized the Donaldson Bond & Stock Company to sell for them two hundred and twenty-five thousand (\$225,000) dollars of the first mortgage five (5%) per cent. bonds secured by a first mortgage on said road, which the said Donaldson Bond & Stock Company did, and sold to the Missouri Trust Company said bonds, and contract signed in duplicate as to the delivery of bonds and payment of moneys therefor having been delivered and accepted under seal by said St. Louis, Cape Girardeau & Southern Railroad Company and Missouri Trust Company, and the said Donaldson Bond & Stock Company, having carried out their contract of sale and fulfilled their obligations, are entitled to their compensation for services rendered, namely; upon the execution of the bonds by the railroad and viséing of same by the trust company, said Donaldson Bond & Stock Company are to receive an order on said trust company for delivery of ten thousand dollars in bonds, and upon completion of ten miles of said road they are to receive a further order of five thousand dollars in bonds more of said first mortgage bonds; for the next ten miles an order of five thousand; and when line is completed from Perryville to Cape Girardeau an order for the balance on said trust company for five thousand dollars in full, making a total of twenty-five thousand dollars in bonds out of a total of two hundred and fifty thousand dollars in bonds issued by the railroad company, of which issue the Missouri Trust Company bought two hundred and twenty-five thousand dollars in bonds.

"Sec. 2. It is agreed by the Donaldson Bond & Stock Company that they will not sell any of these bonds until at least twenty miles of the road is completed.

"Sec. 3. And further it is agreed that in case the said Missouri Trust Company should in any wise fail or refuse to carry out the contract for the purchase of said two hundred and twenty-five thousand dollars of bonds that the bonds to be delivered hereunder are to be returned to said St. Louis, Cape Girardeau & Southern Railroad.

"Sec. 4. And it is further agreed that the interest coupons of the said ten thousand dollars of bonds delivered and of the several installments of bonds of five thousand dollars shall not be paid by the said company until one year after the completion of the said road between Cape Girardeau and Perryville.

"In witness whereof, this contract has been signed and attested by the seal of said St. Louis, Cape Girardeau & Southern Railroad Company by its president and attested by the

seal of the company, this 2d day of August, 1901. * * *

"It is mutually agreed that sections marked 3 and 4 of above contract shall be and are hereby revoked and this following section marked 5 be substituted in lieu thereof namely, section 5. It is further agreed that for coupons on \$25,000 bonds due respectively, 1st January, 1902, and 1st July, 1902, the following agreement shall obtain, viz.:

"The St. Louis, Cape Girardeau & Southern R. R. Co. will give the Donaldson Bond & Stock Company the notes of the company for all coupons maturing on bonds delivered them as above, as follows: For coupons due Jan. 1, 1902, amounting to \$625.00 the note of the company payable one year after date with 5% interest, and for coupons due July 1, 1902, amounting to \$625—note of the company for same amount due Jan. 1, 1903, with interest at 5% per annum. The Donaldson Bond & Stock Company to take up the coupons for those two terms on bonds delivered them as said coupons mature by depositing the money to pay the same with the Missouri Trust Company as a special fund for the coupons on the \$25,000 in bonds or any part of the said \$25,000 in bonds delivered to them."

Defendant relies on that contract, as covering the subject-matter of the suit as to the bonds to be given in compensation for services. As said heretofore, plaintiff's learned counsel argue that such contention is but an effort to apply the doctrine of novation to the case. They argue that defendant, being individually bound originally, now seeks, by way of a shield against liability to introduce a new party by novation, to which plaintiff must look for its pay. They have industriously collected a line of cases holding, in effect, that, where there is an original binding contract, a contracting party cannot escape liability by novation or substitution where there is no consideration for the new agreement, where the old contract was not rescinded or abandoned, or where the new agreement did not cover the whole subject. We shall not enter into a discussion of those contentions, for the reason that we have reached the conclusion that the doctrine of novation is not in the case. What was done here was not to substitute. It was the very thing itself. When plaintiff corporation, looking forward to a contract, as we have held it did, accepted one, as it did, which narrated (not that Houck, but) that the railroad company was constructing a railroad from Perryville to Cape Girardeau, that (not Houck, but) the company needed means to enable it to carry out the project; that (not Houck, but) the company had authorized plaintiff to sell its bonds, which plaintiff had done, and which narrated that plaintiff had carried out that very contract of sale, and had fulfilled its obligations thereunder, and was entitled to its compensation for services rendered as set forth—we say, all these things appearing in set phrases, it cannot be fairly held that it

was a mere order for bonds. It must be held that it was contractual in its nature; that it evidenced those features finally deemed vital by the contracting parties, and merged into itself all prior negotiations. The legal principles involved are so primary, that they need no reinforcement by citation of authority. In view of the premises we are unwilling to hold that the court erred in giving the instruction on the first count, and then finding the facts against plaintiff.

2. The evidence shows that the bonds were never delivered to plaintiff, that no bonds were ever sold, and that the road was abandoned. It seems the president of the Missouri Trust Company, Mr. Crandall, dying, new officers took charge of its affairs, who raised the point that the railroad company had violated the contract. They criticised the scheme as it then stood, and suggested a new one. No new contract was consummated, and the whole thing fell through. There is some evidence squinting towards the fact that the railroad company, or Mr. Houck, or both, became lukewarm and indifferent, and failed to go on. In this condition of things, we are asked to measure out praise and blame, to hold that plaintiff fully performed its contract to find a purchaser for the bonds, who was solvent and obligated to take them, and that the failure of the scheme is due to the conduct of defendant. But it must be self-evident that, having held that defendant did not contract with plaintiff individually, there is no need to determine questions so raised; hence, the cause of action alleged in the first count of the petition being determined before those questions are reached, they become by-matter. We should not determine a point not necessary to a decision, and thereby in anywise prejudice a cause of action which plaintiff may or may not have on that very issue of fact against the St. Louis, Cape Girardeau & Southern Railroad Company.

3. Did the court err in refusing the instruction covering the second count? We think not. However correct as an abstract proposition of law, it was properly refused, because there is no evidence of any probative force that plaintiff was the procuring cause of the sale mentioned in that count. The documentary evidence introduced on that count, including letters and option agreements, and the oral testimony, of which there was much, clearly show that plaintiff was not the procuring cause. True, plaintiff at one time was negotiating with Mr. Fordyce. True, Mr. Fordyce was a member of the last syndicate formed to buy, and which did buy, the Houck roads. But there is no testimony that Mr. Fordyce became a member of the final syndicate through the effort of plaintiff. It is the other way. Mr. Houck was engaged on independent lines in the sale of his stock in the Houck system. The early negotiations in which plaintiff took part came to nothing, and were abandoned to all intents and purposes. The testimony shows that plaintiff

knew nothing of the formation of the last purchasing syndicate. These facts present an impassable obstacle in the way of recovery. We conclude the finding nisi was right on the second count.

4. In its motion for a new trial the plaintiff alleges error in excluding evidence offered on the second count. This evidence went to the measure of the damages; but, as we have held that under the facts and the law there was no liability, it follows that an exception, saved on the exclusion of evidence of that character, could not constitute reversible error. But on any view, the testimony excluded was too remote. It related to the value of bonds issued after the system was sold. The cause appears to have been well tried and well decided.

Accordingly the judgment is affirmed. All concur, except VALLIANT, P. J., who is absent.

CHLANDA v. ST. LOUIS TRANSIT CO. et al.

(Supreme Court of Missouri, Division No. 1,
July 3, 1906.)

1. CARRIERS — INJURIES TO PASSENGERS — STREET RAILROAD—BURDEN OF PROOF.

Where plaintiff who was injured in a collision between street cars sued two street railroad companies, and charged that she suffered damages through the negligence of the servants of both, the burden was on her to prove such charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1287.]

2. STREET RAILROADS—CONTRACTS—CONSTRUCTION—LEASE—AFFECT.

A street railway company contracted with another to lease its railway to the latter for 40 years in consideration of a specified rent to be paid and the performance of certain duties in the nature of the restoration of the property at the end of the term and for re-entry in case of default. The contract did not provide that the lessee company should transact business in the name or for the benefit of the lessor, except in so far as the former was benefited by the consideration to be paid by the latter. *Held*, that the contract was a lease and relieved the lessor company from liability for torts committed in the operation of the road by the lessees' servants.

3. EVIDENCE—WRITTEN INSTRUMENTS—SUFFICIENCY.

Where plaintiff introduced in evidence a lease from one of the defendant street railway companies to the other, plaintiff could not thereafter object that the lease was void because of defendant's failure to show municipal assent thereto required by Const. art. 12, § 20 (Ann. St. 1906, p. 309).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2442.]

4. STREET RAILROADS—LEASE—PRESUMPTIONS.

Where a street railway company leased its line and property to another company, it must be presumed in the absence of evidence to the contrary that municipal assent to such lease required by Const. art. 12, § 20 (Ann. St. 1906, p. 309), was obtained.

5. APPEAL AND ERROR—REVIEW—REASONS FOR DECISION BELOW.

Where motion for new trial was sustainable on any of the grounds alleged, it was immaterial

on appeal that it was not sustainable on the ground on which it was based by the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408-3430.]

6. DAMAGES—PERSONAL INJURY—EXCESSIVE DAMAGES.

Plaintiff was injured in a street car collision. None of her bones were broken, and there was only a slight temporary discoloration outwardly visible. There were no discoverable lesions or known existing abnormal organs traced to the injury, but she lost considerable weight, and claimed to be suffering from locomotor ataxia or paralysis, affecting her ability to walk. A commission of doctors appointed by the court, however, testified that her trouble was traumatic neurasthenia and traumatic hysteria, and that she would probably recover. There was also evidence that she had incurred indebtedness in the sum of \$1,000 for medical treatment and \$500 for drugs and medicines. *Held*, that a verdict awarding her \$18,000 was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357-371.]

7. NEW TRIAL—GROUNDS—EXCESSIVE DAMAGES.

Damages so great as to indicate passion or prejudice on the part of the jury are ground for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 153-156.]

8. CARRIERS—INJURIES TO PASSENGERS—RES IPSA LOQUITUR.

Where, in an action for injuries to plaintiff, a street car passenger, in a collision between the car on which she was riding and a following car, the petition counted on general negligence, plaintiff was entitled to the benefit of the doctrine *res ipsa loquitur*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1287.]

9. WITNESSES—PHYSICIANS—COMPETENCY.

The statute declaring a physician incompetent to testify concerning any information acquired from his patient while attending him in a professional capacity, and which was necessary to enable him to prescribe or do any act as a surgeon, did not disqualify plaintiff's physician from testifying in her action for injuries that on one occasion when he went to her house to collect a bill he saw her walking about and go up a flight of stairs without crutches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 771.]

10. APPEAL AND ERROR—REVIEW—PREJUDICIAL ERROR—EVIDENCE.

Where, in an action for injuries, defendant's chief contention was over the extent and permanency thereof and the amount of damages, and the whole trend of plaintiff's case was that she could not walk without artificial aid, the erroneous exclusion of evidence of plaintiff's physician that on one occasion he saw her walk about the house and go upstairs without crutches was prejudicial.

11. SAME—INVITED ERROR.

In an action for injuries defendant offered to prove by plaintiff's physician that on one occasion he saw her walking about the house and upstairs without artificial aid, an objection that the witness was incompetent having been overruled defendant's counsel then stated "This doctor has not been discharged as plaintiff's physician, but has continued to treat her and was, at the time of going to see her with reference to his bill." On such statement the objection was erroneously sustained. *Held*, that the statement made by defendant was not an invitation to the court to change its ruling on the objection so as to render the changed ruling invited error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3597-3600.]

Appeal from Circuit Court, Boone County; Alex. H. Waller, Judge.

Action by Rose Chlanda against the St. Louis Transit Company and another. Judgment for plaintiff, and from an order granting defendants' motion for a new trial, plaintiff appeals. Affirmed.

C. B. Sebastian, Thomas T. Fauntleroy, and Shepard Barclay, for appellant. Boyle & Priest and T. E. Francis, for respondents.

LAMM, J. This is a suit for \$35,000 damages for personal injuries alleged to have been received by plaintiff through the negligence of two domestic street railway corporations, viz., the St. Louis Transit Company and the United Railways Company of St. Louis. Begun in the circuit court of the city of St. Louis, such changes of venue were had that the cause went to the Boone circuit court, and was tried at Columbia before Judge Waller and a jury, resulting in a verdict against both defendants for \$18,000. Defendants, not content, filed their separate motions for a new trial. The court sustained both, after taking time to consider. There was an array of grounds in each motion but, singling out one, the court made it the basis of its order, viz., error in excluding legal and competent evidence offered by defendants. From the order granting a new trial, plaintiff appeals after an unsuccessful motion to vacate it.

The cause was tried on a second amended petition setting forth that defendants were doing business in the city of St. Louis as common carriers of passengers for hire, owning and operating a line of street railway and cars run by electricity upon Washington avenue, a public street in said city, and connecting with a system of street railways similarly owned and operated; that on the 6th day of December, 1901, she was a passenger for pay on one of defendant's cars; that while seated therein, and when between Thirteenth and Fifteenth streets, another of defendants' cars ran into hers, "because of the negligence and careless operation of said cars of defendants, whereby they were so permitted to collide as aforesaid, when by the exercise of due and reasonable care, such as it was the duty of defendants to observe towards plaintiff as a passenger as aforesaid, in the said circumstances, said collision would have been avoided by defendants and their agents in charge of said cars and each of them." By the collision, plaintiff alleges she was violently thrown out of her seat with much force, "so that she fell backward upon the same seat"; that she received severe injuries to her back and spinal column; was severely jolted and shocked and bruised, and received hurts to her spine and inwardly which crippled her for life, destroyed her health and happiness, subjected her to heavy expenses for medical care, attention, and nursing, and will continue in the future to cause such expenses, that she has endured and will endure great physical and mental

pain and suffering, has lost her ability to earn a livelihood, has lost time and earnings to a large amount, and will continue to lose them in the future—all as the direct result of said collision and injuries. The defendant filed general denials as separate answers. It stands conceded plaintiff was a passenger for pay, that defendant transit company was operating the car on which she was riding and the one ramming it as a common carrier of passengers for hire, and that a rear end collision occurred. So much is without conflict.

Plaintiff introduced testimony tending to show that the force of the collision was severe; that her car had stopped to let passengers off and on; and that a following car struck hers with great force, throwing her out of her seat and then backward, injuring her in the small of the back; that therefrom she had lost weight (20 to 30 pounds) and power of locomotion, had become nervous, anemic and pale, suffering constant pain by day and by night, which pain was increasing instead of diminishing; and that she was generally obliged to use crutches in walking but sometimes could walk at home without, aided by a chair or cane. Her medical experts gave it as their opinion that she suffered a concussion of the spine; that locomotor ataxia or paralysis resulted; that she would never completely recover the use of her limbs and that her helplessness is permanent. These experts had not examined her later than March, 1902 (the trial was in June, 1904). A few days before her injury she had been examined by a physician for insurance, and was found in perfect nervous condition—"a picture of health" and "sound in all particulars." The same physician had seen plaintiff at intervals since that examination, the last time about July 26, 1903. At that time (from observation) he characterized her condition as that of a "physical wreck," and as showing a lack of locomotion.

Plaintiff is a widow, and was engaged in the occupation of a seamstress in all its various branches—custom shirtmaking, dressmaking, embroidery—all kinds of fancy work, to make a living for her family. She was earning thereat from \$1,000 to \$1,100 per year. Since her injury she had not earned \$1, was not able to perform duties as seamstress. Her hearing had become defective. When trying to walk without assistance she had a sense of being ready to fall. As the result of her injuries, she had incurred liability for medical services to the amount of \$1,000, and for drugs and medicines about \$500.

Defendants' testimony tended to show that some part of the machinery (the turn buckle) of the car on which plaintiff was riding broke; that the motorman, hearing a rattling noise from the broken part dragging on the pavement, stopped his car between cross-streets to examine, and, while so stopped, the following car collided with it very slightly. It was about 7:30 p. m. on December 6, 1901—a dark, rainy, drizzling evening. The

grade was down about one foot to the block. The following car was going about $4\frac{1}{2}$ miles an hour, and was not over 15 feet behind; that the jar was not hard enough "to notice." Defendants also put in evidence admissions by plaintiff to two ladies to the effect that she was not thrown out of her seat; that the collision did not produce much of a jar; that she did not feel the effects of it for two days afterwards, and did not know she was hurt until then. One of the claim agents in the employ of the transit company (Slough) testified that once during the year of the trial and twice the year before he had seen plaintiff. Once he saw her walking downstairs without crutches "apparently with not a thing the matter with her." The court appointed a commission of disinterested medical experts (Drs. McAlester, Moss, and Gordon) to examine plaintiff. Defendants used them as witnesses. From their testimony, it appeared they examined her a day or so before testifying at the Parker Hospital on the University grounds.

Dr. McAlester gave it as his opinion that she was suffering from traumatic neurasthenia, i. e., an over-sensitive condition of the nervous system from some injury. His judgment was that she was not suffering from paralysis or locomotor ataxia. He said she located her injury at the junction of the sacrum with the last lumbar vertebra; that is, low down in the back; that probably she would get well. That was his opinion, though it was a hard matter for a man to say. The history of the bulk of such injuries is that most of them get well. On cross-examination, he testified that injuries producing results to the nervous system such as seen in plaintiff's case were not necessarily of a serious character; that an over-sensitive condition may follow slight injuries—more than probable they do; that traumatic neurasthenia and traumatic hysteria were not quite, perhaps, but almost synonymous; that a person by centering his mind on a given point can modify the functions of an organ; that he could see or feel nothing in plaintiff's person by which he could judge of the nature of the injury, and he had to take her statement for the latter; that he noticed the expression of her face and it indicated she was suffering from traumatic neurasthenia; that the day he examined her she had some hysteria. On cross-examination he testified that he would not state positively, but he thought she would get over it; that the existence of litigation, in his opinion, aggravated her condition.

Dr. Gordon testified that plaintiff complained of a sensitive area at the lower part of the spine; that her pulse beats (when examined) were a little fast; that he found no evidences of paralysis or locomotor ataxia; that he found her arms and limbs well nourished and firm; that she used her arms very well and wrote her name very well; and that she could stand on her feet, but complained

she had to use a crutch to walk or support herself by a chair or something of that kind; that she was suffering from a sensitive condition of the nervous system and he thought she would likely recover; that "neurasthenia" and "hysteria" were pretty nearly synonymous terms.

Dr. Moss' testimony agreed in substance with that of Drs. McAlester and Gordon.

In this court, defendants file separate briefs in support of the order granting a new trial. The United Railways Company puts its argument on a ground peculiar to itself.

1. It will be seen from the abridgement of the petition that plaintiff charges that both of the corporate defendants were operating the street railway line and the cars thereon, including the two in question. The gist of the charge is that plaintiff suffered damages through the negligence of the servants of both. Now, the United Railways Company denies that allegation. Hence, under the issues made, the burden was on plaintiff to prove that charge. How did she carry that burden—well or ill? There is not a scintilla of testimony directly or indirectly even squinting that way unless a certain lease, put in evidence by plaintiff from the United Railways Company to the transit company proves it. That lease is set out in *Moorshead v. United Railways Company of St. Louis* (certified here from the St. Louis Court of Appeals) 203 Mo. 121, 96 S. W. 261, 100 S. W. 611. It is very long, and we shall reproduce none of its terms. Inquirers may find them in that case.

In connection with the offer of the lease, the record shows the following: "It is admitted by the parties to the suit that the cars mentioned in the petition in this case were operated by the St. Louis Transit Company. Also that the place on Washington avenue in St. Louis, where the alleged accident is said to have occurred, and where plaintiff claims to have been injured was then a part of the property leased by the United Railways of St. Louis to the St. Louis Transit Company by lease between those companies made in September, 1890. The defendant admits the fact as stated in the above stipulation, that that is a part of the line that is covered by lease between the two companies mentioned, but the defendant objects to the competency of that fact tending to prove any issue in the case, and more especially for the reason that although the United Railways Company may have leased its cars and lines to the St. Louis Transit Company, that fact does not tend to prove that the two companies were jointly operating this line of the St. Louis Transit Company. This admission here is that at the time said line was being operated by the transit company, and, if that be true, then the United Railways Company cannot be liable in this case. The plaintiff offered in evidence a copy of the lease entered into between the said two companies, which is

offered as tending to show the property in question was leased while belonging to the United Railways Company, and it is leased for operating purposes to the St. Louis Transit Company. To the introduction of this lease in evidence the defendant at the time objected, for the reason that if the facts stated in the petition in this case be true the United Railways Company cannot possibly be liable in this action. It is immaterial as a matter of law that the obligation of the parties may have been as stated or set out in the lease, still the United Railways Company would, notwithstanding that, not be liable in this action for any negligence on the part of the St. Louis Transit Company whose employes were operating the particular car of the St. Louis Transit Company, that being the operating company and the United Railways Company not having anything to do with it. The relations existing between the two companies by reason of this lease that is proposed to be offered in evidence here could not make the United Railways Company liable. There is no objection made to this lease on the ground that it is not a correct copy of the original, or that it is not a copy of the lease. On the contrary it is admitted to be a copy of said lease and the objection is on the general ground that it does not tend to prove any issue whatever in the case. Which objection the court overruled, and to the action of the court in overruling their objection the defendants at the time saved their exception. Plaintiff offers this lease in evidence for the purpose of showing that the United Railways Company is the owner of the property, and that it is operated by the St. Louis Transit Company for the benefit of both companies. The Court: I will overrule the objection and admit this lease in evidence for the present, subject to exclusion hereafter if in the course of the evidence in the case, I find the lease is inadmissible. To which ruling of the court defendants, by counsel, excepted at the time."

On this record, these observations may be made: In the Moorshead Case it was contended, as follows (mark the first ground as it is urged in the case at bar): "That the United Railways Company is liable in damages to plaintiff notwithstanding the contract between it and the transit company, and the operation of the line and car on which she was hurt by the transit company, pursuant to the contract, is maintained on three grounds: First, that if the contract is a lease, it is inoperative for lack of consent to the leasing by the city of St. Louis; second, that the contract is not a lease, but in legal effect is an agreement by the transit company to operate the railway lines it was put in possession of for the United Railways Company as the latter's agent, or else is a partnership agreement between the two companies; third, that if a valid lease, the United Railways Company as lessor remained liable for all torts of the transit company as

lessee, because the statute allowing such lease by street railway companies contain no clause expressly exempting a leasing company from liability for the acts of the lessee."

Those contentions were examined with fineness and acumen by Judge Goode in the St. Louis Court of Appeals and were disallowed seriatim. What he said in that behalf was adopted by this court in banc and spread of record as meeting our unanimous views. In the case at bar, we are asked to reopen the question or send the matter into banc to have it retheshed. But we shall do neither. Because, the Moorshead Case was well considered. The conclusion of Brother Graves that the opinion of Goode, J., was sound was deliberately arrived at. We were all of mind that the document in question was a lease to all intents and purposes, and as such lease, was a good defense against liability of the lessor for torts of the lessee. Accordingly, absent allegation and evidence (as here) showing the lease was a contrivance for a fraudulent or wrongful purpose in fact or law, so that "the covin doth suffocate the right," it must be held that the United Railways Company did not remain liable to those suffering personal injuries from the negligence of the employes of the transit company. Hence the lease, *ex vi termini*, did not tend to fasten liability on the United Railways Company, unless a phase of the case now to pass in review had that effect. That is this: It is insisted by learned counsel that, even if we stand by the doctrine of the Moorshead Case, still the United Railways Company is liable because there is no municipal assent shown to the lessee. They put a finger on article 12, § 20 (Ann. St. 1906, p. 300), of the Constitution which provides for municipal assent for the operation of a street railway in a city, and provides, further, that "the franchises so granted shall not be transferred without similar assent first obtained." They argue that, absent such assent shown, the United Railways Company is liable. They do not say there was no such assent in fact. They argue that their introduction of the paper put the defendant in such a pickle that it had to prove the assent. Is there soundness in this view? We think not. Because: (a) It will not escape attention that in legal effect that very point was in the Moorshead Case and disallowed. (See aforesaid contentions.) (b) Again, if plaintiff had fastened liability on the United Railways Company, alunde, and if it had introduced the lease to avoid that liability, then, on such hypothesis and in a proper case, plaintiff might possibly be heard on an objection that the lease was bad as not receiving municipal assent. But we reserve the point; for there is no such case here. Here, plaintiff introduced the lease. After offering it, getting it in evidence, and using it as proof, counsel ought no more to be heard to impugn its validity than to impeach a witness they had put on the stand. By that act they vouched

for its legitimacy and may not place a bar minister on its shield. They may argue the legal effect of the lease is this or that, or so and so, but may not argue it is not what it purports to be, to wit, a valid lease. This is within the reasoning of the holding in the *Moorshead Case*, supra (q. v. loc. cit. pp. 157-8). (c) Moreover, defendants' learned counsel maintain the proposition that acts done by a corporation which presuppose the existence of other acts to make them legal and operative are presumptive proof of the latter. They invoke such proposition and presumption in this case. We think the proposition sound and that they are entitled to the presumption. *State ex rel. v. Kupferle*, 44 Mo., loc. cit. 158, 100 Am. Dec. 265; *American Ins. Co. v. Smith*, 73 Mo., loc. cit. 371; *Chouteau v. The Missouri Pacific R. R. Co.*, 122 Mo., loc. cit. 384, 385, 22 S. W. 458, 30 S. W. 299.

The maxim that all things are presumed to be legitimately done, until it is proved to the contrary (*omnia presumuntur legitime*, etc.), is applicable to corporate acts. Says Mr. Justice Story (*Bank of the United States v. Dandridge*, 12 Wheat. [U. S.] loc. cit. 69, 6 L. Ed. 552): "By the general rule of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim *omnia presumuntur rite et sollemniter esse facta, donec probetur in contrarium*." * * *

The same presumptions are, we think, applicable to corporations."

In *American Insurance Co. v. Smith*, supra, a defense was interposed to a premium note given to a foreign insurance company that there was no proof of its authority to do business in this state. Of that defense this court said: "As the plaintiff might, by complying with our laws, rightfully issue a policy of fire insurance in this state, and as nothing appears on the face of the note or the application to indicate that the policy recited to have been issued was issued in violation of law, or was for any other reason illegal or void, it must be presumed that the plaintiff had taken those steps, which would, under our law, authorize it to issue such policy." In other words, those artificial persons, except corporations, are entitled to a presumption of duty well done until the contrary appears, the same as a natural person. A presumption therefore arises that the United

Railways Company had the right to do what it did do, to wit, make that lease, and this presumption fairly includes a municipal assent first obtained. It is rebuttable, but here there is no effort to rebut it.

The premises considered, we conclude not only that the *Moorshead Case* settles the proposition in hand as an authority in point, but that under the peculiar facts of this record there is no substance in the point on the reason of the thing.

2. The United Railways Company asked a peremptory instruction at the close of the case. It was refused. In its motion for a new trial it assigned error of that refusal. That assignment was good, hence the motion, under our holding in the preceding paragraph, might well have been sustained on that ground. The order granting a new trial was not put on any such ground. But that is not vital. It is a common-place rule of steady application in appellate procedure that though a court, nisi, may give one reason for granting a new trial, and that a bad one, if there were other good reasons, then its action, producing a right result in the administration of justice, can stand. The reason assigned for a decision below is of no value on appeal, so long as the end reached is right. The reasons have served their purpose, the thing done is the live matter. There was, therefore, no error in granting defendant, the United Railways Company, a new trial.

3. We come now to consider the case from the viewpoint of the transit company.

(a) The verdict is a heavy one. While it must be viewed with serene judicial judgment yet its very size bespeaks anxious judicial scrutiny. It stands conceded there were no broken bones. There was once a slight and very temporary discoloration, but never a visible scar. There were and are no discoverable lesions or known existing abnormal organs traced to the injury. That Mrs. Chlanda has resulting nervous trouble seems put beyond all question. Her main symptoms are classified, by men of science, as subjective instead of objective—that is, they are got at through her own statements except as to those visible indices such as the expression of her countenance, her loss of weight and her use of artificial aids in moving about. The testimony of her experts was based on examinations antedating the trial by a year or more. Their conclusion as to the permanency of the injuries to her nervous system must be tempered by that fact. The disinterested commission of doctors appointed by the court gave it as their opinion that the probabilities of recovery were in her favor. We find no testimony from physicians who examined her condition at or close to the time of the trial tending to show that she was not in a class suffering from nervous trouble colored and somewhat affected by psychological phenomena prone to disappear when her mind was set at rest. We say this with-

out the slightest intent to indicate our belief in the lack of sincerity and honesty of the worthy lady whose cause is held in judgment. There being no elements of malice in the case, she was entitled (not to punitive damages, but) to just compensation—no more. We are of opinion the order granting a new trial may be sustained on the theory of an excessive verdict somewhat attributable to such overwrought sympathy on the part of the jury as amounts (in legal effect) to prejudice and passion. There was an assignment of error to that effect in the motion for a new trial and the order granting one may stand on that assignment.

(b) Counsel contend that the order may be sustained because of error in giving instructions for plaintiff and in modifying one asked, by defendant. We shall not develop the contention. Our consideration of it leads us to the conclusion it is without merit. Among other views pressed here under that head, they insist the doctrine of *res ipsa loquitur* cannot be invoked by plaintiff. We do not agree to that. The petition is broad enough to permit the application of that doctrine. The relation of carrier and passenger existing and the petition counting on general negligence, plaintiff's case falls within the line of cases holding that under such circumstances the thing speaks for itself. Therefore, whether the following car was moving too swiftly or whether it was running too closely to plaintiff's car or whether there was negligence in stopping the first car, without notice to the following car and so close to it that a collision inevitably resulted, makes no difference. The collision happened, plaintiff was hurt thereby, and the burden rested upon defendant to show it used the highest practicable degree of care to preserve its passenger from injury.

(c) There was error in the exclusion of testimony. Under this head we will notice but one assignment—this for the reason that other incidents may not arise on a retrial. Defendant put Dr. Henry on the stand and the record shows the following: "Dr. Robert Y. Henry (a practicing physician), being duly sworn on behalf of defendants, testified as follows: 'Q. I will ask you whether or not you saw the plaintiff during the month of June at any time? A. Yes, sir. Q. Where at? A. At her residence on Blow street. Q. June of this year? A. Yes, sir. Q. What day of June was it? A. I could not give the date exactly. Q. Was it about the middle of the present month? A. Yes, sir; about the middle of this month. Q. Where was she at that time? A. At her residence. Q. State whether or not you saw her walking about there anywhere at that time. (To this question the plaintiff at the time objected, for the reason— By the Court: What was the purpose of your visit at that time? A. I went to see her relative to a bill she owed me. By Judge Barclay: Was it a bill for your services in her behalf? A. Yes, sir.

The plaintiff here objected to this witness stating anything he saw at that time, for the same reasons as heretofore. Which objection the court overruled, as to what he saw. And to the action of the court in overruling her objection the plaintiff at the time saved her exception.) Mr. Jamison (counsel for defendant): This doctor has not been discharged as the plaintiff's physician, but has continued to treat her and was at that time going to see her with reference to his bill. The Court: I sustain the objection in that view of the case.' And to the action of the court in sustaining the objection the defendant at the time saved its exception. The defendant offered to prove by this witness: That he saw the plaintiff at her residence about the 15th day of the present month; that she was walking without the use of crutches, and went up one flight of stairs, in the presence of this witness, without the use of crutches. To this offer of proof the plaintiff at the time objected for the same reasons as heretofore. Which objection the court sustained, and to the action of the court in sustaining the objection of the plaintiff the defendant at the time saved its exception."

Conceding Dr. Henry was plaintiff's physician at the time in question, yet we think the offered evidence was competent. The statutory interdiction on the testimony of a physician or surgeon is salutary but must be kept well within the banks of the prescribed statutory channel. He is incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." The offered testimony did not come within the letter or the spirit of the statute. Dr. Henry was making no professional call on the plaintiff. He was not seeking information to enable him to prescribe for her or do any act for her as a surgeon. Admitting that facts gathered for that purpose while acting in a professional capacity are a sealed book, yet in this instance he was neither acting in a professional capacity nor was the fact inquired about in any wise necessary to treat his patient. In the law, as to that fact, Dr. Henry was the same as any other bill collector possessed with eyes. According to the common sense of the thing the matter was plainly without the province of a physician, and he was therefore competent to testify (*Green v. Terminal R. R. Co.* [not yet officially reported] 109 S. W. 715, and authorities cited).

But it is said that if the exclusion of that testimony was error it is not reversible error, because the ruling was invited. It is argued that at first the court overruled the objection, but defendants' counsel not content to let well enough alone then injected the following remark: "This doctor has not been discharged as the plaintiff's physician, but has continued to treat her and was at the

time of going to see her with reference to his bill." The shrewd construction put upon this interpolation by counsel is that it was an invitation to change the ruling, hence was an invitation to commit error, which (they say) the court proceeded to do "most obligingly." But was not counsel entitled to lay the facts before the court so that it might rule understandingly and well advised? Is a court, nisi, to be likened to a gun loaded only with error, ready to fire it off if counsel state a fact? The remark of counsel undoubtedly led up to the ruling, but did not invite an erroneous one.

The chief bone of contention as to the transit company was over the extent of the injuries to plaintiff, their permanency and the quantum of damages. True, defendant put in proof from Slough that at another time he had seen plaintiff going downstairs without crutches. But the whole trend of plaintiff's case was to the effect that she could not walk without artificial aid. The point was sharply controverted and was a deadly one. Courts have sometimes said that where offered evidence was merely cumulative, as that term is technically understood, it might not be error to exclude it. Counsel cite cases to that effect, a sample of which is Brill v. Eddy, 115 Mo., loc. cit. 606, 22 S. W. 488. In that case the offer was to show that the father of the injured boy told him to stay away from the cars. It was held its exclusion was not error. That such fact might be germane if the father was suing. That the boy himself testified in plain and distinct terms that he knew it was wrong to ride on the cars and had been driven away from the yards on a number of occasions. The court said: "With this evidence of the boy before the jury, the defendants could not have been prejudiced by the exclusion of that of the father on the same point."

If, in this case, plaintiff had testified that she could go up and down stairs without artificial aid, then the Brill Case would be in point. But on the facts here it is not in point. So, the other cases cited may be distinguished from the case at bar on principle. Where the crucial issue in a case turns on a question of fact upon which the evidence is in direct conflict, the exclusion of competent evidence is a matter of much more consequence than it would be in a case where the testimony on the point was substantially all one way. Levels v. R. R. Co., 196 Mo., loc. cit. 618, 94 S. W. 275. By way of illustration let us indulge an hypothesis, viz.: Counsel insist that, with Slough's testimony before the jury, the offered proof was merely cumulative, and hence it was not error to refuse it. Now, suppose the court had ruled that, although plaintiff had introduced several witnesses who testified to her helplessness in walking—that she could not walk without a crutch, a cane, or some other object to lean on—yet defendant was restricted to one witness (to wit, Slough) to prove the contrary?

Would learned counsel contend that such ruling would be right? Hardly, but, such is not the law. Railroad v. Auburn, 199 Mo., loc. cit. 360, 97 S. W. 867, 9 L. (N. S.) 426, 116 Am. St. Rep. 499 et seq. cases cited.

The premises all considered, we hold order granting a new trial subserved ends of justice. Accordingly, it is affirmed.

All concur, except VALLIANT, P. J. dissent.

REED et al. v. COLP et al

(Supreme Court of Missouri, Division N
July 3, 1908.)

1. ABATEMENT AND REVIVAL—DEATH OF APPELLANT.

The suggestion of the death of one appellant being made after the first submission on appeal and before the resubmission of the hearing, and no steps having been taken after the appearance of his personal representative, it will be assumed that a revivor has been abandoned.

2. SAME.

Under Rev. St. 1890, §§ 856, 857 (Am. 1903, pp. 806, 806), providing that if the several appellants, and one of them dies, submission of the cause, the death shall be suggested by the others, and if one of them after submission of the cause the appeal shall not thereby abate, but such death shall be suggested, and the cause shall proceed at the instance of the surviving appellants, a revivor is not necessary to a continuation of a suit on a case where suggestion of the death of one of the appellants is made after first submission on appeal, but before the resubmission on rehearing.

3. APPEAL AND ERROR—AMENDING BILL OF EXCEPTIONS.

The proceedings of the trial court in amending the bill of exceptions after appeal cannot receive no additional validity from leave to return to the trial court for the amendment, granted by the Court of Appeals while the appeal is pending there; the case being one of which the Court of Appeals had no jurisdiction, and the court being therefore precluded from doing anything in the cause, except to transfer it to the Supreme Court.

4. EXCEPTIONS, BILL OF—AMENDMENT.

Subsequent to the settling and filing of the bill of exceptions, and as part of the schedule amend said bill, the trial court corrected, re-tuned, record entries of the overruling of motions for new trial and in arrest, to show saving of exceptions to such ruling of the court the entry of corrections showing, by necessary implication, through reference to the statement of the trial that it is not necessary to suggest exceptions to such ruling, but they will be assumed, that the sole reliance of the court in the insertion of the exceptions was such statement. Held, that the bill of exceptions could thus be amended through mere argument and deduction from a standing rule.

5. SAME—EXTENDING TIME FOR FILING.

The bill of exceptions not containing motions for new trial and arrest, or any other, or any exceptions to the overruling thereof, alterations to show these therein, after lapse of time for filing a bill, is not amendable thereof, but an extension of time for filing a bill, which is not allowable.

6. JUDGMENT—CONFORMITY OF PLEADING TO EVIDENCE.

The petition, in effect, for cancellation of the fraud, of plaintiff's purchase of a mill, and an offer to reimburse defendants for use of

mill, and the decree showing that plaintiff, in open court, offered such reimbursement as the price of a decree, and the chancellor holding that the use of the mill was worth \$150, but the decree for cancellation, by inadvertence, omitting to adjudge defendants such payment, there is error on the record proper.

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Suit by M. O. Reed and another against John Colp and another, a firm dealing as Colp Lumber & Machine Company, and another. Decree for plaintiffs. Defendants appeal. Reversed and remanded.

L. R. Thomason and Martin L. Clardy, for appellants. Mozley & Wammack, for respondents.

LAMM, J. This is a suit in equity to enjoin a sale under a deed of trust upon real estate belonging to plaintiffs and situate in Stoddard county, Mo., and to cancel the notes secured thereby as void by reason of fraud and misrepresentation moving in their execution, and to remove the cloud upon plaintiffs' title arising from the record lien of said deed of trust. Defendants are the trustee, Houck, and the beneficiaries in the deed of trust, to wit, John and Monroe Colp, doing business as the Colp Lumber & Machine Company. The decree was for plaintiffs, and defendants appeal.

At the April term of this court, 1906, the cause was submitted on argument and briefs. At its October term, 1906, an opinion was handed down, but a rehearing was granted. At the October term, 1907, counsel suggested the death of Mr. Houck, and the cause was continued to the April term, 1908. At said April term it was resubmitted on the same briefs. The petition sets forth that the notes were given for plaintiffs' purchase of a sawmill from the Colps, and the false representations (alleged with a scienter, and relied on in the dicker and sale), relate to the sawing capacity, the newness, and market value of said mill. Among other things, it is alleged that, on discovering the covinous contrivances of the Colps in and about the sale and the deceit practiced in false representations leading up to it, plaintiffs offered to rescind the contract and to return the sawmill and its appurtenant machinery in as good condition as when received and to pay defendants a reasonable price for its use, demanded their notes and the satisfaction of the deed of trust securing the same, and that defendants refused the offer. Further, the petition states that: "Plaintiffs now here in court offer to redeliver to defendants said sawmill and all machinery in connection therewith in as good condition as when received by plaintiffs." Denying the fraud and affirmatively pleading other matter not in point for our present purpose, the answer avers that plaintiffs have leased said mill to parties named and have collected the rent for their own use and benefit. In its decree, the trial court found the allegations of the petition to be true (setting

them forth), and found further: "That plaintiffs in court offer to deliver said sawmill in as good condition as received and pay a reasonable price for use of said sawmill. That a reasonable price for use of said sawmill was \$150." The decree then continues as follows: "The court therefore decrees that defendant take this said sawmill, deliver up for cancellation said deed of trust and \$1,800 note, together with the two \$600 notes, and that same be canceled, that same are void and of no effect, that the cloud upon plaintiffs' title to said real estate be and is hereby removed, that defendants take nothing for said notes and deed of trust, and that the costs of this suit be adjudged against defendants." For reasons appearing later, the facts need not be stated. A sufficient statement to make intelligible questions of practice determined will appear in the body of the opinion.

1. The suggestion of the death of one of appellants was made after the first submission and before the resubmission. No steps having been taken to enter the appearance of his personal representative, we shall assume that a revivor has been abandoned. Under the circumstances noted, a revivor is not an indispensable step to a continuation of a suit in the Supreme Court where one out of several appellants dies. *Rev. St. 1899, §§ 856, 857 (Ann. St. 1906, pp. 805, 806)*. Statutes somewhat similar were under exposition in *Prior v. Kiso*, 96 Mo., loc. cit. 315 et seq., 9 S. W. 893, and that was the conclusion reached whether the statutes or the common law controlled. See, also, *Hunleth v. Leahy*, 146 Mo. 408, 48 S. W. 459.

2. The appeal in this cause was granted to the St. Louis Court of Appeals. On submission there, that court handed down the following opinion: "The object of the suit is to set aside a deed of trust to land on the alleged ground of fraud in its procurement. Such a suit directly involves title to real estate within the meaning of the Constitution defining the jurisdiction of the Supreme Court. *Nearen v. Bakewell*, 110 Mo. 645, 19 S. W. 988; *Overton v. Overton*, 131 Mo. 559, 33 S. W. 1; *Scheer v. Scheer*, 148 Mo., loc. cit. 448, 50 S. W. 111; *Bouner v. Lisenby* 73 Mo. App. 562. For the reason therefore that the jurisdiction of the subject-matter of this suit is by the Constitution of the state vested in the Supreme Court, the cause is transferred to that court." On the strength of that opinion, the cause came here. While pending in the St. Louis Court of Appeals, it seems appellants there applied for and were granted leave to apply, nisi, to amend the bill of exceptions, so as to show for the first time the motions for a new trial and in arrest, and that exceptions were saved severally in overruling them. At all events, we find among the papers a transcript of entries made on proceedings had on March 19, 1902, in the Stoddard circuit court, several terms after the appeal was granted and the original bill of exceptions was settled and filed, which

seek to justify themselves by such leave. That transcript, omitting caption and certificate, follows, totidem verbis: "Whereas, appellant in the above-entitled cause did on heretofore, to wit, the 10th day of March, A. D. 1902, file in the St. Louis Court of Appeals their application for leave to amend their bill of exception filed in this cause on heretofore, to wit, August 8, 1901; and whereas, the St. Louis Court of Appeals on the date aforesaid did grant leave to appellant to apply to the circuit court of Stoddard county, Mo., to correct and amend said bill of exceptions filed by appellants as aforesaid so as to show that appellants filed their motion for a new trial and in arrest of judgment and took and saved their exceptions to the order of the court in overruling of said motion provided that said court should further find from competent evidence that said motions were in fact filed, and that said exception were in fact taken and saved by appellants; and whereas, appellants have this day, to wit, the 10th day of the March term of the circuit court of said Stoddard county, Mo., presented their application for leave to amend their bill of exception in the manner and form aforesaid, and both parties appearing by their attorneys, said application being by the court taken up, and the court being fully advised, did find from the record that appellants on May 30, 1901, filed their motion for a new trial and in arrest of judgment, and that on the date aforesaid said motions were by the court overruled, and that appellants did take and save their exceptions to the actions of the court in overruling of their said motion, and that by virtue of a rule of the circuit court of said Stoddard county appellants were not required to save their exceptions to the action of the court in overruling of their motion for a new trial and in arrest of judgment by matter of record, as under and by virtue of said rule all exceptions to the action of the court on such motions are deemed to be saved, which said rule was in force at the time of the action of the court in overruling of the motions for a new trial and in arrest of judgment filed by appellant in the above cause, but said exceptions were saved by appellants: Wherefore the application of appellants to correct their bill of exceptions is hereby sustained, and leave granted appellants to correct said bill, and said bill is corrected by adding thereto pages Nos. 49, 50, 51, and the same is ordered made a part of the record in said cause as of the date of the filing of said bill showing the filing of such motions for new trial and arrest of judgment, the overruling of said motions, and the exceptions by appellants to the action of the court." The original bill of exceptions not only failed to contain exceptions saved to the overruling of the motions for a new trial and in arrest, but made no call for the motions. The record entries in the original transcript showed motions for a new trial and in arrest were filed and overruled. They

stopped short at that point, and properly so. However, in an additional transcript here, there are several pages which, though not numbered, we construe to be the "49, 50, 51" referred to in the transcript of the proceedings of March 10, 1902, *supra*. These additional pages embody the motions for a new trial and in arrest, and set forth entry rulings on those motions so reconstructed as to show that exceptions were saved to overruling them. It is plain that this showing sprang into record life as part and parcel of the general scheme to amend.

On this record, the following observations are due:

(a) In the first place, the proceedings of the Stoddard circuit court on March 19, 1902, can receive no additional vitality or legality from the leave narrated therein as granted by the St. Louis Court of Appeals. This, for the obvious reason that the Court of Appeals was precluded from taking any steps in the cause except to transfer it to this court. Its own record shows it had no jurisdiction, and such is the fact. The order granting leave was therefore *coram non iudice*.

(b) In the next place, attending to the proceedings, *nisi*, subsequent to the appeal, it appears that record entries overruling the motions for a new trial and in arrest were reconstructed by enlargement so as to show that exceptions were saved to the action of the court. The saving of an exception by a record entry is without vitality for appellate use. It has always been held that an exception cannot be saved in that way for service on appeal. It must be saved in a bill of exceptions. If the original entries had shown that exceptions were saved, even though such exceptions had no place there, a different question might be here. In such hypothetical condition of things, we shall not hold that the court might not have seized upon such entries as evidence of the saving of exceptions, and have used them as proper data to correct the bill by a *nunc pro tunc* entry; but no such question is here. Here the record entries showing the saving of exceptions were manifestly made subsequent to the settling and filing of the original bill, and, as said, were mere parts of the general scheme to amend.

(c) In the next place, from the character of the record entry of July 19, 1902, amending the bill of exceptions, it is seen to bear internal evidence of having been prepared by counsel. Subjecting it to a just analysis, it appears therefrom by necessary implication that the sole reliance of the court for the amendment inserting exceptions was a standing rule of court to the effect that it was not necessary to save exceptions to such ruling—that, *per contra*, they were deemed to be saved, *i. e.*, they saved themselves spontaneously. If the entry in question had omitted all reference to the rule, and had baldly found that the records of the court showed such exceptions were saved, then a somewhat different

question might be here. In such case, by a plenary stretch of abounding judicial grace, extending quite to the fringe of things, there might be a faint presumption that proper contemporaneous data in minutes of clerk, judge, or files existed and were put in evidence showing the saving of the exceptions, and furnishing a legal basis for a nunc pro tunc entry; but we do not decide the point. It is not clear to us how such data would reasonably exist. In *State v. Gartrell*, *infra*, this court doubted the possibility of their existence, saying in that behalf that: "It is too plain for argument that, unless parol evidence could be resorted to, there was nothing to show that such exception was taken, and when the bill of exceptions was filed, and the term had elapsed, the record became a finality which neither court nor counsel even by stipulation and consent could change." But the reference in the amending entry to the rule of court is of such sort as to entirely preclude such presumption, for the court bases the entry solely on the rule itself. Of such a rule we had this to say in *Green v. Terminal R. R. Ass'n of St. Louis* (not yet officially reported) 109 S. W., loc. cit. 720: "That the ruling (to wit, a ruling that exceptions are presumed to be taken to all adverse rulings, though not noted at the time) is of doubtful value in the trial of a case, and ought to be of no force at all in an appellate court. Obviously, when a case reaches the point where a bill of exceptions is to be made, all exceptions intended to be relied on should be inserted in the bill. They cannot be hid under the cloak of an arbitrary presumption indulged below, and be got at by inference."

In this case the trial court, by indulging in an arbitrary presumption arising as a quasi inference from a standing rule, altered a bill of exceptions in a vital matter. Analyzing that action, it will be seen that, if the court was aided by memory, it fell into a vat of error. So, if it relied on oral testimony, it so fell. But, as said, the entry conclusively shows that it relied on its rule. We are cited to no case holding that such amendment may be made as the result of mere argument and deduction from a standing rule, *nisi*. The good sense of the thing is strongly against that. To adopt that theory would open the door for all sorts of mischief to enter, for thereby an exception never made and never intended to be made could be read into the original bill—possibly on the inapplicable doctrine that equity considers that done which should have been done. No one questions the abstract right, *nisi*, to correct a bill of exceptions by a nunc pro tunc entry. It has been steadily held that, though a trial court has lost jurisdiction of a cause by appeal, it still retains enough jurisdiction of its record to make it tell the truth by such entry, keeping always in mind the sharp limitations on the right to make such entries. *Jones v. Ins. Co.*, 55 Mo., loc. cit. 344; *Ex-*

change National Bank v. Allen, 68 Mo. 474; *De Kalb County v. Hixon*, 44 Mo. 342; *State v. Logan*, 125 Mo., loc. cit. 25, 28 S. W. 176. In *Ross v. Railroad*, 141 Mo. 390, 38 S. W. 926, 42 S. W. 957, the limitations on the power to make nunc pro tunc entries correcting a bill of exceptions was considered in the light of an array of cases reviewed. The sum of the matter was held to be that such correction could not be based on the memory of the judge, nor on parol proof derived from other sources, nor on affidavits; but that, to include an exception in an original bill of exceptions by way of amendment, it must appear from the record of the cause, either in the bill itself, or in the judge's or clerk's minutes, or the stenographer's notes, or some paper in the case, that such exception was made and saved at the very time. *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045, was a murder case. There, with the consent of the Attorney General, the bill of exceptions was amended by a nunc pro tunc entry, and, after discussing the right of the court to amend its record during the term and while its proceedings are in fieri, *Gantt, P. J.*, continuing said: "But after the lapse of the term, or its final adjournment, the judge has no power to change the record further than by nunc pro tunc entries to make the record speak the exact truth of that which actually did occur during the term, and then only when there is sufficient record of minutes of the judge or clerk to authorize such amendment, and it has been repeatedly ruled by the court that such corrections cannot be made 'from outside evidence or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered' (citing cases). It is true that the power of the court over its own records for the purpose of amending, correcting, and completing the same is not affected by the fact that an appeal has been taken from its judgment (citing cases). There are fundamental principles, and again and again it has been decided by this court, that, when the period (beyond the trial term) granted by the court in which to file a bill of exceptions has expired, neither the court nor the judge in vacation can extend it, and what purports to be a bill of exceptions filed in pursuance of such a void order will not be considered by this court (citing cases)."

Now, it is too plain for question that what was done in this case had the effect of merely extending the time for filing a bill of exceptions after the date fixed had passed—a thing that cannot be done. *State ex rel. v. Gibson*, 187 Mo., loc. cit. 536 et seq., 86 S. W. 177. It was loosely concocting a bill of exceptions on what plaintiffs not inaptly call "the installment plan." See *Priddy v. Hayes*, 204 Mo. 358, 102 S. W. 976. The premises all considered, we hold that, as the original bill of exceptions neither contained the motions for a new trial or in arrest, or any call for such motions (see *Rev. St. 1899, § 866* [Ann. St.

1906, p. 815]), and as it contained no exception to the overruling of those motions, and as the amendment to the bill was improvidently made, we cannot consider any matter of exception. In effect, then, the bill of exceptions is so much waste paper. It results from this view that we may consider only the record proper.

3. Attending to that, the petition states a cause of action. In effect, the pleadings bring the matter of reimbursing the Colps for the use of the sawmill before the chancellor. The decree shows that in open court plaintiffs offered such reimbursement as the price of their decree. The chancellor held on that issue that the use of the mill was of the reasonable value of \$150; but, by inadvertence, the decree, though it adjudged that the Colps take the sawmill, omitted to adjudge to them the payment of said sum of money. We perceive no good reason why defendants should be dismissed from a court of equity without a decree giving them what the record proper shows is their equitable due. Why put them to another suit to enforce a right determined by this when equity has jurisdiction to end the matter?

Accordingly, the cause is reversed and remanded, with directions to the lower court to enter a decree in favor of plaintiffs for the return and cancellation of the notes in question (describing them), and for the cancellation of the deed of trust (describing it), and removing the record cloud from plaintiff's title, and to adjudge that defendants the Colps not only take back the mill, but have and recover from plaintiffs the said sum of \$150, as the price of their decree; the costs, nisi, to go against the Colps. All concur, except VALLIANT, P. J., absent.

HEMAN v. CITY OF ST. LOUIS.

(Supreme Court of Missouri. Division No. 1.
July 3, 1908.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — SIDEWALKS — CONTRACTS — CHARTER PROVISIONS—CONSTRUCTION.

St. Louis City Charter art. 6, § 15 (Ann. St. 1906, p. 4857), provides that "all ordinances recommended by the board of public improvements shall specify the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and the fund out of which it shall be paid, and shall be indorsed with the estimate of the cost thereof; * * * provided that nothing in this article shall be so construed as to prevent the board, through the proper officer thereof, from annually letting contracts * * * for the grading, constructing, reconstructing, and repairing of sidewalks, and repairing street, alley, and gutter paving, and such other similar work, which may be ordered by ordinance, or may become necessary to be done during the year." *Held*, that the last line of the section refers to all little odd and end jobs of paving, repairing, and other improvements of the sidewalks, etc., which are too insignificant to be foreseen, and which are not properly chargeable to the adjoining property, and specially provided for in each ordinance and contract providing for regular street improvements, and hence such

work need not be ordered done by ordinance, and performed under contract awarded by competitive bidding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 802, 854.]

2. SAME—EXTRA WORK.

St. Louis City Charter, art. 6, § 15 (Ann. St. 1906, p. 4857), authorizes the board of public improvements, through the proper officer thereof, to annually let contracts for the grading, constructing, repairing, etc., of sidewalks, etc., and other similar work, which may be ordered by ordinance, or may become necessary to be done during the year. Section 27 (Ann. St. 1906, p. 4867) in express terms makes it the duty of the board to make all necessary repairs requiring prompt action, without submitting them to the Assembly, as it must do regarding all general street improvements. Article 4, § 35 (Ann. St. 1906, p. 4832), gives the street commissioner special charge of the construction, repairing, etc., of the public streets, etc., of the city. *Held*, that in contracting for the construction, repair, etc., of sidewalks, the board properly authorized the street commissioner to determine what part of the improvement should be considered as extra, and to agree on the price to be paid therefor.

3. SAME—NECESSITY OF SPECIFIC APPROPRIATION.

In the absence of a charter provision prohibiting it, a city may contract for extra work connected with street improvements, without first making a specific appropriation for the purpose, subject only to the constitutional limitation of 5 per cent. on the assessed value of the property within the city limits.

4. SAME—CHARTER PROVISIONS.

St. Louis City Charter, art. 6, § 28 (Ann. St. 1906, p. 4869), providing that every ordinance requiring public work to be done shall contain a specific appropriation therefor, does not apply to emergency and unforeseen work, which, under other provisions of the charter, need not be ordered done by ordinance.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by John C. Heman against the city of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit on a contract, for extra work done and materials furnished by plaintiff, under a contract with the city to construct and repair sidewalks upon the streets thereof. The petition was in three counts, and the answer consisted of a general denial and several special defenses, all of which are mentioned in the referee's report, which will follow in full. The cause was referred to the late Mr. Arba N. Crane, who found the issues for plaintiff, and reported those findings to the court. Exceptions to the report of the referee were overruled, and judgment rendered thereon for plaintiff, and defendant excepted, and, after an unavailing motion for a new trial, duly appealed to this court.

As the issues made by the pleadings and the facts found by the referee are clearly stated in his report to the court, for economy of space we will here set out the report, which is as follows:

"I, the undersigned, to whom the above-entitled cause was referred to try the issues herein, having duly qualified by taking the statutory oath, have proceeded to hear the cause on said order, both parties appearing.

The testimony adduced before me appears in the record of four volumes, which I file herewith, and I also file the exhibits introduced at the hearing. The petition, amended by interlineation, has three counts. The statement is simplified by dealing first exclusively with the first count, the decision as to which involves almost every point to be decided as to the other two counts. The defendant entered into a valid contract with plaintiff, numbered 3,520, for the construction of sidewalks with artificial stone flagging, and repairing sidewalks with brick whenever and wherever directed by the street commissioner of defendant within the portion of the city of St. Louis defined in the contract, from the date of the contract in June, 1893, to July 1, 1894. Under that contract plaintiff acted. These allegations of the petition are met only by general denial, and I find have been proved without conflicting evidence. The petition, which sets out the contract in *hæc verba*, proceeds to state that plaintiff, in course of various constructions which he was called on to make under the contract, under the orders and directions of defendant's street commissioner, did extra work and furnished extra material. Exhibit B2, referred to in the petition, and treated by me as part thereof, states under respective notice numbers, orders for construction and repair involving such alleged extra work and material and the prices charged therefor. The defense, applying to all of the three counts, is a general denial, and a special defense, the gist of which is, first, that under provisions of the charter of the city of St. Louis, cited in the answer, the city cannot be held liable for the extra work claimed in the petition; second, that the contract, arguing from certain cited provisions, does not bear an interpretation authorizing any charge for such extra work; third, that any provision of the contract authorizing such charge would be void as in contravention of the city's charter; and, fourth, that plaintiff had received special tax bills in full discharge of all claims under the contract. The reply is a general denial of the answer.

"The general situation, as I suppose both sides concede it—at all events as I formally find it—is as follows: When a piece of sidewalk within the district covered by plaintiff's contract had been found by the city authorities to require reconstruction, the owner of the adjoining premises was notified. If he failed to do the work within a defined time, plaintiff was notified by the street commissioner to reconstruct. This notice to the owner was a prerequisite to the issuance of a special tax bill for the work done by plaintiff. This notice to the contractor, plaintiff, was in writing. For this reconstruction plaintiff was paid by special tax bills against the owner, which tax bills were for the exact amount of space covered by the work. Such orders to plaintiff to reconstruct were frequent, often several on a day. When car-

rying out this reconstruction, incidental work would frequently be necessary. There would be public constructions on the sidewalk, such as the cover of the sewer inlets and the various plugs and meters in public use; there would also be coal holes in the middle of the walk, and steps and entrances of various kinds adjoining the building. The sidewalk in each case was to be an uninterrupted plane. I find that the city required that of plaintiff. When a condemned sidewalk was reconstructed, the structure mentioned, in very many cases, if left untouched, would have constituted irregularities, depressions, or protuberances. I find under the evidence that the plaintiff was required by the street commissioner to adjust all these structures to the plane of the sidewalk.

"We have thus a class of alleged extra work, arising out of the city's demand that everything about the sidewalk should be adjusted to the required plane. With these items I have associated the cases where extra work is claimed on steps or other structures appertaining to the premises of the property adjoining the sidewalk, supposed to be in fulfillment of the city's duty to adjust such structures, to reconstruct the sidewalk, and to see to it that the owner was in no way injured by the change. This class of items it is practically impossible to separate from the preceding group, so far as plaintiff's bill is concerned; since the items of that bill in most instances cover both kinds of work in one item without indications by which apportionment can be made. Since all these items arose under an order from the street commissioner, as will appear by my subsequent findings, I deem it unnecessary, for the purpose of any legal question, to attempt discrimination between extra work on the sidewalk and extra work on construction of the adjoining property. All items of Exhibit B2 covering any work claimed to be done incidentally to carrying out the work which was done under any notice given by the street commissioner are grouped together in the first list of ultimate findings hereinafter set forth. In that same group, I have placed such cases of extra grading or filling as appear in the contract.

"Another class of items in plaintiff's account rests on this state of affairs. The city would order plaintiff to reconstruct some sidewalk. This order would give the width of the sidewalk, either expressly or by use of the term 'full width,' which has an understood meaning in each locality. The plaintiff would excavate and lay cinders to the required width. Then, he claims, the city would order him to lay a narrower sidewalk; he finishes the narrower sidewalk, receiving his special tax bill therefor, and introduces in his account an item for the cost of preparing the excess over the finished sidewalk by excavating and placing of cinders. My second list of ultimate findings covers this class of items.

"A third group is composed of a few cases

where plaintiff was directed to reconstruct, and after he had done some work, was ordered to stop.

"Fourthly is a single case where plaintiff, under claim of order, reconstructed a piece of pavement beyond the limits fixed in the notice to the adjoining proprietor and in the notice following thereon to plaintiff.

"I next collate from the contract between plaintiff and defendant, set forth in the petition, what seems necessary to the consideration of the case. The contract requires plaintiff to reconstruct sidewalks where property owners failed to reconstruct in compliance with ordinance.

"Section 4 of the contract is as follows:

"Any work not herein specified, which may be fairly implied as included in this contract, of which the street commissioner shall judge, shall be done by the first party without extra charge. The first party shall also do such extra work in connection with this contract as the street commissioner may especially direct, and if it shall be for a kind for which no price is stated in this contract, such price shall be fixed by said commissioner; but no claim for extra work shall be allowed unless the same was done in pursuance of special orders as aforesaid, and the claim presented as soon as practicable after work is done and before the final estimate."

"Section 5 is as follows:

"To prevent all suits and litigations, it is further agreed by the parties hereto that the street commissioner shall, in all cases, determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and he shall decide all questions which may arise relative to the execution of this contract on the part of the contractor, and his estimates and decisions shall be final and conclusive."

"Section 28, art. 6, of the charter (Ann. St. Mo., p. 4869) is referred to in the argument, being set forth in section 7 of the contract, though I think it clearly inapplicable to any phase of this case.

"Section 10 of the contract provides that all orders for construction and repairs of sidewalks shall be given every morning at the street commissioner's office with provision for penalty for failure to complete work in a time which the order must specify. The prices are then specified, being for constructing sidewalks 'known as' different kinds of 'flagging,' for repairing and patching old sidewalks, (1) with flagging, (2) with new brick, (3) old brick. No other prices are specified.

"Under 'Manner of Payment' it is provided that 'the payment for extra work in making excavation or refilling subfoundations and for furnishing and setting new curbing and for taking up and resetting old curbing' shall be made by the city. 'The remainder of the work embraced in this contract shall be paid by special tax bills,' etc.

"As to the manner in which this alleged

work was performed, I make the following finding: When performance under the contract began, the street commissioner of defendant directed plaintiff to do, without further order, the incidental work of the character above illustrated, necessary to make the pavement a good job, and to properly protect the adjoining proprietors from any detriment caused by the change of the pavement. A restriction that more important matters should be specially referred to him I think is of no practical bearing, since I find that the only item which would seem to come under this exclusion, under notice 483, the second item in the first list hereinafter set forth, was given personal attention by the street commissioner. I find plaintiff did all the work claimed by him of the nature coming under the first group of items, in a few instances under special orders from the street commissioner or his authorized deputies; in most instances, however, under the general direction of the street commissioner above given. I do not find sufficient evidence of a written order for this extra work in the first group in any special case. Plaintiff did this alleged extra work in every case in the presence of and with the knowledge of an authorized representative of the street commissioner; some such representative being continuously present during the performance of each job under the contract. As the work claimed to be extra on each job was completed, within a short time (less than a month) thereafter, and before the issuance of a tax bill on the work for which the claimed extra work was incidental, there was submitted to the street commissioner a claim for such extra work, stating the price claimed therefor. There were discussions between the plaintiff and the street commissioner as to the charges on some items, and I find that the commissioner and plaintiff finally agreed on the charges as in the exhibit, and as hereinafter found. Each and every item was O. K'd by the street commissioner with his own hand, and given to plaintiff. These O. K'd charges as to most items were produced in evidence, plaintiff being unable to find the balance. I further find that the price charged for each item was reasonable; that no part of these items was incorporated in special tax bills against the property owners. There must be a finding also as to whether the items charged as 'extras' were really extras; whether they did not regularly come under the contract, and should not have been charged in the special tax bills. If the issue were presented baldly on the contract, together with the evidence as to the work done, several items would be hard to determine. For instance, as to work around trees, so frequently recurring, it may be well questioned whether it was not incidental to the contract. But the bulk of the items are clearly outside of the contract. As to the doubtful items, I

think it a controlling factor that the street commissioner, representing the city in that behalf, ratified their character as 'extras.' His authority to speak for the city seems clear. The acts of the parties decide the interpretation of contracts in cases of doubt. I find that each and every item in my itemized account was 'extra.'

"By answer and appropriate objections to the introduction of evidence defendant insists that, under the city's charter, the city can in no way be made liable for work incidental to pavement reconstruction to be paid for by special tax bills. *Steffen v. City of St. Louis*, 135 Mo. 44, 38 S. W. 31, deals with recovery from the city under a contract, almost, if not absolutely, identical in form with the one here involved. The city was held liable for work begun under city orders, but stopped before completion. Under the reasoning of the opinion I think it clear that the city can be liable for extras. Again, the defendant urges that the provisions as to manner of payment, directing that the payment for a few defined classes of work shall be made by the city, limits the extra work for which the city may be made liable, including the extra work not specifically mentioned. I do not think this clause does anything more than lay down a few classes of work for which the city is always liable. The contract in section 4 provides for such extra work, in connection with this contract, as the street commissioner shall specifically direct, and gives him, in section 5, the power to decide all questions which shall arise relative to the execution of this contract on the part of the contractor. I think it clear that the contract contemplates 'extra work' beyond 'making excavations, refilling subfoundations, and furnishing and setting new or old curbsings.' I think it clearly contemplates work for most of which there would be no legal right to issue special tax bills. Section 4, quoted in full above, provides for 'such extra work in connection with this contract as the street commissioner may specifically direct. * * * But no work shall be allowed unless the same was done in pursuance of special orders.' I do not think that anything in the contract requires such special orders to be in writing. I find there was a general order from the street commissioner to plaintiff to do extra work of the character shown in the first group of items without coming in for a special order in each individual case. Quite a number of the items in this group I am satisfied were specially ordered by the street commissioner, or his authorized representatives as extra work, though plaintiff can identify only a small number of such cases.

"In cases which defendant claims to have been done only under a general order, I make my finding of fact that in each instance some authorized representative of the street commissioner was present during the whole time

any job of paving was being done; that in each case said representative required the extra work to be done, and saw that it was done. While I find the representative required such extra work to be done, I believe that in most instances there was nothing said between plaintiff and such representative as to whether such work was 'extra.' Shortly after completion of such a piece of work, a bill was presented in each instance to the street commissioner for the extra. In all cases of items in group 1 the street commissioner approved the bill in the amount stated below, as an extra. On these specific findings I base my general finding that each and every item of group 1 was done in pursuance of 'special orders.'

"As to group 2, consisting of cases where the sidewalk was narrowed from the first order, I find there was a special order in every case. I also find that, in each and every case covered in the four groups, the claim was presented as soon as practicable after the work was done, and before the final estimate.

"The third group of items have the following facts in common: Plaintiff received the regular notice to reconstruct, proceeded thereunder, and while the work was in hand, was notified by an order, emanating directly from the street commissioner, to suspend work, and did so. In all cases the plaintiff's bill for what was thus done under the street commissioner's orders was approved by the street commissioner. In the cases under notice, Nos. 731, 1,090, and 1,452, plaintiff was directed by the street commissioner to relay the brick pavement, did so, and included charges therefor in the bill which the street commissioner approved. In cases 731, 1,291, and 1,292 it appears that the adjoining owner had not been served with the jurisdictional notice. In No. 1,210 there was no ordinance authorizing the laying of any pavement by the city. Under notice 1,005, where it seems there was due notice to the owner, plaintiff completed part of the job, being extras, of the character of those in group 1, involved in his claim, and had partly done the remainder of 20 odd feet of his order when the commissioner directed him to stop. For the completed work plaintiff has special tax bills, and charges, as an extra in this suit, for the partly finished portion of the pavement. In all these cases the plaintiff complied with the personal directions of the street commissioner. I find his demand in each and every case was presented in due time, and was approved by the street commissioner. I think under the ruling in the *Steffen Case* he is entitled to recover on all these items of the third group.

"I have put fourthly, by itself, an item involving unsegregated elements of the nature of these under group 1, resting in greater part on the following state of facts, as I find them: The notice to reconstruct to the owner, duly served, described a particular frontage; the order to plaintiff, No. 117, conform-

ed to the description. The plaintiff, under direction of the street commissioner or his authorized agent, laid 10 feet more of granite than the order to plaintiff or the underlying notice to the owner called for. There is no charge for laying that 10 feet, but it seems an unascertainable portion of the bill for \$21.25, charged in this item as extra work of the nature of claims in group 1, was for work in this 10-foot strip. The bill for extras, including this element, was O. K'd by the street commissioner. I think it should be allowed.

"I herewith present my list of items of what plaintiff is entitled to recover under my findings, in four groups, as follows: The left-hand column gives the number of the notice from the street commissioner to plaintiff under which the extra work was done—the right column states the amount which I find should be allowed on each item:

"(1) Claims for extra work on completed pavements, consisting of alterations of structures on the pavements to maintain the level, and of alterations, readjustment, and repairs on pavement of structures appurtenant to premises of adjoining owner:

No. of Order	Amount
471.....	\$ 27 20
483.....	413 05

"[Then follow several pages of itemized amounts and the number of notices or orders to make sidewalks in manner shown above. These are omitted. The aggregate finding under this class, \$3,499.45.]

"(2) Cases where work was done under original order and sidewalk narrowed thereafter by defendant's order. [Then follows statement as under first class, aggregating \$1,004.70.]

"(3) Cases where work was partially done and countermanded. [These items aggregate \$755.75.]

"(4) Incidental work on authorized pavement as above found:

117.....	\$ 21 25
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"I think all the items above listed should be allowed. All items in Exhibit B2 not above listed were either withdrawn by plaintiff, or else, in my opinion, not proved. I find against plaintiff on all such items. The items whose allowance I recommend aggregate \$5,281.15. I find that demand was made, not later than August 1, 1894, that interest be allowed from that date.

"The second count is for a similar claim for extra work under a contract, numbered 3,712, in another district of the city, from July 20, 1894, to July 1, 1895. The contract underlying this count is, in all respects concerning this suit, analogous to the one underlying the preceding count, save in one particular: The first paragraph in contract No. 3,520, first count under 'Manner of Pavement,' quoted before, directing that extra work in excavation, subfoundation, and curbing shall be paid for directly by the city, does not ex-

ist in contract 3,712, so the latter contract states that, 'All the work embraced in this contract shall be paid' in special tax bills. The distinction strikes me as unfavorable to the defendant's claim that the city is not liable for the extra work authorized by section 4, the price of which the street commissioner determines, so far as not coming within the limited number of kinds of work for which a price is fixed. The work thus clearly authorized is 'of a class for which no special tax bill could issue.' The 'Manner of Payment' provision can only cover the work for which special tax bills can be issued. I construe the whole contract as authorizing the street commissioner to order extra work and make the city liable therefor.

"The items of this count, Exhibit D2, fall under the three first groups of the prior count. I make the same findings. I find each item was done under special order of the street commissioner—in group 2 and 3 under his personal order—in group 1 in the same manner in which I made the corresponding finding in the first count. The work was done under the supervision of the street commissioner or his authorized representative. It was in each instance worth the price charged. The bill was O.K'd by the street commissioner in person, which occurred, in each instance, as soon as practicable after the extra work was done, and prior to final estimate.

"I find the issues in favor of plaintiff as to the following items of Exhibit D2, the classification being the same as with regard to the first count: (1) Items omitted aggregate \$162.60; (2) items omitted, aggregating \$93.60; (3) items omitted, aggregating \$200. I find evidence insufficient as to notice 310—\$37.40 claimed—and recommend the rejection of that item. The items of the foregoing lists whose allowance I recommend aggregate \$456.20. Demand was made not later than August 1, 1895, and interest should be allowed from that date. The claim on the third count, under contract 3,712, of which the items appear in Exhibit F2, is in all respects analogous to the claim in the second count. I repeat my findings as to the general facts common to all of the claims, and give the list of items under this third count, as under the prior two counts, with the recommendation for their allowance in the sums set forth. I find the issues in favor of plaintiff as to the following items of Exhibit F2, the classification being the same as with reference to the first count: (1) Items omitted aggregate \$150.10; (2) items omitted, aggregating \$183.70. I reject item 387 for \$16.40. The items of the foregoing lists whose allowance I recommend aggregate \$333.80. Demand was made not later than August 1, 1895, and interest should be allowed from that date."

On the report of the referee judgment was rendered for plaintiff on all counts, the amount of which, including interest, was \$9,990.41.

Charles W. Bates and Benj. H. Charles, for appellant. Alexander Young and Chester H. Krum, for respondent.

WOODSON, J. (after stating the facts as above). Appellant assigns numerous errors committed by the trial court, but, when properly considered, we are of the opinion that they are all fairly embraced in the three following: First. The findings of fact of the referee are not sufficient in law to sustain a judgment in favor of the plaintiff, and the court erred in rendering judgment for the plaintiff in said report. Second. The court erred in holding that the plaintiff could recover the reasonable price of work and materials as extras where the written contract under which plaintiff claims to have done the work and furnished the materials specified the prices thereof. Third. The court erred in holding that the plaintiff could recover against the city, on a contract for work and materials, in the absence of any showing that an appropriation had been made therefor, or in allowing a recovery in excess of the appropriation.

We are unable to lend our assent to the first assignment, for the reason that the evidence preserved in the record sustains the referee in his findings, in that he and the city entered into the contract sued on; that he performed the work and furnished the materials, as extras, in compliance with the terms of the contract; that they were reasonably worth the prices charged, and that he and the city engineer agreed upon those prices, as provided for by the contract; that the city duly accepted the work and materials; and that he made a demand for payment, and that payment was refused. Counsel for appellant contend that those facts do not entitle the respondent to a recovery, for the reason, first, that the evidence shows that the extra work done and materials furnished were not done and furnished under a contract not let to him by competitive bidding, in pursuance to an ordinance of the city, ordering the work to be done; and, second, because the city engineer had no authority under the charter to determine what was extra work to be done, or the price to be paid therefor. Section 15 of article 6 of the charter (Ann. St. 1906, p. 4857) reads as follows: "All ordinances recommended by said board shall specify the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and the fund out of which it shall be paid, and shall be indorsed with the estimate of the cost thereof; provided, that no improvement or repairs shall be ordered upon any future street, alley or highway, which shall not have been opened, dedicated or established according to the provisions of this charter and law; and provided further, that nothing in this article shall be so construed as to prevent the board of public improvements, through the proper officer thereof,

from annually letting and entering into contracts on the first day of July of every year for the grading, constructing, reconstructing and repairing of sidewalks and repairing street, alley and gutter paving and such other similar work, which may be ordered by ordinance, or may become necessary to be done during the year." By reading this section of the charter it will be seen that it does not require the work mentioned in the last line thereof to be done in pursuance of an ordinance of the city, specifying the character of the improvements to be made; but the second proviso of that section expressly authorizes the board of public improvements to annually let contracts on the 1st day of July of every year for doing this class of work. We take it that the last line of that section refers to all little odd and end jobs of paving, repairing, and other improvements of the sidewalks, which are too insignificant to be foreseen, and which are not properly chargeable to the adjoining property and specially provided for in each ordinance and contract providing for regular street improvements. For that reason that class of work falls outside of the regular street improvements, which must be ordered done by ordinance, and performed under contract awarded by competitive bidding. All such work which does not fall within the regular street improvements, and which has its origin, more or less, in emergency and lack of foresight, are designated in the annual contract as "extra work"; and sections 4 and 5 thereof provide as to how the character of such work is to be determined and paid for. We are therefore of the opinion that the contract for the extra work sued for is authorized by the charter.

As to the second contention of counsel for appellant, it may be conceded that there is no express charter provision authorizing the street commissioner to determine what part of the improvement shall be considered as extra, or which authorizes him to agree upon the price to be paid therefor; but it is perfectly clear from reading said section 15 of the charter that it grants to the city the power to make such contracts, which necessarily implies that it must pay for all such improvements ordered by it. In the absence of the charter provision designating the person who shall determine what is extra work, and fix the prices to be paid therefor, we are of the opinion that the board of public improvements, who has charge of such matters, very properly selected and intrusted that duty to the street commissioner, who, by section 35 of article 4 (Ann. St. 1906, p. 4832), is given special charge of the construction, reconstruction, repairing and cleaning of the public streets, avenues, and alleys of the city; and sections 4 and 5 of the contract sued on designate the street commissioner as the person to determine those questions.

Said sections read as follows:

"(4) Any work not herein specified, which may be fairly implied as included in this

contract, of which the street commissioner shall judge, shall be done by the first party without extra charge. The first party shall also do such extra work in connection with this contract as the street commissioner may especially direct, and if it shall be of a kind for which no price is stated in this contract, such price shall be fixed by said commissioner; but no claim for extra work shall be allowed unless the same was done in pursuance of special orders as aforesaid, and the claim presented as soon as practicable after work is done and before the final estimate.

"(5) To prevent all disputes and litigation, it is further agreed by the parties hereto that the street commissioner shall, in all cases, determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and he shall decide all questions which may arise relative to the execution of this contract on the part of * * * the contractor, and his estimates and decisions shall be final and conclusive."

The conclusions above reached are supported by section 27 of article 6 of the charter (Ann. St. 1906, p. 4867), which, in express terms, makes it the duty of the board of public improvements to make all necessary repairs requiring prompt action without submitting them to the Assembly, as it must do regarding all general street improvements. In fact, if he had not been designated as the person who should determine what work was extra and fix the price thereof, it would have excited suspicion, to say the least.

2. It is next contended by counsel for appellant that the court erred in holding that the respondent could recover for the reasonable price of work and materials as extras, where the written contract under which plaintiff claims to have done the work and furnished the materials specified the prices thereof. Learned counsel overlook the fact that while the contract provides generally for doing extra work, yet it designates no particular work of that character to be done, nor does it fix the price to be paid therefor, but authorizes the street commissioner to determine, as the emergency may arise, when extra work shall be done, and to fix the price thereof. In other words, while the contract authorizes the street commissioner to have extra work done, yet in all other respects that character of work is extra and beyond the contract. This is not only the spirit of the contract, but it is also the plain letter thereof; and when so read, the contention of counsel for appellant that the street commissioner has no power to fix or agree upon prices where the contract states them has no foundation upon which to stand, for the reason that he has not fixed any prices for work and materials where they are provided for and fixed by the contract; but has fixed the prices for work which is extra of the contract. We are therefore of the opinion that appellant's second contention is untenable.

3. The third proposition presented by counsel for appellant presents a much more serious question for solution; and that is that the respondent cannot recover against the city, on a contract for work done and materials furnished for such street improvements, in the absence of any showing that an appropriation had been made therefor, or in allowing a recovery in excess of the appropriation. Counsel for appellant have not called our attention to any charter provision prohibiting the city from entering into contracts providing for this class of work without the city first makes a specific appropriation for the purpose, and out of which such improvements must be paid for; and, after a most careful investigation of the charter, we have been unable to find any such provision. We therefore take it for granted that there is no such provision, and that there is no limit to the amount the city may become indebted for such improvements, except the constitutional limitation of 5 per cent. on the assessed valuation of the property located within the city limits. Section 28 of article 6 of the charter (Ann. St. 1906, p. 4869) relates only to street improvements which are required and ordered to be made by ordinance, and has no application whatever to this emergency and unforeseen class of work called "extra work." This seems to be the view this court took of the contract to do this class of work in the case of *Steffen v. City of St. Louis*, 135 Mo. 44, 36 S. W. 31, where the plaintiff was permitted to recover for similar work and materials, without, however, considering the question of appropriation. That point seems not to have been made in that case, and the court and counsel for both parties assumed that an appropriation was not necessary in such cases. We think that assumption was correct, and is controlling in this case.

The judgment is affirmed. All concur, except *VALLIANT, P. J.*, absent.

SPARKS v. JASPER COUNTY.

(Supreme Court of Missouri. June 26, 1908.)

1. COUNTIES—CONTRACTS—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a county on bridge contracts, held to support a finding that the bridge commissioner and bidders who accompanied him to a point half a mile from the site of the proposed bridge, where the contract was let, if at all, did not know that there were no other bidders at the site of the proposed bridge at which it had been advertised the contract would be let.

2. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.

The findings of the trial court or jury on conflicting evidence of a substantial nature will not be disturbed by the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

3. COUNTIES—CONTRACTS—PLACE OF LETTING.

The letting of a county bridge contract at a spot half a mile from the bridge site, the contract having been advertised to be let at the site of the bridge, was not in compliance with the

statute requiring public notice of the proposed letting of a contract, stating the time and place the contract will be let.

4. PAYMENT—APPROPRIATION BY DEBTOR.

A county bridge contractor, to whom the county had issued a warrant as part payment designating the bridges and the sum to be applied on each, was without power to change the application so made as to a part of the sum to be applied on a designated bridge and to apply it on another account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 102.]

5. ASSIGNMENTS—ORDERS ON DEBTOR—PAYMENT IN VIOLATION OF TERMS.

The mere fact that a bank took orders issued by a county bridge contractor on the county to a subcontractor, such orders providing that they should not be paid until the bridges were completed and accepted by the county surveyor, and furnished the subcontractor money with which to purchase material and employ labor, with the additional fact that the contractor may have known of that arrangement between the bank and the subcontractor, in no manner authorized the county to pay to the subcontractor or the bank the money called for in an order, except as therein stated, and if the county or the bank saw fit to pay an order before the subcontractor earned the money called for, it was its loss, and not the contractor's.

6. COUNTIES — CONTRACTS — ILLEGAL CONTRACTS.

Where a county, expressly granted the power to build bridges, accepted bridges and paid therefor, it could not recover the amount so paid on the ground that the contracts were illegally let without a return of the bridges, or an offer to return them.

7. SAME.

Where a county court is charged with the performance of certain duties in reference to a particular subject-matter, and undertakes in good faith to execute its powers, but fails to observe some requirement of law, so that its acts are irregular, such acts, if acquiesced in, are binding on the county as completely as if regular.

Lamm and Graves, JJ., dissenting.

In Banc. Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by J. H. Sparks against Jasper county. From the judgment, both parties appeal. Reversed and remanded, with directions.

The following is the opinion of WOODSON, J., in Division No. 1:

"These appeals result from an action brought by J. H. Sparks against Jasper county to recover judgment for balances claimed to be due on three separate contracts for the construction of bridges in said county and the finding and judgment of the court on the pleadings and evidence. Appeals were taken by both plaintiff and defendant and should have been brought to this court on one bill of exceptions and as one case, but were brought up on separate bills of exceptions and as separate cases. They should be heard together. The lower court found against plaintiff on the first count of his petition and for him on the second and third counts of his petition; found against defendant as to its various defenses, except on the first count of the petition; found against defendant on all its counterclaims except \$22 overpayment; and rendered a judgment in favor of plain-

tiff for the balance of \$——. A concise showing of the issues made by the pleadings is as follows: The amended petition is in three counts: (1) Count on contract for Blackberry bridge, \$2,895, with credit for \$1,400. Balance claimed, \$1,495. (2) Count on contract for Tuckahoe or Turkey Creek bridge and moving and rebuilding bridge on Jones creek, \$2,990, and for extra concrete pillars at Jones creek, \$65; credits \$1,100 paid; and claims balance of \$1,995. (3) Count on contract for three steel bridges—Turkey Creek range line bridge, sections 32 and 33; span south end of Terry's Ford bridge; bridge across Center creek at Reed's Station—\$9,650; credits \$5,400; and claims balance of \$4,250.

"Amended answer: (1) Denies right to recover \$1,495 on Blackberry bridge or part, for reason contract was not let as provided by law. Advertised to be let at bridge site, and, if let at all, was let one-half mile or more from site, and contract used was obtained by fraud committed by plaintiff and Grieb, bridge commissioner, on county and county court. (2) Denies right to recover \$65 for concrete pillars at Jones Creek bridge. No contract for same and no order of county court for same. The payment of \$1,100 by county court was on contract for Tuckahoe and Jones Creek bridges, and not on extra. Plaintiff has no right to apply any part on this extra concrete pillar work. (3) Defense as to \$2,900, by virtue of order of Sparks to David Miller for \$3,500, upon which county has paid \$600 to Central National Bank, assignee, of order with plaintiff's approval, and after completion of bridge contracts paid said bank \$2,600, for which defendant is entitled to credit.

"Counterclaims and offsets by defendant: (1) Claim for \$1,400 paid on Blackberry bridge for the same reasons for defending against first count for balance claimed on said bridge. (2) Claim for \$2,471; \$22 being amount overpaid as shown by contracts and payments on Carl Junction, Belleville, and Rucker's Ford bridges. The contract being \$13,678, and the payment being \$13,700. \$2,449 of claim being for amount paid for extra span on Carl Junction bridge. Said span being built without any contract upon an order of the county court without any compensation being fixed. (3) Claim for \$15,935; \$4,850 for Terry's Ford bridge, \$2,645 for Duenweg bridge, \$4,745 for Hille's Ford bridge, \$2,545 for Center Creek bridge, \$1,250 additional 50 feet on Terry's Ford bridge.

"There is little or no dispute about the facts when you get into the evidence, so the questions before the court are mainly questions of law.

"1. The plaintiff insists that the finding of the court against him on the first count of the petition was error, and that the judgment rendered thereon should be reversed. The plaintiff's evidence upon this count of the petition tended to prove: That the con-

tract for building the bridge was advertised to be let by public outcry at the site of the proposed bridge, and that on the day designated for letting the contract the road and bridge commissioner of the county, accompanied by plaintiff and three other prospective bidders for said bridge, went by rail to Carl Junction, and from there drove in a hack to a point about one-half mile from the site of said proposed bridge, and in plain view thereof; that they looked at the site from that distance but saw no one there; that said bridge commissioner announced then that he would then and there let the bridge contract by public outcry to the lowest bidder; that in good faith he proceeded to let the contract by outcry, and received several bids from the various parties who accompanied him, among whom was the plaintiff, who bid \$2,395, which was the lowest bid made; and that the contract was then and there awarded to the plaintiff for said sum, which was afterwards approved by the county court, and, in pursuance thereof, the contract sued on was executed. The defendant's evidence tended to prove that, when the parties got to within about one-half mile of the site of the proposed bridge, they realized that they could not drive on to the site and return in time to catch their train, home-bound, at Carl Junction, and that they turned round and drove back to the junction without letting the contract or attempting to so do. The court gave an instruction for the plaintiff and defendant presenting their respective theories of the case. Under the evidence and the instructions, the court found the facts for the defendant and rendered judgment accordingly. This action of the court is assigned as error.

"The law requires public notice to be given of the proposed letting of contracts for building bridges, stating the time and place the contract will be let. The object of the notice is to inform prospective bidders of the proposed letting, so that they may meet there and make competitive bids for their construction. The court found, and justly so, we believe, that the bridge commissioner and the bidders who accompanied him did not know, nor could they testify positively, that there were no prospective bidders at the site of the proposed bridge on the day the contract was advertised to be let. These parties may have been in full view of the site, and they may not have seen any one at or near there. Yet that does not signify that there was no one there in fact, for they may have been there and still not observable from the point where plaintiff claims the contract was let, which was a half mile or more from the site. Prospective bidders might have been there, down in the creek, the banks of which might have obstructed the view. At any rate, this was a matter the trial court had a perfect right to take into consideration in passing upon the weight to be given to their

testimony. In addition to what has just been said, the positive testimony of one of the party who drove out to the point where the contract was said to have been let is to the effect that the country between that point and the bridge site was rough and uneven, and for that reason it was a physical impossibility for them to see the site from the place where they stopped and turned back to Carl Junction.

"To view this evidence in the most favorable light possible to plaintiff, still it cannot be sincerely contended that there is no evidence to support the finding of the court upon that issue. In fact, there was a direct and sharp conflict between the testimony introduced by plaintiff and defendant which presented a proper question of fact to be determined by the court. The law is that, where the evidence introduced by the respective parties is conflicting and of a substantial nature, the findings of the trial court or jury will not be disturbed by this court. *Everman v. Eggers*, 106 Mo. App. 732, 80 S. W. 592; *Culbertson v. Hill*, 87 Mo. 553; *Blanton v. Dold*, 109 Mo., loc. cit. 69, 18 S. W. 1149; *Weller v. Wagner*, 181 Mo. 151, 79 S. W. 941. The reason for that rule is obvious. The triers of the facts have before them the witnesses who testify in the case, and they have the opportunity of observing their demeanor while upon the witness stand and their manner in testifying. They are in a much better position to judge as to the credibility of the witnesses and the weight to be given to their testimony. This rule is usually followed even in equity cases, where this court has the unquestioned right to review and weigh anew the evidence of the case, and, if the findings of the chancellor are based upon substantial evidence, this court will refuse to reverse a decree of the lower court on the ground that the findings were against the weight of the evidence. *Johnson v. Realty Co.*, 177 Mo. 595-597, 76 S. W. 1021. Counsel have cited no authority sustaining the proposition that a letting of the contract a half mile from the site of the proposed bridge was a compliance with the requirements of the statute, while, upon the other hand, this court has many times held that a sale under a deed of trust, if held at a place different from that designated in the notice, will not pass a valid title. *Stewart v. Brown*, 112 Mo. 171, 20 S. W. 451; *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631. So must a sale under execution be made at the time and place stated in the advertisement, or it will be void. *Merchants' Bank v. Evans*, 51 Mo. 335; *Ladd v. Shipple*, 57 Mo. 523. The principle underlying the cases just cited is applicable to the facts of this case, and by a parity of reasoning there is no escape from the conclusion that the contract sued on in the first count of the petition was not properly let, and for that reason the court properly held

the plaintiff was not entitled to recover thereon. *Roeder v. Robertson*, 202 Mo., loc. cit. 537, 100 S. W. 1086.

"2. The second count of the petition is based upon a contract to construct a bridge across Tuckahoe or Turkey creek, and for moving and rebuilding a bridge across Jones creek. The contract price for both was \$2,900. By a subsequent and separate oral agreement, the defendant employed plaintiff to construct some concrete pillars for the Jones Creek bridge, and agreed to pay him \$65 therefor. During the progress of this work, the county court issued to plaintiff a county warrant for the sum of \$11,000 as part payment on several bridges he was building for the county, designating the bridges and the sum to be applied to each, and one of the items stated therein, and among them, is the following: 'Tuckahoe Bridge, \$1,100.' Had plaintiff credited that sum upon the amount due him on the Tuckahoe bridge, there would have been a balance due him of \$1,890; but, instead of doing that, he applied \$65 of it in payment of the concrete pillars built for the Jones Creek bridge, which left \$1,035 to be credited on the Tuckahoe account. He then credited the latter account with said sum, which left a balance of \$1,955 due him on that account. The defendant raises two objections to the action of the plaintiff in applying the \$65 of the \$1,100 payment in satisfaction of the \$65 item due him for building the pillars for the Jones Creek bridge: First, because the warrant upon its face made the application of the payment of the \$1,100 on the 'Tuckahoe Bridge,' and that, it having done so, the plaintiff had no power or authority to change that application of payment from the Tuckahoe bridge account and apply it in payment of the concrete pillars account; and, second, because the contract for building the concrete pillars was not in writing, as required by the statute, and is for that reason void. If the first objection is valid, the second is immaterial in so far as this suit is concerned, for the reason he has not sued for the \$65, but claims it has been paid.

"As to the first objection presented, concede for the sake of argument, without deciding it, that both of said contracts are valid—that is, the contract for constructing the Tuckahoe bridge and the contract for building the concrete pillars—yet that would not have authorized the plaintiff to make the application of payment as he attempted to do, crediting \$65 of the \$1,100 on the concrete pillars account, and the balance on the Tuckahoe bridge account, for the reason that the defendant made the application of payment at the time the \$1,100 was paid by it, which is shown by the warrant before mentioned. The law of this state is well and firmly settled that when a debtor owes two accounts, and both are due, he has the right to designate the one upon which payments made by him shall be applied, and, if he make the ap-

plication, then the creditor has no power to make the application, or to change the application so made by the debtor; but, if the debtor fails or refuses to make the application of payment, then the creditor may make it; and, if neither of them makes it, then the law will make it for them according to the equity and justice of the case. *Gantner v. Kemper*, 58 Mo. 570; *Waterman v. Younger*, 49 Mo. 415; *McCune v. Belt*, 45 Mo. 174; *Beck v. Haas*, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516. It follows from what has been said that the trial court erred in permitting the plaintiff to make the application of payment after the county had previously done so. There are no other objections urged against the judgment rendered in favor of the plaintiff on the second count of the petition.

"3. The third count of the petition is based upon the contract to construct three steel bridges; one across Turkey creek, on range line, sections 32 and 33, one at Terry's Ford, and the third across Center creek at Reed's Station. The contract price was \$9,650. The county court has paid on this account the sum of \$5,400, leaving a balance of \$4,250 claimed by plaintiff to be due him, less the sum of \$600 paid by the defendant to David Miller, or for his use and benefit, under the following circumstances: The record discloses the fact that plaintiff had been constructing bridges in Jasper county for several years prior to the beginning of this litigation, and that said Miller was a subcontractor in constructing those bridges, including the three last mentioned, and that on September 29, 1903, the plaintiff gave to said Miller the following order upon the county court of said county, to wit: 'St. Joseph, Mo., Sept. 29, 1903. Hon. County Court Jasper County, Carthage, Mo.—Gentlemen: Please pay to David Miller the sum of thirty-five hundred dollars for building all bridges for which I now have contracts for in Jasper county, excepting Jones Creek bridge, payable when work is completed and accepted by T. V. Greib, county surveyor, and charge same to account of me on my contracts. Respectfully, J. H. Sparks.' Indorsed on the back thereof is the following: 'For value received I assign the within order to the Central National Bank of Carthage, Mo. David Miller.' The record discloses the facts: That Miller was a subcontractor under plaintiff, and furnished much of the labor and materials used in the construction of those bridges; that he borrowed money from the Central National Bank of Carthage, with which he carried out his subcontracts, and turned over to the bank orders issued by plaintiff to him on the county court of Jasper county similar to the one before mentioned in payment of the money so borrowed by him. At the time plaintiff issued the order before set out, Miller was indebted to said bank in a sum in excess of \$3,500, therein mentioned. At the time Miller indorsed the order over to the bank, it gave

him \$400 in cash, and credited his account with \$3,100, the balance thereof. Some time thereafter the county court of said county paid to the bank on the order \$600. Plaintiff does not object to the action of the court in so paying that \$600, because it was paid before he countermanded the order. About this time Miller abandoned his contracts with plaintiff to build the bridges, and left them in an unfinished condition. When Miller threw up his contracts and refused to complete the bridges, the plaintiff served written notice on the county court not to pay the order issued by him to Miller for \$3,500, dated September 29, 1908. The plaintiff was then required under his contracts with the county court to complete the bridges, which he did at a cost of something over the sum of \$4,000. After plaintiff had completed the bridges according to his contracts, he demanded of the county the balance due him under his contracts, which the court offered to pay, less the \$2,900, balance claimed by the bank on the order issued by plaintiff to Miller on the county and by Miller indorsed to the bank. The plaintiff objected to the deduction of this \$2,900, because it was not payable until Miller completed the bridges, and they were accepted by the county surveyor. The bank gave to the county an indemnifying bond, and, in spite of plaintiff's protest, the county paid said \$2,900 to said bank, and offered to pay plaintiff the balance, which he refused to accept.

"It is thus seen that the only controversy between the plaintiff and defendant on the third count of the petition is over this \$2,900 paid by the county court to the Central National Bank. The defendant's position regarding that matter is this: It contends that the course of dealing between the plaintiff and said Miller created some kind of an agreement or understanding between plaintiff and the bank by which it was to furnish the necessary money to Miller with which to purchase material and employ labor used in the construction of the bridges by him under his subcontract, and that plaintiff was to issue orders to Miller on the county for money due or to become due him for work and materials done and furnished on said bridges, which the bank was to receive in payment of the money so furnished by it to Miller. While the record shows that was the course of dealing between the parties, yet the record is perfectly silent as to any agreement or understanding on the part of plaintiff by which he bound himself to pay to the bank or to any one else any sum of money except as stated in the orders issued, and that he in no manner authorized the bank or any one else to furnish Miller money on account of said orders. The mere fact that the bank took said orders and furnished Miller money thereon, with the additional fact that plaintiff may have known of that arrangement between Miller and the bank, did in no manner authorize the county to pay to Miller or the

bank the money called for in the order, except as stated in the order itself. If the county or the bank saw fit to pay the orders before Miller earned the money called for by them and before they were due or payable, as expressed upon their face, then that was their fault and misfortune, which should not be visited upon the plaintiff, who was no party to the transactions, and out of which he received no benefit or profit. The order was merely a direction to the county court to pay the sum stated therein to Miller when the bridges were completed by him and accepted by the county surveyor, and not before. The meaning of the order is plain and unambiguous, and, if the bank or the county court saw proper to advance money to Mr. Miller on the order before he had earned it, that is their misfortune, as before stated. The fact is undisputed that Miller never completed the bridges mentioned in the order, and the record discloses the fact that plaintiff was required to expend \$4,100 in order to complete them after Miller threw up his contracts, and to now make him pay the \$2,900 in addition would be not only against the letter and spirit of the order, but it would be grossly unjust and inequitable. We are therefore of the opinion that the action of the court in holding the county liable to him for that sum was proper.

"4. The defendant sets up in its answer divers counterclaims and set-offs, aggregating about \$15,000, for money paid by the county to plaintiff for bridges constructed by him in years gone by, under various contracts, which defendant alleges were illegally let to plaintiff. It is not alleged that the bridges were not constructed according to the terms of the contract, or that they were not worth the sums of money paid therefor; nor is it alleged that the county refused to receive the bridges. While, upon the other hand, the evidence shows that the contracts for constructing these bridges had been fully performed on both sides long prior to the institution of this suit. The record also discloses the fact that the contracts for their construction were fair and reasonable, that the bridges were substantially built and were reasonably worth the money paid by the county for them, that they were accepted by the county, and that they have been retained and constantly used by the public ever since, with no offer to return them to the plaintiff. Under those circumstances, conceding for argument's sake the contracts were illegal in their inception, yet it would be unjust and inequitable to permit the county to retain the bridges and at the same time recover back the money paid therefor. That principle of equity should apply here which requires persons who seek equity to do equity before their prayer will be heard. This is no novel question to the jurisprudence of this country. The law is that where there has been a complete performance of the contract on both sides, and it is fair and reasonable in fact, there can be

no recovery of the consideration by the municipal corporation where it retains and enjoys the benefits of the contract, and where it cannot or will not restore the property acquired by the contract, even though the contract be one which the law denounces as illegal and which could not be enforced on that account. *Frick v. Town of Brinkley*, 61 Ark. 397, 33 S. W. 527; 20 Am. & Eng. Ency. Law (2d Ed.) p. 1180; *Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900; *Long v. Boone County*, 36 Iowa, 60; *Inhabitants of Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264.

"In *Frick v. Town of Brinkley*, supra, a member of the city council (prohibited by law from making contracts with the city) sold the city a lot of tiling and received payment therefor. Subsequently an action was brought to recover the purchase price without returning the tiling. The court say: 'We think it (the town) cannot in good conscience be allowed to receive the value back, while at the same time it is enjoying the benefits of its purchase; at all events, when it does not even offer to restore that which it claims could not have been its property, and, consequently, is not now its own. This is not the assertion of any right which the appellant has, nor any obligation resting upon the appellee under the contract of purchase; but it is a rule of justice and right growing out of an implied contract and obligation of every one, whether a natural or artificial person, to restore to another that which belongs to him and that is in the possession of the former or in his power to restore, and when the power to restore does not exist, and when a restoration in the nature of things became impracticable, then to be precluded from recovering back the fair price paid. In such cases as this the sole duty of the courts seems to be to see that the public corporation suffers no material loss or injustice, but further than this they could but inflict burdens upon others more or less disastrous where no resulting good can follow—a thing courts of justice ought not to indulge in.'

"In *Riverside County v. Yawman & Erbe Mfg. Co.*, supra, the court say: 'It affirmatively appears from the complaint that the board of supervisors has purchased and paid for and retained the use of certain personal property, and the court is asked to compel restitution with penalty in favor of such purchasers. The Legislature never contemplated conferring such power upon a public corporation when it enacted section 8 of the county government act. The right there sought to be conferred was to recover money paid without authority at law. To say that one who receives property under a contract that the owner retains and uses it is not authorized by law to pay for it would be to say that a public corporation may take and use property for public purposes without compensating the owner, provided they can once get possession of it under the guise of a contract;

and to say that they may recover the purchase price actually paid, without tendering back that which they have received, would be, to say that our Legislature intended to discourage common honesty as applied to public corporations, and that the courts were to be made the "handmaidens of iniquity."'

"In *Long v. Boone County*, 36 Iowa, 60, quoted with approval in *King v. Mahaska County*, 75 Iowa, 336, 39 N. W. 639, it was held: 'When the legally constituted agent of the county contracts for work in respect to which he has no power unless authorized by a special vote of the people, and executes a warrant for the amount thereof to the treasurer of the county, which is voluntarily paid by the latter officer, the county cannot recover back the amount so voluntarily paid.' While some of the expressions in the case of *King v. Mahaska County*, 75 Iowa, 329, 39 N. W. 636, seems at first blush to support defendant's contention, when critically considered it will be seen that it distinguishes that case from the case of *Long v. Boone County*, 36 Iowa, 60, by using the following language, on page 336 of 75 Iowa, and page 639 of 39 N. W.: 'When all the pleadings are considered, the defendant was not in the attitude of seeking to recover back money paid to the plaintiff on their illegal contracts.'

"The Supreme Court of the United States and courts of last resort of many of the states go much further in the adjustment of the rights of parties growing out of illegal contracts than this court has. In other words, they grant not only the relief this court grants, but they go much further, and relieve where this court will not do so, as will appear from the following cases: The Supreme Court of the United States, in the case of *Chapman v. County of Douglass*, 107 U. S. 357, 2 Sup. Ct. 70, 27 L. Ed. 378, in discussing this question, used this language: 'This doctrine was fully recognized by the Supreme Court of Nebraska as the law of that state in the case of *Clark v. Saline County*, 9 Neb. 516, 4 N. W. 246, in which it adopts from the decision of the Supreme Court of California the following language: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor from the like obligation. *Argenti v. San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution.'" The same rule is announced in the following cases: *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Marsh v. Fulton Co.*, 10 Wall. (U. S.), loc. cit. 684, 19 L. Ed. 1040; *Hitchcock v. Galveston*, 96 U. S., loc. cit. 351, 24 L. Ed. 659; *McBrian v. Grand Rapids*, 56 Mich. 95,

22 N. W. 206; 1 Beach on Pub. Corp. § 227. These cases are but samples of the overwhelming authorities which hold that, where a moral duty exists to make satisfaction, a legal liability springs therefrom, and as said by the Supreme Court of the United States in the case of *Hitchcock v. Galveston*, supra: "There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was therefore, at farthest, only *ultra vires*, and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *State Board of Agriculture v. Citizens' Street Railway Co.*, 47 Ind. 407, 17 Am. Rep. 702. There it was held that: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." See, also, substantially to the same effect, *Allegheny City v. McClurkan*, 14 Pa. 81, and, more or less in point, *Maher v. Chicago*, 38 Ill. 266; *Onelda Bank v. Ontario Bank*, 21 N. Y. 490; *Argenti v. City of San Francisco*, 16 Cal. 256; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370. The same is true of the case at bar. Jasper county was not prohibited by statute from building bridges; but, upon the other hand, the statute expressly grants to the county that power. Conceding the contracts for building the bridges were illegal, yet the execution of those contracts were, at most, a defective exercise of the power granted, and, when the bridges were constructed in pursuance thereof and accepted by the county, then she was, to say the least, morally bound, in the absence of fraud, to pay for them, if not legally bound to do so, which she is not under the decisions of this court. *Walcott v. Lawrence County*, 26 Mo. 272; *Anderson v. Ripley Co.*, 181 Mo. 46, 80 S. W. 263; *Woolfolk v. Randolph Co.*, 83 Mo. 501; *Crutchfield v. Warrensburg*, 30 Mo. App. 456.

"The conclusions reached in these cases are correct and rest upon sound reason. They

were suits based upon contracts not in writing, etc., which were prohibited by statute, and the court in those cases simply enforced the statute as it found it, and, to have done otherwise would have given force and effect to contracts which were prohibited by statute from being made. *Roeder v. Robertson*, 202 Mo., loc. cit. 537, 100 S. W. 1086. But that is not the question involved in this case. Here the plaintiff is not asking this court to enforce these alleged illegal contracts. They were years ago fully performed on both sides, and the defendant is now here by way of counterclaim, in the nature of a cross-bill, seeking to recover back the money she paid for those bridges without an offer to return them to the plaintiff. This she cannot do without she first returns, or offers to return, them to him, and the reason therefor is this: If the contracts were void, then the title to the bridges never passed thereby from plaintiff to the defendant and became her property; but they remained his property the same as though the contracts had never been entered into. That being true, then when the county acquired the possession of the bridges under those void, yet colorable, contracts, she was morally bound to pay for them, as she did; and conceding, as before stated, without deciding it, that, after accepting the bridges and paying for them, she had the right to repudiate the contracts and sue for the recovery of the money paid by her for them, she would be morally bound, and from that springs the legal liability to return the bridges to plaintiff before she would be permitted to recover back the contract price so paid. This same principle underlies the case of *Roeder v. Robertson*, 202 Mo. 522, 536, 100 S. W. 1089, in which this language is used: "The act is prohibitive in its operation. It seeks to prevent foreign corporations from doing business in this state until they have complied with the provisions of the act by filing a copy of their charter or articles of incorporation with the Secretary of State and by appointing an agent in this state to represent them. If such corporations, in violation of the act, do business in this state, all such transactions are, by the courts, declared null and void, and all contracts made by them with citizens of this state for the sale of goods, wares, and merchandise are nullities, and the title to the property sought to be transferred thereby does not pass to and vest in the vendee, but remains in the vendor the same as if the pretended contract had not been executed. * * * For under the facts of this case a citizen of this state would not be permitted to recover the possession of the property sold to the respondent, nor its value, in case of its conversion, without first refunding or paying back to the respondents the consideration paid by them under the void contract, and received by A. W. Stevens & Son. He would be estopped from claiming the property until the purchase price had been re-

turned.' *Simpson v. Stoddard Co.*, 173 Mo. 421, 73 S. W. 700.

"And there is another reason equally valid why the defendant should not be permitted to recover upon her counterclaims, which is well expressed by Judge Fox in the case of *Simpson v. Stoddard Co.*, 173 Mo., loc. cit. 466, 73 S. W. 710, in the following language: 'The principle is that, where a county court is charged by law with the performance of certain duties in reference to a particular subject-matter, and that court undertakes, in good faith, to execute its powers, but fails to observe certain requirements of the law, so that its acts in that regard are irregular, such acts, if acquiesced in, will become binding upon the counties as completely as if they had been regular in the first instance.'

"We are therefore of the opinion that the ruling of the trial court in disallowing all of the counterclaims was proper.

"Because of the error of the trial court pointed out in the second paragraph of this opinion, regarding the application of payments, the judgment is reversed, and the cause remanded, with directions to disallow plaintiff's claim of \$65 for the concrete pillars constructed for the Jones Creek bridge, without prejudice, and to affirm the judgment in all other particulars."

Thomas & Hackney, for appellant. McReynolds & Halliburton, for respondent.

PER CURIAM. The foregoing causes having been reconsidered and argued in the court in banc, the opinion of WOODSON, J., in Division No. 1, reversing the judgment and remanding the cause, is adopted as opinion of the court in banc.

GANTT, C. J., and BURGESS and VALLIANT, JJ., concur. FOX, J., expresses no opinion. LAMM and GRAVES, JJ., dissent.

COOK v. NEWBY et al.

(Supreme Court of Missouri, Division No. 1. July 3, 1908.)

1. STIPULATIONS—ENFORCEMENT.

A court of equity properly refuses to specifically enforce a stipulation for judgment, the answer and proofs admitting and showing it does not contain all the compromise agreement, but omits important features thereof, the compromise scheme clearly pointing to a consultation of the attorneys for both parties, and the drafting of a stipulation that would meet with the approval of counsel, and effect a just and final settlement of a family trouble, and there being evidence that the stipulation was drawn by defendants' counsel and forwarded to defendants, and that plaintiff was illiterate and needed the advice of counsel, and did not fully understand its effect, and was unduly hurried in its execution by defendants, in the absence of plaintiff's counsel, though requested to wait a day or so for its examination and approval by such counsel.

2. CANCELLATION OF INSTRUMENTS — DEFENSES.

It will not avail defendants in a suit to cancel a deed from plaintiff to them that plain-

tiff obtained title with the separate means of his wife, and that she joins in upholding the conveyance to defendants; plaintiff having bought the land prior to enactment of the married women's enabling acts, the money having been reduced to his possession, with her approval and acquiescence, the title having been taken in him with her knowledge, and remained therein with her consent, defendants having been willing to take his title by a deed conveying it, and conveying merely an inchoate dower interest by his wife, and there being nothing to show such deed was made because the wife was the beneficial owner of the land, but it having been negotiated for, and made, on the theory that the land belonged to plaintiff.

3. HUSBAND AND WIFE — AGENCY OF WIFE FOR HUSBAND.

A letter written by plaintiff's wife, but with his knowledge and at his request, to defendants, promising to give defendants a farm, title to which was in plaintiff, if defendants would come and live with plaintiff and his wife, is admissible against plaintiff.

4. DEEDS—DELIVERY.

To induce, as it did, action on the part of defendants and place beyond doubt their having his farm on his death, plaintiff executed a deed thereof, and at the same time signed a memorandum, directing A. to hold the deed during plaintiff's life and at his death to cause it to be recorded, and reciting that he relinquished all right and title to the farm, excepting possession and use during his lifetime, and placed the deed and memorandum in the possession of A. *Held*, that there was a delivery, vesting title in defendants, subject to the life estate of plaintiff, qualified by the arrangement, entered into as the consideration of the deed, that defendants should come and live with plaintiff on the farm.

5. SAME—RECORDING DEED.

Plaintiff not being injured by the recording of a deed, which vesting in defendants the title, subject to plaintiff's life estate, may not complain of the recording, though it was without his consent, and in breach of a trust not to record it till his death.

Appeal from Circuit Court, Gentry County; W. C. Ellison, Judge.

Suit by Mancil G. Cook against Laura A. Newby and others. Decree for plaintiff. Defendants appeal. Reversed and remanded, with directions.

Platt Hubbell and Geo. Hubbell, for appellants. E. C. Lockwood, W. F. Dalbey, and C. H. S. Goodman, for respondent.

LAMM, J. By his bill in equity, and a count at law in ejectment, plaintiff sued the Newbys to set aside an unconditional warranty deed to 120 acres of land in Gentry county, Mo., and the record of it, and to recover possession of the land. Such steps were taken that Harriett, wife of plaintiff, became a party defendant. A decree on the equity side going in favor of plaintiff and a judgment of ouster with one cent damages going on the count in ejectment, all the defendants appeal. The equity count, in substance, sets forth that plaintiff is the owner of the land; that on July 20, 1903, he and his wife, Harriett, signed and acknowledged a warranty deed conveying the land to the Newbys, as husband and wife; that the deed was not delivered, but was left with a depositary to be held until demanded by plaintiff; that, without plaintiff's consent or knowledge, the New-

bys fraudulently obtained possession of it, and caused it to be recorded for the purpose of defrauding plaintiff out of the land; that the deed purports to be for a consideration of the love grantors bore the grantees and \$100, but that said \$100 and no other consideration was paid plaintiff for the land; that the deed and the record thereof are void and constitute a cloud upon plaintiff's title; wherefore a decree is prayed adjudging plaintiff the legal and equitable owner of the real estate, that the deed and its record be canceled, and for all proper relief. The court in ejectment is conventional. The Newbys filed an amended answer subdivided into counts, viz.: The first count was a general denial of each and every allegation, saving those expressly admitted. The second count states the deed was executed by plaintiff and his wife in the form of a general warranty and conveyed to the Newbys the real estate described; that it was for a good and valuable consideration acknowledged by grantors, and was duly put of record; that, by virtue of it, grantees are the owners of the land in fee simple absolute; that the plaintiff claims some title or right in and to said real estate, wherefore affirmative relief is asked under section 650, Rev. St. 1899, to wit, that the court ascertain and determine the title and right of the parties, respectively, and adjudge and decree title and for any other proper relief. By the third count the Newbys say: The deed was in the nature of a family settlement, giving to Laura A. Newby the portion she was to receive in the estate of plaintiff and his wife, Harriett. That the defendant Laura A. is the child of Mancil G. and Harriett Cook, and intermarried with her codefendant John H. That theretofore Mancil G. and Harriett had conveyed to their other children certain real estate by way of family settlement. By way of matter of inducement leading up to the conveyance, it is next alleged: That Mancil G. and Harriett after the marriage of Laura A. contracted with her and her husband that the Cooks and Newbys were to live on the home farm, and divide the profits in consideration of the Newbys assisting in maintaining a home for Mancil G. and Harriett. That they entered into the performance of said agreement, and the Newbys made valuable improvements on the farm, but the plaintiff, Mancil G., violated the contract and rented the farm to others and the Newbys then moved to a farm near Cameron, Mo. That afterwards Mancil G. and Harriett induced them to return under an agreement to convey the farm to them, but, on their compliance, neglected to make the deed pursuant to the agreement. That thereupon in March, 1903, the Newbys moved from the farm and rented another adjacent. That in July, 1903, the Cooks made a proposition that, if the Newbys would return to the home farm, it should be deeded to them. That, having in mind the failure to perform the former agreements, they declined the of-

fer, unless the conveyance was made as a condition precedent to their return. That thereupon Mancil G. and Harriett promised and agreed to make such conveyance as such condition precedent, and, in pursuance thereof, all the parties met on July 20, 1903, and the deed was made. That, when made, it was delivered and placed in the possession of one Axtell to be held by him (under an agreement of the grantors and grantees) until the death of Mancil G. and Harriett, when it was to be delivered by him to the Newbys and recorded. That Mancil G. and Harriett then and there relinquished all claim or right to said deed or the land, except the right of joint possession of said land with the Newbys. That the consideration of said deed was that the Newbys should keep certain live stock for Mancil G. (describing it), and that the Newbys should remain on the farm, and assist Mancil G. and Harriett in maintaining it as a home, and that a further consideration was the settlement on Laura A. of her share in the estate of Mancil and Harriett. That thereafter, in consideration of the delivery of said deed, the Newbys returned to the farm and performed valuable services and made valuable improvements. That thereafter said Axtell contemplated removing to Oklahoma. That in this emergency it was agreed by the parties in interest that the deed should be taken from Axtell's possession and placed in the possession temporarily of one Simms, and this was done. That afterwards in July, 1904, by the new agreement of all of the parties in interest, the deed was taken out of the hands of Simms, delivered to the Newbys, and recorded. That the execution of the deed and its record were the result of mature deliberation on the part of all the parties interested. That the Newbys performed all their obligations under the contract and conveyance. Wherefore, they renewed their prayer to have the court determine the title and rights of the parties and establish title by its decree, etc. In the fourth count of their answer the third count is referred to and adopted. It next alleges: That in August, 1904, plaintiff instituted a suit of like character to the present one, which he dismissed in September of that year voluntarily; that in October of that year he instituted the present suit. That in November following he came to defendants, and wanted the suit settled and stopped so it could never be started again, and offered to sign a contract to that effect if the Newbys would agree to pay him \$100 per year in lieu of feeding and caring for certain live stock as contemplated in the first agreement. That said proposition was accepted, and a compromise evidenced by a written agreement in the form of a stipulation for a decree in this suit was signed and executed and filed in court, whereby in addition to the considerations set forth in the stipulation, the Newbys agreed to pay plaintiff \$100 per year in cash in lieu of feeding and caring for said live stock.

The stipulation is set forth in the answer, and defendants tender full compliance with its terms, and pray the court to enter a judgment and decree in conformity therewith. By the fifth count in the answer the Newbys refer to and adopt the averments of the third and fourth counts, and further allege that the land was bought by the separate money and means of Harriett Cook; that she is a necessary party to a determination of the cause, and they ask that an order be made requiring her to be made a party defendant. Having been made a party, Harriett Cook adopted the answer of her codefendants, and prayed the court to ascertain and determine the title of all parties and to establish the same. The reply was a general denial. It next alleges that plaintiff is very illiterate; that at the time of the stipulation pleaded in the answer he was in trouble and distress over the litigation and the bad feeling in his family; that these conditions so affected him that he was not able to comprehend the nature of the stipulation, nor its effect, and that he was fraudulently induced by defendants to believe and did believe that it in nowise affected his rights to the real estate; that, under this belief, he signed the same without any consideration passing, wherefore he prayed that it be held for naught, and renewed his prayer for the relief prayed in his petition. Facts pertaining to any material questions determined will appear in the body of the opinion.

1. Defendants complain that a stipulation for judgment was not specifically enforced nisi by a decree. But the complaint is not sound. One trouble with the stipulation is the answer admits, and the proofs show, that it did not contain all the compromise agreement. It left out the important feature that the Newbys were to pay \$100 per year to plaintiff in lieu of a certain stock arrangement in the original agreement. Another trouble is that, although defendants admit plaintiff was entitled to a joint occupation and use of the land during his life, yet the stipulation is without safeguard in that regard. To the contrary, it provides for an out-and-out decree "vesting the fee-simple title and all right, title, and interest in and to said land into the defendants Laura A. Newby and John H. Newby"; and, further, that the court shall "enter its judgment and decree that neither Mancil G. Cook or Harriett Cook have any right, title, and interest in and to said land." Another trouble is that the compromise scheme clearly pointed to a consultation of attorneys on both sides and the drafting of such stipulation as would meet the approval of counsel and effect a just and final settlement of a family imbroglio. There is testimony upon which the court could well find that the stipulation was drawn by defendants' counsel and forwarded by mail to the Newbys; that the plaintiff was illiterate and needed the advice of his counsel; that he did not understand its force

and drastic effect; and that defendants (because of some prior action taken in the absence of their counsel) unduly hurried its execution in the absence of plaintiff's counsel, though requested to await a day or so for its examination and approval by them. The cause was in equity, the stipulation was executory in its nature; and, on the record here, we cannot say the chancellor ruled inequitably in refusing to enter a decree in strict accordance with it. The testimony does not warrant a finding that defendants perpetrated a fraud on plaintiff, or misled him as to the legal effect of the paper, as alleged in the reply, but the record discloses such incidents of surprise, accident, and mistake connected with its execution as appeal strongly to the conscience of a chancellor in dealing with the property rights of an old man, somewhat illiterate as the plaintiff is shown to be. The decree, when entered, became the chancellor's decree—not that of the litigants. It is the voice of the chancellor's conscience—a conscience that is not plastic mortar to be molded this way and that by the hand of a litigant, however skillful a potter he be. If on the whole case defendants were entitled to relief, that is one thing; but that this stipulation should coerce a decree whether or no is a different matter. We find no fault with the refusal to specifically perform the stipulation as such. The point is ruled against defendants.

2. Defendants' learned counsel somewhat rely for reversal on the fact that the land in question was purchased by the separate means of Harriett Cook. They tendered evidence tending to show that fact. It was excluded, but the offer is here for our consideration. In a nutshell, the argument runs somewhat in this wise, viz.: The "moral and meritorious" consideration for the family settlement and conveyance flowed from Harriett, and not from Mancil. Now, Harriett has joined hands with defendants in upholding the deed and the record of it, therefore her wishes should be subserved. But this view is more sentimental than controlling, because the land was bought prior to the enactment of the married women's enabling acts. Conceding it was bought with money coming to the wife by inheritance, yet on this record such money was reduced to the possession of the husband with the approval and acquiescence of the wife. The title was taken in the husband with her knowledge, and remained there with her consent. Moreover, the Newbys were willing enough to take his title through a deed conveying it and conveying merely an inchoate dower interest by Harriett. There is no fact in the case tending to show that such deed was made because Harriett was the beneficial owner of the land. To the contrary, it was negotiated for and made on the theory that the land belonged to Mancil. In this condition of things to hark back to the origin of the estate, and discuss the elements entering into that, tends

only to confuse the real issues. When asked by plaintiff to return⁷ his title, the Newbys may not claim to take under the deed and at the same time mend their hold on the land by denying plaintiff's original title. The two theories are inconsistent. We conclude that the injected theory has no office beyond that of coloring matter. The Newbys must stand or fall on the theory upon which they dealt with plaintiff, to wit, the theory that the land belonged to him and was conveyed to them by a delivered deed. If they want to invoke or stand on an equitable title in Harriett, let them first put Mancil in statu quo ante. The point is ruled against defendants.

3. Complaint is made that the learned chancellor used language nisi indicating inequitable haste in the hearing and disposition of the cause. It is suggested the decree is the product of such haste; but such matter is wholly aside. The chancellor made remarks indicating he wanted the hearing to move on—that his judicial spirit (“the stomach of his sense”) was a trifle disgruntled over tedious examinations of witnesses, the lugging in of extraneous issues—but it must be remembered there was no jury present to take color from his words, and, after all, his remarks at root were con amore. And, finally, we are not concerned with questions relating to either his patience or impatience. The vital question here is: Does his decree, in the light of the facts, do equity? That is the touchstone on appeal.

4. The main question relates to the delivery of the deed, and that question seeks facts. Mancil and Harriett Cook had six children and a modest estate. Old age coming on, they started three of their sons with advancements in land. Two of their children died in infancy. Laura A. was the only one at home, and to her no advancement had been made. The testimony conclusively shows that, when she married Newby, her parents desired the young people to remain on the home place and take charge of it, and help care for them. It shows conclusively, furthermore, that it was their settled intention that Laura should have the home place as her share when they died. True, it was of greater value than the advancements severally made to the sons, but not so much so as to challenge comment in the light of the arrangement made. Verbal arrangements somewhat looking to the end in view were made, but not reduced to writing, and were broken. Finally the young couple went to themselves a distance away on a dairy farm near Cameron, and were brought back by plaintiff and his wife under a promise to convey the land to them. This promise was made in a letter written by the mother, and offered in evidence, but excluded. Defendants put in testimony showing it was written at the request of plaintiff and with his knowledge. He who does a thing by another does it himself. We think it should have been admitted as the promise of both parents

and as a fact throwing light on the final arrangement. Its terms are before us for what they are worth. That letter, under date of June 28, 1901, runs as follows: “Dear Children: I will write you again this evening. We are only tolerable well. It is so dry and hot, nobody feels well. It has not rained yet to do any good. I don't know whether we will raise anything, or not. It is looking doubtful. Laura, Mance and me want you to come home, and we will give you the place. It is more than the boys got, but we expect to live with you. The boys never had any care of us, and we don't know what trouble we may be. If you will do this, write and let us know as soon as you can. We are anxious to know By-by for this time.” Having returned to the farm and performed labor and undertaken betterments in pursuance of that promise, presently plaintiff refused to enter into writings to effectuate the promise, and in consequence the Newbys again moved away, and took another farm. The upshot of it all was that there fell a time when the broken threads of the old negotiations were taken up anew by plaintiff with the purpose of getting the Newbys to return and take charge of the farm, live with him and his wife, and maintain the home. An offer was made to make a will leaving the real estate to Laura A. Newby and her bodily heirs. As no children were born of the marriage, she thought such an arrangement unjust to her husband, and declined it. The Newbys let it be known, in effect, that, unless arrangements could be put into writing, they would not return, but would make their own way in the world. Such being the condition of things, it was finally agreed that a deed be made as a condition precedent to the return of the Newbys. With this end in view, all the parties met by arrangement and an ordinary warranty deed was drawn by one Axtell, and signed and acknowledged by Mancil G. and Harriett, conveying the 120 acres of land constituting the home place of the Cooks (and all the land they had) to Laura A. and John H. Newby. It was left with the scrivener, who as a notary took the acknowledgment, with the following memorandum signed by the grantors: “McFall, Mo., July 20, 1903. We hereby authorize O. A. Axtell to hold a deed this day made by us of our home farm to Laura A. Newby & her husband during our lifetime and at our death to cause said deed to be recorded and to then deliver it to them and we relinquish all right and title to said farm excepting possession and use during our lifetime. Mancil G. Cook. Harriett Cook.” There was present in Axtell's office at the time (besides Axtell, the Newbys, and Cooks) several witnesses. We need not give the testimony in detail. The clear weight of it is to the effect indicated in the written memorandum, to wit, that the title passed, and that the grantors gave up all right thereafter to recall the deed—that the matter was fixed perma-

nently. Mr. Axtell's testimony is somewhat to the contrary, but, when we consider the very object of making the deed as an inducement for the return of the young people to take charge of the farm, keeping in view prior abortive attempts and broken promises to execute writings, and, when we consider the testimony of the grantors and grantees, and that of the other witnesses present, and when we give due weight to the signed memorandum, we are forced to the foregoing conclusion. Subsequently, and before the Newbys moved on the land, Axtell was about to change his domicile to Oklahoma. All parties desired the deed should not be taken away. Accordingly it was settled by family arrangement that it should be moved to a bank and deposited with a banker, Mr. Simms; and, in pursuance of that arrangement, it was taken from Axtell by John Newby and Harriett Cook with the consent of plaintiff and deposited with Mr. Simms. The testimony shows that afterwards the Newbys, in pursuance of the family settlement, moved to the farm, and commenced and continued performance of the contract.

The cause was not tried below on the theory the consideration for the deed had failed, in that the Newbys had not complied with their agreement which was, in substance, to return to the farm, take charge of it, make a home for Mancil and Harriett, keep certain stock for Mancil, and share and divide the profits of farming operations. To the contrary, the court inquired of plaintiff's learned counsel as follows: "On what do you found your complaint to have the deed set aside?" To this Mr. Dalbey, of counsel for plaintiff, replied: "Simply that it was obtained without his consent and placed of record—fraudulently obtained." Again, when a line of inquiry was being pursued relating to the treatment given by the Newbys to the plaintiff, an objection was raised that it was not within the issues on the pleadings, and the following occurred: "By Judge Goodman, counsel for plaintiff: We haven't made it an issue, and we don't expect to. The issue here is the clandestine getting that deed and putting it on record." At a certain time in the summer of 1904 this deed was brought home by Harriett Cook and Mrs. Newby, remained in the house for awhile, and was then put on record. There was testimony upon which the chancellor could find either way on the issue as to whether its removal from the custody of Simms and subsequent record were with the knowledge and consent of plaintiff. Harriett and the Newbys testified it was brought home as the result of an agreement with plaintiff, and was recorded at his suggestion. They say that plaintiff suggested the deed might as well be recorded as to lie in the possession of Simms—that the place for a deed was on record. Harriett testified that she and her husband saw the deed after it was brought home. Plaintiff does not agree to

this. He denies seeing the deed in the house, denies that he consented it should be taken from the custody of Simms or put on record. In corroboration of his theory, it is shown that he went to the bank to get the deed himself from Simms some time later. A tending to impeach the testimony of the Newbys by showing that their motive in getting the deed was to keep plaintiff from getting it, plaintiff put upon the stand two witnesses named Mason, husband and wife. Mr. Mason was on the stand, and for two pages of printed questions and answers he showed such lack of memory and information that the court, at the end of it, directed plaintiff's counsel to "call another witness." Thereupon, under such spur and as a last attempt to get an atom of testimony, counsel plumply asked: "Q. We have another question I would like to ask. To refresh your memory, did they [the Newbys] not tell you that they went to the McFall bank to get that deed to keep the plaintiff, Mr. Cook from getting it?" This question was objected to as leading and suggestive, and because the witness had already testified he didn't know. The court allowed the question, and his answer was this: "Well, sir, I have no recollection of them telling me those words—something to that effect—something near like that. * * * Yes, sir; but what I was why I don't remember." Mrs. Mason testified that in harvest time, 1904, the Newbys showed her the deed. She couldn't say what they said. She didn't know how the subject came up. Witness said, in substance, that she would like to see if the deed was like their deeds. She looked it over with the remark that it was like theirs and gave it back to Mrs. Newby. Then the following occurred: "Did they state where they got that deed? A. No, sir; I don't know that they did. Q. Did they make any statement of how or why they came in possession of it? A. They were afraid Mr. Cook would go and get it. Q. Where did they get it from did they say? A. Out of the bank. On cross-examination she said she could not remember all the conversation; that some of it might have slipped her mind; that she didn't pay any particular attention to what was said. There was evidence that the Newbys were paying the taxes on the land. It was assessed to plaintiff in the year 1903. Plaintiff's assessment list for 1904 showed that he made an affidavit to the effect that he was not the owner of any real estate. On this record can the decree canceling the deed stand? We think not. The broad justice of the case on the facts present leads to that conclusion. The making of the deed was not of sudden whim or a passing emotion of parental love. The deed was not laid away, as on a shelf, as a mere scroll to take time to consider. It was a business arrangement understandingly entered into as the result of business negotiation and supported by a consideration

Halsa v. Halsa, 8 Mo. 303. The avowed object of it was to put the matter beyond the caprice of plaintiff—a caprice which grantees had theretofore suffered from. While Mancil could read and write poorly, yet there is no proof here he was non sui juris. There is no allegation in the bill that this deed was void because of imposition on a grantor of weak mind.

A deed speaks only by delivery, and what constitutes delivery is frequently a close question. It is a question of intent—a mixed question of law and fact. The intent of the parties may be got at by what happened before and at the time, and, it has been said, it may be that what happens afterwards is of value. When a deed, signed and acknowledged, is placed in the custody of a third person to hold for the benefit of the grantee, as here, with the intent of parting with dominion over it, that makes a good delivery in the eye of the law if the grantee accepts the deed. The facts of this case irresistibly tend to the conclusion that what Mancil G. and Harlett Cook did was done to create the reliance on the part of the grantees that the conveyance was irrevocable, and in this case that reliance was created and acted upon. In commenting on a case (*Williams v. Latham*, 113 Mo., loc. cit. 17, 20 S. W. 101) *Brace, J.*, said: "But conceding that it was the intention of Mrs. Smith that the deeds were not to be delivered by Mrs. Thompson or recorded until after her death, and that Mrs. Thompson was cognizant of that intention, yet the delivery was good. It was absolute. The contingency upon which the second delivery was to take place was certain to happen. All the power and dominion of the grantor over the instrument was relinquished without reservation to Mrs. Thompson. The intention to pass title as a present transfer is evident upon the face of the whole transaction and placed beyond doubt by the grantor's reservation of the possession and rents for her life put in the deeds after they were drawn, on her own suggestion. Such being the case, from the moment the deed was delivered to Mrs. Thompson, she became a trustee, holding the instrument for the benefit of the grantee, and, when she discharged the trust by afterwards delivering the deed to the defendant (although after the death of Mrs. Smith), yet such second delivery hath relation to the time of the first, and is good delivery in the lifetime of Mrs. Smith. The ruling of the circuit court so holding is sustained by the rulings of this court in the following cases and authorities cited: *Rothenbarger v. Rothenbarger*, 111 Mo. 1, 19 S. W. 932; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. 494, 1049; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Huey v. Huey*, 65 Mo. 689." In *Foreman v. Archer*, 130 Iowa, loc. cit. 55, 106 N. W. 374,

Weaver, J., speaking to the point, said: "A deed placed by the grantor in the hands of a third person with unconditional instructions to deliver to the grantee upon the death of the grantor, and without any reservation in the grantor of the right to revoke or recall the instrument during his lifetime, operates to vest the grantee with a present interest in the land, which the grantor cannot thereafter recall or destroy by the simple expedient of retaking possession of the deed." The learned judge cites a line of Iowa cases to sustain the proposition advanced, as well as cases from other jurisdictions, viz.: *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Hathaway v. Payne*, 34 N. Y. 106; *Concord Bank v. Bellis*, 10 Cush. (Mass.) 278; *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66; *Thatcher v. Andrews*, 37 Mich. 264; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147. Continuing, he says: "Such a deed, delivered to a third person to be turned over to the grantee after the grantor's death, is usually held to operate as an ordinary conveyance of the fee, subject to a life estate reserved in the grantor"—citing *White v. Watts*, 118 Iowa, 549, 92 N. W. 660; *Pruitsman v. Baker*, supra; *Bury v. Young*, supra, which cases sustain the proposition. In *Pruitsman v. Baker*, supra, *Dixon, C. J.*, said of a like hypothesis: "As to the grantor, the delivery is absolute and final, and so is his conveyance of the land, the title to which passes at once to the grantee, qualified only by the right of the grantor to use and occupy or take and receive the rents and profits during his life, or until the event shall have happened upon which second delivery is to be made. The grantor in such case converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result unavoidably from the certainty of the event upon which the second delivery is made to depend, and from the impossibility, under the circumstances, that the grantor will ever be able to recall or repossess himself of the deed. He delivers the writing, therefore, as his deed, always so to remain and never to return to him, and it becomes presently operative and the title vests immediately in the grantee."

5. Assuming, then, for the purposes of the case as held in the last paragraph that the deed was not in escrow, but was (without power of recall) placed with Axtell for the benefit of the grantees to be recorded on the death of the grantors, the contemporaneously signed memorandum but makes clear that a life tenancy was created in the grantors, which the law itself would predicate of that condition of things. This memorandum was part and parcel of the transaction. It should, therefore, be read into the deed. The arrangement entered into, shown by the record, upon which the parties put their own construction at the time, qualifies the life possession of

grantors by adding thereto the right of joint occupancy on the part of grantees. We do not consider the record of the deed, whether made with plaintiff's consent or not, a material element in the equities of the case. If the title passed from plaintiff (as we have held), he would suffer no injury from a mere record which may have been a breach of trust, but in no wise affected the title (*Wallace v. Harris*, 32 Mich. 380). That fraud to be actionable must result in injury is axiomatic.

6. We now come to a phase of the case, eyed at first a little askance and then critically. Whatever value it has is in showing how one taper lights another in briefs, as in the world at large. It shows, too, how difficult in a close matter it is to determine the proximate cause of things—or the probable result of a given cause. Possibly its force is somewhat spent in disclosing what hidden pitfalls lurk in the primrose paths diverging from the beaten way in brief-making for appellate courts. As wayfarers in the main-traveled highway of the law, we shall set it down to point its own moral, thus: Appellants' scholarly counsel close a good brief in chief with a short and modest flight of fancy—a borrowed apostrophe to Justice—by poetical license, dressed in singular phrase, viz.:

"For Justice
All place a temple, and all season summer."
(Lord Lytton.)

Now, *prima facie*, is this aught but an innocent and mild invocation to serenity of judicial temper? Is it more than a wholesome effort to key up the mind of the court to a notch of high thinking? Inquiring students in the law recall the unexpected and anxious result produced by throwing the squib in the celebrated Squib Case. But mark the novel result here. The very innocence of the apostrophe's face was taken as a mask hiding evil contrivances. So it was that the very blandness of the countenance of Mr. Harte's "Heathen Chinee" (in the case of William Nye) hid like evil. Apparently nettled by its use, learned counsel for respondent condemn appellants' brief by and large. Bethinking themselves of the time when Iago tripped good Michael Cassio into mischief by a night's revel, they designate the brief in Cassio's description of the events of that woeful night as, viz.: "A mass of things, * * * but nothing wherefore." Not only so, but counsel fall upon the (to us) unknown author of the apostrophe with heated epithet. They belabor him roundly, though dead. They say he was the "great agnostic and prince of plagiarists." They say the first part of the apostrophe was "cribbed from a heathen poet" without giving due credit. They say its concluding phrase is of such "occult meaning that no one so far as our knowledge extends has had the hardihood to asseverate that it is within his ken." They conclude a trenchant and sprightly printed argument with a beautiful poetical apostrophe to the Bible,

most becoming and tenderly reverential, and then (by way of sharp contrast) darkly hint that appellants' apostrophe comes from a sinister source, to wit, Paine, Volney, or Voltaire, winding up by laying down certain sacred ethical precepts, which, they insist, announce the right doctrine to apply to the facts of the record. Thus sorely pricked, appellants' counsel (drawing from the well of the drama) retort in their reply brief in the words of Bassanio's comment on the caskets (made to himself. See *Merchant of Venice*, Act III, sc. 2), viz.:

"In law, what plea so tainted and corrupt,
But, being seasoned with a gracious voice,
Obscures the show of evil? In religion,
What damned error but some sober brow
Will bless it, and approve it with a text,
Hiding the grossness with fair ornament."

So much, for the matter. We take leave of it with this observation: Whatever the issue raised, it is not one of fact or law. We refuse to meddle with it on this appeal, and hence leave it to a forum, if any, having jurisdiction to try it out.

7. Defendants by their answer having asked the court to ascertain and determine the title of the respective parties, and sufficient facts for the determination of such titles being in the record, the cause is reversed and remanded with directions to the chancellor nisi to enter a decree determining the title of Mancil G. and Harriett Cook to be a life tenancy with the right to joint possession of the land with Laura A. and John H. Newby, and that the fee (subject to the life estate) is in the said John H. and Laura A. Newby as husband and wife. The chancellor must further decree that nothing in his decree shall prejudice any right of Mancil G. or Harriett Cook or either of them to sue to set aside or modify the conveyance on equitable terms if hereafter the consideration for the deed should fall through subsequent wrongful or negligent acts of the Newbys in complying with their contract. We do not hold such right can exist. That question is not here. We say the right must be preserved if it does spring into existence. All concur, except VALLIANT, P. J., absent.

WHITE v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
June 29, 1908.)

1. CARRIERS—STREET RAILROADS—EJECTION OF PASSENGER—MALICE—QUESTIONS FOR JURY.

Evidence held sufficient to warrant the submission to the jury of the question whether defendant street railroad's conductor, in ejecting plaintiff, a passenger, from a car, was insulting and abusive in his language and demeanor and acted with malice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1492.]

2. SAME—PLEADING—SCOPE OF COMPLAINT—EVIDENCE.

Where the complaint alleged that defendant street railroad company's conductor wrongfully

refused to accept a transfer tendered by plaintiff, a passenger, accused the latter of attempting to defraud the company, and maliciously ejected plaintiff from the car, and that after plaintiff paid his fare and reboarded the car the conductor thereafter continued the charge in the presence of passengers that plaintiff had attempted to defraud defendant, the scope of the cause of action was broad enough to include insults offered during the entire period of transportation, and hence evidence as to what the conductor said after plaintiff returned to the car was admissible.

3. EVIDENCE—OPINION EVIDENCE.

In an action against a street railroad for the wrongful ejection of a passenger from a car, accompanied by insulting and abusive language on the part of the conductor, it was proper for a witness to state that the conductor spoke sneeringly or angrily, and that his countenance bore a threatening or contemptuous aspect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2167.]

4. DAMAGES—EXCESSIVE DAMAGES.

Plaintiff, accompanied by a woman, boarded defendant street railroad company's car and tendered the conductor transfers in payment of fare. The conductor refused to accept the transfers, saying that they were worthless, accusing plaintiff of trying to defraud defendant and threatening to put him off unless the fares were paid. Plaintiff thereupon paid the woman's fare, but refused to pay his own, and the conductor seized him and pushed him off the car, saying that he could not return without paying the fare. Plaintiff paid the fare and returned to the car, but the conductor continued to treat him in an insolent manner, saying: "Well, I put you off, didn't I? You feel a little better now, don't you?" etc. Held, that a verdict of \$250 punitive damages was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 218-221; vol. 9, Carriers, §§ 1487-1490.]

Appeal from Circuit Court, Jackson County; Robt. B. Middlebrook, Special Judge.

Action by Alma R. White against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas, F. G. Johnson, and C. S. Palmer, for appellant. C. C. Madison, for respondent.

JOHNSON, J. Action by a passenger against a common carrier to recover compensatory and punitive damages for the wrongful ejection of the passenger which, it is alleged, was accompanied by insulting and abusive language on the part of the conductor. Plaintiff had judgment in the sum of \$1 actual and \$250 exemplary damages, and defendant appealed.

Material facts adduced by plaintiff are as follows: In the evening of the 9th of August, 1906, plaintiff, a young lawyer, accompanied by a young woman whom he was escorting to Independence, became a passenger on a north-bound street car on defendant's Troost Avenue line in Kansas City, paid the regular fare, and received transfer checks which entitled him and his companion to transfer to the Independence Line at Eighth street and Troost avenue. In due time they boarded an Independence car at this transfer point, and plaintiff presented his checks to the con-

ductor, who refused to accept them and demanded payment of fare. Referring to what occurred, plaintiff testified: "He (the conductor) looked at them, and said: 'These transfers are not good.' I looked at them, and said: 'What is wrong with them?' And he said: 'They are not good.' I hesitated for a minute, and said: 'What is wrong with them?' I examined them pretty thoroughly and saw that they were punched the proper date and the proper time. And he said: 'Those transfers are not good, and you know they are not good.' * * * You are one of those fellows who are all the time trying to beat their fare on the railroad.' * * * And I said to him: 'I beg your pardon, those transfers were given to me by the conductor on the Troost Avenue Line, and I don't see anything wrong with them, and I think I am entitled to explain the matter.' He said: 'They are not good, and you are going to pay your fare or you are going to get off.' And I hesitated for a minute, and I said: 'I will pay the young lady's fare, but you will have to put me off, for I believe those transfers are good.' So I did pay her fare, and he grabbed me by the arm and pulled me up in the aisle, and he gave me a shove and pushed me some little distance, and then gave me another shove, and I went to the back end of the car. And he said: 'Are you going to get off the car?' And I said: 'I am not.' And he then gave me a push between the shoulders in the back and pushed me on to the ground. He kind of sprained my back a little bit and here in the back of my neck (indicating) when he pushed me. And I started to get back on the car and he said: 'You can't get back on this car unless you pay your fare.' And I said: 'I will pay my fare.' And I went into the car and sat down, and he came up and said: 'Well, I put you off, didn't I?' And I said: 'Yes.' And I took a pencil—I asked the young lady who was with me if she had a pencil, and she said 'No,' and the conductor said, 'I will lend you a pencil, if that is what you want,' and he did, and I took the names of some witnesses there and handed the pencil back to the conductor and thanked him and sat down. And that is about all that happened at that time until after we had gotten out to Mt. Washington where they take up the second fare to go to Independence, and he came along, and I handed him the fares, and he said: 'You feel a little better now, don't you?' And I said: 'I don't know as I do.' * * * Q. What was his manner of speech? A. It was sneering. (Objection. Overruled.) Q. Now, from the beginning what was the conductor's manner of speech? A. I don't know that I can explain his manner of speech any more than the man's tone of voice, expression, and manner. That was his action, and that was the expression of all his remarks to me—in that manner and that tone. Q. What manner and tone? A. In a short, bolsterous mode."

This statement is corroborated, in substance, by other witnesses, one of whom, over the objection of defendant, was permitted to state that, some time after plaintiff had been put off, paid his fare, and resumed his seat, the conductor remarked: "The more times he was reported on a thing of that kind the better it suited him, and the company would stand for it." This witness was asked to describe the manner of the conductor during the altercation and afterward. We quote from his examination on this subject: "Q. Can you imitate his manner in any way? A. I am not a very good actor. I can state what his manner was. Counsel for Defendant: I object to that. It is improper for the witness to describe what he thinks about it. The Court: Let the witness describe it the best he can, as to how the conductor acted. Show the jury the best you can the manner in which he acted and what he had to say. (Exception.) A. I don't know as I can do that. He was walking up and down the aisle and made sneering remarks at different times. That is as near as I can state. Counsel for Defendant: I object to that. Let him state what the remarks were, and let the jury decide whether they were sneering. The Court: I think the witness can state what he had to say, and describe his manner, without saying to the jury outright that he was insulting or bolsterous or giving any definition of his conduct. Defendant's Counsel: I desire to have the record show that I object to the remark of the witness that the conductor was walking up and down the aisle making sneering remarks. I object to that as a conclusion of the witness, and ask that it be stricken out, and that the jury be instructed not to consider it. The Court: That portion of the answer describing him as walking up and down the aisle will be allowed to stand, but that portion of the answer stating that the conductor was making sneering remarks is rejected, and the witness is instructed to tell what the remarks were that the conductor made when he was walking up and down the aisle. Q. What was his tone of voice, Dr. Thomas? A. One of the remarks was just what we were talking about awhile ago, when he said to me he didn't care how often he was reported on a matter of that kind; that the company would stand for it. And the gentleman returned his pencil, and he said in a tone of voice that I considered sneering and insulting— Counsel for Defendant: I think this witness ought to be censured. He is an intelligent man, and I move that the answer of the witness be stricken out. The Court: That part is stricken out. * * * Q. Describe the language as near as you can. A. That was the language that I have just quoted, and I don't know of any way of giving his attitude except to express it; that is my idea. The Court: Let the witness go on and say whether it was in a loud tone of voice. A. It was in a medium tone of voice. It was neither very loud nor very low, but it

was the manner in which he spoke it. Q. Can you describe to the jury the expression of his face and his attitude towards the plaintiff? A. His attitude was decidedly domineering. (Objection. No ruling.) Q. What was the expression of his face? A. Of anger; an expression of anger."

It is alleged in the petition that the conductor, "in violation of plaintiff's rights as a passenger, declined to accept the said transfer check or to allow plaintiff to be carried upon said car; that the said conductor, although requested by plaintiff, refused to give any reason for declining to accept said transfer check, and in the presence of numerous passengers falsely and maliciously charged plaintiff with knowingly trying to beat, cheat, and defraud the company, and used violent and grossly insulting language toward plaintiff; that the said conductor forcibly ejected and expelled plaintiff from said car, and in so doing committed an assault and battery upon plaintiff by forcibly pulling him from his seat and pushing him off of the rear platform into the street; that said conductor thereafter continued the charge, in the presence of said passengers, that plaintiff had attempted to perpetrate a fraud upon defendant."

The evidence introduced by defendant is to the effect that the transfer checks offered by plaintiff had not been punched in the proper manner to entitle him to transfer to the Independence car at Eighth street and Troost avenue, and that the conductor employed but little force in ejecting plaintiff, for the reason that plaintiff was willing to be put off under slight compulsion, and that the conductor did not use the insulting language ascribed to him by plaintiff and his witnesses.

We find no evidence in the record to support an inference that the conductor acted in bad faith, i. e., that he refused to accept transfer checks which at the time he knew to be good. Recently, in *Glover v. Railway*, 108 S. W. 105, we stated the well-recognized principle of law applicable to cases of this character: "Where a passenger who is wrongfully ejected from a train by the conductor sustains no physical injury in consequence thereof, and the ejection is unaccompanied by unnecessary force or violence, willfulness, or malice, but is made in good faith, under the mistaken belief of the conductor that the passenger is not entitled to ride on the train, the passenger may recover compensation for all the inconvenience, loss of time, labor, and expense incurred by him in consequence of the wrongful act; but he may not recover damages for mental suffering or humiliation, nor damages by way of smart money. *Logan v. Railway*, 77 Mo. 663; *Trigg v. Railway*, 74 Mo. 148, 41 Am. Rep. 305; *Smith v. Railroad* (reported at this term) 106 S. W. 108. But where the conductor employs unnecessary force or vio-

lence to remove the passenger, or where he assaults him with abusive or insulting language, malice will be presumed, and in such case the passenger is entitled to damages on account of his outraged feelings and humiliation, and also may recover punitive damages." The evidence does not show that the conductor employed greater force than was necessary to eject plaintiff from the car, and the cause of action, as far as it relates to the infliction of punitive damages, rests solely on the charge that the conductor was insulting and abusive in his language and demeanor. On the hypothesis, sustained by the proof offered by the plaintiff, that the transfer checks were properly issued and entitled plaintiff and his companion to become passengers on the Independence car, the evidence most favorable to plaintiff leaves no room to doubt that the conduct of the conductor was highly insulting and humiliating. The accusation of plaintiff, in the presence of the other passengers, of attempting to defraud the company, was wholly unwarranted by the circumstances of the situation and can be regarded in no other light than that of intentional insult. *Glover v. Railway*, supra. Malice will be presumed from such conduct, and the court acted properly in sending that issue to the jury.

It is argued that "the court erred in admitting testimony of what the conductor said after the plaintiff had returned to the car and paid his fare." The evidence was admissible under the allegation of the petition "that said conductor thereafter continued the charge, in the presence of said passengers, that plaintiff had attempted to perpetrate a fraud upon defendant." The scope of the cause of action pleaded was broad enough to include insults offered during the entire period of transportation to Independence. The cases cited by defendants do not support the view that the offensive language and attitude of the conductor following the payment of fare were not a part of the *res gestæ*. In *Barker v. Railway*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646, after the passenger had been put off and the train had left, the conductor made a statement to a passenger who became a witness in the cause and was permitted to testify to that statement over the objection of defendant. Applying a plain and well-settled rule of evidence, the Supreme Court held the evidence inadmissible. In *Koenig v. Union Depot Railway Co.*, 173 Mo., loc. cit. 721, 73 S. W. 637, the plaintiffs "were permitted to prove by the witness Dashman, over the objection of defendant, that immediately after the car came to a stop the motorman came back to where the child was, and in answer to this question by Dashman, 'Are you blind, to run over a child like that?' that he replied: 'I didn't see the child. I was looking at the car coming east.'" The Supreme Court held: "What the motorman said was a narration of a past event with respect to

which he was not authorized to speak for his employer or master. His business was to control and manage the cars of which he had care, and for whose actions within the scope of his employment his employer was answerable, but for nothing he said which did not form a part of the accident, in other words, the *res gestæ*." In the present case, when the conductor received payment of fare from plaintiff, he accepted him as a passenger and thereby charged himself with the duty of treating plaintiff with respect and consideration. He had no right to continue his abuse, and in so doing was guilty of a breach of duty. The controversy over the transfers had become a closed incident, it is true; but a new relation had been established, the obligations of which the evidence under consideration shows the conductor wantonly disregarded. The gravamen of the cause pleaded was a breach of the contract of transportation which consisted, first, of a wrongful ejection accompanied by acts of malice, and, second, of acts of malice committed after the conductor had accepted plaintiff as a passenger. Such being the posture of the case, it differs obviously in essential elements from those reviewed. The evidence clearly belonged to the *res gestæ*. *Shaefer v. Railway*, 98 Mo. App. 445, 72 S. W. 154; *Cunningham v. Railway*, 79 Mo. App. 524; *State v. Davidson*, 44 Mo. App. 513; *Eagle Construction Co. v. Railway*, 71 Mo. App. 626.

Further, it is contended that the court erred in permitting the witness from whose testimony we have copied to describe the appearance and manner of the conductor in his dispute with plaintiff; but we are of opinion that the learned trial judge unnecessarily restricted the scope of plaintiff's examination of the witness. In *State v. Buchler*, 103 Mo. 203, 15 S. W. 331, the prosecuting witness was asked: "Q. State what you discovered on defendant's countenance, if anything? A. The expression of his face was anger, ferocity, vulgar hate, the meanest look a mortal man's face could have." In deciding that this was not a mere expression of opinion, but an evidentiary statement, the Supreme Court said, in part: "The general rule, it is true, is that a witness must testify to facts, and the jury draw its conclusions from these facts. There are, however, manifestations, expressions, and conditions which language, at least of ordinary persons, cannot reproduce. Of such matters a witness is allowed to give the impression produced upon himself. This impression may be very near to an opinion. Thus a witness is allowed to testify that an object is red in order to distinguish it from other colors. This is nothing more than an impression produced upon his mind upon examination of the object, but he testifies about a subject, upon which common experience and knowledge have qualified him to speak.

What facts could he state that would give the idea of red as the color of the object? Of the same character is the expression of the countenance. A person of ordinary understanding could not detail facts which would give to a jury the remotest idea of the passions expressed on the countenance, though a child one year old would distinguish anger from love in its mother's face. Witnesses are allowed to testify to their impressions or opinions on such matters, for want of any other way to get the evidence before the jury. They admit of no more definite proof." Under these principles, it is competent for a witness to describe the appearance and manner of speech of a person of whose acts he testifies. The impossibility, or at least the insuperable difficulty to most people, of portraying such appearances is sufficient reason for according probative value to the impressions produced on the mind of the witness. Repeating the language of the conductor could not disclose to the jury the sneer on his face or the truculence of his bearing. It was proper for the witness to say, if it were the fact, that the conductor spoke sneeringly or angrily, and that his countenance and attitude bore a threatening or contemptuous aspect. *Fulton v. Railway*, 125 Mo. App. 239, 102 S. W. 47.

Finally, it is urged that the punitive damages awarded by the jury are excessive. We do not think so, and perceive no reason for interfering with the judgment on that score.

The judgment is affirmed. All concur.

DAVIS v. STOUFFER.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. MARRIAGE—COMMON-LAW MARRIAGE.

Where a present agreement of marriage is entered into in good faith by persons capable of entering into the contract, the relation of husband and wife is thereby fixed, though such agreement is not followed by cohabitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 12, 13.]

2. COMMON LAW—EFFECT OF LATER ENGLISH DECISIONS.

The courts of this country are under no obligation to follow the mutations of decisions or new views announced by the English courts, as to what was the law of that country prior to the independence of the colonies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Common Law, § 8.]

3. DESCENT AND DISTRIBUTION—RIGHTS OF WIDOW — EFFECT OF COMMON-LAW MARRIAGE.

A common-law wife is entitled, on the death of the husband to all the property rights accorded a widow who had been married by ceremony.

4. MARRIAGE—COMMON-LAW MARRIAGE—EVIDENCE.

Evidence considered, and held sufficient to show a common-law marriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 79-89.]

5. SAME—DECLARATIONS OF HUSBAND.

Where a present agreement to marry, followed by cohabitation, is shown, subsequent declarations of the husband tending to negative the fact of marriage are inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 75.]

6. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a present agreement to marry, followed by cohabitation was clearly shown, the exclusion of subsequent declarations made by the husband, tending to negative the fact of marriage, if error, was harmless.

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Application by Ella Phillips Davis for a widow's allowance in the estate of Joseph B. Davis, deceased. From a judgment of the circuit court affirming the allowance thereof by the probate court, R. W. Stouffer, administrator of said estate, appeals. Affirmed.

T. H. Harvey, J. C. Rieger, and Virgil V. Huff, for appellant. Ernest D. Martin and Robert M. Reynolds, for respondent.

ELLISON, J. Plaintiff, claiming to be the widow of Dr. Joseph B. Davis, deceased, formerly of Saline county, presented a claim to the probate court of that county, where the estate he left was being administered, asking the allowances which the statute gives a widow, including money in lieu of a year's provisions, and \$400 as part of personal dower. Sections 106-108, Rev. St. 1899 (Ann. St. 1906, pp. 373, 374). She prevailed in the probate court and the circuit court, where the case was taken by appeal, and the defendant administrator has brought the case here.

The cause was tried before the court without a jury, and the defense is based on the ground that plaintiff is not the widow of deceased; that they were never married. There is no pretense of a marriage solemnized by religious ceremony, or under the statute, but a common-law marriage is claimed by plaintiff to have been contracted between her and Dr. Davis. The law bearing upon common-law marriages has been ably discussed at length, in oral and printed arguments, by the respective counsel. That there may be a valid marriage without solemnization by minister, priest, or officer is not questioned in this country, except where the statute forbids, and it once was so understood in England. *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359. Marriage is recognized as a status brought about by civil contract, and it may be contracted by the parties themselves, as any other contract, without even the presence of witnesses. "Marriage, in its origin, is a contract of natural law. It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society." *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54. To this we may add that the marriage of Adam and

Eve was not only without a witness, as noticed in that case, but, so far as the record shows, they married themselves; he repeating the contract and she acquiescing by silence. "And Adam said this is now bone of my bones and flesh of my flesh; she shall be called woman because she was taken out of man." Genesis, II, 23. Like other contracts, it may witness an agreement performed *eo instanti*; that is, the contract of marriage may be a contract which makes a marriage at the time *ipsum matrimonium* or, as also expressed in legal terms, a marriage *per verba de presenti*; or it may be a contract not intended as a then present marriage, but for a future marriage, or as expressed in legal terms, *per verba de futuro*, and may be proven like other contracts. *Imboden v. Trust Co.*, 111 Mo. App. 220, 86 S. W. 263; *Plattner v. Plattner*, 116 Mo. App. 46, 91 S. W. 457. These two forms are illustrated in 1 Bishop on Marriage & Divorce, § 313, by a quotation from Swinburne. Thus for a *presenti* contract, he says, "I do take thee to my wife," and she replies: "I do take thee to my husband." The contract in *futuro* is, "I will take thee," thus expressing a future act. When the latter form is the contract, and it is followed thereafter by sexual intercourse (*cum copula*), the marriage becomes complete, as the law presumes in favor of innocence that "they have changed their future into a present consent."

But it is insisted by defendant that, when the marriage is a common-law marriage, something more than a contract in *presenti* is needed. He says that there must be an assumption of the marriage status, and he argues that that assumption means a performance or entering upon the duties of the marriage relation. Such contention will not bear scrutiny. It is not supported by any authority. "When the mutual consent, in the present tense, is between competent parties, they are married." If intercourse follows, it adds nothing in law to the marriage itself, "though it may aid the proof of the marriage." Mr. Bishop adds (sections 314, 315) that "the mere present consent already described constitutes marriage everywhere, except that by the laws of some countries there must be specified forms superadded, but subsequent *copula* is not material." Sir William Scott, after great research, concluded "that the contract *de presenti* does not require consummation in order to become 'very matrimony' that it does, *ipso facto*, *et ipso jure*, constitute the relation of man and wife." *Dalrymple v. Dalrymple*, *supra*. And so the American text-writers state expressly, that cohabitation, including sexual intercourse, is not necessary to the validity of a contract *per verba de presenti*. 2 Kent, Com. 86, 87; 2 Greenleaf, Evid. 400; 1 Scribner on Dower, 90; Schouler on Husband & Wife, § 31. And to the same effect are the American cases. *Dyer v. Brannock*, 66 Mo. 403, 27 Am. Rep. 339; *Topper v. Perry*, 197 Mo. 531, 95 S. W.

203, 114 Am. St. Rep. 777; *Port v. Port*, 70 Ill. 484; *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Jackson v. Winne*, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Clayton v. Wardell*, 4 N. Y. 230. There are cases in which the statement is made that a contract in *presenti*, followed by cohabitation, or by intercourse, is a valid common-law marriage; but the latter clause of that statement was merely addressed to the facts which appeared in the particular case. It was not meant that the marriage would not be complete without that fact. The case of *Hulett v. Carey*, *supra*, calls attention to this. So in the case of *Dyer v. Brannock*, *supra*, the facts were that the verbal contract of marriage in *presenti* "was followed by cohabitation as husband and wife." Judge Napton stated that the validity of a marriage in *presenti*, not followed by cohabitation, or which was not intended to be a present marriage, was not involved. No inference should follow from such remark that he thought cohabitation essential to the contract. The contract of marriage is defined by Judge Gantt in *Topper v. Perry*, cited above, as being "a civil contract, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting, and must, in fact, consent, to form this new relation." And the judge states, in terms, that, "If the contract be made *per verba de presenti*, it is sufficient evidence of marriage." He then proceeds to speak of the marriage status, or of marriage as a status, and says that, "when the consent to marry is manifested by words *de presenti*, a present assumption of the marriage status is necessary."

What is a present assumption of the marriage status? It is not cohabitation and intercourse, as contended by defendant. It need be no more than a recognition that by the contract the parties, in good faith, have become and are married, for the purpose of assuming and carrying out the marriage relation. There may be contracts in the present tense, yet the parties expect something to supervene before they are married, as that a ceremony shall be performed, or that witnesses will be called in. In such instances the status of marriage is not then assumed. There has not been *ipsum matrimonium*. Lord Campbell said in the course of his opinion in *Reg. v. Mills*, 10 Clark & Fin. 1, c. 749 (a case we shall discuss further on), that he "relied upon the distinction between a contract *per verba de presenti* for a marriage to be afterwards solemnized, and nuptiae *per verba de presenti* without any contemplation of a future ceremony as necessary to complete the relation of man and wife; a distinc-

tion (I speak it with the most profound respect) which I think the learned judges have not sufficiently kept in view. The use of the expression 'contract of marriage' is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and wife, and their engagement therefore, though words in the present tense are used, not amounting to nuptiæ." Again, he said at page 779 that "I have already attempted to explain that there may be a contract per verba de presenti which is not ipsum matrimonium, if the parties consider it executory, and do not mean to live together as man and wife till their marriage shall be subsequently solemnized in the face of the church." So it is necessary that there should not only be a present contract, but it must be intended that such contract is to then and there produce the status. It must look to the "consortium vite," and, as some contracts, though in the present tense, were not accompanied by such intention, courts have thought it wise and necessary to require the contract to be such as of itself established the status. That nothing more was intended by such expression is seen from the language of decisions and text-writers above cited, repeating upon every occasion that nothing more than the contract was necessary to a perfect marriage at common law, and that it need not be followed by intercourse. We have already quoted from *Topper v. Perry*. In the authority therein cited we find the same thing stated. Thus, in *Port v. Port*, 70 Ill. 434, it is said "that by the common law, if the contract be made per verba de presenti, it is sufficient evidence of a marriage; or, if it be made per verba de futuro cum copula, the copula is presumed to have been allowed on the faith of the marriage promise, and that so the parties at the time of the copula accepted of each other as man and wife." In *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641, and in *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105, there was not a present assumption of the marriage status. In the *McKenna* Case the evidence showed that he came to her room after night, and, in soliciting to stay with her, stated that "we are as much man and wife now. I take you as man and wife before God and man." She then answered that, "If he was to stay in that manner, certainly I would let him stay." He then remained, and they occupied the same bed. The court held that this was not "equivalent to a promise on her part to become his wife," that she merely "let him stay," and that that was not a present assumption of the marriage status. The question was before the Supreme Court of Minnesota in a case very like this and arising in the same way. It was expressly held that, when a present contract of marriage in good faith is shown, the status becomes thereby fixed without cohabitation, and

proof of reputation of marriage is not necessary. *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419. To this may be added the quotation from *Swinburne* in *Adair v. Mette*, 156 Mo., loc. cit. 512, 57 S. W. 555: "It is a present and perfect consent the which alone maketh matrimony without either public solemnization or carnal copulation, for neither is the one, nor the other, the essence of matrimony, but consent only." If the expression, "a present assumption of the marriage status," means that there must not only be a contract per verba de presenti, but that, in addition, to an intent to enter, the parties must actually enter upon the relation of husband and wife, all distinction between the two kinds of common-law marriages is destroyed. The executory contract per verba de futuro requires the relation to be entered into, cum copula, before there is a marriage, and, if a present marriage requires the same thing, there is no difference between them.

But the defendant administrator insists that it was lately determined by the Supreme Court in *State v. Kennedy* (a case not yet officially reported), but found in 207 Mo. 528, 106 S. W. 57, that it is requisite to the validity of a common-law marriage that there should be something more than the contract; that reputation and cohabitation were necessary. The court by no means decided that. No one could say that reputation of marriage was any part of the marriage, for the simple reason that there could not be rightful reputation of marriage until after the marriage; and so cohabitation is not a part of the marriage, for it can only lawfully exist after the marriage, as a sequence of the marriage. In that case both the man and woman testified that they had never been married. There was evidence only of living together illicitly. Not even reputation of man and wife was shown. Yet it was contended in the Supreme Court that there was evidence tending to show a common-law marriage. In referring to the matter, as thus appearing in the record, the court said that, "in order to *establish*" (italics ours) a common-law marriage, the parties must not only be shown to have lived together as these had, but had so lived together as a sequence of a marriage made by a "present contract" through words, etc. That was clearly true. While there had been cohabitation in that case, yet the court said it must have been, not illicit, but as a sequence of a marriage per verba de presenti. The fact that the court refers to *Topper v. Perry*, supra, which we have cited as supporting our position on the general law of the subject, is sufficient to show that the defendant's position is in no way supported by the case. As just remarked, the Supreme Court said that, "in order to establish a valid common-law marriage," there must be shown, etc. But we will presently show that establishing a marriage is a far different thing from the marriage itself. A contract and proof of a

contract are not the same thing. A common-law marriage, as we have already repeatedly stated, is complete with the mutual present consent. It needs nothing more. We have already shown by authority of decided cases, and such names as Kent, Story, Greenleaf, Scribner, and Schouler, that it need not be followed by cohabitation, either in the sense of living together or of sexual intercourse. Mutual consent, expressed, is the requisite. "Consensus, non concubitus, facit matrimonium" ("Consent, not cohabitation, constitutes marriage"), is a maxim of the common law. "Marriage is the cause. Cohabitation and repute are the effect." *Yardley's Estate*, 75 Pa. 207. And so, when the effect is sufficiently shown, the cause, on the presumption of good morals, may be presumed.

Questions of the effect of a contract when admitted, and proof of a contract when disputed, are far different questions. Difficulty of producing evidence which will satisfy those whose duty it is to hear it and pronounce judgment upon it is beside the question of the contract itself. And so it has been said that a contract incapable of proof is for practical purposes no contract, since, if it is not shown by believable evidence, it cannot be known that it exists. And so, if a contract of marriage *per verba de præsenti* is in dispute and it appears that the parties did not actually assume the relation of husband and wife by living together, such fact is ordinarily so unreasonable, so out of keeping with natural conduct, and, generally, is so inconsistent with the affirmance of such contract as to perhaps destroy, in practical effect, the contract itself by the inference that no intention existed to assume the relation. But, suppose this is explained, suppose it is shown that immediately after the formal contract is made whereby each party intends to be then and there married and to then and there assume the marriage status, one of them is unexpectedly called away and is killed by accident in travel; would any one say that there was no marriage? Mr. Bishop defines the marriage status as distinguishable from the contract. He says: "Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony." 1 Bishop on Marriage & Divorce, § 11. Therefore, in order to a correct understanding of the law governing common-law marriages and to avoid confusion in consideration thereof, the distinction between the contract which brings into existence the marriage status and the status itself must be kept in mind. *Hullett v. Carey*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419. The contract makes the marriage and the status is the marriage. Hence it is said that marriage

is a status which arises out of the contract. 1 Bishop, Mar. & Div., latter part of note to section 11. When there is a marriage by contract in *præsenti*, its nature as a contract is merged in the status (1 Bishop on Mar. & Div. § 14), and, when two single persons marry, they pass into the status (Id. § 37). "A contract between two marriageable persons * * * creates the status of marriage, which is not a contract." Id. § 251. That a contract of marriage in *præsenti* is itself a marriage—that is, produces the marriage status without anything more—is stated by all commentators on the common law and by all adjudications thereof in this country. It is as much a marriage as is a formal ceremony performed by an officer or minister. If a man and woman, intending to be married by the act, have such formal ceremony performed and the man should die the next moment, would not the woman be his widow, and, in this country, be entitled to dower and other rights of widows? There can be no difference in the resulting effect of such formal marriage and that where a man and woman, intending to be married by the act, mutually contract in *præsenti*, he to be her husband and she to be his wife. She becomes his wife as fully by the latter mode as the former; and, in order to make them man and wife, there is no more necessity for anything further in the one case than the other. What are the two persons the next moment after they contract that they are husband and wife? Are they married or single? If yet single, when do they become married? After what act? Sexual intercourse? Is that act essential? If so, proof of a contract in *præsenti* followed by living together in the same house and the husband providing therefor, but without such intercourse (such instances have happened), would not constitute them husband and wife. Bishop says that "at each particular moment of the existence of persons they must be either married or single. There is no intermediate condition." "To constitute a marriage, the agreement must be in the present time, no moment to intervene between it and the superinducing of the status." "Mutual present consent, lawfully expressed, makes the marriage. What is called consummation adds nothing to its legal effect." 1 Bishop on Mar. & Div. § 317.

And so legal authority in the United States supposed this was the common law of England. But it seems that in 1844 an authoritative announcement was made in the case of *Reg. v. Millis*, 10 Clark & Fin. 534, to which we have already referred, that it had never been the common law of England that a marriage could take place, except in a limited degree, without being regularly solemnized according to ecclesiastical law; that is, by certain church formality. It is, indeed, conceded by that case that there may be a marriage without religious ceremony by each party contracting *per verba de præsenti*, he

to be her husband and she to be his wife; but, while such marriage was indissoluble by either or both parties and while it enabled the willing one to proceed against the unwilling party to compel the latter to have the ceremony duly performed, and while a second marriage, though formally solemnized, could be dissolved on account of it, it was not a marriage for most of the material rights of husband and wife, and therefore was said not to be "a complete" or "perfect" marriage. It was not complete in that the woman did not take dower on the man's death. The man had no rights in the woman's property. The children were not legitimate. It did not impose upon the woman the disabilities of coverture. It did not make the subsequent marriage of either, while the other was alive, void, but only voidable. Page 878. It has been stated that that case was a startling announcement to the bench and bar of this country, as well as to a large proportion of the judges and lawyers of England and Ireland. The case was a prosecution for bigamy and was appealed from Ireland where the marriage in question, though performed before a minister, he was not one of the established church, and the marriage was, for that reason, declared void and of no effect, and therefore there was no guilt in the second marriage. The consideration of the case, on appeal, was far more thorough than is, or can be, usually given. The judges in the House of Lords were evenly divided, when, according to English rule, the judgment of the lower court was declared to be the law until Parliament should enact otherwise. It was afterwards so recognized and followed. *Beamish v. Beamish*, 9 H. L. C. 274. But *Reg. v. Millis* does not state the common law of England as it was understood to be by the courts and Legislatures of this country when it was introduced here. *Dyer v. Brannock*, supra; *Hallett v. Collins*, 10 How. (U. S.) 174, 13 L. Ed. 376. It may safely be said that the courts of this country are not under any obligation to follow the mutations of decisions or new views announced in England as to what was the law of that country.

While what we have written as to the completeness of a common-law marriage is sufficiently explicit, yet as the effect of such marriage on the rights of the parties is stated in *Reg. v. Millis* to be so far short of a regular marriage by ceremony as, among other things already mentioned, not to carry dower to the widow, we will add, in order to leave no room for misunderstanding, that the widow who has been thus married is entitled to all the property rights accorded a widow who has been married by ceremony. The other rule came into existence by reason of a system of two courts with jurisdiction over the same matter. 1 *Scribner on Dower*, 105-112. The temporal courts declared what would constitute a valid marriage, and the ecclesiastical courts, with jurisdiction over the marriage relation and the property rights of the

respective parties, and (for reasons some the very best, some not so good) bent on compelling an observance of church ceremony, declared that, while the marriage without ceremony was an indissoluble contract, yet it was not a perfect marriage, and that rights of the one in the property of the other, including dower, did not exist. The only door of relief for such unfortunate situation, says *Scribner*, was through an ecclesiastical court which, at the suit of the willing party, would compel the other to submit to a ceremony. "But in the United States we have no courts of a spiritual character. With us there is no tribunal furnished with the machinery, or clothed with the power, of compelling the specific performance of a contract to marry. Hence, if we adopt, without modification, the supposed rule of the common law upon this subject, we are in an infinitely worse condition than the people of England; for, while any of our citizens who should undertake to contract a marriage in present would be subjected to all the difficulties and embarrassments with which the ecclesiastical courts have environed the irregular marriage in England, in the event that either of the contracting parties should afterwards refuse to solemnize the marriage in a more formal manner, the other, having no forum to which to appeal for the enforcement of a more complete performance, would be neither married nor unmarried." That author adds that, "under our system of laws, it is a solecism in language to speak of a marriage as good for some purposes and not good for all—as a marriage which is not a marriage. And it may be safely said that in those states where the courts already have, or hereafter shall determine in favor of the validity of private marriages, such marriages will be regarded as being attended with all the civil rights, and obligations which, under the ecclesiastical law, flow from a marriage duly solemnized in facie ecclesie, and therefore that they confer upon the wife the right to dower." It is interesting to note *Voltaire's* view of the subject. He states that "marriage may exist, with all its natural and civil effects, independently of the religious ceremony." 6 *Voltaire's Phil. Dic.* 30. "A long time elapsed before the ministers of religion had anything to do with marriage. In the time of Justinian, the agreement of the parties, in the presence of witnesses, without any ceremonies of the church, legalized marriages among Christians." *Id.* 30. "Marriage is a contract in the law of nations, of which the church has made a sacrament. But the sacrament and the contract are two very different things—with the one are connected the civil effects; with the other the graces of the church. So, when the contract is conformable to the law of nations, it must produce every civil effect. The absence of the sacrament can operate only in the privation of spiritual graces." 4 *Voltaire's Phil. Dic.* 410. So the point for us to determine, and the argument of counsel

is directed that way, is what evidence will amount to proof of a common-law marriage in this country. We have already stated the law as we understand it, and it only remains to see if the evidence in the case fulfills its requirements.

Both Dr. Davis and Mrs. Phillips were legally capacitated to make the contract charged to have been made. There was evidence tending to show that he desired to become married, of his acquaintance with her, and of his frequent visits to her house. Finally he went there, as testified to by her son, "one morning about 9 o'clock. Me and my oldest sister was in the room when he came in. We went in the kitchen. Him and my mother had a talk there. He called us in the room and they were standing up on the floor, and had hold of hands, and he said they had come to the conclusion to live together. They took hold of hands. He called us in the room, the east room, and they were standing up there, had hold of hands. The doctor said he had come to the conclusion to live together with my mother as man and wife, and he asked us children what we thought about it, and we told him it was all right, and he said at his death he wanted to leave all to her and her heirs." She said that "it suited her." There was evidence tending to show that after this he and she lived together and he provided for her; that afterwards he moved her nearer the business part of the town; and that they kept house on the second floor of a building. Finally, a child was born which was named Joseph B. Davis, Jr. It was further shown that her father and mother came to see them at this latter place when the child was born, and that while there the former expressed concern at the state of their relations. Dr. Davis, according to the testimony of the mother, said that "he had entered into this contract in 1903, her and him, in the presence of the children, and it was all agreed upon. 'Now,' he said, 'what do you think about it?' I said: 'Doctor. I am a mighty old woman. I never heard of this common-law marriage. It might be so.' He said: 'I have examined the law. I know what I am doing.' I said: 'Well, probably you do.' He said: 'Will it be agreeable to you?' I said: 'Yes, sir; if it is the law.'" She further testified that at another time afterwards the doctor said: "'I will make this agreement in the presence of you. We have agreed if it is agreeable with you to be man and wife under the common law.' And I said: 'That is what I want to hear. I have been in trouble about this thing, and I don't want to have any more trouble about it. If it is law, it is law, and I am satisfied.' In 1905 we lived in the country. I had no chance to see the doctor and meet up with him. In 1905 we moved back to town. He said at that time in the presence of the old gentleman: 'I will call your attention to this occasion.' In January, 1905, January 11th, he looked it up and said, 'This is January

11th,' he said— He called her in the room. She was about her work, and he called her. He said: 'Ella, your mother has come. Come in here. We want to have a conversation over this matter.' He said: 'We want to enter into this contract while your father and mother are here, and we join hands together.' And he says: 'I take her as my wife, and we will live together as long as we shall live. I hold her as my wife.' And he says: 'At my death everything I have got I want to go to her and little Joe and my heirs.' She said, while standing holding hands: 'I will take and hold him as my husband, and everything shall be ours together as long as we live.' The father's testimony was substantially the same.

If we concede that the evidence of what occurred at what is called the first contract standing alone was not sufficiently clear and explicit to show a present contract of marriage, yet it is not necessary to say whether what followed in the way of conduct by the contracting parties was sufficient to show that they understood what they said at that time to be a legal contract of marriage, and that, in accordance with that idea of its legality, they lived together as man and wife, and therefore, thus supplemented, was sufficient to constitute a marriage at common law; for, however that may be, there was evidence strongly tending to show that, acting upon the contract as constituting a marriage, they, after the birth of the child, again formally entered into a contract which showed a marriage with intention to assume the marriage status in present. We therefore conclude that there was ample evidence to support the court's finding of a marriage at common law. In so doing we have in mind the evidence in behalf of the defendant that a marriage was not intended, and was not recognized by Dr. Davis, nor by the community in which they lived. Such insistence has made necessary the somewhat extended investigation we have given the subject.

We do not regard the rulings in excluding statements made by Dr. Davis in regard to the plaintiff as improper; nor do we see how, if admitted, it would have changed the result. The judgment must therefore be affirmed. All concur.

BLACKFORD v. HEMAN CONST. CO. et al.
(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. NUISANCE—WHAT CONSTITUTES — LAWFUL BUSINESS—USE OF EXPLOSIVES.

The employment of explosives in a stone quarry contiguous to another's property in a large city is unreasonable, and will authorize either injunctive relief as against a nuisance, or an action for damages, though the business is entirely lawful and prosecuted with the utmost care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 15.]

2. TRESPASS—REAL PROPERTY—THROWING STONE OR SOIL ON PREMISES.

Throwing stone or soil on the property of another as a result of blasting amounts to an actual trespass, even in the absence of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 8.]

3. NUISANCE—JARRING BUILDINGS.

The jarring of buildings or causing them to vibrate, because of the employment of explosives and the operation of heavy machinery, may be enjoined as a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 15, 23.]

4. SAME—ESCAPE OF LIMESTONE DUST.

The escape of fine limestone dust from a stone crusher, which disturbs the comfortable enjoyment of contiguous premises, may be enjoined as a nuisance.

5. SAME—NOISE.

Though a trade is lawful in itself, its conduct will not be permitted in a locality, such as a residence district in a city, where, because of the unusual noise incident thereto, it entails substantial injury to others by diminution of the comfortable enjoyment of life or property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 23.]

6. SAME—VIOLATION OF LAWFUL RIGHT.

The test of a nuisance is not alone injury and damage, but injury and damage resulting from the violation of a lawful right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 1, 3.]

7. EQUITY—LACHES.

The doctrine of laches is enforced against an existing right only where it would be highly unjust and inequitable to enforce the right, notwithstanding laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 191-196.]

8. SAME—ACQUIESCENCE.

The doctrine of acquiescence is invoked to preclude relief, where it appears that a party acting on the assent implied therefrom has materially changed his conduct with respect to the subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 208.]

9. NUISANCE—ABATEMENT AND INJUNCTION—LACHES—ACQUIESCENCE.

Where, though it appears that the investment in a stone quarry amounts to \$25,000, there is nothing to show that the investment or the owner's conduct in any respect was induced by the fact that a contiguous owner failed to complain of the quarry, as a nuisance, and from all that appears the investment is no larger at the time injunctive relief is sought against the operation of the quarry than it was when first operated, and there is nothing to indicate that the owner was encouraged, because of the contiguous owner's delay, to increase its plant or change its conduct or situation in any manner, no sound reason appears why the doctrine of laches or acquiescence should be invoked against the contiguous owner's right to relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 62, 68.]

10. SAME.

Acquiescence in the conduct of noxious works, where they produce little or no injury, does not operate as acquiescence in the conduct of such works after they have been greatly enlarged, and are productive of greater injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 62.]

11. SAME.

Laches or acquiescence will not be held to arise from a short period of delay, where the

fact of nuisance is clearly established, and a change of conduct or increased expenditure because of apparent condonation does not appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 62, 68.]

12. SAME—RELIEF AWARDED—MODE AND EXTENT OF ABATEMENT.

A decree restraining the operation of a stone quarry and stone crusher only in so far as it was offensive is to be commended, as freedom of action ought not to be curtailed more than the right to relief demands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 93.]

13. SAME—"VIBRATE."

Where the employment of explosives in a stone quarry caused plastering to fall from the ceilings of a contiguous owner's house, bricks to work loose and fall from the cornice, and the mortar to crumble from between the bricks in the walls, the word "vibrate," which means to swing or oscillate with a quick motion, in a decree enjoining the operation of the quarry so as to jar the owner's buildings, or to cause the same to shake and vibrate, awarded to the owner the measure of relief only to which he was entitled, for, if the quarry could not be operated without causing the house to thus vibrate, then its entire operation should be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 93.]

For other definitions, see Words and Phrases, vol. 8, p. 7313.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by George R. Blackford against the Heman Construction Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hickman P. Rodgers, for appellants. Thos. G. Rutledge, for respondent.

NORTONI, J. This is an action in equity, seeking injunctive relief against the operation of a quarry alleged to be a private nuisance. The circuit court decreed a perpetual injunction, and the defendants appeal. The quarry is situated in the very heart of the city of St. Louis. Its precise location is on a plat of ground fronting 250 feet on the north line of Forest Park Boulevard, by about 187 feet north therefrom to an alley. The west line of said plat of ground is about 130 feet east of Spring avenue. The north one-half of said block on which the quarry is situated is occupied by numerous family residences. Plaintiff owns a lot of ground upon which his residence, No. 3770 Laclede avenue, is located. It fronts about 25 feet on the north line of Laclede avenue, and extends south therefrom about 187 feet to a 20-foot alley, passing between his property and that of defendants upon which is located their quarry. Plaintiff's residence consists of a two-story brick dwelling house of nine rooms, valued at \$9,000. The rear of his dwelling is about 130 feet from the north side of the opening of the quarry. On the rear of plaintiff's lot is a shed with the roof constructed of tar and gravel. Plaintiff has owned and occupied his residence about 11 years before the institution of this suit. The

defendants' quarry has been in operation about 10 years. The limestone therein lies in ledges varying from four to eight feet in thickness. At the date of the institution of this suit the quarry had attained a depth of about 110 feet. Giant powder and dynamite are constantly used therein for blasting heavy ledges of rock. The evidence tended to prove that for some time recently before the institution of the suit several heavy blasts were discharged therein daily, except Sundays, many of which occasioned stones, some as much as nine inches in diameter, to ascend far above the earth, and fall upon the property of plaintiff and his neighbors. The tar and gravel roof of the shed on plaintiff's property has been entirely destroyed by stones falling thereon from the quarry. A number of times stones have fallen upon and about his house, one of which lodged in the fork of a small tree about four inches in diameter, and split it to the earth. On numerous occasions stones have fallen so near members of his family about the premises as to threaten their safety. One of his neighbors testified to a stone having fallen through a skylight and into the room of his residence in which he was sitting. Others testified to stones having fallen in Laclede avenue, as much as 200 feet away from the quarry. Others gave evidence of stones having fallen on their houses and about their yards in the same block. A painter engaged at his trade in the block testified to having received an injury to his leg from a stone falling after a blast at the quarry. Plaintiff and others testified as to their several properties being jarred and shaken from the heavy explosions incident to the blasting; that three bricks were jarred loose and fell from the cornice of plaintiff's house; that the mortar had been jarred loose because of the severe vibrations and fallen from between the bricks in the walls of his residence; that great sheets of plastering had been jarred loose and fallen in the rooms of his residence, as was the case with respect to several other residences as well. Numerous witnesses testified to the extreme noise from the explosions. One, a sergeant of police, residing in the block, who was on duty at night and slept in the daytime, testified to being frequently awakened thereby; and the plaintiff and his neighbors gave evidence to the effect of extreme nervous shocks causing them to quiver and jump when some of the explosions took place. It appeared that the paper on the walls of residences in some instances was cracked because of the vibrations of the earth therefrom, and that dishes on the table and in the closet, as well as windows of the house, were frequently rattled and jarred. In connection with the quarry, defendants maintain a plant for the crushing of stone on the same plat of ground. This plant appears to be two stories high, is equipped with heavy machinery appropriate to the purpose, and, when in operation, creates a

fine dust resulting from the crushing of limestone. This dust is constantly being blown by the wind into the residence of plaintiff and his neighbors, accumulates on the dishes, on the carpets, curtains, and furniture, and operates as a source of annoyance and discomfort. When the house is closed, it percolates around the windows and doors. To add to this discomfort, noxious gases and noisome odors are almost constantly emitted from the prosecution of the quarry and stone crusher, permeating the atmosphere in and about the residence of the plaintiff and his neighbors. It also appears that, besides the dangers and discomforts mentioned, the plaintiff's property has been depreciated in value to the extent of 25 per cent. The court decreed a qualified injunction. The defendants and each of them were perpetually enjoined from so operating their quarry, or permitting the same to be so operated as to, first, throw rocks and stones on the plaintiff's lot; second, as to jar the buildings on plaintiff's said lot or cause the same to shake and vibrate; or, third, to destroy or impair the comfortable use and occupancy of such buildings by loud and deafening explosions and sounds produced in the quarry; and, fourth, from so operating their stone crusher had in connection with the quarry or permitting the same to be so operated as to cause a fine limestone dust to fly from said machine across plaintiff's lot and settle in his residence. It is said by Mr. Wood in his excellent work on Nuisances, (3d Ed.) § 140, that the blasting of rock by the use of giant powder and other explosives in the vicinity of another's dwelling house is a nuisance where the blasting is negligently done. There is no proof of negligence in this case, unless such may be inferred from the loud and severe explosions. Be this as it may, the case falls within the rule with respect to the employment of dangerous explosives in a large city. There are numerous authorities to the effect that where explosives, as in this case, are employed for blasting purposes contiguous to another's property in a large city, such must be regarded as an unreasonable, unnatural, and unusual use of his property. Such unreasonable use of property to the substantial impairment of the rights of another will authorize either injunctive relief as against a nuisance or an action at law for resulting damages, even though the calling is entirely lawful and it is prosecuted with the utmost care and skill. In such circumstances the question of negligence is entirely beside the case. Although defendants have, beyond a doubt, the right to quarry stone on their property, the plaintiff enjoys the right to the undisturbed possession of his home. If these rights conflict, the right to operate the quarry must yield to the latter, which, in the eye of the law, is the more important of the two, for upon grounds of public policy it is better that one man should surrender a par-

ticular use of his land than that another should be deprived of the beneficial use of his property altogether, which would result if the privileges of the quarry should be wholly unrestricted. Even in the absence of negligence, throwing stone or soil upon the property of another as a result of blasting amounts to an actual trespass. *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Hay v. Cahoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cahoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *Fitzsimons v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; *Tiffin v. McCormick*, 34 Ohio St. 638, 32 Am. Rep. 408; *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740; *Schaub v. Parkinson Bros. Const. Co.*, 108 Mo. App. 122, 82 S. W. 1094; *Regina v. Muters, Leigh & Caves C. C.* 491; *Monroe v. Pacific Coast Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Thurmond v. Ash Grove, etc., Co.*, 125 Mo. App. 73-77, 102 S. W. 617; 12 Amer. & Eng. Ency. Law (2d Ed.) 508-510; 1 *Thompson, Com. on Neg.* § 764. Besides such blasting as resulted in throwing stones upon plaintiff's premises, the court enjoined the defendants from jarring plaintiff's buildings so as to cause them to shake and vibrate. The jarring and causing the buildings to vibrate, as in this case, to the injury of another by means of the employment of explosives and the operation of heavy machinery, is frequently enjoined as a nuisance. *Wood on Nuisances* (3d Ed.) §§ 642, 622-624; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *McKeon v. See*, 4 Rob. (N. Y.) 449; *Scott v. Firth*, 10 L. T. (N. S.) 240; *Robertson v. Campbell*, 13 F. C. (S. C.) 61. And, likewise, the defendants may be enjoined from permitting the escape of fine limestone dust which disturbs the comfortable enjoyment of the plaintiff's premises. *Wood on Nuisances* (3d Ed.) § 508; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252. Although a trade is lawful in itself, one will not be permitted to conduct it in a locality, such as a residence district in a city, where, by reason of the unusual noise incident to the business, it entails substantial injury upon others by diminution of the comfortable enjoyment of life or property. *Wood on Nuisances* (3d Ed.) § 619; *Fish v. Dodge*, 4 Denlo (N. Y.) 311, 47 Am. Dec. 254; *Wallace v. Auer*, 10 Phila. (Pa.) 356; 21 Amer. & Eng. Ency. Law (2d Ed.) 695-697. The doctrine fundamental of preventive relief in respect of nuisance is that one person has no right to exercise acts of ownership over his property, even in a lawful manner, so as to materially and substantially impair the rights of his neighbor; and therefore the test of a nuisance is not alone injury and damage, but it is injury and damage resulting from the violation of the lawful rights of another. *Wood on Nuisances* (3d Ed.) § 880; *Paddock v. Somes*, 102 Mo. 226-237, 14 S. W. 746, 10 L. R. A. 254.

It is argued on the part of defendants that plaintiff's laches and acquiescence were such as to preclude the court from granting the relief given in the decree. The argument predicates upon the facts that the quarry had been in operation immediately adjacent to the plaintiff's residence for 10 years before the institution of this suit, and that it represents an investment of about \$25,000. The equitable doctrines of laches and acquiescence are very much akin and almost identical. These doctrines, however, do not obtain with the rigor of the statute of limitations. The statute of limitations arbitrarily precludes the enforcement of an existing right by the lapse of time prescribed, whereas the doctrines of laches and acquiescence arise from the fundamental principles of natural justice, inherent in the particular cause with which the court is called upon to deal. An examination of the cases will disclose that the courts only enforce the doctrine of laches against an existing right in those cases where it would be highly unjust and inequitable to enforce the right, notwithstanding laches of the plaintiff. The doctrine, arising as it does from the principles of justice, proceeds upon the theory that it would be unjust to enforce the plaintiff's right under circumstances where his delay has placed his adversary at a disadvantage in some manner, or has caused him to invest means or materially change his course of conduct because of the failure of the plaintiff to assert his right at an earlier date. Acquiescence implies assent. The doctrine is invoked to preclude relief in cases where it appears the defendant, acting upon this implied assent, has materially changed his conduct with respect to the subject-matter. It is certain that mere lapse of time alone is entirely without influence in those cases where the statute of limitations does not obtain. *Gallher v. Cadwell*, 145 U. S. 368-373, 12 Sup. Ct. 873, 36 L. Ed. 738; *St. Louis Safety Deposit Co. v. Kennett Est.*, 101 Mo. App. 370-397, 74 S. W. 474; *Spurlock v. Sproule*, 72 Mo. 503; 18 Amer. & Eng. Ency. Law (2d Ed.) 97-100; 1 *Beach on Injunctions*, §§ 42, 43. Although it appears the defendants' investment at and about the quarry amounts to \$25,000, there is no word in the testimony tending to show that the investment or defendants' conduct in any respect for that matter was induced by the fact that plaintiff failed to complain of the nuisance, if such it was, theretofore. From all that appears, the investment may be no larger now than it was the first day of the quarry's operation. Nothing whatever indicates that defendants were encouraged because of plaintiff's delay to increase their plant or expend any means, change their conduct or situation in any manner. This being true, there appears to be no sound principle of equity invoking the doctrine of laches or acquiescence against plaintiff's right to relief. However all this may be, when the facts in proof are carefully scrutinized, no word or circumstance

therein indicates that the plaintiff had any right to relief until within the last two years before the institution of the suit, for all of the proof goes to show the occurrence of the acts complained of within the two years last past. It is possible for a quarry to be operated, even in the situation of this one, without entailing annoyance upon the neighbors, and it may be that this quarry was operated for many years so that no violation of the plaintiff's rights occurred. At any rate, the proof tends to show only that his rights have been invaded for about two years next before the institution of the suit, during which time the acts which produced the nuisance seem to have increased. It is certain that acquiescence in the conduct of noxious works, when they produce little or no injury, does not operate acquiescence to the same works after they are greatly enlarged and productive of greater injury. *Bankhart v. Houghton*, 27 Beav. 425. And, indeed, it has been determined that where the fact of nuisance is clearly established, as in this case, and nothing appears tending to show the defendant has changed his conduct or increased his expenditures on account of apparent condonation arising from plaintiff's conduct, the court will not adjudge laches or acquiescence to arise from a short period of delay. *Meigs v. Lister*, 23 N. J. Eq. 199. The decree was given in a modified form. The intention of the chancellor is obvious to restrain only the conduct of the quarry and stone crusher in its present offensive manner. It has been well said that such decrees are to be commended when they meet the exigencies of the case; for the freedom of action on the part of one ought not to be curtailed more than the right of relief on the part of another demands. *Schaub v. Parkinson Const. Co.*, 108 Mo. App. 122, 82 S. W. 1094; 2 Beach on Inj. § 1072; *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795.

Among other things, the decree enjoined operating such quarry or permitting the same to be so operated, as to jar the buildings on plaintiff's said lot, or to cause the same to shake and vibrate." The argument advanced against this portion of the decree is that the employment of the word "vibrate" therein operates to effectually enjoin the operation of the quarry. It is said that it is impossible to prosecute work at the quarry without causing the plaintiff's house to vibrate, and that the decree should be modified by inserting the words immediately thereafter, "to his injury or damage." The argument must be examined with respect to the facts in proof. The word "vibrate" is defined by the Standard Dictionary as follows: "To give a rapid, swinging or oscillating motion; to move to and fro, especially with a quick motion; move or swing back and forth; oscillate." Now, it is certain that the word "vibrate" awards to the plaintiff the measure of relief only to which he is entitled. By reference to the facts upon which the decree is given, it appears the vibrations from unusual

explosions caused plastering to fall from plaintiff's ceiling, bricks to work loose and fall from the cornice of his house, and the mortar to crumble from between the bricks in the walls. It therefore appears the vibrations contemplated by the decree entailed a substantial injury to the plaintiff's property. The principle of equity invoked is available to prevent the identical injury mentioned. When we consider that the swinging or oscillating of brick walls with a quick motion, as given in the definition of the word "vibrate" above referred to, essentially entails such results, it seems certain the argument advanced is unsound. If the quarry cannot be operated without causing plaintiff's house to thus vibrate, then its entire operation should be perpetually enjoined. No doubt the business can be successfully prosecuted without such vibrations by employing a lesser quantity of explosives therein.

The judgment will be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

MITCHELL v. CHICAGO & A. RY. CO.
(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. CARRIERS — PASSENGERS ON FREIGHT TRAINS—CARRIER'S DUTY.

Though passengers upon freight trains assume such risks and hazards as are ordinarily incident to the operation of such trains, the carrier owes them the same high degree of care that it owes to passengers on regular trains, and a passenger on a freight train does not assume the peril arising from the negligence or want of proper care of those in charge of the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1098.]

2. SAME — NEGLIGENCE—EVIDENCE — SUFFICIENCY.

That cars of a freight train were coupled so violently that a passenger sitting on a trunk near a side door of the caboose was thrown through the door to the ground, a water keg in the car was overturned, papers were jarred from the conductor's desk, and a lamp was jarred from its position, etc., warrants a finding that the company was negligent, though there is no proof of a specific negligent act on the part of those operating the train.

3. SAME.

That a jerk given a train on a coupling of cars was extraordinary and unusual tends to prove negligence in operating the train.

4. NEGLIGENCE—RES IPSA LOQUITUR.

Where a thing causing injury sued upon is shown to have been under the management of defendant or his servants, and the accident was such that in the ordinary course of things it would not have happened had those having the management used proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 218.]

5. CARRIERS — INJURY TO PASSENGER ON FREIGHT TRAIN—RES IPSA LOQUITUR.

The res ipsa loquitur doctrine applies to injury received by a passenger on a freight train where cars were coupled so violently that he was thrown from a trunk on which he was sit-

ting in the caboose, through a side door, to the ground, a water keg in the car was overturned, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283, 1286.]

6. NEGLIGENCE—STANDARD FOR MEASURING.

The conduct of an ordinarily prudent person is the standard for measuring negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 6.]

7. SAME—CONTRIBUTORY NEGLIGENCE.

Before contributory negligence will defeat recovery for negligent personal injury, the dangers must be so obvious that an ordinarily prudent man would not assume the situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 83-89.]

8. CARRIERS — PASSENGERS — CONTRIBUTORY NEGLIGENCE.

A passenger on a freight train could assume that a coupling of cars of the train would be made without negligence.

9. SAME—PASSENGER'S DUTY.

A railway passenger need not exercise more than ordinary care for his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1348.]

10. SAME—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether it was negligent for a passenger on a freight train to sit on a trunk near an open side door of the caboose *held* under the evidence a jury question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375, 1402.]

11. SAME.

Though negligent toward a passenger, a railway company is not liable for resulting injury if his failure to use ordinary care contributed to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1346.]

12. SAME—INSTRUCTIONS.

In an action against a railway company for injury to a freight train passenger, an instruction that if he voluntarily sat near an open door of the caboose, etc., and was thrown from the car by the jar made by a coupling, he could not recover, having been properly refused for failing to refer the jury to the conduct of a reasonably prudent man and the exercise of ordinary care for his own safety as the standard by which the passenger's conduct should be measured, it was not error to modify it by directing that, though he knew he was liable to be thrown from the car, he could recover unless he was thrown by a usual and ordinary jar.

Appeal from Circuit Court, Audrain County; J. D. Barnett, Judge.

Action by F. A. Mitchell against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Scarritt, Griffith & Jones, for appellant. P. H. Cullen, for respondent.

NORTONI, J. This is an action for damages alleged to have accrued to plaintiff because of personal injuries received through being precipitated from his seat in the caboose of defendant's freight train. Plaintiff recovered, and defendant prosecutes the appeal.

The evidence tended to prove that defendant maintains a branch line of its railroad from Mexico to Cedar City in this state, upon

which it operates a freight train with a caboose attached for the purpose of carrying passengers. The plaintiff became a passenger on this train at New Bloomfield, destined to the city of Mexico. The caboose is separated into two compartments by means of a partition. About two-thirds of the car is provided with seats for passengers, and the remaining one-third thereof occupied for the purpose of carrying express and United States mail as well as passengers. On either side of the car there is a door about five feet in width. On the date in question, each of these doors was standing open, as is usual in the summer time. Upon entering the car, plaintiff chose a seat upon the expressman's box or trunk near one of these doors and was there seated when the conductor collected his fare. The train progressed to the city of Fulton, at which station it stopped for some time for the purpose of transacting business. While the locomotive was engaged in switching at Fulton, plaintiff went out upon the depot platform for the purpose of purchasing a newspaper, and while there observed that the caboose was standing with about six cars on the main line of the track, and the locomotive, with other cars attached thereto, was detached from that portion of the train to which the caboose was connected. The locomotive was engaged in switching and picking up several cars of stock. Plaintiff returned to the caboose and resumed his seat, as before, upon the expressman's box. Other passengers were occupying that portion of the car as well, and he was engaged in conversation with a gentleman who was leaning against the partition of the car. It is proper to say here that the two compartments of the car communicated by means of a door which remained open, and that the compartment occupied for the purpose of express, in which the plaintiff was seated, was constantly used for passenger service as well. The train was headed northward. The expressman's box on which the plaintiff was seated was situate immediately adjacent to and on the east side of the car and also immediately north of the open door, which was about five feet in width, on the east side of the car. In this situation, plaintiff was seated with his back to the northward, the direction the train was going, with his feet to the southward, and more particularly directed toward the center of the car. While thus seated and in conversation with his fellow passenger, the locomotive, with about six cars attached, endeavoring to make an automatic coupling, backed with great force against the freight cars to which the caboose was attached, and thereby precipitated plaintiff from his seat through the side door of the car onto the ground, inflicting the injuries complained of. The evidence tended to prove that this coupling was made with great force and produced an extraordinary jerk, jar, and rebound of the caboose. The plaintiff and several passengers gave evidence to

the effect that, although they were familiar with the operation of freight trains and frequent passengers thereon, it was the most severe and extraordinary jerk they had ever experienced. Plaintiff testified substantially that the jar came just like a crash and threw him off of the box, out of the door, onto the ground. There was a loud noise. It was almost like a wreck. It was the most severe jerk he had ever experienced riding on any kind of train, and threw him across the floor, and then hurled him out of the side door. Another passenger, who was seated in the passenger compartment, said he rode on freight trains a great deal and had "never felt a more severe jar except once at Joliet, when the engineer knocked out a drawhead." The effect of the jar was very great, and caused him to suffer backache and headache so that he could not sleep that night or the next. Another witness said it was "almost like a collision and threw the passengers around right smart," and a 10-gallon water keg containing ice and water was overturned, and the water ran over the floor. It knocked papers out of the conductor's desk and pigeon holes, jarred the lamp chimneys loose from their clamps near the ceiling of the car, and jarred a pair of gloves off the conductor's desk. It caused him to have a headache. He testified he had ridden on freight trains considerably and had observed them making couplings, but that this was the heaviest jar he had ever experienced. All of the witnesses testified that, besides precipitating the plaintiff from his seat through the door of the car onto the ground, the effect of the collision was sufficient to and did overturn the water keg in the car, jarred the lamp chimneys from the clamps provided to hold them in position, as well as causing numerous papers and a pair of gloves on the conductor's desk and other papers in pigeon holes to fall and scatter over the floor of the car. There was no other evidence tending to support the allegations of negligence of the defendant than that above stated.

It is therefore argued, on the part of the defendant, that the court should have peremptorily directed a verdict for it for the reasons: First, that the case is devoid of evidence tending to prove negligence on the part of defendant with respect to a defective track, imperfections in the car or apparatus, or unskillful handling of the locomotive or cars by the engineer or other trainmen; and, second, that the doctrine of *res ipsa loquitur* is not pertinent to the facts in proof. It is said that even though the law imposes a high degree of care upon the defendant in favor of the passenger on a freight train, as it does on other passenger conveyances, that it is not responsible for injuries inflicted resulting from the usual jerks and jars incident to their operation. In other words, the argument invokes the rule to the effect that a person, by taking passage on a freight train, assumes all of the risks and inconveniences

ordinarily incident to the operation of trains of that character. Indeed, it is the law that persons taking passage upon freight trains assume such risks and hazards as are ordinarily incident to the operation of such trains. In the very nature of things, there cannot be the same immunity from peril in traveling upon freight trains as there is in traveling upon passenger trains. Nevertheless, if the carrier accepts passengers on such trains, it thereby assumes toward its patrons an obligation of a high degree of care, precisely as it does when prosecuting its calling of carrying passengers on its regular passenger trains. The measure of care, however, is to be adjusted with respect to the circumstances attending the different modes of carriage and the incidental hazards assumed by passengers on freight trains. The net result with respect to the safety of the passenger may be, and no doubt is, wholly different, because of the inherent hazard incident to the operation of one train and not to the other. It is this hazard which the passenger assumes by taking passage on a freight train, the operation of which he fully knows and understands to be subject to severe jerks and many inconveniences. The carrier is responsible, however, for its negligence in the operation of a freight train precisely as it is in the operation of its passenger train, and in no instance does a passenger assume the hazard and peril arising from the negligence or want of proper care of those in charge of the freight train. *Hedrick v. Mo. Pac. R. R. Co.*, 195 Mo. 104, 93 S. W. 268; *Wait v. Railway*, 165 Mo. 612, 85 S. W. 1028; *Erwin v. K. C., etc., Ry. Co.*, 94 Mo. App. 289, 68 S. W. 88; *Hawk v. C. & Q. Ry. Co.* (Mo. App.) 108 S. W. 1119.

The defendant relies upon the cases above cited to support its argument here to the effect that the evidence entirely fails to show negligence on its part. In each of those cases, the evidence tended to show only an ordinary and usual jerk of the train, such as is ordinarily incident to the taking up or running out of slack in long freight trains. Such was the case too of *Guffey v. Railway Co.*, 53 Mo. App. 462. There can be no doubt that the law was accurately declared in those cases to the effect that the plaintiffs were not entitled to recover, and this, for the reason, if none other, that the passengers had accepted the risk of such jerks and jars as were ordinarily incident to the operation of the trains in question. The rule is well settled to that effect, and upon sound principle it could not be otherwise. The facts in proof in the case now under advisement extend quite beyond the usual and ordinary jerks incident to the operation of a freight train, however, for to say otherwise would be to declare that it was a usual and ordinary occurrence in the coupling of trains to produce such a collision as hurled passengers from their seats through the doors of the car onto the ground, overturns water kegs, jars papers

from the conductor's desk, pigeon holes, and the lamps from their positions; and, too, that it is a usual and ordinary occurrence for freight trains to make their coupling in such a manner as to inflict injury upon passengers seated in the cars, sufficient to produce headache, lame backs, and the loss of sleep for two successive nights. Common knowledge in that behalf points such to be more than the result of an ordinary and usual jerk of a freight train operated without negligence. We are fully persuaded that, although there was no proof of a specific negligent act on the part of those operating the train, the facts above related are amply sufficient to authorize a legitimate inference of negligence on the part of the engineer and those engaged in the coupling constituting substantial evidence in support of the verdict. The court has given a like judgment upon facts less persuasive heretofore. *Dorsey v. Railway*, 83 Mo. App. 528. If the jerk was extraordinary and unusual, it tends to prove negligence in the operation of the train. *Bartley v. Met. Street Ry. Co.*, 148 Mo. 124-140, 49 S. W. 840.

As to the proposition presented with respect to the doctrine of *res ipsa loquitur*: It is true our Supreme Court said, in *Hedrick v. Mo. Pac. Ry. Co.*, 195 Mo. 104, 93 S. W. 268, that the doctrine of *res ipsa loquitur* did not obtain in aid of the plaintiff in that case. As we view it, the judgment in that case was entirely sound in this respect, for the evidence developed upon the trial presented nothing more than the ordinary and usual jolt and jar which attends the operation of a freight train, and therefore fell short of pointing negligence on the part of defendant, especially so when considered in connection with the risks ordinarily incident to such travel and assumed by the passenger. The judgment that the doctrine of imputable negligence did not obtain in favor of the plaintiff on these facts is entirely without influence here, for the reason the facts in proof in this case show an extraordinary and unusual occurrence in the operation of even a freight train. The rationale of the doctrine *res ipsa loquitur* is that in some cases the very nature of the act complained of may, of itself, and through the presumption it carries, supply the requisite proof of negligence. The sound rule on the subject declared in an early case and often approved by the courts is: "Where the thing is shown to be under the management of defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care." *Scott v. London, etc., Dock Co.*, 3 Hurlst. & C. 596; *Dougherty v. Mo. Pac. Ry. Co.*, 9 Mo. App. 478; *Id.*, 81 Mo. 325, 51 Am. Rep. 239; *Trotter v. St. L. & Sub. Ry. Co.*, 122 Mo. App. 405, 99 S. W. 508; *St. Clair v. St. L. & S. F. Ry. Co.*, 122 Mo. App. 519, 99 S. W. 775; *Labatt,*

Master & Servant, § 834; 21 Amer. & Eng. Ency. Law (2d Ed.) 512, 513. It seems that, if there be any group of facts to which the doctrine referred to is pertinent at all, it is to those now under consideration, for there appears in proof the several elements essential to invoke it. The locomotive and train were entirely under the management of the defendant's servants. The injuries and results entailed from the coupling of the cars or collision in proof are such as in the ordinary course of things do not happen if those who are managing the coupling use proper care, for it is certainly true that by exercising proper care in that behalf the coupling of a freight train is ordinarily made without producing a collision sufficient to entail the results developed in the proof now before us. The courts have given judgments to the effect that the doctrine of *res ipsa loquitur* does obtain, and that negligence is imputed to defendant on facts almost identical or at least in no respect materially different from those before the court. *Murphy v. Railway*, 43 Mo. App. 342; *Dougherty v. Railway*, 9 Mo. App. 478; *Id.*, 81 Mo. 325, 51 Am. Rep. 239. See, also, for a statement of the gist of the doctrine, *Bartley v. Met. Street Ry. Co.*, 148 Mo. 124-140-141, 49 S. W. 840.

It is insisted, however, that the court should have directed a verdict for the defendant because of the negligence of plaintiff contributing to his injury, and the fact that he seated himself in the car near or adjacent to the open door is insisted upon as one tending to establish culpable negligence on his part. In considering this question, it is proper to say, first, that under the proof made the fact that plaintiff was seated in that portion of the car employed for express and mail is entirely without influence on the question of contributory negligence for the reason all the proof shows that such portion of the car, instead of being forbidden, was, with the full knowledge and consent of the defendant, occupied by passengers quite as much as the other portions thereof, and in this case the conductor collected plaintiff's fare while he was seated therein. The pertinent facts to be considered, however, with reference to the matter of contributory negligence, assuming the plaintiff to be rightfully in that portion of the car, are that he was seated on the box near the door when he knew the train was divided in parts and the locomotive engaged in switching at the time. Of course, this necessarily involved the knowledge that the coupling of the train would be had before it departed from that city, and that some considerable jerks and jars always attend such couplings. Now the standard by which negligence is measured and ascertained is the conduct of an ordinarily prudent man situated in like circumstances. *Amer. Brew. Ass'n v. Talbot*, 141 Mo. 674-685, 42 S. W. 679, 64 Am. St. Rep. 538; *Loehring v. Westlake Const. Co.*, 118 Mo. App. 163, 180, 94 S. W. 747. And a party may be charged with

negligence if his conduct falls short of that which would be ascribed to an ordinarily prudent man in a like situation. However this may be, the doctrine is firmly established in this state to the effect that, before a court is authorized to declare negligence as a matter of law to the extent of precluding a right of recovery, the dangers attending the situation of the party must be such as to threaten imminent peril; that is, the situation assumed by him must be fraught with peril to his safety and portend calamity apart from and without the intervention of negligence on the part of the actor to threaten the injury. The dangers must be so obvious that an ordinarily prudent man would not assume the situation. *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653, 86 S. W. 593; *Elkenberry v. St. Louis Transit Co.*, 103 Mo. App. 442, 80 S. W. 360; *Wellmeyer v. St. Louis Transit Co.*, 138 Mo. 527, 95 S. W. 925. There is no doubt the place chosen by plaintiff near the door should have appeared to him somewhat unsafe, in view of the fact that he knew the coupling was to be made. The law always presumes correct conduct on the part of all concerned, however, and it was entirely proper for the plaintiff to presume that the coupling would be made without negligence, and therefore unattended with the results entailed by the negligent conduct which afterwards developed. We are unable to say that the place chosen by him for a seat was so obviously dangerous as to preclude his right of recovery, especially when it appears that defendant permitted passengers to occupy this compartment. Of course, had he known or had reasons to believe that defendant's servants were about to make a coupling with gross negligence, he might, by exercising extraordinary care, have chosen a safer position in the car. The law required no more than the exercise of ordinary care for his own safety, however. *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537, 90 Am. Dec. 399. The several cases cited by defendant on this proposition are not in point. They all deal with facts where the party assumed a situation of greater danger than did the plaintiff in this case. The cases of *Wait v. Omaha, etc., Ry. Co.*, 165 Mo. 612, 65 S. W. 1028, and *Erwin v. K. C. & Ft. S., etc., Ry. Co.*, 94 Mo. App. 289, 68 S. W. 88, seem, upon a first reading, to declare negligence as a matter of law against a passenger under circumstances even more favorable to plaintiff than those disclosed in the proof here. Upon an attentive reading, however, it will appear that the judgment of the court in each was really given upon the proposition that the proof fell short of establishing negligence against the defendant. The matter of plaintiff's contributory negligence was only incidentally mentioned. At any rate, it seems their doctrine is not a sound exposition of the law with respect to contributory negligence on the facts in proof. The case was properly referred to the jury.

The defendant requested, and the court refused, its instruction No. 6, as follows: "If you believe from the evidence that the plaintiff voluntarily assumed a position on or against the messenger trunk at or very near the open door of the car in question, and that plaintiff knew said door was open, and that in such position he was liable to be thrown from said door by the coupling of cars to the train, and that there were other seats provided for his use, which he could have occupied with safety, and that by reason of his taking said position he was thrown from said car by the jerk or jar made by the coupling, then he cannot recover in this case, and your verdict must be for the defendant." The court modified the instruction by inserting the words "usual and ordinary" immediately before the word "jerk" in the latter part thereof, thus directing the jury that, even though the plaintiff knew the car door was open and the coupling was to be made, and that in such position he was liable to be thrown from the car, he was still not precluded from a recovery unless he was thrown from the car by a usual and ordinary jerk or jar. It is urged this served to entirely eliminate the question of his contributory negligence on the case made from the consideration of the jury and was error. As modified the instruction directed the jury that they should consider those facts only in case the plaintiff's injury was received as a result of a usual and ordinary jerk; that is, in case there was no negligence on the part of the defendant, for, if the injury was occasioned by a usual and ordinary jerk of a freight train, it was one of the risks assumed by the plaintiff and cannot be attributed to the defendant as resulting from an act of negligence. By this instruction as requested, the defendant no doubt sought to submit to the jury the proposition that, even though the defendant may have been negligent, yet if the plaintiff was guilty of a breach of ordinary care contributing to his injury he could not recover. This is a sound proposition of law, but the instruction did not incorporate it. To have given the instruction first requested would have been equivalent to directing the jury that the acts therein enumerated constituted negligence as a matter of law, and this, too, notwithstanding a reasonably prudent man, exercising ordinary care for his safety, might have done likewise under the same circumstances. Plaintiff is to be held to the measure of care only which would be exercised by an ordinarily prudent person in a like situation. The instruction wholly failed to refer the jury to the conduct of a reasonably prudent man and the exercise of ordinary care for his own safety as the standard of care and measure of duty by which plaintiff's neglect or care in that behalf should be ascertained. It was therefore properly refused. The instruction, as requested, having failed to properly declare the law with respect to contributory negligence,

the court did not err in modifying it so as to destroy its purpose to preclude a recovery unless in the event there was no negligence on the part of defendant. In such case, a recovery would have been precluded because of the failure to establish negligence on the part of defendant rather than for the reason that negligence should be attributed to the plaintiff. The modification inserted by the court was to the end that the instruction should not amount to a direction precluding plaintiff's recovery unless the injury resulted from the usual and ordinary jerk of the train, in which case there was, of course, no negligence on the part of the defendant. The modification was proper under the circumstances stated.

We have given attention to the other questions presented in the briefs and find them to be without sufficient merit to justify prolonging the opinion. They will therefore not be discussed.

The judgment is affirmed.
It is so ordered.

BLAND, P. J., and GOODE, J., concur.

KELLOGG v. CITY OF KIRKSVILLE.

(Kansas City Court of Appeals. Missouri.
June 29, 1908. Rehearing Denied
July 15, 1908.)

1. PLEADING—ELECTION BETWEEN CAUSES OF ACTION—RIPARIAN RIGHTS—POLLUTION OF STREAM.

In an action for damages arising from the pollution of a stream, a count in the petition based the action on the wrongful deposit of filth and sewage on plaintiff's land, alleging that, by reason thereof, the rental value of plaintiff's land was reduced, his pasturage destroyed, and his family made sick, and their health injured, and the market value of the lands diminished. *Held* that, since all damages arising from a single wrong make but one cause of action, the count did not contain more than one cause of action in asking damages for the decrease in the value of the land, a decrease in its rental value, and the impairment of the health of plaintiff's family. Hence a motion to require plaintiff to elect on which cause he would rely was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1199.]

2. MUNICIPAL CORPORATIONS—SEWAGE—POLLUTION OF STREAM—DAMAGES—PERMANENT INJURY TO PROPERTY.

Where a city collects its sewage, and discharges it in a volume into a stream, whereby a riparian property owner is injured, he may recover for a permanent injury to the property, and depreciation in the value of the land caused by the nuisance is a proper element of the damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1787.]

3. TRIAL—INSTRUCTIONS—CONFORMITY TO ISSUE.

A petition in an action for damages for pollution of a stream counted on one wrong, the collection and precipitation of sewage and particularized the injurious consequences to plaintiff of that wrong. An instruction was given for plaintiff on the issue of damages arising from

surface drainage. *Held*, that the instruction was erroneous, as outside the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by Warren J. Kellogg against the city of Kirksville for damages for the pollution of a stream. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

H. F. Millan, for appellant. Will A. Rothwell, James E. Rieger, and Alexander Donneghy, for respondent.

JOHNSON, J. Action against Kirksville, a city of the third class, to recover damages for maintaining a public sewer from which sewage was emptied into a creek which runs through the farm of plaintiff. The suit was begun September 12, 1905, and the amended petition on which the action was tried is in two counts: In the first the cause alleged is the maintenance of the nuisance from October, 1899, to August, 1902. In the second the cause is the continuation of the nuisance from November, 1902, to the time of the beginning of this suit. We quote as follows from the second count: "That through said lands there flows a natural stream of water in an easterly direction, which said stream furnished a plentiful supply of water for man and beast, which was before the injury hereinafter complained of pure and wholesome, and added greatly to the value of said land, and its comfortable use and enjoyment and occupancy, but that the defendant city had constructed and now permanently maintains a sewer which collected and carried the sewage and filthy matter of said city, and the inhabitants thereof who had been permitted by said city to connect privies and water-closets with said sewer, and emptied and discharged its said foul and filthy sewage and contents into said stream at a point on the west near plaintiff's said lands, and by that means so polluted the water of said stream as it came down on, and passed over plaintiff's said lands, that it was foul, offensive, unwholesome, and unfit for man or beast, and, in its turn, polluted the atmosphere so that the same was thereby rendered offensive and injurious to the health and comfort of the occupants of said lands, and that the defendant city suffered and permitted said sewer to so remain and continuously discharge its foul and filthy contents as aforesaid from the — day of November, 1902, until the present time; that, by reason thereof, the rental value of plaintiff's lands was greatly reduced in value, his pasturage destroyed, himself and family made sick, and their health injured, and the market value of said lands diminished, thereby damaging this plaintiff in the sum of \$4,500." Defendant attacked this count by motion "that plaintiff be required to elect upon which cause of action stated in the second

count of his petition he will proceed to trial. . . . because said count of said petition is founded upon or attempts to charge a cause of action for the diminution of the market value of plaintiff's land by reason of the matters alleged in said count, and also another and different cause of action for the decrease or diminution in the rental value of plaintiff's lands, and also another cause of action for sickness caused in plaintiff's family by reason of the matters complained of in said petition." The motion was overruled, and one of the errors assigned by defendant, the losing party in the trial court and the appellant here, is that the motion should have been sustained. The ruling of the trial court was proper. There is but one cause of action pleaded in the second count—i. e., the wrongful deposit of filth and sewage on plaintiff's land—from which resulted the different injuries alleged. The rule is well settled that all damages arising from a single wrong make but one cause of action. *Bliss on Code Pleadings*, § 118; *Connoble v. Clark*, 38 Mo. App., loc. cit. 482; *Murphy v. Transit Co.*, 96 Mo. App. 277, 70 S. W. 159; *Boyd v. Transit Co.*, 108 Mo. App. 303, 83 S. W. 287.

The evidence introduced by plaintiff tends to establish the existence of the following state of facts: Plaintiff is the owner of a farm of 70 acres lying east of the city of Kirksville, 8 acres of which are within the city limits. The farm is crossed by a natural waterway called "Steer creek," in which surface water flows except in times of drouth. In 1899 the city extended one of its sewers, and caused it to discharge sewage into the creek, but at some distance above plaintiff's land. In 1902 the city further extended the sewer, thereby bringing the point of discharge much nearer plaintiff's land. A bed of noisome muck formed in the creek in its course over the farm, which gave off an annoying and unwholesome stench, and polluted the water so that it became unfitted for plaintiff's live stock to drink. Witnesses say this deposit is of such a nature that it would remain indefinitely, even should the discharge from the sewer be discontinued, and would continue to be offensive and unhealthful. The dwelling house on the farm which is occupied by plaintiff and his family is not far from the creek. No actual damage under the first count is shown by the evidence, nor does it appear that plaintiff suffered any loss of rentals on account of the nuisance. The only damage disclosed was depreciation in the market value of the land caused by the results of the last extension of the sewer, which, as stated, is the foundation of the cause of action pleaded in the second count. Defendant admits that it built and extended the sewer and caused it to empty sewage into the creek, and, in effect, admits that the matter discharged from the sewers constitutes a nuisance on plaintiff's land. The principal issue of fact presented by the evi-

dence of defendant relates to the extent and permanency of the injury. In substance, witnesses for defendant say that the injury is but temporary, and would cease with the cessation of the discharge into the creek from the sewer. At the request of plaintiff, the court gave the jury the following instructions:

"The court instructs the jury that, under the pleadings and the evidence in this case, the verdict of the jury must be for the plaintiff under the first count of the petition in this case in any sum not to exceed \$1.

"The court instructs the jury that if you find and believe from the evidence in this case that the plaintiff was the owner of the lands described in the petition and that through said lands there flowed a natural stream of water, which said stream furnished a supply of pure or wholesome water for stock and other purposes, and that the defendant city constructed or maintained a sewer which discharged its contents in the said stream, and by that means polluted the water of said stream as it passed over said lands, and permanently changed the character of said stream by leaving deposits therein, thereby rendering the same unfit for use by man or beast, and polluted the atmosphere so that the same was thereby rendered offensive or injurious to the health or comfort of the occupants of said land from the ——— day of November, 1902, until the 12th day of September, 1905, and that, by reason of all of which, the said lands were permanently reduced in value, then you will find for the plaintiff on the second count of the petition in such sum as you may believe from the evidence will reasonably compensate him for the injury, if any is shown by the evidence, not to exceed \$4,500 in all; but, in considering the elements composing the damages, if any, to which plaintiff may be entitled, you will confine yourselves to the damages, if any, to the market value of the plaintiff's real estate immediately before the failure of the filter in 1902 to operate, and immediately after it ceased to operate, and you can allow him for sickness or injury to the health of his family only nominal damages, if any, but sickness or injury to the health of his family may be considered by you in connection with the charge of permanent damage to the real estate.

"The court instructs the jury that, while the plaintiff cannot recover for any damage caused by the natural surface drainage, yet you are further instructed that the defendant city has no right to collect the surface drainage in volume, and cast the same on plaintiff's land. Nor has the city any right to carry by means of its sewer surface drainage near the plaintiff's land, and cast the said surface drainage upon the plaintiff's land, which surface drainage would not, but for the sewer, reach plaintiff's lands.

"The court instructs the jury that the second count of plaintiff's petition claims

damages by reason of the diminution of the rental value of his land, the destruction of his pasturage, injury to the health of himself and family, and reduction in the value of his land by reason of the flow of sewage from the Marion street sewer through his land from the — day of November, 1902, to the 12th day of September, 1905.

"On this count of the petition, you are instructed that there is no evidence before you under which you can find for the plaintiff by reason of any reduction in rental value of his land, nor by reason of any destruction of pasturage nor by reason of any injury to the health of plaintiff or his family, but may allow nominal damages for the last item, if you find for the plaintiff on the second count of the petition."

Defendant contends that the court should not have submitted to the jury the issue of whether the injury to plaintiff's land was permanent in character, and should have declared as a matter of law that it was temporary. Should we sanction this proposition, it would follow that further error was committed in instructing the jury that depreciation in the value of the land caused by the nuisance was a proper element of damage. Defendant finds support for its views in the case of *Foncannon v. Kirksville*, 88 Mo. App. 279, where, with facts before us very similar to those under consideration, we said: "The most important consideration in the case is the measure of damages adopted by the court in the admission of evidence and instructions to the jury. The court instructed the jury, if they found for the plaintiff, the measure of damages was the difference, if any, in the market value of the land and improvements before the sewer was extended or built, and the market value since. 'In an action for negligent injury to real estate, the rule of damages generally adopted is to allow the plaintiff the difference between the market value of the land immediately before the injury occurred and the like value immediately after the injury is complete.' But it is obvious that this rule has no application to such nuisances as may be removed the day after the verdict or for a continuance of which a second or third action may be maintained, or which may be abated at the instance of the injured party, by the order of a competent court. *Brown v. Railroad*, 80 Mo. 457; *Pinney v. Berry*, 61 Mo. 359. The

nuisance here complained of is not a permanent one, and may be removed, and is subject to abatement by the order of a competent court. Therefore the instruction of the court on the measure of damages, and the admission of evidence supporting the theory of the case contained therein, was wrong, and in conflict with the authorities last cited." As we understand the opinion of the Supreme Court in the later case of *Smith v. Sedalla*, 182 Mo. 1, 81 S. W. 165, a different view of the law is entertained by that tribunal. Speaking through Valliant, J., the court say: "If the defendant city has collected its sewage and discharged it in a volume into the creek to the injury of the plaintiff, he is entitled to compensation for the depreciation caused thereby in the market value of his land if that is shown, for the destruction of its comfortable use and occupation if that is shown, and for actual loss of rents if that is shown." And, as we are bound by that decision, we must hold that the learned trial judge correctly instructed the jury in the respects under consideration.

But we find prejudicial error in the giving of the third instruction. The evidence of plaintiff tends to show that, in addition to the discharge of sewage where it would injure plaintiff, defendant collected surface water and discharged it from the mouth of the sewer, thereby injuring the land of plaintiff. The petition complains of but one wrong—I. e., the collection and precipitation of sewage—and it particularizes the injurious consequences to plaintiff of that wrong. It is silent on the subject of surface water, and therefore defendant was not notified to prepare to meet the issue submitted in the instruction under review. No rule is better settled than that which prohibits an enlargement in the instructions of the scope of the cause pleaded. Where the damages resulting from the wrong alleged are specially averred, a recovery of other damages will not be allowed, and where, as here, the instructions include such other damages, they enlarge the scope of the cause of action.

For this error, the judgment is reversed and the cause remanded.

ELLISON, J., concurs. BROADBUSH, P. J., concurs solely on authority of *Smith v. Sedalla*, supra.

RICE v. STATE.

Court of Criminal Appeals of Texas. Nov. 6, 1907. On Rehearing, May 13, 1908.)

1. JURY—CRIMINAL LAW—CHECKING VENIRE—ACTS OF STATE ATTORNEY.

That an attorney for the state assisted the clerk in checking a venire list with the list from which it was drawn is not cause for quashing the venire, on the theory that the state's attorney was apprised, before accused's counsel, as to who constituted the venire, since after the venire list was drawn up it was subject to inspection by any one the sheriff cared to show it to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 284, 543.]

2. CRIMINAL LAW—HARMLESS ERROR—FAILURE TO SERVE JURORS.

The state's peremptory challenge of jurors rendered any irregularity in their summoning harmless.

3. JURY—CRIMINAL LAW—SUMMONING JURORS—DILIGENCE.

It was not error to refuse to quash a venire in a murder case on the ground that the sheriff's return failed to show diligence in summoning particular jurors drawn, where his amended return shows that such jurors, excepting one, were not found after diligent search, and that that juror was served and was in attendance, his name being omitted from the return by mistake, and where the state subsequently challenged such juror, and the sheriff and his deputies testified to the details of efforts made to find the other jurors, that some of the jurors were out of the state, that none were omitted purposely, and that the sheriff and his deputies had carried a list of the jurors throughout the county, inquiring for them where they were supposed to live.

4. CRIMINAL LAW—HARMLESS ERROR—EVIDENCE.

In a murder trial, any error in allowing the state to show by an attorney that it was customary in the county to show copies of a venire to counsel for accused before its service and return, and that the sheriff's office had extended such favor in other cases to such attorney, was harmless, where the testimony was given in the jury's absence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3137.]

5. JURY—MURDER CASES—DRAWING VENIRE—ORDER.

In a murder trial, it was not error to allow the clerk to explain why the venire was drawn from the list of jurors for the week, instead of from the special venire list, and why the venire was drawn before that in other pending murder cases set for trial before the case at bar, since accused had no right to have his venire drawn in any particular order as to the other cases, and the clerk was required, in drawing the venire, to go to the special venire on exhausting the regular venire.

6. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

It was not prejudicial error to overrule accused's challenge to a juror for cause, where it does not appear that an objectionable juror was forced upon accused through his being compelled to exhaust a peremptory challenge on the challenged juror.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3117.]

7. JURY—CRIMINAL LAW—JUROR'S QUALIFICATIONS.

That a juror answered affirmatively questions whether he would require accused to show that he did not kill decedent, etc., did not disqualify him; it appearing that the answers were given under a misconception of accused's

counsel's questions, and the juror having stated that he would give accused the benefit of reasonable doubt, when the court explained the law to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 437.]

8. CRIMINAL LAW—CHANGE OF VENUE—FILING PAPERS.

The clerk of the court to which the venue of a case was changed, having treated the indictment and transcript as filed, though he did not so mark them, was properly directed to place his file mark thereon nunc pro tunc, after it was discovered after the reading of the indictment that he had failed to mark them; the law regarding the papers as filed the day the clerk received them.

9. HOMICIDE—UXORICIDE—EVIDENCE—ACCUSED'S Demeanor DURING DECEDENT'S SUFFERING.

The state could show that one accused of uxoricide by using poison sat by while his wife suffered before her death with complacency and indifference, without inquiring as to her complaint or the extent of her illness, and manifesting no concern as to the outcome of her sickness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 351, 356.]

10. CRIMINAL LAW—EVIDENCE—EXPERT TESTIMONY—STRYCHNINE POISONING.

A physician was qualified to testify whether decedent died of strychnine poisoning, where he had practiced medicine for about 20 years and was a graduate of a regular school of medicine, though he had had no practical experience with strychnine poisoning, and the only knowledge he had of the subject was acquired from reading text-books and medical works and from studying medicine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1067.]

11. HOMICIDE—MURDER—EVIDENCE.

One accused of murdering his wife by placing strychnine in a fountain syringe used by her, having shown by an expert that no traces of strychnine were found in the syringe and that if any had been placed there traces would remain, the state could show that the strychnine could have been placed in the nozzle and have been forced out on the use of the syringe without leaving a trace.

12. CRIMINAL LAW—EVIDENCE—MATTERS NOT SUBJECT TO EXPERT TESTIMONY.

How a syringe is ordinarily used by one accustomed to its use is not a proper subject for expert testimony.

13. HOMICIDE—MURDER—EVIDENCE.

The state could show that one accused of uxoricide had had improper relations with another woman 18 months or 2 years before the homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 326-328.]

14. SAME.

The state could show that one accused of uxoricide induced witness to make an appointment for him to meet a particular woman a few days after the homicide, where there was testimony that accused had had improper relations with such woman before and after the homicide, that he had attempted to induce her to send poison to his wife, that they had agreed to live together after his wife's death, and that he induced such woman to leave the country after the indictment was found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 326-328.]

15. SAME.

One convicted of murder cannot complain because his witness was permitted to testify on cross-examination that decedent's brother brought witness to the county of prosecution, where she was placed in jail, since that fact tended to

discredit her testimony tending to show a motive for the homicide, thus assisting accused's case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 326-328.]

16. CRIMINAL LAW—EVIDENCE—OPINIONS—SANITY—NONPROFESSIONAL WITNESSES.

In a murder trial, nonprofessional witnesses for the state were properly permitted to testify concerning decedent's sanity, where defendant offered testimony tending to show that decedent was insane.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1045, 1046.]

17. SAME—INSTRUCTIONS COVERED BY THOSE GIVEN—REFUSAL PROPER.

Instructions covered by those given are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

18. HOMICIDE—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to show murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 518-538.]

On Rehearing.

19. SAME—UXORICIDE—WIFE'S DYING DECLARATIONS.

Under Code Cr. Proc. art. 775, prohibiting one spouse from testifying against the other, except in prosecutions for an offense by one against the other, in a trial for uxoricide by poisoning, the state could show declarations by decedent before her death incriminating accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 447.]

20. SAME.

On a trial for uxoricide by placing strychnine in a syringe, the state could show that shortly before decedent's death she said to accused: "Go away, Ward! go away, Ward! You know you did it. No longer than this morning you asked me if I used the syringe to-day"—and that accused made no reply; the declaration being one of fact, and not one of opinion, which would be inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 451-456.]

21. CRIMINAL LAW—EVIDENCE—DECLARATIONS.

On a trial for uxoricide by poisoning, statements made by decedent in accused's absence were admissible against accused, especially where the same statements were substantially made several times by decedent in accused's presence and were not denied by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 937-949.]

22. SAME—NECESSITY FOR LIMITING.

When extraneous matter is admitted in evidence for a specific purpose, incidental to, but not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise an undue or improper influence upon the jury as to the main issue prejudicial to the rights of the party, the court must so limit the testimony in the instructions to avoid such results; but a court need not limit the purpose for which testimony has been adduced, when the admitted testimony proves or tends to prove the main fact, or when it can only be used for a purpose for which it was introduced—the rule applying to both impeaching and corroborative evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1872-1876.]

Davidson, P. J., dissenting.

Appeal from District Court, Hill County; W. C. Wear, Judge.

D. R. Rice was convicted of murder in the first degree, and he appeals. Affirmed.

See 94 S. W. 1024.

Odell & Johnson, Ramsey & Odell, and Hughes & Cummings, for appellant. F. J. McCord, Asst. Atty. Gen., Cleveland & Haynes, W. Poindexter, W. E. Spell, and Morrow & Smithdeal, for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at lifetime imprisonment in the penitentiary. The former appeal of this case will be found in 94 S. W. 1024, 16 Tex. Ct. Rep. 396.

Appellant's bill of exceptions No. 1 complains of error of the court in refusing to quash the venire. The facts in said bill are: A venire was drawn according to the statute of this state. There were seven jury weeks of the term of court at which this venire was drawn, and 30 men were drawn for each week, aggregating 210 men. There were three special venire cases on the docket—this one, State v. Harris, and State v. Watson. On the 9th of January the court made an order requiring a special venire in each case, and set the day for the trial of each. It had been previously agreed that the Rice case should be set for the 4th of February, but the court made no order on the docket to that effect; but on the 9th day of January he did make the order and set the other cases for the 28th and 30th of January, respectively. The district clerk, in drawing the venire, drew that for the Rice case first, and drew it from 210 names on the lists of regular jurors. After the venire in this case was drawn by the clerk, the writ was made out and signed by him; one of the attorneys for the state assisting the clerk in checking off the list with the list of jurors from which it was drawn. Of this appellant seriously complains; but we do not think there was any error in this. There is no allegation of fraud, nor insistence that anything was done irregularly; but the complaint seems to be based purely upon the fact that this apprised the state's attorney of who constituted the venire before appellant's counsel knew same. After the venire list was drawn up, as indicated above, it was subject to the inspection at the instance of any one to whom the sheriff might see fit to show it, and the fact that one of the state's counsel assisted in checking the jurors would not be a ground for quashing the venire.

The motion complains, further, of the failure of the court to serve L. J. Garner and Bill Tatum, Sr. Both of these jurors were subsequently brought into the court and tendered to the defendant, and were peremptorily challenged by the state. The state's challenge of the jurors certainly rendered any irregularity in their service harmless. See Miller v. State (Tex. Cr. App.) 83 S. W. 393.

The motion complains, further, of the fail-

ure of the court to quash same because the return of the sheriff fails to show diligence with reference to the jurors Sanders, Roach, Sheets, Blunt, Cruse, Taylor, Bailey, Henderson, Helton, Bankston, and Chapman. The sheriff's amended return shows that said jurors were not found in Hill county after diligent search, except the juror Sheets, who had in fact been served and was in attendance upon the court, and whose name had been omitted from the return by mistake. The bill shows that the state subsequently challenged Sheets peremptorily. The sheriff and his deputies testified before the court, giving the details of the efforts made to find the other jurors. Their testimony shows that some of these jurors were out of the state; that none were omitted purposely; that the sheriff and his deputies had carried a list of the jurors throughout the county, making inquiries for them in the neighborhood where they were supposed to live. After a very careful reading of the matter above complained of, we do not think there was any error in the ruling of the court. For a discussion of similar matters, see *Spencer v. State* (Tex. Cr. App.) 90 S. W. 639, and *Starr v. State* (Tex. Cr. App.) 86 S. W. 1023.

In bills Nos. 2 and 3 appellant complains of the ruling of the court in the following: W. C. Morrow, an attorney practicing at the bar, was asked "if it was not the custom and habit of the sheriff's office in Hill county, Texas, to prepare copies of venire and show them to counsel for the defendant before the said venire had been served and returned by the sheriff, and as to whether the sheriff's office had extended such favors in other cases to the said W. C. Morrow." To which question he answered that "such was the custom, and such favors had frequently been extended to him in other cases." Appellant objects to the testimony, on the ground that any custom that might exist which was unknown to the defendant and his counsel could in no sense be binding upon him. The bill shows that this question and answer did not occur in the presence of the jury. We do not think that the testimony threw any light on the legal question involved in appellant's bill, but it certainly was harmless in any view.

R. E. Sparkman, clerk of the court, after being sworn, was asked to explain why the venire in this case was drawn from the list of jurors for the week, instead of from the special venire list, and why said venire was drawn in this case before the venire was drawn in the case of *State v. Hence Watson*, which was set for the 28th of January, and the case of *State v. Leggett*, which was set for the 30th day of January, 1907. The court explained that at the previous term of the court it made an order that this cause be set for trial on the 4th day of February. Appellant objected to said statement on the ground that, if an order was made, to have any force and legal effect it must have been in writing and of record, and that the record

would be the best evidence, and on the further ground that there was no order of record, and that a verbal order could not have any legal force, and that, if said order had been made, would not authorize the clerk to draw the venire in this case from the list of jurors for the week, instead of from the list of special venire, as it would have been drawn if the clerk had followed the law with reference to drawing venires. The bill is also approved with the statement that this testimony was introduced in the absence of the jury. We know of no law that guarantees to this appellant the right to have his venire drawn first or last, or at any particular time, when there are two other murder cases demanding a venire. The law says that, when the clerk in drawing the venire exhausts the regular venire, then he must go to the special venire provided by law. There certainly is no error in the ruling of the court.

Bill of exceptions No. 4 shows that E. Sheets, one of the jurors mentioned above, was peremptorily challenged by the state. The defendant previous to the peremptory challenge complained of the irregularity of his summons. This certainly cures any possible error in the summoning of said Sheets.

Bills of exception Nos. 8, 10, and 12 complain of the following matters: "R. M. Hood, in reference to his qualifications to serve as a juror, answered as follows appellant's questions: 'Q. Would you require the doubt in your mind to be very strong before you would acquit, or would you acquit him if you had a reasonable doubt? A. I would have to have a mighty reasonable doubt. Q. Would you require defendant to prove that he did not kill her? A. Yes, sir. Q. I mean to say, that after the state has rested, if the state had succeeded in conveying an impression to your mind that the defendant is guilty, then under all the explanation that I have given you, would you require the defendant to establish in your mind that he is innocent, or would you only require of him to introduce evidence that would raise a reasonable doubt in your mind as to whether he was or not? A. I would require him to show evidence that he was not guilty.' That the explanations referred to in the preceding questions were made by the court to the juror before said questions were propounded and answers made, which explanation was 'that the defendant was presumed to be innocent until his guilt was established beyond a reasonable doubt, and that the defendant was in no event required to prove his innocence; but, if the evidence should raise a reasonable doubt in the juror's mind as to whether the defendant was guilty or innocent, he would give the defendant the benefit of the doubt and acquit him.' Thereafter the following questions were asked by appellant: 'And if the state had satisfied you that he was guilty, bearing in mind all the explanations stated, that the defendant is not required to prove his innocence

after the state has proved he was guilty, you would never turn the defendant a loose until he had proved himself innocent? A. Yes, sir. Q. The mere fact that he would raise a reasonable doubt in your mind as to whether he was guilty or not, you would require more of him than that to prove that he is innocent? A. Yes, sir.' Thereupon the court propounded the following questions to said juror Hood: 'Q. The law is, if you have a reasonable doubt as to his guilt, you would turn him a loose. A. Yes, sir. Q. Would that instruction, if you got in the jury box and hear all the evidence that is admitted before you, take the charge of the court, and give the defendant a fair and impartial trial, and give him the benefit of the doubt all the way through? A. Yes, sir.' Thereupon the defendant challenged peremptorily said juror." The defendant exhausted his peremptory challenges before the jury was selected. The juror Beckham, being the last juror selected, was taken after appellant had exhausted his challenges. The court states, in explanation, that appellant excepted to the juror Beckham without objection, and did not call the court's attention to any objection to him. This being true, we do not think there is any error in the ruling of the court, but hold that the juror was qualified. The answers given to appellant's counsel clearly appear to have been a misconception on the part of the juror of appellant's question; but, when the law was explained by the court, the juror answered that he would give the defendant the benefit of the reasonable doubt. See *Johnson v. State* (Tex. Cr. App.) 94 S. W. 224. Furthermore, no disqualified juror was permitted to serve on the jury after appellant exhausted his challenge. See *Green v. State* (Tex. Cr. App.) 98 S. W. 1062; *Mays v. State* (Tex. Cr. App.) 96 S. W. 333, and *Woodward v. State*, 97 S. W. 501. It has frequently been held by this court that defendant must show that an objectionable juror was forced upon him. See *Loggins v. State*, 12 Tex. App. 73, *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125, and *Green v. State*, 98 S. W. 1061. We have carefully reviewed all of appellant's assignments with reference to the organization and drawing of the venire in this case, and must say that we do not think any of his complaints are well founded, but hold that this venire was drawn and the jury was organized in strict conformity with the law and decisions of this court.

The twenty-fifth to thirtieth grounds, inclusive, in the motion for a new trial, relate to the action of the court in ordering and allowing the clerk of the district court of Hill county to place his file mark nunc pro tunc upon the indictment and transcript, when, after the indictment was read to the jury, it was discovered that the clerk had not placed his file mark upon same. Thereupon the state filed a motion setting up the

fact that the indictment and transcript from the district court of Johnson county, from which county the venue was changed to Hill county, had been received by the clerk of the district court of Hill county on December 5th, but that the clerk neglected to put his file mark on them. In support of the motion the clerk testified that the same was received in his court on the 5th of December, and the county attorney instructed him that there was no law authorizing him to file same. Mason Cleveland, county attorney of Johnson county, testified that the indictment read to the jury was the indictment originally returned by the grand jury of Johnson county. Thereupon the court permitted the file mark of the clerk to be placed upon it. Article 622, Code Cr. Proc., provides that, when an order for the change of venue is made, the clerk where the prosecution is pending shall make out a transcript of the orders made in the cause and transmit the same, together with the original papers, to the clerk of the court to which the venue has been changed. We find no provision requiring the clerk of the court to which venue is changed to place his file mark upon the papers, but clearly it was proper to do so at the time of their receipt; but in any event the law would regard the indictment and transcript filed the day the clerk received the same in his custody from the clerk of the district court of Johnson county. The record shows that the district clerk of Hill county treated the indictment and transcript as filed papers, and docketed the papers and issued process as though they had been filed, and the only thing he neglected is the simple duty of placing his file mark on the papers.

Bills of exception Nos. 15, 16, 17, and 18 complain of the introduction of the testimony of various witnesses who testified to declarations of the deceased, and conduct and acts of deceased, within an hour after the poison had been, through appellant's instrumentality, injected into her bowels. For a statement of the evidence on this question, see the former appeal of this case in 94 S. W. 1024, 16 Tex. Ct. Rep. 396; also see said statement, in substance, for the evidence adduced upon the trial of this case. All the objections urged to this testimony were passed upon by this court in the previous opinion, and we there held that the same come within the clear rules of law and were entirely admissible, either as *res gestæ*, dying declarations, or accusations against appellant in his presence. For a discussion of the questions, see said opinion. We do not deem it necessary to again review the questions, but adhere to the former decision of this court on all these questions; and for further authorities on the questions, in addition to the opinion above cited, see *Holden v. State*, 18 Tex. App. 91, *Browning v. State*, 26 Tex. App. 432, 9 S. W. 770, *Clement v. State*, 22 Tex. App. 23, 2 S. W. 379, *Jennings v. State*, 42

Tex. Cr. R. 78, 57 S. W. 642, and *Humphrey v. State* (Tex. Cr. App.) 83 S. W. 187. In the case of *Tooney v. State*, 8 Tex. App. 458, the record shows deceased was found lying at the back of a saloon apparently drunk. One of his pockets was turned wrong side out, and when found the deceased said that "he was not drunk, but had been drugged and dragged out there." We held that said testimony was admissible as *res gestæ*. In the case of *Lewis v. State*, 29 Tex. App. 204, 15 S. W. 642, 25 Am. St. Rep. 720. It was proved that one hour and a half after the deceased had been wounded she stated that "Joe Lewis had come up behind her while she was at the wash tub, ran his hand under her arm, pulled her back, and cut her nearly in two." We held that this statement was admissible as part of the *res gestæ*. As to what constitutes *res gestæ* and under what circumstance *res gestæ* statements and dying declarations are admissible, we cite the following collation of authorities: *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. 892, 37 Am. St. Rep. 794; *Powers v. State*, 23 Tex. App. 66, 5 S. W. 153; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *McKinney v. State*, 40 Tex. Cr. R. 372, 50 S. W. 708; *Freeman v. State*, 40 Tex. Cr. R. 545, 51 S. W. 230, 46 S. W. 641.

Bill of exceptions No. 19 complains of the following: While Mrs. James Pickett, the state's witness, was on the stand, she was asked the following question: "Q. State whether he (meaning the defendant) was composed or quiet, or whether he was restless, getting up and down. State how that was. A. Very restless." Appellant objected to this question and answer, on the ground that it was a matter of temperament, and was immaterial and irrelevant and inadmissible for any purpose, and called for a conclusion of the witness and opinion as to an immaterial matter; that same was calculated to inflame the minds of the jury against appellant. This bill is approved with the explanation that the witness was well acquainted with the defendant; that at the time he was out and in, first one way and then the other, and seemed very restless, unusually restless. Bill of exceptions No. 20 complains that the state asked the witness Bowman the following question: "What was his (meaning the defendant's) manner as you observed on that occasion (meaning the last illness of his wife, shortly before she died), compared with his manner at other times, whether anything usual or unusual? A. Well, I thought it was very unusual. Q. Describe it to the jury. A. Only in this way: He sat there and had nothing to say, and nothing to do; didn't ask a question as to how she felt or what was the matter." This bill is approved with the statement that the witness further testified that deceased was suffering intensely, and everybody was at work trying to relieve her in some way, and the defend-

ant sat right there and did not say a word to her—how she felt or what was the matter; that the defendant did not do a thing or say a word to her, and he thought that was remarkable, all of which statements made in this explanation were made without objection. Suppose the bills before us should have shown that at the time of the last illness of appellant's wife he (appellant) had been wrought up to an intense frenzy or point of grief and sorrow over the condition of his wife, and this court should hold that said testimony could not be approved as a circumstance to indicate the lack of probable truth in the state's indictment, wherein it is alleged that appellant poisoned his wife. Certainly appellant would have just ground for believing this would be both a cruel and inaccurate ruling of this court. Then surely the converse of the proposition is equally true from the state's standpoint. The record shows before us that deceased was suffering the agonies of death from strychnine poison. These witnesses testified in substance that he (appellant) sat by with the utmost complacency and indifference, not even inquiring as to her complaint or the extent of her illness, and manifested no concern as to the outcome of her sickness. This is a strong circumstance to show the cruel and reckless disregard that appellant had for the life and safety of his wife. The testimony is clearly admissible.

Bill of exceptions No. 24 complains that Dr. James Pickett was permitted to testify that deceased came to her death from strychnine poison. Appellant objected to his testimony on the ground that he was not qualified as an expert in such a matter and could not therefore give testimony as to his opinion in such matters, and was not qualified according to his own statement of his knowledge and experience with reference to strychnine poison cases to give an opinion upon such matters. The witness admitted that he had been practicing medicine for a period of about 20 years, was a graduate of a regular school of medicine, but never had a case of strychnine poison and never treated one; never had had any practical experience with a case of strychnine in the course of his practice; that the only knowledge he had of strychnine poison, the symptoms and effect upon the human system, was acquired from reading textbooks and medical works on the question and what he had learned at school while a student of medicine. This testimony was admissible, and so held by this court on the previous opinion in this case.

Bill of exceptions No. 23 presents the following: While Dr. E. B. Osborne was on the witness stand, in behalf of the state, over appellant's objection, after the witness had been shown the fountain syringe, consisting of a rubber bag with a small tube of rubber, some four or five feet long, extending from the lower portion of said bag, and a gutta percha or rubber nozzle was shown to have a small

opening or barrel which it was shown would contain from five to ten grains of strychnine in its ordinary crystal or pulverized form, the state asked the witness the following question: "Q. Supposing a tube is used as I have described, with a nozzle as I have described, the strychnine just above the nozzle in the end of the tube, the clamp above that rendering the crystals in the bottom of the tube entirely away from any water or anything that would dissolve, what, in your opinion would be the effect, if the syringe was then filled with warm water and an enema taken, as to whether or not there would be any trace of the strychnine crystals left in the tube? A. I believe that the strychnine would be washed out of the tube immediately, for the reason that whenever you clamp that syringe, that tube above, you are bound to get some air in there, the strychnine would never go in the solution, but the air would blow it out as powder." Appellant objected to the question, because same was leading; because there was no semblance of evidence that the strychnine was so placed, or that any ordinary person would have known to have placed it there, and it is out of the ordinary to place said poison in that way; that there is no evidence that it would be placed or could have been placed in such a way, or that the average man would have thought of placing the strychnine in the tube in any such way or manner, and that it calls for the judgment and conclusion and opinion of the witness on remote, speculative, and inconceivable evidence; and that said testimony is prejudicial to the minds of the jury. The court approves the bill with this statement: "The defendant on cross-examination elicited from this witness statements to the effect that he made an examination of the syringe used by the deceased and found no traces of strychnine in same, and that if strychnine had been in the same it was his opinion that traces thereof would have been left. The witness also testified to several experiments he made subsequently with a view of determining whether strychnine placed in water in a syringe would leave traces of the strychnine in the syringe when the water passed out, and had found traces remaining. Witness further ventured the opinion that, if the deceased died from strychnine poison, she did not get the same through the syringe. Thereupon the state propounded the above, and foregoing answers from the witness, which the court thought entirely proper under the circumstances." We hold it was clearly admissible. The state was relying upon the fact that appellant poisoned his wife by placing strychnine in a syringe that she was accustomed to using. Now the defense had proved by this doctor that he found no strychnine poison remaining in the syringe, and that if any had been placed there some of it would still remain, and certainly it was admissible for the state to show that it could have been in there under a certain

condition and forced out of the syringe, as stated above, without leaving traces of strychnine.

Bill of exceptions No. 29 complains of the refusal of the court to permit Dr. Osborne to testify as to how a syringe of this kind was ordinarily used by one accustomed to its use. The state objected to this on the ground that it was not a question for an expert to give testimony about. We think this testimony was not a matter that an expert could testify about. The record shows it was an ordinary syringe, and there is nothing here to show how the deceased used it, and it is only circumstantially established as to how the poison got in the syringe; hence there is no error in the ruling of the court.

Bill of exceptions No. 30 shows that, while the witness Ollie Shanklin was on the stand for the state, it appeared that about 18 months or 2 years before the death of the deceased defendant had improper relations with her, the said Ollie Shanklin. Appellant objected to this testimony on the ground that the relations ceased a year and a half before the death of appellant's wife, therefore too remote to furnish any ground, motive, or suggestion for the defendant to murder his wife; that the only effect of the evidence would be to show that he had maintained casual passing illicit relations and acts with the witness, and could throw no light upon any issue in the case. This bill is approved with this explanation: "That it was material to show ill feeling existed between deceased and defendant, and the origin of the trouble and the length of its duration. This witness further testified that the defendant told her that the deceased knew of these improper relations, and that she, the deceased, was all the time throwing the witness' name up to him and quarrelling with him, and that his home was not what it ought to be on that account. Indeed, the defendant proved by E. J. Rice, uncle of the defendant, that the deceased, Mrs. Rice, told him, the said E. J. Rice, in the summer before the homicide, that she and defendant had not lived together as husband and wife for two years. The court is of the opinion that both were admissible as tending to show the cause and the length of time the separation and bad feeling had existed between the two. Besides, the Court of Criminal Appeals on the former appeal settled this question." This testimony, as stated by the learned judge, was held admissible by the majority of this court on former appeal of this case. If the defendant could have proven that the utmost harmony, love, fealty, and fidelity had existed between him and his wife up to the very hour of the homicide, this certainly would have been strong evidence for appellant, and the writer thinks there could be no cavil as to its admissibility. Then to whatever extent the state can show a lack of good feeling, or to whatever extent the state can show bitterness existing between appellant and his wife, and especially when

this bitterness comes down to within a year or such matter of the homicide, it is admissible as a circumstance to throw light upon the motive, animus, and purpose of appellant.

Bill of exceptions No. 31 shows the state asked the witness L. E. Berry the following: "I will get you to state whether or not, at any time after the death of defendant's wife, the defendant made any request of you to make an appointment with Nellie Long for him to meet her. If so, when was it?" The witness testified, in substance, that a few days after the defendant made the request of him he made an appointment with Nellie Long for the defendant to meet her. Appellant objected on the ground that same was illegitimate and improper, and could serve no proper purpose in this case, and was prejudicial. This bill is approved with this statement: "In view of the defendant's relations with the witness Nellie Long, both before and after the homicide—that is, his living with her before the homicide—her testimony that defendant tried to get her to send poison to his wife in headache powders, and as to their mutual arrangement to live together after the death of the deceased, and in view of the defendant's conduct in hiring said witness to leave the country after the indictment was found, the court regarded this evidence as material." In the light of this statement the evidence clearly was admissible.

Bill of exceptions No. 32 complains of the introduction of testimony showing, in substance, the following: Nellie Long was asked on cross-examination: "Q. Who brought you from Dalhart to Cleburne? A. Jack Thornton. Q. Do you know what relation he is to Mrs. Amanda Rice? A. He is her brother. Q. When you got to Cleburne, what became of you? A. They put me in jail." To this testimony the appellant objected on the ground that the best evidence would be the record. Furthermore, appellant objected, unless the record showed that Thornton was an officer, and because the act of a prosecuting witness or hostile kinsman of the deceased ought not to be received as evidence against the defendant; that said acts, being done in the absence of appellant, are hearsay as to him; and, too, the answer made that she was put in jail when she arrived in Cleburne is not admissible for any purpose, but is wholly immaterial, irrelevant, and hearsay. Furthermore, the return on the attachment issued out of the district court of Johnson county for the witness, Nellie Long, to the sheriff at Dalhart, Tex., shows that said attachment was executed by one Hotton, sheriff of Dalhart county, Tex. The defendant objects to the testimony of the witness with reference to Jack Thornton's connection with her being brought to Cleburne, because it is inadmissible, in view of the fact that said attachment and the return thereon shows her to have been brought into court by authority of written process. The court appends this explanation to the bill: "That

as a part of the state's case it was material to show where the defendant procured the witness Baldwin and others to carry the witness, Nellie Long, in order to keep her from testifying as a witness on the trial of this case in Johnson county, and it was necessary to identify Nellie Long, the main state's witness, as being the witness attached in Dalhart, Tex., and in order to do this it was permissible to show that Jack Thornton located her in Dalhart, Tex., and brought her back to Cleburne, Tex. The witness Jack Thornton also testified on the same subject, and his evidence is in the record. The evidence further shows that defendant and one Baldwin and one Sigler took Nellie Long to the Indian Territory, and that defendant procured the said Baldwin to carry her to Dalhart, Tex., and to remain with her and see that she kept out of the way, and away from the county of Johnson, until after the day on which defendant's case had been set down for trial." This testimony was all admissible. The fact that she was placed in jail would be a matter that would go to discredit the witness' testimony before the jury, and instead of injuring, could not serve any other purpose than to assist, appellant's case, since she testified to the motive for this killing. If she was so infamous or unreliable that she had to be placed in jail to force her to testify, to that extent it weakened the verity of whatever statement she might make, and this is a matter of which appellant could not complain, since it would necessarily redound to his benefit in this trial.

Bill of exceptions No. 37 shows that, while the witnesses Mrs. Tolar and Mrs. Pickett were upon the stand, they were each asked the following question by the state: "From your acquaintance with the deceased, and conversation with her and observation of her, have you an opinion as to whether her mind was sound or unsound?" To which questions and answers sought to be elicited appellant objected, on the ground that the defendant had raised no issue of insanity, except as to the single matter referred to in a letter introduced in evidence written by the deceased, that matter being with reference to the relations of the defendant and the deceased, and defendant's relations to other women, and on the further ground the testimony was incompetent, irrelevant, immaterial, and inadmissible, all of which objections, which are literally copied in this opinion, were overruled by the court, and the witnesses answered: "Perfectly sound." This bill has appended to it the following explanation: "That defendant placed E. J. Rice, uncle of defendant, upon the stand, who testified that in June, 1904, deceased visited him in Dallas, Tex., and remained there several days, and in speaking of her conduct there the witness testified that deceased 'was perfectly crazy.' He further testified that from his acquaintance and conversations with her he was so alarmed that he wrote to J. M. Rice, brother

of the defendant, at Ranger, Tex., on the subject. This letter, of date June 23, 1904, written by E. J. Rice to J. M. Rice, was read in evidence. This letter, among other things, recites that deceased had been on a visit to him, but he (witness) was sorry to see Mandy (the deceased) crazy, but that she was as crazy as a bedbug, and was jealous about Ward being too thick with other women, and advised J. M. Rice to go and see defendant, and have him to have the deceased adjudged insane. On cross-examination the witness E. J. Rice repeatedly stated that deceased was crazy on the subject of the property she and the defendant owned, and about the bad women the defendant was running with. In view of this evidence the court allowed the state in rebuttal to introduce the above and foregoing evidence, which the court regarded as clearly admissible. It was further shown in the testimony of E. J. Rice, witness for the defendant, that deceased, while in Dallas in June, 1904, threatened to kill herself and her little boy if defendant did not convey to her and her children by deed all his property, and that she was guilty of other acts indicating an insane mind, and in the condition of the record the court admitted the foregoing evidence in rebuttal." It will be seen, from an examination of appellant's bill of exceptions, that appellant does not complain that the proper predicate was not laid for the introduction of said testimony; that is to say, the bill of exceptions does not complain that, the witnesses being nonprofessional witnesses, before they could testify they would have to tell the facts upon which their opinion as to insanity of deceased was predicated. We have repeatedly held that, where a nonprofessional witness testifies to the insanity of any one, before doing so they must rehearse and state the facts upon which they predicate their opinion. The bill does not show whether this was done or not; nor does appellant object to the introduction of this testimony on the ground that it was not done. This being true, we are left, then, to consider the bald proposition as to whether a nonprofessional witness can testify to the insanity of the deceased. We hold that they can, and it could not be held irrelevant and immaterial for them to do so in a proper case, like the one at bar.

The charge of the court in this case is a practical copy of the former charge, with such amendments as were suggested on the former appeal of this case, and all the errors pointed out on the former appeal of this case in the charge of the court have been cured in the charge in this case. This being true, the charge is clearly correct, and it necessarily follows from this fact that it was not error for the court to refuse any of appellant's charges, since to whatever extent they were applicable they were covered in the main charge of the court.

This opinion has already gone beyond the length to which we feel called upon to write in these cases, but suffice it to say that this

record is without any error authorizing the reversal of this case. It shows a cruel and wanton killing, with premeditated malice on the part of appellant towards her whom appellant had sworn to love, cherish, and support through life. The fiendish deliberateness with which the act was accomplished, the diabolical malignancy displayed by appellant at the dying bedside of his wife, his indecent disregard of her memory in seeking an immediate interview with a prostitute who was the sole cause and motive for the murder of his wife, all present to our mind a record with unparalleled brutality and fiendishness, that amply warrants the verdict inflicted in this case.

Finding no error in the record, the judgment is affirmed.

HENDERSON, J., absent.

On Rehearing.

On the 14th of March, 1908, the Governor appointed Hon. HOWARD F. O'NEAL as Special Judge, to act with Judges DAVIDSON and BROOKS upon the motion for rehearing; Judge RAMSEY having entered his disqualification in this case.

O'NEAL, Special Judge. We have carefully considered the motion for rehearing in this case and believe that the opinion heretofore rendered is correct. On this motion we will only consider the points specially called to the attention of the court by motion for rehearing, brief, and oral argument of counsel for appellant, as follows:

1. The questions raised by bill of exceptions No. 15 with reference to the admissibility of certain testimony detailing the declarations and statements made by the deceased Mrs. Rice immediately before her death; the contention of the defendant being that none of said statements and declarations were admissible, either as a part of the *res gestæ*, dying declarations, or accusations of guilt undenied, for the reason that under our law, the deceased being the wife of the defendant at the time said statements were made, they are not admissible against him. The wife, if living, could not have been permitted to testify in respect to said matter, and therefore her statements and declarations were not admissible under any rule of evidence. We cannot agree to this contention. We do not believe that our Legislature ever intended such a construction when they enacted article 775 of the Code of Criminal Procedure, which provides that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Our Penal Code is divided into two grand divisions. One is offenses against the person; the other is offenses against property. Therefore it necessarily follows that this case is an offense against the person. We have a special statute (article 647, Pen. Code) which provides that,

"if any person shall mingle or cause to be mingled any other noxious potion or substance with any drink, food or medicine, with intent to kill or injure any other person, or shall willfully poison or cause to be poisoned any spring, well, cistern or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." Now, with reference to the case of *Garnet v. State*, 1 Tex. App. 605, 28 Am. Rep. 425, and relied upon by appellant, on examination it will be found that the case was reversed purely upon the ground that Garnet was charged with an offense denounced by article 647 of the Penal Code above cited, and the trial judge, instead of submitting to the jury the offense described in the indictment, gave to the jury a charge upon an assault with intent to murder, an entirely different offense from that with which the defendant was charged. We believe that the court did right in the reversal of the *Garnet Case*, for the reason above stated. It will be observed that in the concluding part of the opinion in the *Garnet Case* the court says that a new trial should have been granted upon the ground alone that the trial court erred in his charge to the jury. We do not understand that the question of an assault was really before the court in the *Garnet Case*. It is true that the court discussed to some extent what it takes to constitute an assault, but the case was reversed solely upon the ground that the appellant was charged with a specific offense, to wit, administering poison, and the judge gave to the jury a charge upon an entirely different offense, to wit, an assault with intent to murder. "In the United States, according to the weight of authority, administering poison or any other harmful drug or substance to a person with the intent to inflict injury amounts to an assault." See *American and English Encyclopedia of Law*, vol. 2, p. 960, and cases there cited. It is held by the Supreme Court of Georgia, in the case of *Johnson v. State*, 92 Ga. 36, 17 S. E. 974: "Where the accused put a deadly poison into coffee with the intent and purpose that the same should be drank by another, who without knowledge of the presence of the poison actually drank of the coffee, the poison was administered to him by the accused, and in so doing the latter committed an assault." See, also, *Commonwealth v. Stratton*, 114 Mass. 303, 20 Am. Rep. 350; *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408. The court, in 114 Mass. 305 (20 Am. Rep. 350) say: "Although force and violence are included in all definitions of assault, or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts"—citing *Chit. Crim. Law*, 799; 1 *Cobbett's Crim. Law*, 82; 2 *Greenl. Ev.* § 84. We hold that the administering of poison by the husband to the wife

is an offense committed against her, such as is contemplated by article 775 of the Code of Criminal Procedure, and makes her a competent witness against the husband. We therefore hold that the court did not err in permitting the declarations and statements of deceased to the witnesses who testified to the same to go to the jury, both as *res gestæ* and dying declarations. We do not think that the *Miller Case* in 37 Tex. Cr. R. 575, 40 S. W. 313, and the *Baxter Case* in 34 Tex. Cr. R. 516, 31 S. W. 394, 53 Am. St. Rep. 720, are in point in this case. To our minds it is a monstrous doctrine to hold that, where the husband poisons the wife, the wife is disqualified, by reason of our statute, to testify against him. We do not believe that our Legislature ever intended such to be the law. It would place the wife at the mercy of the husband. We believe this would be an unreasonable law, such as our lawmakers never intended and did not pass.

2. This court has held in two opinions that the testimony of Mrs. Foster, Mrs. Pickett, and other witnesses who heard the statements and declarations of deceased a short while before her death was legal evidence and admissible. Certainly from the form of the statements and declarations as appears in the record, it seems that deceased was speaking a fact, and not an opinion. The language of the deceased was, "Go away, Ward! go away, Ward! You know you did it. No longer than this morning you asked me if I used the syringe to-day"—to which defendant made no reply. We understand the rule to be that, if the statement be merely an opinion, the testimony would not be admissible; but from the record in this case it appears that deceased spoke a fact that she had knowledge of. It was a short rendition of the facts, as appears from the record. We take the record as we find it, and in this case it appears that she was stating a fact.

3. We think the testimony of Dr. Townes as to statements made to him by the deceased, Mrs. Rice, in the absence of the defendant, was admissible both as *res gestæ* and dying declarations. Besides, the same statement was substantially made time and again by deceased in the presence of defendant, and not denied by him.

4. We do not think there was any injury done the defendant, or error on the part of the court, in failing to limit the testimony of Mason Cleveland. Cleveland's testimony was merely to corroborate the testimony of the women Long and Taylor, in a statement to him (Cleveland), wherein the defendant had undertaken to contradict them, and we cannot see how any injury resulted to the defendant by a failure of the court to limit same to the purpose for which it was introduced. It is true, whenever extraneous matter is admitted in evidence for a specific purpose, incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a wrong, undue, or improper influence

upon the jury as to the main issue, injurious and prejudicial to the rights of a party, then it becomes the duty of the court in its charge to so limit and restrict it that such unwarranted results cannot ensue. The rule requiring the court to limit and restrict the purpose for which testimony has been adduced does not apply when the admitted testimony proves or tends to prove the main fact. *Foster v. State*, 32 Tex. Cr. R. 39, 22 S. W. 21; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398. It is a well-known rule of this court that admitted evidence does not have to be limited by the court in his charge to the jury, where said evidence can only be used for the purpose for which it was introduced. This rule applies to both impeaching and corroborative evidence, and *Mason Cleveland's* evidence was merely corroborative testimony.

We have carefully considered the record in this case, as well as the able brief and oral argument of counsel for appellant; but we are unable to find where the court in its opinion heretofore rendered has committed any error.

We therefore overrule the motion for rehearing.

DAVIDSON, P. J., dissents.

HOBBS v. STATE

(Court of Criminal Appeals of Texas. Feb. 12, 1908. On Rehearing, June 6, 1908.)

1. CRIMINAL LAW—NOLLE PROS. OR ACQUITTAL OF CODEFENDANT—RIGHT OF DEFENDANT SUBJECTED TO TRIAL.

Code Cr. Proc. art. 707, provides that when two or more defendants are prosecuted for an offense growing out of the same transaction by separate indictments, and either defendant files his affidavit that the evidence of the other defendants is material to his defense, and that he believes that there is not sufficient evidence against such other defendants to secure their conviction, such other defendants shall be first tried. Article 708 provides that when a severance is claimed the defendants may agree in what order they shall be tried, but in case of failure to agree the court shall direct the order of trial. Article 709 provides that the attorney representing the state may at any time under the rules provided in article 37 dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party. Defendant and W. and L. having been separately indicted for the same homicide, the court, on motion of defendant, ordered a severance and directed that defendant be tried after the trial of W. and L. The county attorney did not try the indictments against W. and L., but entered nolle pros. as to them on account of insufficiency of the evidence. *Held*, that defendant could not complain that the failure to try W. and L. left them without a guaranty of immunity from further prosecution, so that he was deprived of the benefit of their untrammelled testimony, especially where neither he nor the prosecution called such discharged defendants as witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 687-697.]

2. HOMICIDE—EVIDENCE AT INQUEST—DEATH OR ABSENCE OF WITNESS.

A transcript of testimony of witnesses taken down at an inquest, at which accused appear-

ed and cross-examined the witnesses, may be introduced in evidence by the prosecution on the trial of accused, where the witnesses whose evidence was so taken are dead or beyond the jurisdiction of the court at the time of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 467.]

3. SAME.

The admissibility of such transcript is not dependent on the necessity for its introduction, and is not affected by the fact that there is independent testimony of living and available witnesses covering the same matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 467.]

4. SAME.

The necessity for the introduction of such transcript must be left to the discretion of the prosecuting officer and of the trial court.

5. WITNESSES—COMPETENCY—HUSBAND AND WIFE—CRIMINAL PROSECUTIONS.

Where, in a prosecution for homicide, defendant's wife testified in his behalf that decedent grossly insulted her and that she informed her husband of such insult prior to the homicide, questions propounded to her on cross-examination as to what she told a neighbor as to the conduct of decedent was in the nature of cross-examination, and did not make her a witness against her husband, within the meaning of Code Cr. Proc. art. 774, providing that husband and wife may in all criminal cases be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 144, 145, 165.]

6. SAME—EXAMINATION—SCOPE OF CROSS-EXAMINATION.

Where, in a prosecution for homicide, defendant's wife testified in his behalf that decedent grossly insulted her, and that she informed defendant thereof before the commission of the homicide, a question propounded to her by the prosecution as to what she said to a neighbor as to decedent's conduct was proper cross-examination.

On Rehearing.

7. CRIMINAL LAW—EVIDENCE—TESTIMONY AT PRELIMINARY EXAMINATION OR FORMER TRIAL.

The rule as to the admissibility of a transcript of evidence given on a preliminary examination or former trial of one accused of crime is the same, whether the witness giving the testimony is dead or is beyond the jurisdiction of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1231-1235.]

8. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF TESTIMONY.

A judgment of conviction will be reversed, where evidence erroneously admitted by the court may when viewed in one light prejudice the minds of the jury, though considered in another light it is harmless.

9. HOMICIDE—EVIDENCE—HEARSAY—PREJUDICIAL EFFECT.

Where, in a prosecution for homicide, defendant's wife had testified in his behalf that decedent had grossly insulted her and that she had informed defendant of that fact, a statement by the wife on cross-examination that she had told the wife of a neighbor that she had communicated decedent's conduct to defendant, and that defendant "had gone to look for" decedent, and that she "did not know what was going to happen" was prejudicial, as calculated to impress the jury that defendant had made some statement to his wife showing preparation on his part to assault decedent.

Davidson, P. J., dissenting in part.

Appeal from District Court, Hill County; W. C. Wear, Judge.

Earl Hobbs was convicted of manslaughter, and appeals. Reversed and remanded.

Collins & Cummings and A. A. Hughes, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by indictment with the murder of one Ed Kelly, alleged to have been committed on the 5th day of September, 1906, in Hill county, Tex. He was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary.

The facts, in brief, show that appellant, at the time of the homicide, was a young man slightly past 21 years of age, living with his young wife, and baby, a few months old, some four miles east of Itasca on a farm. The deceased was a man some 35 years or more, and was practically a stranger in the community. About a week before the homicide he had been hired by appellant, along with O. Leggett, who was also a stranger, to pick cotton. On the day before the homicide appellant went to Itasca, a town near by, on business, leaving the deceased and Leggett at his home with his wife and child. Shortly after he had left home Leggett left also, leaving deceased and appellant's wife at the house. It is claimed by the wife of appellant that the deceased was guilty of gross indignities in the absence of her husband, going to the extent of seizing her in his arms and importuning her to have carnal intercourse with him. Defendant's wife made no report to him of the matter that night on his return, but in view of his announcement of his purpose to go to Itasca again the next morning she remonstrated with him and begged him not to go and leave her with that man (meaning deceased), and in reply to his demand to know why she was afraid of deceased, she stated to him a portion of the insulting conversation with the deceased leading up to his seizure of her, but did not make a full disclosure, for the reason, as stated by her, that this would cause great trouble and sorrow, through which she was now passing. However, in view of what his wife already told him, appellant at once discharged deceased, and told him that if he would go into town he would get the money he owed him and pay him for his services. This deceased declined to do, and it was stated he would not wait for his money, and immediately left appellant's house, going in an easterly direction. Appellant went on to Itasca, which was situated in a westerly direction from where he lived, and while there purchased a double-barreled shotgun and some ammunition. While in Itasca he made some inquiry as to what one should do or ought to do to a man who had insulted his wife. Appellant was accompanied home by Watson, his cousin, and Leggett, his employé. When he reached there, as he states, he went to his wife, and

told her that he did not believe that she had told him all that had occurred the day before. Whereupon she broke down, as he says, and through her tears made a full disclosure of all that had occurred, involving the most reprehensible conduct on the part of the deceased. On receiving this information, appellant went out of the house, mounted a horse that belonged to his cousin, Watson, and galloped off in the direction the deceased had gone some hours before, with the purpose, as he declares, of requiring deceased to explain his conduct. He soon found deceased picking cotton in the field of one Morris, and, while the testimony is not wholly in agreement, the substantial facts seem to be that, without parley, and probably without warrant, shot the deceased in the field in the cotton row where he was at work. Appellant, however, it should be stated, claims in his testimony that when he came upon deceased, with a view of making inquiry as to his conduct towards his wife, and demanding an explanation of same, that the deceased was looking straight at him and threw his hand behind him, and appellant thought he was going to draw a pistol. Leggett and Watson, the parties with appellant, were each separately indicted as a principal for the murder of deceased. While not intending to comprehend herein every essential fact of the case, the statement above substantially illustrates the situation far enough to make intelligible the issues discussed. There are three substantial questions raised on the appeal, which were discussed in oral argument and are clearly presented in the record:

1. It was shown, as stated, that Hence Watson and Oscar Leggett and the appellant were each separately indicted as principals for the murder of deceased. It was shown that at the January term, 1907, of the district court of Hill county, and on the 30th day of that month, appellant filed his motion in writing, which was duly sworn to, in which he alleges the pendency of said indictment against Watson and Leggett for the same offense, and that the evidence was insufficient to convict said Watson and Leggett, and that he desired their testimony, and prayed a severance to the end that these defendants be first tried. This motion was granted by the court, and an order entered that Watson be first tried, and that Leggett be next tried, and that both of them should be tried before appellant. It is further shown in the record that on the 8th of April, 1907, when this case was called for trial, neither Watson nor Leggett had been placed upon trial, nor had their cases been disposed of, but both cases were held pending on the docket. The record further shows that appellant filed an additional motion at that time calling the court's attention to the failure of the state to comply with the order of the court formerly made granting his motion to sever, and in said second motion renewed the former motion for severance, and again prayed the

court to have said cases against Watson and Leggett first tried and finally disposed of before he should be placed upon trial. Thereupon the county attorney prepared a formal motion in the Watson and Leggett cases, asking an order of nolle pros. on the ground that the evidence was insufficient to sustain a conviction against them, and asking that said cases be dismissed. Whereupon the court entered upon the docket, opposite each of said cases, the following order: "April 8th. Nolle pros. by state for reasons on file." The record further shows that appellant, by his counsel, objected and protested to the proceedings so had in dismissing said Watson and Leggett cases, because such proceeding was not in compliance with the order of the court made, nor in accordance with appellant's motion to sever, and that said dismissal was not a trial or final disposition of the cases, and contended that they should have been tried or dismissed, with a guaranty of immunity from further prosecution, so that appellant could avail himself of the said Watson and Leggett as witnesses, and that he might have them free and untrammelled by any fear of a future prosecution. In this state of the record appellant was compelled to make an announcement of ready or not ready for trial. The record further shows that the state rested its case without having placed either Watson or Leggett upon the witness stand, at which stage of the proceedings appellant filed a motion, asking the court to require the state to place Watson and Leggett on the witness stand and prove by them the facts and circumstances immediately attending the homicide, in order that appellant might have the privilege of a cross-examination of said witnesses. This motion was overruled by the court, and neither Watson nor Leggett was introduced by either party, nor were they witnesses in the case at any stage of the proceedings.

Appellant claims that these proceedings were directly in the face of the holding in the case of *Puryear v. State*, 98 S. W. 258, 17 Tex. Ct. Rep. 721. To this contention we accede, and if the rule adopted in the *Puryear Case* should prevail we would not hesitate to reverse the case for the error here assigned. We do not believe, however, that the *Puryear Case* should be followed. We think the reasoning in that case is fallacious and unsound, the conclusion reached unsafe, and the result wholly mischievous. It is directly in the teeth of the decision of this court in the case of *Brown v. State*, 42 Tex. Cr. R. 176, 58 S. W. 131. It is, as we believe, at variance with the letter and spirit of our Code of Criminal Procedure. Articles 707, 708, and 709 are as follows:

"Art. 707. When two or more defendants are prosecuted for an offense growing out of the same transaction, by separate indictments, either defendant may file his affidavit in writing that one or more parties are indicted for an offense growing out of the same transaction for which he is indicted,

and that the evidence of such party or parties is material for the defense of the affiant, and that the affiant verily believes that there is not sufficient evidence against the party or parties whose evidence is desired to secure his or their conviction, such party or parties for whose evidence said affidavit is made shall first be tried; and in the event that two or more defendants make such affidavit and cannot agree as to their order of trial, then the presiding judge shall direct the order in which the defendants shall be tried; provided, that the making of such affidavit does not, without other sufficient cause, operate as a continuance to either party.

"Art. 708. When a severance is claimed the defendants may agree upon the order in which they are to be tried, but in case of their failure to agree the court shall direct the order of the trial.

"Art. 709. The attorney representing the state may at any time, under the rules provided in article 37 dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party."

It will thus be noted that provision is made that where two or more defendants make such affidavit, and cannot agree as to the order of trial, then the presiding judge shall direct the order in which the defendants should be tried. It will also be noted that provision is made that the making of such affidavit shall not, without other sufficient cause, operate as a continuance to either party. It is expressly provided (see article 708) that when a severance is claimed the defendants may agree upon the order in which they are to be tried, but in case of their failure to agree the court shall direct the order of trial. Article 709 provides that the attorney representing the state may at any time, under the rules provided in article 37, dismiss a prosecution as to one or more defendants jointly indicted with others, and the persons so discharged may be introduced as witnesses by either party. Now, in this case neither of the parties, Watson or Leggett, were in fact introduced by the appellant. While it might be presumed that they would have testified to facts helpful to him, this is but a presumption. It is possible that, if placed upon the witness stand, they might have refused to testify on the ground that their testimony would tend to criminate themselves; but whether they would have done so or not is at most an idle speculation and a chance surmise. To hold that the very fact that a severance was claimed and granted, and that after the prosecution was dismissed against these witnesses, without offering them, without any effort being made to obtain their testimony by placing them on the witness stand, that appellant is entitled to a reversal for the sole and only reason that the cases had not in fact been tried or immunity granted, is going farther than we are willing to go. If

there was any suggestion in the record that the dismissal of the cases was not in good faith, as appears in some of the cases, a different question would be presented, but to uphold in this case appellant's contention on this point is to give him a greater right in respect to the Watson and Leggett cases than either of those defendants themselves had. When their cases were reached, under the law, it lay within the discretion of the county attorney to determine whether he would prosecute the cases or enter a nolle pros., and such defendant, if he so concluded, would have no just cause for complaint. Shall we give this appellant a greater right in respect to Leggett's case than Leggett had? If the case against Watson be, over his protest, dismissed, shall we say what might be lawfully done over Watson's protest will be unavailing when another party, appellant in this case, objects?

Again, such a holding is opposed to and would stand in the way of a due and proper administration of justice. It can well be understood in this case, even if the county attorney had the most convincing evidence of Watson's and Leggett's guilt, that at the time when the cases were called some witness might be missing whose testimony would be indispensable to their conviction and to the due administration of justice. He might decide for some reason at the moment to dismiss the case. Shall it be said that the hand of the law or chief officers of the state shall be rendered powerless because some other litigant may have a remote interest in the proceeding—that such litigant shall have the direct control and be the presiding genius over the fortunes of the state's prosecutions? How would it work in this case? Neither Watson nor Leggett had been offered as witnesses in the case. We might assume that their testimony is important. Upon another trial it may or may not in fact be offered. Suppose we reverse this case. Let us assume the most charitable view that Watson and Leggett are both innocent. It results that we send this case back to the district court of Hill county, with a message to the judge of that court that he is to go bravely through with the reassembling of the grand jury, that they may indict innocent men, for the purpose of having a formal order of acquittal entered, to the end that appellant may have the option, which so far he has not chosen to exercise, to offer these codefendants as witnesses on the trial of his case. As we say, we think that the Puryear Case is not supported by the intent and true meaning of our statutes. It is against the early decisions of the court. It is illogical in its reasoning, and it is evil, and only evil, in its results. So believing, we overrule the Puryear Case, and uphold and commend the action of the trial court in the matter complained of.

2 It is shown by proper bill of exceptions that shortly after the homicide in this case

an inquest proceeding was held before a justice of the peace, and that on this hearing John T. Morris and Wiley Clair testified, and that their testimony was reduced to writing, sworn to, and signed by them. At this hearing appellant and his counsel were personally present and cross-examined these witnesses. Without setting out their testimony, it may suffice to say that it was material and adverse to appellant. On the trial it was shown that Wiley Clair was in the state of Oklahoma. It was also shown that the witness Morris was in the state of Oklahoma. The state introduced in evidence, over appellant's objection, preserved by proper bill, the written testimony of both these witnesses, Clair and Morris, taken at the inquest. The point here made is that this testimony was not admissible in any event, for the reason, as contended, that under the Constitution appellant had the right to be confronted on this trial by these witnesses, and that under the peculiar facts of this case, the rule maintained in the Porch Case, 99 S. W. 1122, 18 Tex. Ct. Rep. 761, and other cases, ought not to apply, for the reason that under the peculiar facts of this case the ground of necessity, upon which this testimony is sometimes admitted, does not apply. We do not feel ourselves required to go into this question at length. It can no longer, we think, in this state be an open question that where the testimony of a witness has been reduced to writing in a regular proceeding, where opportunity for cross-examination had been afforded defendant, and a witness has died or moved beyond the jurisdiction of the state, on a final trial of the case this testimony will be admitted. Such testimony was admitted by our Supreme Court, many years before the creation of this tribunal, in the case of Greenwood v. State, 35 Tex. 588, in 1871. This position has been maintained and upheld by this court, beginning with the case of Black v. State, 1 Tex. App. 369, in an unbroken line of decisions for more than a quarter of a century, and was never seriously questioned until the rendition of the opinion in the Cline Case, 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. While the majority opinion in that case is a magnificent piece of legal reasoning, and shows great research, it is so opposed, not only to the decisions of this court, but practically every court of last resort on the American continent, that we do not believe the temporary departure thus made from the settled rule of construction everywhere among the English-speaking people should be an authority seriously regarded. In passing, it may be stated that the ruling in the Greenwood Case, the Black Case, and in the Porch Case is in accordance with what has been the rule in England since 1654. This, too, is the rule in the Supreme Court of the United States, where the question has often been considered (See *Mattox v. State*, 156

U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409, and *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 985), and under statutes similar to our own has been uniformly so held without a single dissent, so far as an examination of the authorities go, in any court of last resort in America. So that, without further discussion we are constrained by the overwhelming weight of authority to hold this contention adverse to appellant.

Nor do we believe that the point made by appellant's counsel, and presented with great earnestness and much ingenuity, that a departure from the general rule ought to be made on the ground that, as applied to the facts of this case, the reason for the rule falls. Their contention is that other witnesses, including P. J. Morris and George Clair, were present, and saw, heard, and testified to every fact which was testified to and included in the evidence of the absent witnesses, John T. Morris and Wiley Clair, and that, therefore, the testimony could not have been admitted from any supposed reason of necessity, as is sometimes said in the decisions. The argument of necessity which is sometimes said to be a basis and ground for the admission of this character of testimony is but another way of saying that such testimony shall be permitted to be introduced on the ground that its exclusion might and would sometimes defeat the ends of justice. We do not feel ourselves at liberty to say just when this reason of necessity ceases. In a controverted case, like the one at bar, the mere fact that some one or two witnesses testified to the same state of things as is testified to by the absent witnesses would, we think, make little or no difference. After all, it must be left to the discretion of the prosecuting officer and of the trial court to say whether, in a given case, it is deemed necessary or important to have before the trial court the testimony of these absent witnesses. Nor do we think it essential to the admissibility of this testimony that it should be put upon the ground of necessity alone. The assignment is overruled, and the action of the court complained of is sustained.

3. Another important question arises upon the examination of Mrs. Lula Hobbs, the wife of appellant. To the end that this may be fairly presented, we adopt, for the purpose of a discussion, the statement of appellant's contention as found in appellant's brief. They say: "Bill of exception No. 6, recites that the appellant placed his wife, Lula Hobbs, upon the witness stand in his own behalf, for the purpose only of proving that on the day preceding the homicide the deceased used insulting language and was guilty of improper conduct toward her, and that on the day of the homicide she communicated these facts to the appellant. No other fact or circumstance was elicited or sought to be elicited from said witness by the appellant. The state on cross-examination proved by appellant's wife that, a few months after the

occurrence between the deceased and the said Lula Hobbs, Mrs. George Clair came to the house of appellant, and also that the witness Lula Hobbs went to the house of Mrs. George Clair on the day of the homicide, just a short time before the homicide occurred. Counsel for the state also asked appellant's wife if she did not state to Mrs. Clair in a conversation that just before Mrs. Clair came to her house on the day before that deceased tried to get smart with her and put his hand on the arm of her chair, and she then got up out of the chair, and deceased said, 'Good lady, I mean no harm;' and the said Lula Hobbs denied making such statement. Counsel for the state also asked the wife of appellant if she did not say to Mrs. Clair at the latter's house, just a few moments before the killing, that the deceased had tried to get smart with her on the preceding day, and that she had told her husband, and that they had gone to look for Kelly, and that she, the said Lula Hobbs, did not know what was going to happen; and said witness denied making that statement. No objection was made by appellant's counsel to any of these inquiries made of his wife, concerning matters that the appellant had not examined her about; and we rely upon the authority of *Brock v. State*, 44 Tex. Cr. R. 335, 71 S. W. 20, 60 L. R. A. 465, 100 Am. St. Rep. 859, to sustain the proposition that this examination was improper, and constitutes reversible error, without a bill of exceptions has been reserved at the time. The bill of exceptions now under discussion shows that, after the appellant's wife had denied making these several statements, the state placed the witness Mrs. George Clair on the witness stand and proved by her that Mrs. Hobbs did make each of the statements inquired about. The appellant objected to said testimony of Mrs. Clair because, first, it was an effort to impeach the wife of appellant upon an issue immaterial; second, because the said Lula Hobbs was the wife of appellant, and in her direct examination no inquiry was made concerning any visits or conversations between her and Mrs. Clair, and it was in effect making the wife a witness against her husband; and, third, that any statements made by Lula Hobbs in the absence of the defendant, to the effect that her husband had then gone to look for deceased, and that if he found him she did not know what would happen, was hearsay, inadmissible, and highly prejudicial to the defendant. All of those objections were overruled, and said testimony permitted to go before the jury. Following the authority of the cases of *Brock v. State*, supra, and *Moore v. State*, 45 Tex. Cr. R. 234, 75 S. W. 497, 67 L. R. A. 499, 108 Am. St. Rep. 952, we believe the testimony was not admissible under the doctrine that the wife will not be permitted to testify against her husband."

We do not believe that this contention

should be upheld, nor that the authority of the Brock Case can be invoked successfully. In the Brock Case the wife of the defendant there being tried was introduced and used as a witness by the state, and the contention was made that under our statute the wife is not a competent witness against the husband in a criminal proceeding of this character, with or without his consent; that neither spouse can consent to the other testifying against him in a criminal case, except where it is an offense of one against the other. Article 774 of the Code of Criminal Procedure provides that "neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial." Article 775, Code of Criminal Procedure, provides: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other." This disqualification of giving adverse testimony against each other rests upon sound grounds and proper policy, and should be upheld with a strong hand, and we can well understand how the court would deprecate and condemn the use of the wife against the husband, or the husband against the wife as was attempted in the Brock Case, whether at the time the person being tried objected or did not object; but the case we have here is, as we conceive, very different. Here the wife was offered as a witness in behalf of her husband. Her testimony was vital and important, and, if true, as the jury seemed from their verdict to have believed, evidenced such a gross insult and outrage as to reduce to the grade of manslaughter what otherwise might have seemed an unprovoked and cold-blooded murder. She testified in substance and effect that, while unprotected in her household, with only the little babe present, the deceased grabbed her, embraced her, and made the direct proposition that she submit her person to his lustful embraces. The accuracy of this statement the state sought to challenge, and to disprove by the fact that her conduct and conversation with the witness Mrs. Clair was wholly at variance with the serious condition of affairs which she claimed she had told her husband. The state could not, in the first instance, have offered appellant's wife against him. He was free, however, to introduce her as a witness in his own behalf, and to seek to obtain the utmost possible benefit from her testimony. She could not be made to enlist against her husband; but, when she entered the field for him, she is

subject to such cross-examination as will fairly test the truthfulness of her testimony. She becomes as any other witness in respect at least to the examination that fairly and legitimately tends to test the credibility and accuracy of the testimony which she gives. This was the limit to which the cross-examination went in this case, and it was restricted within these legitimate bounds. Having offered his wife as a witness in his own behalf, he is to be held to have consented that her credibility might be tested by such reasonable cross-examination as would disclose the truthfulness or inaccuracy of any statement which she makes. *Messer v. State*, 43 Tex. Cr. R. 97, 63 S. W. 643.

The only matter about which we have any doubt is a feature of her testimony, which is not so much discussed in the brief by counsel for defendant, and is her statement to the witness Mrs. Clair, in effect, that her husband had gone to look for the deceased, and she did not know what would happen. A somewhat similar question arose in the case of *Skaggs v. State*, 31 Tex. Cr. R. 563, 21 S. W. 257. In that case the wife of the accused stated in her testimony that she knew her husband was going to kill the deceased. This statement was held to be opinion evidence only, and incompetent for any other purpose; but, the error having been cured by the court's withdrawal of the statement from the consideration of the jury, no special attention seems to have been paid to it. In this case reference is had to the case of *Drake v. State*, 29 Tex. Cr. R. 266, 15 S. W. 725. In that case, while the witness Drake, Jr., was on the witness stand, it was sought to impeach him by inquiring, in substance, that if he did not state to persons named that he knew that his father, the defendant, was going to kill Guinn (the deceased) before he (the witness) left home that morning. This was held not to be a fact, or knowledge of a fact, or a material fact about which the witness could be impeached, but was a mere opinion and conclusion, and introduction of the evidence as impeaching testimony was held improper. Here, however, the only extent to which the wife's testimony goes, as shown by the bill, which is much stronger than appears in the statement of facts, is that her husband had gone to look for the deceased, and that she did not know what was going to happen. In other words, it is a mere statement to the witness, Mrs. Clair, having in view her disclosure to her husband, that he was then away from home, and that she did not know what the result of the conference would be. If, as the defendant himself testified, his mission was to see the deceased to demand an explanation, this testimony might relate to the result of the explanation so given. In any event, as presented in the record, it is not clear that the testimony was not admissible, and, if it should be held that it was not admissible as a mere expression of opinion, it does not on its face or by necessary impli-

cation disclose the statement of opinion as to what the appellant meant to do, and is, therefore, we believe, not material or hurtful, even if it be conceded that it should not have been admitted.

We have carefully gone over the entire record. It bears incontestable evidence on every page that the rights of defendant have been well cared for. Whatever our own views or sympathies may be, it is our belief that the appellant has had a fair and impartial trial. The evidence affirms beyond doubt that he took the life of the deceased, and, giving him the benefit of the great provocation testified to by his wife, the jury have imposed the lowest penalty, which, under all the facts, they were reasonably justified in doing.

Finding no error in the record, the judgment of the court below is affirmed.

DAVIDSON, P. J., dissents, and will file reasons.

On Rehearing.

RAMSEY, J. The judgment of conviction in this case was affirmed at the late Dallas term, and now comes before us on motion for rehearing filed by appellant on the 27th day of February, 1908, and since then taken under advisement.

There is one statement in the opinion, in respect to a matter not mentioned in the motion for rehearing, which is not strictly accurate. It is there stated: "This, too, is the rule in the Supreme Court of the United States, where the question has often been considered (see *Mattox v. U. S.*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409, and *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965), and under the statutes similar to our own has been uniformly so held without a single dissent, so far as an examination of the authorities go in any court of last resort in America." This is a correct statement of the rule where the testimony of deceased persons has been sought to be reproduced. The rule is not, however, so unanimous in cases where testimony has been sought to be reproduced where the witness was shown to be beyond the jurisdiction of the court. In the event of the absence only, there is a sharp division in the authorities as to the admissibility of such testimony. We do not think, however, that whether the witness is dead or beyond the jurisdiction of the court is a matter of controlling importance.

The only matter which we desire to discuss is the third ground of appellant's motion. It is as follows: "The court erred in its opinion in holding that the testimony of the witness Mrs. George Clair to the effect that on the day of the homicide the wife of appellant came to her house, a short time before the homicide occurred, and after the appellant and Hence Watson and Oscar Leggett had left in search of the deceased, and told the said witness, Mrs. Clair,

that the appellant and Watson and Leggett had gone to look for deceased, and if appellant found him she, the said Lula Hobbs, did not know what would happen, because said testimony was clearly hearsay, and a statement made in the absence of the defendant, if made at all, and was in effect compelling the wife to testify against the husband, and was an impeachment of the wife upon an immaterial issue, because the appellant had placed her upon the stand to prove only that the deceased had insulted her, and that she had communicated the insult to her husband, and no inquiry had been made of her by the appellant with reference to any statement she may have made to Mrs. Clair. The said holding was further erroneous because it involved an opinion of Mrs. Hobbs that something serious would happen if her husband should find the deceased, and said statement, if made by Mrs. Hobbs, was not a statement of any fact, but, if the jury believed that she made said statement, would only tend to convey the idea to the jury that Mrs. Hobbs was apprehensive of the result of a meeting between the appellant and the deceased; whereas, the only thing that could have been properly proved by Mrs. Hobbs or Mrs. Clair would be some statement that the defendant may have made which would have caused such apprehension upon the part of his wife."

In the opinion rendered in the case it was stated: "The only matter about which we have had any doubt is the feature of her testimony (meaning Mrs. Hobbs) which is not so much discussed in the brief by counsel for appellant, and that is her statement to the witness Mrs. Clair, in effect that her husband had gone to look for deceased and she did not know what would happen." We have concluded, on fuller reflection, and in the light of the authorities which have been presented and discussed in the motion for rehearing, that we were in error in the original opinion, wherein we said: "In any event, as presented in the record, it is not clear that the testimony was not admissible, and, if it should be held that it was not admissible as a mere expression of opinion, it does not on its face, or by necessary implication, disclose the statement of opinion as to what the appellant meant to do, and is, therefore, we believe, not material or hurtful, even if it be conceded that it should not have been admitted." It is also suggested in the opinion that if, as defendant himself testified, his mission was to see the deceased to demand an explanation, this testimony might relate to the result of the explanation so given. A closer inspection of the record, however, makes it certain that we overlooked the important fact that there is no testimony showing that the appellant ever stated to his wife that he meant to seek, or was seeking, the deceased for the purpose of having such conference. It is sometimes difficult to tell, in respect to in-

admissible testimony, what may or may not be injurious and hurtful. If, when such testimony is admitted, considering it in one light it would be prejudicial, and considering it in another it would be harmless, it would seem that the law, which is ever jealous of the rights and liberties of her citizens, would scarcely justify or permit the admission of such testimony when it might be used improperly to the prejudice of the defendant.

The case of *Bluman v. State*, 33 Tex. Cr. R. 43, 21 S. W. 1027, 26 S. W. 75, is very much like the case at bar. In that case the appellant had been indicted for arson. He had sought to show as a reason why he did not burn his store that he had placed the belongings of his wife, containing her wedding trousseau and solid silver presents, a few weeks before the fire, and that all of these were burned. He made proof of this fact by his wife. On cross-examination she was asked the following question: "Did you not, at the hotel, on the night of the fire, after the fire had broken out, state that you had a presentiment that something was going to happen?" Here the language is, "My husband has gone to seek deceased, and I don't know what is going to happen." Objection was made to this question, and the answer sought to be adduced thereby, because the witness was appellant's wife, and she had not been asked about these matters on direct examination. The objection being overruled, Mrs. Bluman answered: "I did so state." In passing on this matter the court say: "The cross-examination must be confined to the matter elicited by the direct examination. This is the settled rule. The state could have examined Mrs. Bluman fully as to the trunks, their contents, when they were placed in the store, etc.; and, if she had made other statements regarding these things, this could have been shown. What relation or pertinency a presentiment which she may have had bears to the testimony about the trunks, their contents, etc., we fail to perceive. The Attorney General contends that this matter was also without injury. It was not germane to the testimony in chief, nor did it tend to contradict her evidence in any legitimate manner. It was, therefore, the state's evidence. She was made a state's witness, and her evidence was a part of the state's case, just as if the state had introduced her, and proved by her that she had had a presentiment that something was going to happen, and that when the fire broke out she stated the fact that she had had such a presentiment. Can it be contended that the state had the right to prove these facts by the wife of defendant? Certainly not. For what purpose could, and perhaps did, the jury use this presentiment of the wife? The witness was the wife of defendant—a relation than which none can be closer or more confidential. While the house was burning, she speaks of this presentiment. The jury interprets and

applies it to the burning of the house. Was it in fact a presentiment, or had she been informed by her husband that the store was to burn? All people do not believe that there is such a thing as a presentiment. Those who do may not have believed this to have been such, because now closely connected with the burning of the store. For what purpose could the jury have used this matter? Evidently to prove that appellant had determined to burn, or have burned, his store and had directly or indirectly informed his wife of his intentions. The state certainly desired to use it for this purpose. There was no other possible use to which it could be applied. But it may be urged that Mrs. Bluman gave such an explanation of her presentiment as to eliminate from it all that which was pernicious. This proposition is correct, and should solve the question, injury vel non, against the appellant, but for one stubborn fact, which can never be settled by this record—did the jury believe her explanation? We know not, nor does any other person know, save the jurors who tried the case."

In the case of *Hoover v. State*, 35 Tex. Cr. R. 342, 33 S. W. 337, following the *Bluman Case*, the court says: "On cross-examination of a wife who has testified as a witness for her husband, she can be interrogated only as to such matters as naturally spring out of, and appertain to, her examination in chief; and it is error to permit her to be cross-examined as to original matters, which may be used against or are prejudicial to her husband." In that case the defendant was charged with murder. There was a plea of insanity. The wife was introduced as a witness in his behalf. On direct examination she testified as to her husband's acts and conduct the night before the killing, and as to his uneasiness and apprehensions of danger for about four weeks before the killing. On cross-examination the state, over the objection of defendant, proved by her that she knew defendant had shot one of the Sparks boys, and that he and the Sparks had never made friends. In discussing the testimony adduced on cross-examination, the court say: "She (the wife) was introduced by appellant in his behalf, and testified as to his mental condition, and that he was in a state of apprehension or alarm for some time prior to the homicide. On cross-examination, over the objection of appellant, the state was permitted to prove that, some years before this, appellant, her husband, had shot one of the Sparks boys, and that just previous thereto he was in a similar condition of mind. We heretofore held that this evidence was germane to her testimony in chief; but on a more careful and thorough examination of the question, in the light of the authorities, we are of the opinion that we were in error. The rule is well established that the wife can be introduced on behalf of her hus-

band, and that on cross-examination she can be interrogated only as to such matters as naturally spring out of and appertain to her examination in chief. This testimony did not spring out of, and was not germane to, the examination in chief. It was original evidence, and of a most damaging and material character. In fact, it was producing in evidence before the jury, against appellant, testimony of another and distinct crime than that for which he was then on trial. It was calculated to inflame the mind of the jury against appellant, and to prejudice his rights as to the case then on trial. We adhere to the rule heretofore laid down by this court in the case of *Bluman v. State*, 33 Tex. Cr. R. 43, 21 S. W. 1027, 26 S. W. 75." See, also, *Jones v. State*, 38 Tex. Cr. R. 100, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719, and *Richards v. State* (decided at the present term) 110 S. W. 432, and *Gaines v. State*, 38 Tex. Cr. R. 228, 42 S. W. 385.

We think it fairly certain that the statement, attributed to Mrs. Hobbs, that her husband had gone to seek deceased, and that she did not know what was going to happen, tended strongly to establish and convince the jury of apprehension on her part that something serious was to happen, and was within itself well calculated to impress the jury or justify the inference by them that appellant had made some statement to his wife showing preparation on his part to assault the deceased, or at least that this inference was a reasonable deduction from the testimony. Having carefully examined the authorities cited and others, we do not believe that we would be justified in permitting this judgment of affirmance to stand, unless we were prepared to overrule the decisions of this tribunal in the *Bluman Case*, in the *Hoover Case*, in the *Jones Case*, and in the *Gaines Case*, cited above; nor are we, on reflection, prepared to say that the decision in the *Bluman Case*, so strikingly like the one under consideration, is in itself wrong. On the contrary, fuller consideration and more careful thought has led us to the conclusion that the *Bluman Case* was rightly decided, and that the court below should not have admitted the testimony of Mrs. Clair, herein complained of. For the error in so doing, it is ordered that appellant's motion for rehearing be granted, and the judgment of conviction be set aside, and the case be reversed, and the cause remanded.

BROOKS, J., absent.

DAVIDSON, P. J. I concur in reversing the judgment on ground stated. I think reproduction of testimony of absent witness error and reversible.

DAVIDSON, P. J. (dissenting). Upon motion for rehearing the affirmance was set aside and a reversal had in regard to cross-

examination of appellant's wife. To this I agree, but I wish, however, to express my dissent from that portion of the opinion in which it is asserted it is not error to reproduce the testimony of the absent witness. The evidence reproduced was taken before the examining court; the witness being shown absent from the state at the time of the final trial. In *Cline v. State*, 36 Tex. Cr. R. 320, 36 S. W. 1089, 37 S. W. 722, 61 Am. St. Rep. 850, the writer discussed the question at considerable length with reference to reproducing the testimony of a deceased witness, holding it could not be done under that clause of the Constitution which guarantees the right to the accused to be confronted with the witnesses against him. My Brethren have overruled the *Cline Case*, stating practically that it is a universal rule to reproduce the testimony of a deceased witness. At page 312, *Ency. of Evidence*, it is stated that the tendency of the early decisions was greatly to limit or wholly to deny the admissibility on the final trial of evidence of a witness who could not be produced at the trial when his evidence had been given at a preliminary examination of the accused; citing, among other cases, in support of that, *Finn v. Com.*, 5 Rand. (Va.) 701. In that case, among other things, it was said: "In civil cases, if a witness who had been examined in a former trial between the same parties and on the same issue is since dead, what he swore on the former trial may be given in evidence; for the evidence was given on oath, and the party had an opportunity of cross-examining him. *Peake's Case*, 60 Phill. 199." But we cannot find that the rule has ever been allowed in a criminal case. Indeed, it is said to be expressly otherwise. Nor can we find that the rule in civil cases extends to the admission of evidence formerly given by a witness who has removed beyond the jurisdiction of the country. Much less can it be admitted in a criminal case." Also see *Brogy v. Com.*, 10 Grat. (Va.) 722; *Montgomery v. Com.*, 99 Va. 833, 37 S. E. 841. These are Virginia cases. In *People v. Newman*, 5 Hill (N. Y.) 295, the court said: "It seems to be well settled in this court that nothing short of the witness' death can be received to let in his testimony given on a former trial; but, if the rules were otherwise in respect to civil cases, we are of opinion that it should not be applied to criminal proceedings." It was also the rule in Tennessee until changed in the opinion in *Kendrick v. State*, 10 Humph. 479, rendered in 1850, which overruled *State v. Adkins*, 1 Overt. 229. It seems to have been as well the rule in Missouri until the decision of *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435. This decision was rendered in 1857. The case of *Montgomery v. Com.*, 99 Va. 833, 37 S. E. 841, was rendered in February, 1901.

It is unquestionably true that the earlier rule excluded the reproduction of the testimony of all witnesses, whether dead or alive.

Such was the rule practically in the history of the past until the acts of Parliament in England. On a certain occasion the Jews sought to have the Apostle Paul brought to trial. The old Roman judge stated with absolute confidence and without contradiction that it was the custom of the Romans not to try parties until they had been brought face to face with their accusers. The vast assemblage of the accusing Jews entered not a dissent to this statement of the Roman judge. It was too well settled as a law in the Roman Empire to bear contradiction. The Jews as well had been so instructed and taught under the laws of Moses, and from that time down the ages it was the rule, and wherever the jurisprudence of the past has touched the Anglo-Saxon civilization it has been the well-recognized rule until statute changed the rule in England. Under the common law it may be, I think, safely stated that it was an impossibility to reproduce such testimony in a criminal case, the reasons for which will be found by an investigation of the history of that great body of law. This was so well recognized in England that it took statutes at intervals covering perhaps 200 years to abrogate. The first act was passed by Parliament authorizing the reproduction of testimony of dead witnesses. Years afterwards another statute was added, permitting the reproduction of evidence of witnesses who had become insane, and then followed still another statute, to wit, where the witness was kept away by the adverse party, and finally the reproduction was admitted when the witness was too sick to ever be able to be present at the final trial, or was permanently beyond the realm. These were statutory innovations, and it took in the neighborhood of 200 years to ingraft these exceptions upon the rule at common law inhibiting the reproduction of testimony. Even under the statute the reproduction of testimony was inhibited in cases of treason. The statute of England with reference to treason, in this connection, used practically the same language as adopted in our Constitution, and thus compelled the confronting of the accused with the witnesses against him when the party was on trial for that offense.

Many expressions occur in the opinions in the United States to the effect that it was the rule at common law to reproduce the testimony of a dead witness, and even some of the opinions have gone far enough to hold that it was a rule at common law to reproduce the testimony taken at an examining trial. Suffice it to say that depositions were unknown to common law, and it may be further satisfactorily stated that depositions are never taken except under statutory authority. Therefore this rule could not have existed at common law. In the United States it has been stated that such reproduction was a rule of evidence at common law, and especially so with reference to the evidence of a deceased witness. An examina-

tion of the history of the question will show that such was not the case when speaking of the common law proper. So in those states where this rule has been announced, doubtless an inspection, especially of the history of the earlier states, will show that the Legislatures of the respective states have adopted many of the acts of Parliament, and in some all acts of Parliament have been adopted to a certain period. Some of these states adopted all acts of Parliament down to 1688 as common law. The different states vary in fixing the time when the acts of Parliament should become common law, some of them bringing it down even as late as 1776. It can be seen, then, very readily why the decisions in those states speak of the reproduction of such testimony as under the common law. It will be ascertained, I rather think, if an investigation of the jurisprudence of those states should be made, that the decisions had no reference to common law, properly speaking, but to the statutes adopted as common law. So there is no question in the opinion of the writer, that the earlier rule, as far back in history as the Jewish and Roman civilization, was that the accused must be confronted with the witnesses against him. The modern rule, however, has been adopted, and it has been done, as intimated, not by adhering strictly to the truth of the history of the question, but by reason of the statutes mentioned, reinforced by the rule of necessity. It would hardly be contended by any student of our jurisprudence, or that of England, from which we have largely borrowed, that prior to the acts of Parliament it would be asserted that at common law the testimony of the dead or absent witness could be reproduced. In Texas we have not adopted the acts of Parliament, but only the common law as such, properly speaking. So much for the question with reference to the reproduction evidence generally, and of the testimony of the deceased witness specially.

The decisions in regard to the reproduction of the testimony of an absent living witness is far from being harmonious or unanimous. The contrary rule finds support in a great many authorities, and it is more than difficult to say which is the prevailing rule. Some of the cases which deny the rule are here cited. *People v. Newman*, 5 Hill (N. Y.) 295; *Finn v. Com.*, 5 Rand. (Va.) 701; *Brogy v. Com.*, 10 Grat. (Va.) 722; *State v. Houser*, 26 Mo. 431; *Collins v. Com.*, 12 Bush (Ky.) 271; *Pitman v. State*, 92 Ga. 480, 17 S. E. 856; *United States v. Angell* (C. C.) 11 Fed. 34; *State v. Lee*, 13 Mont. 248, 33 Pac. 690; *Owens v. State*, 63 Miss. 450; *Motes v. U. S.*, 178 U. S. 459 et seq., 20 S. W. 903, 44 L. Ed. 1150. Some of the cases hold that to receive the evidence of a witness who was merely absent is violative of the constitutional right of the accused to confront the witnesses against him. In the majority opinion the intimation is that when Texas

became a Republic, and subsequently a part of the federal Union, our Bill of Rights requiring the accused to be confronted with the witnesses against him was copied or taken from Constitutions of other states, and therefore, when adopted, it was with the construction placed upon it in those states. This, perhaps, is a little difficult of historical confirmation, especially as it is not settled from which state Texas copied her Bill of Rights. Texas became an independent Republic in 1836, and was admitted into the federal Union in 1845. At the time of our adoption of the Bill of Rights, many of the states, if not a majority of them, had not adopted the later rule of reproducing such evidence, but were operating under the old rule, which excluded such reproduction of evidence. As before stated, in Missouri, the rule seems to have been otherwise until 1857, as I understand the *McO'Brien* Case, *supra*. So it was in Tennessee until 1850, and it seems that it was not only so in Virginia then, but is still the rule, as well as perhaps in Georgia, as to absent witnesses. And it seems that under the cited cases it is so in Mississippi as to the absent witness. That the jurisprudence of Tennessee and Missouri entered largely into the general make-up of the organic law of Texas may be relied upon with some degree of confidence, by reason of the fact that those states furnished some of the great founders and statesmen who carved out Texas independence, gave her a national existence, and contributed largely to her statesmanship, as well as to her legislation and jurisprudence. The Austins and the Bryans hailed from Missouri, while Crockett and Houston came from Tennessee. However, I do not purpose to enter into the history of this question, or of the great men who made our constitutional laws as well as our jurisprudence. I mention these matters to especially call attention to the fact that the rule was more than doubtful even in regard to the deceased witness at the time of the formation of the organic law of the Republic of Texas, as well as of the state of Texas.

The rule was not known in Texas jurisprudence until after the War between the States that the testimony of a deceased witness could be reproduced. *Greenwood v. State*, 35 Tex. 587. The intimation in that opinion is that it was necessary to so hold in order that the defendant might have the benefit of reproducing such testimony. Of course, this holding would not be correct, inasmuch as the constitutional inhibition only applies to witnesses against the accused, not to those in his favor. It is, however, correct that the almost unbroken line of authorities in Texas since the *Greenwood* Case sustains the rule authorizing the reproduction of such evidence. From *Montgomery v. Com.*, *supra*, I make this quotation: "Referring to the opinion in the *Finn* Case, 5 Rand. (Va.) 701, he says, after stating that in civil

cases, where the witness is since dead, what he swore on a former trial may be given in evidence, the judge proceeds: 'But we cannot find that the rule has ever been allowed in a criminal case. Indeed, it is said to be expressly decided otherwise, and all the judges concurred in the opinion that the evidence was inadmissible. This decision has never been controverted in Virginia since. The whole Criminal Code has since undergone a revision, but the rule as laid down in the *Finn* Case has been acquiesced in by both the courts and Legislature. I do not think it necessary, therefore, to go into an inquiry whether the rule was originally founded on proper principles or not. The rule has been established and recognized, and I think should be adhered to, and, whether a foundation had been laid for its introduction or not, the evidence was properly excluded.'"

In *Motes v. U. S.*, *supra*, the Supreme Court of the United States, through Justice Harlan, in regard to absent witnesses, said: "We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement, or act of the accused. * * * In *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244, which was an indictment for bigamy, committed in Utah. * * * The trial court admitted proof of what a witness had stated on a former trial of the accused for the same offense, but under a different indictment. This court said the Constitution gives an accused the right to a trial at which he should be confronted with the witnesses against him; but, if the witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but, if he voluntarily keeps witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." In that case reference was made to several authorities, American and English, and the court further said: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong, and consequently, if there has not been in legal contemplation a wrong committed, the way has not been opened for the introduction of the testimony. * * * In *Reg. v. Scaife*, 2 Den. C. C. 281, it was held by all the judges that the depositions were not admissible against the defendant who had not caused the absence of the witness. Lord Campbell, C. J., said: 'I am of opinion that the rule for a

new trial must be made absolute. After having been given, the defendant Smith has resorted to a contrivance to keep the witnesses out of the way. The deposition was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned judge (Cresswell, J.), in summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant Smith alone, and not as against the others. The question, then, is whether such deposition is admissible against a prisoner without proof that the witness has been kept away by his contrivance, or without proof of the death of the witness. No case has yet gone so far, and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having the witnesses for the prosecution against him examined and cross-examined before the jury upon every matter that may be material to his defense. I therefore think that the deposition was improperly admitted against Scaife and Rooke, and that there should be a new trial.' This opinion was delivered on May 21, 1900, by the Supreme Court of the United States, through Justice Harlan, one of our greatest jurists.

I have seen proper to say this much, realizing that for the present it may be useless; but I am so firmly convinced that neither the courts, nor the Legislature, nor both combined, are at liberty, or intrusted with authority, to either overturn the plain language of the Constitution or ingraft upon its plain reading rules of necessity to meet untoward contingencies or inconveniences. If the rule of necessity is to be the criterion by which the Constitution is to be modified or changed, either by legislative enactment, decisions of courts, or both, then this rule can be, at the will of the dispensing or construing power, enlarged without limit. I wish to reiterate that there is no power under our form of government invested with authority to change constitutional provisions, except those who ordained the Constitution, and no emergency can become sufficiently urgent to authorize either or all departments of government combined to ingraft any rule of necessity upon the plain reading of that instrument, which is in the least subversive of its provisions. In closing, I desire to incorporate in this opinion the following language found in 10 Am. Cr. Rep., at page 249, which is well worthy of careful perusal, thoughtful consideration, and perpetuation, and so well accords with the views of the writer that he takes the liberty of reproducing it verbatim:

"In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him. What was the aim and object of this declaration found in the sixth amendment of the federal Constitution, a counterpart of which is embodied in the Bill of Rights, in the Con-

stitution of every state in the Union? Does it mean that, if the accused be confronted with the witnesses against him at a preliminary hearing or coroner's inquest, the statements given in evidence on such a rehearing or investigation may be given in evidence at the trial, should it appear that the witnesses were dead or had gone beyond the seas? Not at all. Such a holding would virtually eliminate all of the declaration from the Bill of Rights. Under such conditions, how could the traverse jury discern the demeanor of the witness when on the stand? The paper testimony would not reproduce before the jury the facial expressions, the halting and changing of voice, the forced self-assertion and abandon, which so markedly reveal the character of the witness when testifying, and constitute almost unerring indications of the truth or falsehood of his testimony. History, reason, and the philosophy of the law verify the force and correctness of the conclusion that the aim and object of this declaration is to secure to the accused the right to be brought face to face with the witness testifying against him, before that jury which is the arbiter of his right to life or liberty. Before reviewing some of the historic incidents which the framers of the Constitution most likely had in mind when they penned this declaration of right, let me here solemnly admonish judges, especially of courts of review, to cling closely, with jealous care, to the landmarks of the Constitution and to hold it their bounden duty to see to it that no person, however humble, shall be denied any right or privilege guaranteed him by that instrument. My own experience and observation, at the bar and on the bench, in the trial of criminal causes, emphasize the truth of the assertion that notwithstanding the intellectual and moral advance of to-day over all the ages which have gone before, the danger of innocent persons being convicted to appease popular sentiment is just as great now as it was when every official held his commission from the king. How many times within the memory of us all have innocent men been indicted by a star-chamber grand jury, tried and convicted at the bar of public opinion through the powerful influence of the press, and who would have been sent to the penitentiary, perchance to the gallows, but for the timely interposition of friends or neighbors, through whose aid the victims were enabled to employ counsel to prepare their defense and establish their innocence. It is safe to assume that the fathers of the Constitution could not have been unmindful of the teachings of history, touching the Star Chamber and the Inquisition, those tribunals of infamy and terror, before whom men were condemned to death upon the depositions and statements in writing from witnesses unknown to the accused, or by spurious confessions and admissions wrung from the prisoner by torture and terror.

"The inestimable value of the right to the

accused of being confronted with one whose testimony is against him is most strongly illustrated in the sacred writings, as well as in the history of criminal jurisprudence. We are told that when Adam broke the Divine command he hid himself from the face of the Lord. After Peter denied the Christ, when the Lord turned and looked upon him, he remembered the word of the Lord, and Peter went out and wept bitterly. Luke xxii, 61, 62. Again in Acts of the Apostles, c. 25, when Paul was a prisoner at Cesarea, King Agrippa visited Festus, the governor, and when the king had been there many days Festus declared Paul's case unto the king: 'There is a certain man left in bonds by Felix, about whom, when I was at Jerusalem, the chief priests and the elders of the Jews informed me, desiring to have judgment against him, to whom I answered: It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.' When affidavits were read to Mary, Queen of Scots, in prison, imputing to her great crimes, the unfortunate queen answered: 'Who are the witnesses (for they were not even named to her). Bring them before me, and they will forswear their falsehoods when they meet me face to face.' In 1589 Philip Howard, Earl of Arundel, was tried for high treason; Gerard and Shelby being witnesses against him. These witnesses accused him of having offered up his prayers for the success of the Spanish expedition against England. Arundel declared that his prayers were only for the preservation of himself and fellow Catholics from the general massacre, to which report had said they were doomed in the event of the Spaniards effecting the landing. Then fixing his eyes upon Gerard, and adjuring him to 'speak nothing but the truth, as he must one day stand before the tribunal of the living God to answer for what he should then say,' he so daunted and disconcerted the witness that he lost his utterance and was unable to repeat his first assertion. Sir Walter Raleigh was convicted of high treason, chiefly upon the written statement of one Conham, which he denied in a letter to Raleigh, but afterward reaffirmed in part in a letter to the lords, the evening before the trial. Upon the trial, Sir Walter Raleigh demanded that Conham should be confronted by him. He appealed to the statute law and to the law of God, which required two witnesses. He even offered to abandon his defense if his accuser would dare to assert, in his presence, that he had ever advised any dealing whatever with the Spanish monarch. He demanded again that his accuser stand forth, and, if Conham dared to reaffirm a single charge before his face, he would submit in silence to his fate.

"It is unnecessary to multiply cases, for the whole record of each state trial is but the

recital of judicial murders, planned by conscienceless and envious officials, and perpetrated through that inhuman system of jurisprudence which permitted affidavits, letters, and depositions to be read in evidence against the accused. Judges, let me again admonish you to make the Constitution the touchstone of your official action."

MARSH v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1903.)

1. WITNESSES—IMPEACHMENT.

Where accused, claiming that he shot decedent after satisfying himself of the truth of a statement of his wife that decedent had insulted her, sought to show, on the direct examination of the wife, as a witness in his behalf, that decedent had insulted her, without asking her as to whether decedent had not at the same time insulted another woman, it was proper to permit the state, on her cross-examination, to show that decedent then insulted another woman, and then call the latter to show that the wife's statement was false, and thereby impeach her testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1088, 1272, 1273.]

2. SAME—CROSS-EXAMINATION.

Everything legitimate for the purpose of testing the knowledge of the fact testified to by witness, his bias, prejudice, and any matter that legitimately goes to discredit him, is admissible on cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106-1108.]

3. SAME.

Where the wife of accused testified, on direct examination as a witness in his behalf, that decedent had insulted her and that she had informed her husband thereof previous to the homicide, it was proper, by way of impeachment of her, after laying a proper predicate, to show that shortly after the alleged insult decedent left the house, but came back and had a friendly conversation with the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106-1108.]

4. SAME—CROSS-EXAMINATION.

Accused, claiming that he shot decedent after satisfying himself of the truth of a statement of his wife that decedent had insulted her, sought to show on the direct examination of the wife that decedent had insulted her. On cross-examination the state asked her whether she stated on the examining trial anything about decedent having offered her a drink out of a bottle in the presence of another woman. *Held*, that the question was legitimate subject of cross-examination; it being assumed that the matter related to and covered part of the transaction testified to on the direct examination.

5. SAME.

Where accused, claiming that he shot decedent after satisfying himself of the truth of a statement of his wife that decedent had insulted her, showed by the testimony of the wife that decedent had insulted her and that she had informed accused thereof prior to the homicide, it was error to permit the state to ask the wife on cross-examination as to whether she had stated, after the homicide, that it was caused by a foolish remark of a third person, followed by proof that she made such remark on her answering the question in the negative, since it related to a transaction subsequent to the killing, and was not receivable, either for the purpose of impeachment or as a circumstance adverse to accused.

6. CRIMINAL LAW—EVIDENCE—OPINION EVIDENCE.

A question, asked a witness in a homicide case, as to whether she had not stated, after the homicide, that the trouble between decedent and accused was caused by a foolish remark made by a third person, was objectionable as calling for the opinion of the witness as to the killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1035-1042.]

7. HOMICIDE—CONDUCT OF ACCUSED—EVIDENCE—ADMISSIBILITY.

Proof of the conduct of accused after coming to the house of decedent, where the killing occurred, was admissible; the demeanor of accused and his appearance, as to whether angry or not, being legitimate matters to be testified to on the trial of criminal cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 341-371.]

8. SAME—INSTRUCTIONS—HARMLESS ERROR.

Where accused was convicted of manslaughter, errors in the charge of murder in the first degree were immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 715-720; vol. 15, Criminal Law, § 3161.]

Appeal from District Court, Jones County; Cullin C. Higgins, Judge.

Will Marsh was convicted of manslaughter, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of manslaughter, and his punishment assessed at five years' confinement in the penitentiary.

The facts in the case show the following: Defendant lived in Cisco, Eastland county, and deceased, Baggett, in the town of Hamblen, Jones county, and on the 30th of April, 1907, deceased was at his residence just after dinner, and in his house were five or six of his neighbors. They were all sitting around talking after the midday meal. Defendant came up to the house and spoke to deceased. Deceased invited him into the house. They shook hands. The deceased introduced defendant to the different people in the house and requested his wife to prepare dinner for the defendant, when the defendant declined on the ground that he had eaten dinner. They all sat in the house from a half to three-quarters of an hour, engaged in common conversation; deceased making inquiries of defendant as to his family, their health, etc., and wanting to know if he came to the town prospecting. He offered to go with him around over the edge of the town; defendant stating that he would return on the evening train, which passed between 3 and 4 o'clock. The deceased was engaged in building a house some 100 yards from his residence. At 1 o'clock he got up. The neighbors all left, and went to their different places; and deceased, in company with Milton Newman, whom he had employed, went to the house they were working on. Defendant accompanied them, and sat around the building talking generally with the deceased. The deceased would be up on the house part

of the time and down on the ground part of the time. After they had been at work some few hours, the witness Newman, together with deceased, went to the work bench, off some 20 or 30 feet from the building. As they started to the work bench, the defendant asked the deceased if he had some water. Deceased directed him around the corner of the house. The witness and deceased were standing at the work bench, each with a board in his hand, when the defendant shot the deceased from behind twice, killing him, and then turned around and walked hurriedly towards the depot. These are the circumstances immediately surrounding the killing. The defendant took the witness stand and testified of some lewd conversation with defendant's wife that deceased indulged in before he killed him. He also testified that he (deceased) had been informed by his wife that deceased on a visit to them at Cisco had insulted her, and had made indecent and improper proposals to her, and that he had come to deceased's place in order to satisfy himself of the truth of what his wife told him, and becoming convinced of same, and fearing deceased was going to attack him, he shot and killed him.

Bill of exceptions No. 1 shows that after Mrs. Marsh, wife of appellant, had testified in his favor to the effect that deceased had offered her an insult, but did not testify and was not asked anything concerning Cathaleen Adams, nor concerning the deceased pinching the said Cathaleen Adams on the breast, and after defendant finished his examination in chief of the said Mrs. Maggie Marsh, wife of defendant, she was turned over to the state's counsel to cross-examine, and counsel for the state interrogated her concerning deceased pinching Cathaleen Adams on the breast, and asked the witness if she did not testify on the examining trial, and did not so state, that deceased pinched Cathaleen Adams on the breast, while she (the witness) and Cathaleen Adams and deceased were in the room on the evening witness claimed that deceased insulted her. Appellant objected, because the same was not brought out by defendant on direct examination, and because the state could not prove the facts as a predicate to contradict and impeach the witness on immaterial and irrelevant matter, and because the evidence sought to be brought out was irrelevant and immaterial matter, and calculated to injure the defendant. The objection being overruled, the witness testified that, while deceased and Cathaleen Adams and herself were in the room, the deceased did pinch Cathaleen Adams on the breast, and that she so testified on the examining trial. The state's counsel thereupon placed the witness Cathaleen Adams on the stand, and proposed to prove by her that deceased did not pinch her on the breast at the time and under the circumstances testified to by Mrs. Marsh. Appellant objected to this testimony for the reasons above stated, and because it was

forcing the wife to give testimony against the husband through the mouth of the witness Cathaleen Adams. This bill is approved with the following qualification: "That, after the wife of the defendant had testified concerning the insult of the deceased offered to her, the testimony elicited on cross-examination by the state was in the opinion of the court concerning the same transactions, more fully developing the matters testified to and brought out as stated in this bill, and the general charge of the court limited the testimony of the wife on cross-examination to affecting her credibility (paragraph 22 of the court's general charge), and the court approved and gave the special charge of the defendant limiting the testimony of Cathaleen Adams to the impeachment of the defendant's wife." In the case of *Messer v. State*, 43 Tex. Cr. R. 97, 63 S. W. 643, we held that, where a wife swears to certain facts and circumstances, the cross-examination must be confined to the matter elicited in chief. Of course, everything legitimate for the purpose of testing her knowledge of the fact testified to, her bias, her prejudice, in fact any matter that legitimately goes to her discredit, is admissible on cross-examination. The same rule is laid down by this court in the case of *Earl Hobbs v. State* (decided at the present sitting of the court on June 6, 1908) 112 S. W. 308. It follows, therefore, that the testimony complained of was strictly within the rule laid down in the last-cited cases, and was legitimate cross-examination of the wife.

Bill of exceptions No. 2 shows defendant placed Mrs. Maggie Marsh, his wife, upon the stand as a witness in his behalf, and she testified that on the evening of April 13, 1907, the deceased came to the house of Mrs. Lizzie Adams, and into a room where witness was, and put his arm around her, mashed her on the breast, put his hand up under her dress, and pinched her on the leg, and said: "It looks like you could be good to me." Appellant did not ask his wife any question on direct examination concerning a conversation between the witness and Will Brown after the killing occurred. Thereupon the state's counsel asked the wife on cross-examination the following question: "Q. I ask you if on the night you got the news that your husband had shot Jodie Baggett, in the town of Cisco, Eastland county, if you did not say to Will Brown on that night, when he asked you what caused the trouble, that you told him, 'Nothing at all, but a foolish remark.' I will ask you if you did not say this: 'It was nothing in the world that caused the trouble except a foolish remark of Cathaleen Adams.'" To which question the defendant then and there objected, for the reason that same called for an opinion of the witness as to the cause of the killing; the witness having been shown to have been in Cisco at the time of the killing, and that the killing took place at Hamblen, about 100 miles distant, and be-

cause the matter sought to be proved by this witness was not brought out by defendant on direct examination, and because the question asked called for evidence of the wife against her husband, and because the testimony elicited by said question is irrelevant and immaterial for any purpose, and calculated to injure the defendant before the jury. The objections being overruled, the wife answered: "No; I did not." Thereafter the witness Will Brown was placed upon the stand and testified, after a proper predicate was laid: "Yes, sir; she made that remark." This bill is approved with the following explanation: "That in paragraph 22 of the court's general charge the court limited the entire testimony brought out by this defendant's wife to the matter of her credibility, and in the special charge No. 1, prepared by defendant, the court limited the testimony of both Will Brown and Cathaleen Adams to affecting the credibility of the wife of the defendant, all of which charges were given to the jury as part of the law in the case."

Bill of exceptions No. 3 shows the state asked appellant's wife the following question: "Is it not true that, a short time after you claim to have been insulted, Baggett left the house and then came back again, and that you sat there in the house in a friendly conversation with this man whom you claim insulted you, and that when Will Brown came you two and he engaged in a conversation." Appellant made the same objection to the testimony, and witness answered: "No, sir; it is not true." Thereupon the state was permitted, over appellant's objection, to prove by Will Brown that it was true, after laying a proper predicate. The court limited this testimony, as shown by the bill, to the credibility of the witness Maggie Marsh, and gave appellant's special charge to that effect.

Bill of exceptions No. 4 shows that, after appellant's wife had testified in chief, state's counsel, over appellant's objection, asked her the following question: "Mrs. Marsh, you testified on the examining trial of your husband here in Anson, before Judge Stinson, on the 14th day of May, 1907, did you not? A. Yes, sir. Q. At that time you stated nothing at all on that examination about Baggett having offered you a drink out of a bottle in the presence of Cathaleen Adams, did you?" Appellant objected, because the failure of the witness to testify on the examining trial is not a matter about which she could be contradicted, and because it is new matter about which the defendant did not ask her in the examination in chief, and because it is forcing the wife to give testimony against her husband, and is an attempt to impeach the wife on an irrelevant and immaterial matter, about which she was not asked in the examination in chief. The objection being overruled, she answered: "No, sir; I don't think so."

We think the testimony complained of in bill of exceptions No. 3 was admissible as a circumstance tending to rebut and throw dis-

credit on the original statement made by appellant. It was a legitimate subject of cross-examination, in that this fact, if true, was at variance with her statement of an insult by Baggett, and should have been received and strictly limited for that purpose. We understand that the matter objected to and covered by appellant's bill of exceptions No. 4 related to and covered part of the same transaction, and had reference to the same time originally testified to by Mrs. Marsh. On this assumption, and for the purpose of impeachment, as tending to affect the recollection and memory of the witness, we think this testimony, when properly limited, as it was, was admissible. We do not believe, however, that the testimony included in bill of exceptions No. 2 should have been admitted. It formed no part of the transaction, or the conversation or matter inquired of from Mrs. Marsh on her original examination. It wholly related to another transaction subsequent to the killing, and was not receivable, either for the purpose of impeachment or as a circumstance adverse to appellant. Again, we think the testimony was objectionable, in that it called for the opinion of the witness as to the killing. For full discussion of this matter, see *Richards v. State* (Tex. Cr. App.) 110 S. W. 432; *Jones v. State*, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; *Messer v. State*, 43 Tex. Cr. R. 97, 63 S. W. 643; *Washington v. State*, 17 Tex. App. 197; *Hoover v. State*, 35 Tex. Cr. R. 346, 33 S. W. 337; *Gaines v. State*, 38 Tex. Cr. R. 216, 42 S. W. 385; *Creamer v. State*, 34 Tex. 173; *Greenwood v. State*, 35 Tex. 587; *Merritt v. State*, 39 Tex. Cr. R. 70, 45 S. W. 21; *Johnson v. State*, 28 Tex. Cr. R. 26, 11 S. W. 667; *Hamilton v. State*, 36 Tex. Cr. R. 375, 37 S. W. 431; *Owen v. State*, 7 Tex. App. 332; *Red v. State*, 39 Tex. Cr. R. 436, 46 S. W. 406; *Bluman v. State*, 33 Tex. Cr. R. 64, 21 S. W. 1027, 26 S. W. 75.

Bill of exceptions No. 5 shows that the state was permitted to prove by Milton Newman that when the defendant came to the house of deceased he did not appear to be excited, and that he (the witness) did not notice anything unusual in his talk or conduct. The court in his charge to the jury withdrew this testimony, but we do not think there was any error in admitting it. The fact that appellant went to the house of deceased, sat on the gallery awhile in a quiet and composed way, and then went to the house deceased was building and stayed there quite a while before killing appellant, in a quiet and composed way, is a matter that the witness could testify about. The demeanor of a witness and his appearance, as to whether he was angry or not, are legitimate matters to be testified to by witness in the trial of all criminal cases.

Appellant complains of the charge on self-defense as not presenting real and apparent danger. This criticism is not correct. Charge

No. 6 on the law of self-defense was covered by the main charge.

Appellant in his third complaint urges error in the charge on murder in the first degree. This charge passed out of this case, since the verdict was for manslaughter.

For the errors pointed out, the judgment is reversed and the cause is remanded.

BROOKS, J., absent.

TEXAS & N. O. R. CO. v. BELLAR et ux.†
(Court of Civil Appeals of Texas. May 26, 1908. Rehearing Denied June 18, 1908.)

1. RAILROADS—DESTRUCTION OF PROPERTY BY FIRE—EVIDENCE.

In an action against a railroad company for destruction of property by fire resulting from defendant's negligently permitting fuel oil to escape from a tank on its right of way, evidence considered, and *held* to support a finding that defendant negligently permitted the oil to escape from the tank and to saturate the surrounding soil and that such oil was the means of communicating fire to plaintiff's property.

2. SAME—PROXIMATE CAUSE.

In such case the evidence considered, and *held* sufficient to support a finding that the presence of the oil in and upon the ground was the proximate cause of the destruction of plaintiff's property.

3. SAME.

Where defendant railroad company permitted a tank containing crude oil for use as fuel in its engines to remain on its right of way, it was liable for destruction of plaintiff's property by fire communicated by oil which defendant negligently permitted to leak from such tank, though plaintiff failed to show that defendant ignited the oil.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1673-1676.]

4. NEGLIGENCE—PROXIMATE CAUSE.

The proximate cause of an injury is not always the last act of cause or the nearest act to the injury, but it may be such a negligent act as actively aids in producing the injury as a direct and existing concurrent cause, and such as might reasonably be expected to result in the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-81.]

5. EVIDENCE—JUDICIAL NOTICE—INFLAMMABLE CHARACTER OF CRUDE OIL.

In an action for the destruction of property by fire communicated by crude oil permitted to saturate the soil surrounding the property, the court will take judicial notice that crude oil is of an inflammable character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 6.]

6. RAILROADS—DESTRUCTION OF PROPERTY BY FIRE—COMBUSTIBLES ON RIGHT OF WAY—EVIDENCE.

In an action against a railroad company for destruction of property by fire communicated by crude oil permitted by defendant to escape and saturate the surrounding soil, evidence that defendant used such oil as fuel in its locomotives and that on several occasions prior to the fire the oil on the ground had become ignited, was sufficient to support a finding that the oil was of an inflammable character.

7. SAME — PROXIMATE CAUSE — CONCURRENT CAUSE.

Where a railroad company permitted crude oil which it used as fuel in its locomotives to escape from a tank on its right of way and to

† Writ of error refused by Supreme Court.

saturate the surrounding soil, it was liable for the destruction of property on the adjoining land by fire communicated by the oil, though a flood occurring before the fire had carried a greater quantity of oil to the surrounding land than might have been carried to it if there had been no flood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1690-1693.]

8. EVIDENCE—HEARSAY.

In an action against a railroad company for destruction of property by fire communicated by oil leaking from a tank on defendant's right of way, statements made by a person during the progress of the fire as to the cause of the ignition of the oil were hearsay and inadmissible on behalf of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1181.]

9. SAME—RES GESTÆ.

A statement by a bystander made during the progress of a fire communicated to plaintiff's property by oil which escaped from defendant's oil tank as to the cause of the ignition of the oil was not admissible for defendant as a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 330, 330½.]

10. NEW TRIAL — PROCEEDINGS — SCOPE OF INQUIRY.

On the hearing of a motion for a new trial, testimony of jurors tending to show misconduct on the part of the jury is properly disregarded by the court, where the motion for a new trial contains no allegation as to such misconduct.

11. SAME—MISCONDUCT OF JURY—TESTIMONY OF JURORS—SUFFICIENCY OF EVIDENCE.

On a motion by defendant for a new trial, defendant offered to show by one of the jurors that during the deliberation of the jury he learned that his wife's mother, who was a member of his family, was very ill and expected to die at any moment; that up to that time his mind had been concentrated on the case, and that he did not at that time feel justified in agreeing to a verdict for plaintiffs; that after receiving such information he was much worried and could not concentrate his mind upon the facts of the case to the same extent as before, and that he thereafter agreed to the verdict in plaintiffs' favor; that he did not know that the condition of his family caused him to agree to the verdict, but he believed that it hastened the verdict; that, but for the information received by him, he would have discussed the case more fully and that he was not altogether satisfied with his verdict. Defendant also offered the testimony of another juror to the effect that such juror was among the last, if not the last, of the jurors to consent to a verdict in plaintiffs' favor; that he sympathized with the juror last mentioned on account of the sickness in his family and that this may have had something to do with bringing in the verdict, but that he did not agree to the verdict altogether on that account. *Held*, that the evidence offered did not establish that the jury was influenced by the facts stated to render the verdict they did, and such evidence furnished no ground for a new trial.

12. SAME — VERDICT — IMPEACHMENT BY JURORS.

Under the direct provisions of Laws 1905, p. 21, c. 18, it is competent, on a motion for a new trial, to show by the testimony of jurors that the jury was guilty of misconduct in receiving communications or in receiving other testimony than that offered on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 290, 297.]

Appeal from District Court, Jefferson County; E. E. Easterling, Special Judge.

Action by L. A. Bellar and wife against the

Texas & New Orleans Railroad Company. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Baker, Botts, Parker & Garwood, Parker & Hefner, and Will E. Orgain, for appellant. Smith, Crawford & Sonfield, John Lovejoy, and Jno. W. Parker, for appellees.

McMEANS, J. This was a suit brought by the appellees, L. A. Bellar and wife, against the appellant, Texas & New Orleans Railroad Company, for damages resulting to them from the loss by fire of two houses in Beaumont.

Appellees alleged that appellant negligently permitted oil to escape from an oil tank on its premises and from tank cars on its switches, and that the oil so escaping saturated the ground upon which their houses were situated, as well as all that intervening between the tank, switches, and plaintiffs' premises, rendering the same highly inflammable, extrahazardous as regarded the danger of being set on fire, and that such condition greatly increased the danger of fire, and was the proximate cause of the fire which destroyed their houses. They also alleged the destruction of the houses by fire, which fire, they alleged, started in the nighttime, and "was carelessly and negligently set by defendant, its agents and servants, in operating its engines and cars adjacent to plaintiffs' premises, by fire escaping therefrom, or by said employes in some other manner, or by its employes, otherwise engaged in its behalf thereabout, or by some other person or agency, plaintiffs being unable to point out with any greater certainty the origin or cause of the fire, but allege that same would not have been set out and plaintiffs' property destroyed but for the highly inflammable and extrahazardous condition in which plaintiffs' premises were placed by the escape of oil as aforesaid." They further alleged that they protested to defendant against the continuance of such negligence, and repeatedly requested defendant to remove the oil and to stop the cause that produced the condition of danger from fire, which defendant failed to heed, and that the defendant, in the exercise of ordinary care, should have foreseen the destruction of plaintiffs' property as likely to result from such condition. The defendant answered by general denial, and specially pleaded that the fire was not caused by fault on its part, but from causes over which it had no control, and for which it was in no wise responsible. The case was tried before a jury and resulted in a verdict and judgment for the appellees, from which the railroad company has appealed.

Mrs. Bellar owned in her own right lot 9 in block 31 of the Van Warner addition to the city of Beaumont and she and her husband, L. A. Bellar, owned in community lot 10 in said block. On lot 9 there was a two-story frame house of 19 rooms and on lot 10 there was also a two-story frame house, and

on both lots there were necessary outhouses, wells, cisterns, fences, etc. These lots were situated south of and abutted on the right of way of appellant's railroad. The railway at this point ran east and west, and the main line track was about 300 feet north of the two houses. Between this track and the lots there were 8 or 9 sidetracks, the nearest of these to the lots being about 20 feet. About 275 feet west from the lots appellant maintained an oil tank 30x20 feet in dimensions, in which it stored oil for use in its locomotives, the oil being pumped therein from tank cars. On the track nearest the lots defendant kept cars of oil nearly all the time, there being on some days only one or two and on other days from seven to eight. The general slope from the tank was in the direction of the Neches river, which was east of the lots, and which made the slope toward plaintiffs' premises. It was not controverted that oil in large quantities leaked or escaped from the tank and from the cars and overran and saturated the ground between the tank and the lots, but the evidence was conflicting as to whether it flowed onto the lots in question. The jury was justified in finding, and in support of the verdict we find that the oil did flow onto plaintiffs' lots and under the house situated on lot 9. Some of the witnesses testified that the territory mentioned was a lake of oil; others that oil stood in pools, and that all the ground was saturated; the oil stood four or five inches deep under a part of the house on lot 9. This condition had existed for more than a year before the fire. The oil was crude petroleum, and of the character used as fuel by defendant for generating steam in locomotives, and was highly inflammable; and on several occasions before the houses were burned the oil had caught fire on parts of the ground covered by it, but had been extinguished before any serious damage was done. On the night of October 29, 1903, the oil in some way, unexplained by the testimony, caught fire, and, burning upon the ground, finally communicated fire to the house on lot 9, first catching at the northwest corner, and consumed the entire building, and from the burning of this house fire was communicated to the house on the other lot, burning it also, and thereby appellees were damaged in the amount found by the jury. No one testified as to the manner in which the fire was set out; but when first discovered the oil on the ground from near the side track nearest the houses was ablaze, and the fence on the west side of the lots was on fire and the flames had taken hold of the northwest corner of the house on lot 9 and were running up the side of the house. It is a reasonable inference from the facts stated, and in support of the verdict of the jury we find, that the fire which caused the destruction of appellees' property was communicated by the burning oil, and but for the presence of the oil the loss would not have ensued; that the spreading of the oil

over the ground was due to the negligence of appellant, and was the proximate cause of appellees' damages. The day before the fire a water pipe near plaintiffs' premises burst, and the escaping water flowed onto the lots in question, carrying with it a larger quantity of oil than was there before, but we find that the danger to plaintiffs' property was not materially increased thereby.

By its first assignment of error appellant complains of the refusal of the court to instruct a verdict for defendant as requested in its first special charge.

The second assignment complains that the verdict and judgment were without evidence to support them in many particulars, prominent among which were the following: That the evidence did not show (1) that the defendant started the fire or that it was in any manner responsible for its origin; (2) nor that defendant was negligent in permitting the escape of the oil; (3) nor that the oil was in itself dangerous or that it did or could cause the damage complained of without the intervention of some independent, intervening cause; (4) nor that the oil was so highly inflammable as to constitute a menace to the plaintiffs' property; (5) nor that the defendant could have reasonably foreseen that such a result would ensue from allowing oil to escape; and (6) that the flowing of oil onto plaintiffs' premises was due to the bursting of a water pipe the day before the fire which caused plaintiffs' premises to be flooded, the water carrying the oil onto the lots; and that this was an independent, intervening cause between the escape of the oil and the destruction of the property without which the loss would not have ensued, and which result defendant could not have reasonably foreseen. The court in its charge submitted to the jury the issue of negligence on the part of defendant in allowing the oil to escape, and the question of whether such negligence was the proximate cause of the damage sustained by the plaintiffs. No objection to the form or substance of the charge is made.

By its first proposition under the assignments appellant contends that the escape of the oil was not shown to have been the proximate cause of the fire and the consequent destruction of plaintiffs' property, but that the proximate cause of the loss was the communication of the fire to the oil, and inasmuch as the origin of the fire was not shown the defendant cannot be held liable. The finding of the jury that the negligence of the defendant in permitting the oil to escape, thereby causing the ground to become so saturated with oil as to create the danger of setting fire to plaintiffs' property, was the proximate cause of the destruction of the property, is sustained by the evidence. The fact that the fire might have started from some cause other than through an act of the railroad company does not exculpate the defendant. It may be that the defendant was in no wise responsible for the origin of the

fire, and the evidence does not show that it was; but it was responsible for the part its negligence performed. That negligence consisted in bringing about a condition which subjected the plaintiffs' property to a danger, which resulted in its destruction, which did not theretofore exist, and which danger and result was reasonably apparent to and should have been foreseen by a person of ordinary prudence. It is true that the oil of itself did not create the danger, and that the danger therefrom did not arise until some other act was performed, namely, the kindling of the fire which ignited the oil. Neither would the kindling of the fire at a point near or remote from the property have created the danger but for the presence of the oil. It is not always the last act of cause or nearest act to the injury that is the proximate cause, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances. *Gonzales v. Galveston*, 84 Tex. 7, 19 S. W. 284, 31 Am. St. Rep. 17; *Railway v. Rowland*, 90 Tex. 370, 38 S. W. 756; *Railway v. Green* (Tex. Civ. App.) 36 S. W. 813; *Galveston v. Posnainsky*, 62 Tex. 134, 50 Am. Rep. 517; *Railway v. Mussette*, 86 Tex. 719, 26 S. W. 1075, 24 L. R. A. 642; *Seale v. Railway*, 65 Tex. 277, 57 Am. Rep. 602.

Appellant by its second proposition contends that it was not sufficient to show, merely, that the damage was caused by oil escaping from defendant's premises, but that the plaintiffs must go further, and show that it was through the negligence of the defendant that the oil so escaped. The proof shows that the oil escaped, with the knowledge of defendant, in such large quantities as not only to saturate and stand upon defendant's land, but to invade the premises of plaintiffs, and that this condition existed, and was permitted by defendant to exist, for probably more than a year before the catastrophe, although its servants more than once had been remonstrated with in regard to that state of affairs and had failed to correct it. The evidence was sufficient to justify the jury in finding that the escape of the oil was due to the defendant's negligence.

Appellant contends by its third proposition that as there was no proof that crude oil spread over the surface of the ground is so highly inflammable as to constitute a menace to, or indicate to the mind of a reasonably prudent person that it would cause the burning of adjacent property, and that in the absence of such testimony the law will not presume in favor of plaintiffs, nor can the court judicially know the fact.

It is our opinion that this court can take judicial knowledge of the nature and inflammable character of crude petroleum. 18 Cyc. 855.

But independent of this the jury had before it sufficient testimony to prove the combustible quality of such oil. It was shown that the railroad company was using such oil as fuel in its locomotives, and that on several different occasions the oil on the ground had, in some manner not explained by the evidence, become ignited.

Nor can we agree with appellant that the bursting of the water pipe and the flooding of the plaintiffs' premises in consequence, and the carrying of larger quantities of oil by the water on the lots was an independent intervening agency which broke the causal connection between the escape of the oil and the destruction of the property, as contended in its fifth proposition. The evidence showed that conditions at the time of the fire were the same as before the bursting of the pipe and such conditions had existed for more than a year. The only effect of the inrush of the water was to carry additional oil on the lots and to cause it to rise higher from the ground. It is not perceived how the flooding of the lots by water in any way increased the danger from fire. The assignments are overruled.

On the trial appellant offered to prove by the witness Eastham that during the early stage of the fire he heard a party at the fire make a statement to the effect that the fire was caused by the overturning or explosion of a lamp in the upper story of the building. The sustaining of an objection to this testimony is made the basis of appellant's fourth assignment of error. The testimony was hearsay and was properly rejected. It was not competent either as part of the *res gestæ* nor as corroborative of other testimony given by witnesses for defendant as to the origin and cause of the fire. The assignment is overruled.

In its motion for a new trial appellant urged as grounds upon which the verdict should be set aside that the jury before agreeing upon the verdict was guilty of what in legal contemplation amounted to misconduct, to the prejudice of the defendant, in that the jurors, or some of them, were so affected by extraneous matters communicated to them as to probably influence them in arriving at and agreeing to the verdict, and but for the consideration of such matters the verdict rendered would probably have not been rendered. The ground of the motion is not more specific. When the motion was heard appellant offered to prove by John W. Henderson, one of the jurymen, that during the deliberation of the jury he received intelligence that his wife's mother, who was a member of his family, was very ill and was expected to die at any moment; that up to that time his mind had been concentrated on the case and that he did not at that time feel justified in agreeing to a verdict for plaintiffs; that after receiving said information he was much worried and could not concentrate his mind

upon the facts of the case to the same extent as before, and that he thereafter agreed to the verdict in plaintiffs' favor; that he did not know that the condition of his family caused him to agree to the verdict, but he believed that it hastened the verdict; that but for the information received by him he would have discussed the case more fully, and that he was not altogether satisfied with his verdict. Appellant also offered the testimony of one Henry, one of the jurymen, to the effect that he was among the last, if not the last, of the jurors to consent to a verdict in plaintiffs' favor; that he sympathized with the juror Henderson on account of the sickness in his family, and that this may have had something to do with bringing in the verdict, but that he did not agree to the verdict altogether on that account. The introduction of this evidence was objected to on the grounds (1) that no such matter was set up in defendant's motion for new trial and that there were no allegations in the motion under which such evidence could be introduced; (2) because it was not shown that the evidence offered established that the jury was influenced by the facts stated to render the verdict they did; and (3) that it was incompetent for jurors to, in such manner, impeach their verdict. These objections were sustained, and the court refused to hear the evidence in support of the motion, and upon this action of the court error is assigned.

The first two objections were valid and were properly sustained. While formerly the testimony of a jurymen tending to impeach his verdict would not be heard, the Legislature has seen fit to enact a law making it competent for a jurymen, on motion for new trial, where the ground of the motion is the misconduct of the jury in receiving communications or receiving other testimony than that offered on the trial to testify to the facts, by examination in open court; and upon proof of such misconduct, if the testimony received, or communication made, be material, to authorize the court in his discretion to grant a new trial on such evidence. Acts 1905, p. 21, c. 18. The evidence offered in support of the motion does not show that the communication in any way prejudiced appellant. According to the statements it at most only hastened a finding by the jury on the facts legally before it. While it would be proper, under appropriate grounds alleged in the motion, to hear proof of improper conduct on the part of the jury in arriving at the verdict, in this instance the matters sought to be proved were immaterial, and the refusal of the court to hear the evidence, if error, was harmless.

Appellant's other assignments of error have been examined by us, and we do not find reversible error in any of them.

The judgment of the district court is affirmed.

ARMSTRONG v. NATIONAL LIFE INS. CO.†

(Court of Civil Appeals of Texas. May 28, 1908. Rehearing Denied July 2, 1908.)

1. PRINCIPAL AND AGENT — TERMINATION OF AGENCY—RIGHT OF PRINCIPAL.

Ordinarily any breach of duty undertaken by an agent is good cause for terminating the agency, and as between the principal and agent the principal may discharge the agent for a breach of any duty he had contracted, either expressly or impliedly, to perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 54.]

2. INSURANCE — AGENCY FOR INSURER — TERMINATION — "GOOD CAUSE."

A contract of employment as soliciting agent for an insurance company for seven years stipulated for the payment of a commission on renewal premiums in the event the company discontinued the contract after one year, provided that the agent should forfeit his rights under the contract on his being guilty of specified acts, and declared that the contract might be terminated by the company "at any time for good cause in accordance therewith." Held, that the company could without cause discharge the agent at any time after one year, in which case he was entitled to the commission on renewal premiums, and the company could also discharge him for any of the acts operating to forfeit his rights, "good cause" applying to the matters specified in the contract.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3112-3114; vol. 8, p. 7672.]

3. SAME—"CORRUPT."

A contract of employment as soliciting agent for an insurance company stipulated that the agent should forfeit his rights under the contract in the event he increased the company's liabilities by any "corrupt" or false representation. The failure of the agent to keep within his control notes delivered to him, in payment of premiums, wrongfully increased the liabilities of the company, but the failure resulted from the agent reposing confidence in a third person, which confidence had for its basis representations made by an agency manager of the company. Held that, since the word "corrupt" meant a consciously wrongful and fraudulent act, his failure did not operate to forfeit his rights.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1629.]

4. SAME.

A contract of employment as soliciting agent of an insurance company stipulated that the agent should forfeit his rights under the contract on his failing to remit to the company money collected by him. Premiums on policies issued by the company were covered by notes which were sold, and a portion of the proceeds were misappropriated by a third person, acting with the agent in soliciting insurance. It did not appear that the notes were collected by the agent or by the third person for him. Held not to show that the agent collected money for the company which he failed to remit.

5. SAME.

A contract of employment as soliciting agent of an insurance company stipulated that the agent should forfeit his rights under the contract on his failing to make "any and every report required of him." The contract required him to make a monthly report of business transacted during the preceding month, and stipulated that all policies should be reported on or returned within 30 days. Held, that a failure of the agent to make the monthly report, and the report on policies issued, operated to forfeit his rights, but a failure to make any other kind

† Writ of error refused by Supreme Court.

of report, though properly required by the company as growing out of implied terms of the contract, did not so operate.

6. SAME.

An agent of an insurance company, with authority to solicit insurance, had the assistance of a third person, but the company notified him that it would treat as his business alone the applications sent to it in his name, and would not recognize any understanding between him and the third person. Applications purporting to be sent by the agent were sent to the company, and policies issued thereon were transmitted to him. *Held*, that the agent failing to notify the company that he was not responsible for the applications was estopped from asserting as against the company that the third person was responsible for them.

7. SAME.

A contract of employment as soliciting agent of an insurance company required the agent to make a monthly report of business transacted during the preceding month, and provided that all policies should be reported on or returned within 30 days, and declared that a failure to make the reports should operate to forfeit the rights of the agent. The agent did not make reports, though the company demanded them. Previous to the demand, the nonobservance of the contract had been acquiesced in by the company. The agent showed that he had transacted no business during the months covered by the demand, and that he had made a verbal report covering certain policies. *Held*, that the failure of the agent to make the reports in writing, as demanded by the company, operated to forfeit his rights under the contract, though the company might waive its right to demand such reports.

8. CONTRACTS—CONSTRUCTION—INTENTION OF PARTIES.

The intention of the parties to a contract must be arrived at from a consideration of the nature and purpose of the contract, as shown by the language used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 732.]

9. SAME.

Where there is a conflict between the written and printed portions of a contract, the former controls.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 745.]

10. INSURANCE—AGENCY FOR INSURER—CONTRACTS—CONSTRUCTION.

A contract of employment as soliciting agent for an insurance company stipulated for the payment of commissions on renewal premiums in the event of a discontinuance of the contract after one year, and provided that the rights of the agent under the contract should be forfeited on his wrongfully increasing the company's liabilities by any corrupt act, or failing to remit to the company money collected by him, or to make required reports, and authorized the termination of the contract for good cause. *Held*, that a forfeiture of the rights of the agent under the contract operated only as to rights which might in the future accrue under the contract if it remained in force, and to exempt the company from liabilities on account of transactions which might in the future be had, and which, if the contract remained in force, would create liabilities against it, and a cancellation of the contract because of the wrongful acts of the agent deprived him of the right to commissions on renewal premiums subsequently paid.

11. APPEAL AND ERROR—HARMLESS ERROR—ERROR FAVORABLE TO PARTY COMPLAINING.

A defeated party cannot complain because the court directed a verdict against him for a smaller sum than the successful party was entitled to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4061.]

12. SAME—IMMATERIAL QUESTIONS.

Where a cause was tried on the issues raised by the amended petition seeking a recovery of an indebtedness due from defendant, and on his cross-action seeking a recovery for his wrongful discharge under a contract of employment for a fixed period, the question whether the original action, which was for an injunction, was maintainable on the grounds alleged in the original petition, was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 3331-3341.]

Hodges, J., dissenting in part.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by the National Life Insurance Company of the United States of North America against John D. Armstrong. From a judgment for plaintiff, defendant appeals. Affirmed.

Gross & Armstrong, for appellant. Locke & Locke and Thurmond & Steger, for appellee.

WILLSON, C. J. From April 20, 1901, when the contract covering his service was entered into, until November 13, 1905, when he was discharged by appellee, appellant was appellee's agent, and as such authorized to represent it in soliciting life insurance in Fannin county. Claiming that under the contract for his employment he was entitled, during a period of 10 years following the date of his discharge, to commissions on renewal premiums on policies written by him while acting as appellee's agent, paid after he ceased to be such agent, within a month after he was discharged appellant brought suit against appellee for \$13.86, as the amount of such renewal commissions accrued to him after his discharge, and secured a judgment; and about one month thereafter instituted another suit, but for the sum of \$67.27, representing, as he asserted, commissions accrued to him after the date of his discharge and a sum he claimed to be due to him for an alleged failure on appellee's part to issue a policy on an application he had submitted while he was its agent. This suit was then brought by appellee to enjoin the prosecution of the appellant's last-mentioned suit, and to enjoin appellant from instituting and prosecuting, as it was alleged he had threatened to do, other suits for commissions he claimed would accrue on renewal premiums. A temporary injunction was granted as prayed for, but afterwards on a motion to dissolve was so modified as to permit the prosecution by appellant of the suit for \$67.27. Appellant answered denying under oath and specifically the allegations in appellee's petition, and by a cross-action sought a recovery against appellee of \$2,333.80 as damages for his discharge, which he alleged was wrongful, and of \$481, which he alleged to be his share of commissions on certain policies alleged to have been written by one H. S. Crain alone, or by said Crain and appellant acting together for appellee. Appellee then amended

its petition and sought as against appellant a recovery of \$838.41 on account of matters alleged to have created an indebtedness in its favor against appellant. The trial was before a jury, who were peremptorily instructed to return a verdict for appellee for the sum of \$662.64. In accordance with this verdict a judgment for said sum was rendered against appellant, and the injunction which had been granted was perpetuated. This appeal is from that judgment.

The record is a voluminous one—consisting of nearly 500 pages. It appeared that in September, 1903, and January, 1904, one Child, appellee's agency manager, visited appellant, complained that his company was not getting the business it should get in Fannin county, and suggested he would send a man there to get the business his company was entitled to if appellant did not furnish it. One Crain was mentioned by Child as a good business producer and a "straight" man, and he seems to have led appellant to the conclusion that he (Crain) was the man he (Child) contemplated sending in to get the business. Appellant suggested that it was an inopportune time to attempt to procure the business, and stated to Child that if the matter was delayed until after another crop was grown he (appellant) would have Crain come and assist him. Child seems to have acquiesced in this suggestion, as a man was not then sent into the territory by the company, and, so far as the record shows, nothing further was ever said to appellant by either Crain or any other officer of the company about sending a man into the territory for the purpose of soliciting business there. In October, 1904, in response to a letter from appellant requesting him to do so, Crain, who was then representing appellee as its soliciting agent, but with the title of "district manager," in Kaufman, Wood, and several other counties, went to Fannin county, and until May, 1905, acted with him in procuring risks and writing policies. The arrangement agreed upon between Crain and appellant seems to have been that they would act together in soliciting and writing risks, and divide between themselves equally the business secured. While this arrangement existed a large amount of insurance was written by the parties—the amount sent to the company in appellant's name and on his account alone aggregating nearly \$300,000. In the transaction of this business it seems that if not all, practically all, the premiums to be paid by the insured were covered by notes executed by the insured as the applications for the policies were made. The notes, as a rule, were made payable to Crain, who from time to time discounted such of them as could be cashed at the bank, paying small portions of the proceeds over to appellant for his personal use, and other sums for remittance to the company. Those of the notes which could not be so cashed were sent to the company. The sums paid to him for the purpose

by Crain were properly remitted by appellant to the company to cover portions due it of the premiums paid on policies applied for. In May, 1905, Crain, having discounted the premium notes and misapplied a large portion of the proceeds, thereby defrauding both the company and appellant, disappeared. Later the condition of the business transacted by him and appellant was disclosed, and appellant and the company learned fully the extent of Crain's misconduct. Among other evidences of such misconduct it was ascertained that Crain had discounted and misappropriated the proceeds of six notes, aggregating \$604.56, given to cover premiums on policies never issued, the applications for which had been taken by and sent to the company in appellant's name as agent, and a note for \$137.40 given to cover a premium on a policy for which no application had ever been sent to the company. As a result of such misconduct appellee became legally liable to pay and did pay in settlement of the notes a sum aggregating \$741.96. On the trial below the contention was made by the appellant, and is renewed here, that as between himself and the company he was not liable for Crain's acts—that if the latter was not in effect sent into his territory by appellee to work with him as its agent, appellee nevertheless ought not to be heard to complain of his conduct and hold appellant responsible therefor, because of the fact that Child had recommended Crain as a "straight" man, a good agent, etc., at a time when he (Child) knew that Crain was untrustworthy, etc.; and, afterwards, while he was acting with appellant in Fannin county, being advised of instances of Crain's misconduct, had neglected to inform appellant of the facts in regard thereto. In support of his contention appellant offered as evidence certain letters written by the Commissioner of Insurance, etc., of Texas to Child, in February, March, and April, 1905, directing attention to specific misconduct on Crain's part; and also offered to prove by the witness Ohr certain statements he testified Child had made to him, after Crain had abandoned the country, in regard to said Crain. The evidence was excluded, and appellant complains of the action of the court in excluding it. In the view we take of this feature of the case it is unnecessary to determine whether the evidence properly was excluded or not. Whatever right appellant may have had to think Crain was in his territory assisting him as the representative of the company, sent there for the purpose, and whatever weight he may have attached to Child's statements favorable to Crain, he was distinctly advised by the company as early as December 29, 1905, that it was in no way responsible for Crain, so far as any arrangement existing between him and appellant was concerned. On the date mentioned appellee wrote appellant as follows:

"We note your remarks that a division of

commissions upon certain policies written by Mr. Crain and yourself is to be made. Of this arrangement we have no knowledge, nor do we consent to or permit ourselves to be made a party thereto. The policies issued upon applications received were charged to the respective account of agent signing the application, especially where the agent signed the same upon the two lower lines as the party indorsing for, and to whose account should be charged the premium in question. Mr. Crain is working under contract separate and distinct from yours, and the policies that were mailed to him in conformity with notice upon the application, are charged to him; the policies that were mailed to you in conformity with notice upon the application were charged to you, and no mixing of the accounts was made by us. Any understanding that you may have with Mr. Crain relative to the same are personal, and in no way are concern of ours, as both contracts, yours and Mr. Crain's, are in every particular separate and distinct with us. The account of premiums upon policies and commissions thereon we request must be so considered."

We do not think appellant could have construed this letter as meaning anything else than that appellee disclaimed any responsibility on account of Crain for his conduct in connection with any matter relating to the business appellant and Crain by agreement between them were transacting together. If, up to that time he had been relying upon any statement made to him by Child, he not only should not have longer relied thereon, but should have taken such steps as might have been open to him to have placed his past transactions with Crain upon the basis they belonged upon; that is, the mutual trust and confidence he and Crain had in each other. In the face of the letter quoted and other evidence in the record, we do not think the conclusion can be escaped that appellant cannot claim a freedom from liability for a failure to perform any duty he owed appellee on account of any act or conduct in connection therewith on the part of Crain. Eliminating Crain and his conduct from further consideration, therefore, and looking at the case left, as made by the record, the next matter we will consider is the nature and effect of the contract between appellant and appellee, as evidenced by its terms, and the other evidence in the record.

Among other stipulations in the contract were the following: "It is further stipulated and agreed that there shall be paid the said J. D. Armstrong a renewal commission of 10% of the first renewal premium paid on all policies obtained by him during the continuance of this contract, and 7% of all succeeding renewal premiums paid upon said policies during the continuance of this contract, and in case this contract is discontinued subsequent to one year from its date thereof, then in that case the company shall continue to pay the said renewal commission as

herein agreed to the said Armstrong, his heirs or assigns for a period of ten years after said discontinuance of said contract, less one per cent. as the cost of collecting the same." "It is also agreed in case a note is taken for premium upon any policy, and the said note is not paid, and is not collected, the said Armstrong shall undertake to obtain said policy for which said note was given in payment for, and return it to the company for cancellation, in which case he shall not be charged with the cost of insurance for the time for which said policy was in force, but does agree to pay the cost of examination." "Should the said agent, by his own act, or by collusion with any medical examiner, policy holder, applicant for a policy, or any other person defraud the company, or wrongfully increase its liabilities by any corrupt act or false representation, or attempt thus to defraud or wrongfully increase the liabilities of the company or should he fail to remit to said company, as required by this agreement, money collected by him or to make any and every report required of him then in every such case all rights of the said agent under this agreement shall become and be forfeited to the said company, and the company shall thereupon be discharged from every liability to said agent." "This contract may be terminated upon the service of notice by the company upon the said agent at any time, for good cause, in accordance therewith; otherwise it shall remain in force for a term of seven years from the date hereof."

It will be observed that by the terms of the contract it could, without cause, have been discontinued by appellee at any time subsequent to one year from its date—in which event, there can be no doubt, appellant would have been entitled to the renewal commissions during a period of 10 years from the date of its discontinuance. By its terms the contract also could, for "good cause," have been terminated at any time, by service of a notice on appellant. The words "in accordance herewith," in the provision for a termination of the contract for "good cause," we think, should be held to limit the "good causes" which would authorize such a termination to those specified in the contract as working a forfeiture of appellant's rights—that is, to a failure by appellant to make reports his contract required him to make, a failure to pay over money collected for the company, or a defrauding or attempting to defraud the company, or wrongfully increasing or attempting to increase its liabilities by a corrupt act or false representation. Ordinarily speaking, any breach of a duty undertaken by an agent would be "good cause" for terminating the agency, and we think, as between appellant and appellee, the former might have discharged him for a breach of any duty he had contracted, either expressly or impliedly, to perform. But here the "good causes" in the minds of the parties at the time and intended to operate as a forfeiture

of appellant's rights must, we think, be held to be no others than those specified by them in the writing evidencing their agreement. Our inquiry therefore will be confined to a consideration of the evidence in the record relating to the causes so specified. There can be no doubt, we think, that the effect of appellant's failure, as shown by the record, to preserve and keep within his control notes which must be treated as having been delivered to him in payment of premiums on risks solicited and transmitted to appellee by him as its agent, was to wrongfully increase its liabilities in the sum of at least \$604.56. But we think the evidence not only fails to show that such increased liability was the result of a corrupt act or false representation on the part of appellant, but on the contrary shows it was the result of confidence reposed in Crain, and that, to some degree at least, this confidence in Crain may have had for its basis the fact that by accrediting him as its agent appellee had recommended him as entitled to be trusted. We cannot take the view urged by appellee that the word "corrupt" as used in the contract does not necessarily mean that appellant must have been guilty of a consciously wrong and fraudulent act. As used in the contract, we think it must be held to necessarily mean such an act. Therefore, we are of the opinion that the action of the trial court cannot be sustained on the ground that appellant had forfeited his rights under the contract because responsible for a wrongful increase in the company's liabilities. Nor do we think the action of the trial court can be supported on the ground that appellant had failed to remit to the company money collected by him. The record shows that the premiums on the policies issued by the company were covered by notes. It shows that the notes were discounted and sold, and that a portion of the proceeds were misappropriated by Crain. But it does not show that the notes or any of them matured and were collected by appellant or by Crain for him. It therefore does not appear that appellant had collected for appellee any money which he failed to remit. It seems, therefore, that if the action of the trial court as to this phase of the case is sustained it must be on the ground that the evidence conclusively established that appellant had failed to make a report or reports required of him by the terms of his contract. Appellant bound himself on or before the 5th day of each month to report to the company "on all business transacted during the preceding month, including both premiums on policies issued and all renewal receipts sent to him for collection, deducting only such commissions as are herein allowed." The contract further stipulated that "all policies issued shall be reported upon or returned within thirty days from the date of issue; but, upon special request, the company will allow policies to be held an additional thirty days." No other kind or character of reports were by the terms of the con-

tract required to be made by appellant. A failure, therefore, to make any other kind or character of report, however properly it may have been required by appellee, or however clear may have been the duty growing out of implied terms in his contract of appellant to make same, would not furnish a ground for enforcing as against him the forfeiture insisted upon. The question then is: Was the evidence that appellant failed to make (1) the monthly reports provided for, or (2) the report on policies issued, of such a character as to justify the peremptory instruction to the jury? The evidence showed that the provision in the contract requiring reports on policies issued, and as well the monthly reports to be made by appellant, was ignored, and that its nonobservance had been acquiesced in by the company from the time the contract was entered into until after the complications in the business brought about by Crain's misconduct were discovered. Demands for these reports were then made by appellee on appellant. The monthly reports were not made in compliance with the demand therefor. Appellant sought to justify his failure to make them by showing the course of business which had obtained previous to the demand made therefor, and by further showing that he had transacted no business for the company during the months covered by the demand. He relied upon the same custom as an answer to the demand for a report on certain specified policies issued and sent to him for delivery, further insisted that he had verbally made to Child a report covering the policies, and, further, that the applications for the policies on which the report was demanded had been taken not by him, but by Crain. With reference to the contention last noted, it is sufficient to say that it appeared that the applications sent to the company for the policies purported to have been sent by appellant, and that the policies as issued thereon had been transmitted to him. And it further appeared that the policies had been so transmitted after he had been fully advised by the company in the letter hereinbefore quoted that the company would treat as his business alone the applications sent to it in his name, and would not recognize as controlling in its transactions with him any understanding between him and Crain. If he was not responsible for the applications, as the policies issued thereon were received by him he should have so advised the company; and not having done so, we think, should not afterwards be heard to say as against the company that Crain was responsible for them. As to the verbal report covering the policies, it appears to have been made in the latter part of August or early part of September, 1905. After it was made, appellee, through its attorneys, demanded a report on the policies. The report so demanded was not made. We think it was appellant's duty under the terms of his contract to have made the report demanded; and we do not think

that the fact that such reports had before been waived, nor the fact that he had verbally made a report to Child covering the policies, relieved him of the performance of the duty. The company was entitled to the report demanded, and we think entitled to it in writing. It might, of course, be waived; and so making it in writing might be waived. But not only does the record fail to show such waiver, but on the contrary it shows that appellee was insisting that it be made. The record, as we understand it, suggests no satisfactory reason why it was not made as demanded. It is, we think, no answer to say that breaches of the term in the contract requiring the reports to be made had always before been waived. If the maintenance by appellee of its suit depended upon breaches of the contract, which by its course of business with appellant it had waived, it could not be maintained; but we do not think such a waiver as to other breaches should be held to have relieved appellant of the consequences of the breach relied upon to support the forfeiture claimed, in face of the specific demand shown to have been made on him for a compliance on his part, as to pending matters, with the terms of his contract. 3 Paige on Con. § 1496. And what we have just said applies as well to appellant's failure to make the monthly report stipulated for in his contract for the month of September, 1905, demanded of him. Without the demand therefor shown to have been specifically made, the course of dealing between the parties might be said to have operated as a waiver of the report. In the face of a demand that the report be made, we do not think it should be held to have been waived.

Having reached the conclusion that appellee for "good cause," within the meaning of the contract, terminated it, the next question is: Was appellant's right to commissions on renewals thereby forfeited? The answer must depend upon the intention of the parties at the time the contract was entered into, and that intention must be arrived at from a consideration of the nature and purpose of the contract as shown by the language used by them. Did they intend it to so operate as to entitle appellant to commissions on renewal premiums paid to the company after its termination? If it fairly can be, we think it should be, so construed, as thereby the forfeiture of rights acquired under it will be avoided. The portion of the contract providing for commissions on renewal premiums is in writing. The other portions of the contract affecting the question form parts of printed blanks used by the company in completing contracts with persons to act as its agents. If there is a conflict between the written and the printed portions of the contract, the former should be held to control. But we think there is no conflict. The written portion declares that specified commissions on renewal premiums paid during the continuance of the contract

shall be paid to appellant, and then further declares that, in case the contract is discontinued subsequent to one year from its date, the company should "continue to pay the said renewal commission as herein agreed" for a period of ten years after the discontinuance of the contract. This is followed by the provision declaring that should appellant fail to make reports, etc., all his rights should become and be forfeited to the company, which should thereupon be discharged from every liability to him. The stipulation is a broad one. Its language would include and discharge appellee from liability for any sum it might then have owed to appellant on account of services already completely performed. But to give it such a meaning we think would be unreasonable. It reasonably could not have been the intention of the parties that the provision for a forfeiture of appellant's right should so operate. Fairly construed, we think the intention was (1) that the forfeiture should operate only as to rights which might in the future accrue under the contract if it remained in force; and (2) to exempt appellee from liability, not on account of past and completed transactions, but on account of transactions which might in the future be had, and which, if the contract remained in force, would create liabilities against it in favor of appellant. Appellee's liability for commissions on renewal premiums, for instance, when the contract was declared at an end, was not an absolute one in appellant's favor. It was conditioned on the policies being renewed and the payment of the renewal premiums. Before it should accrue it was contemplated that further services on the part of appellant in connection with the given policy might be required. He might be called upon, as provided by the contract, to act for appellee in having the policy continued in force by collecting and remitting the renewal premiums and delivering to the insured the renewal receipt. A cancellation of the contract relieved him of this duty at the same time it deprived him of a right to the commissions on the renewal premiums. It would not be contended that appellee, if it should care to do so, after the cancellation of the contract had a right to call upon appellant to collect the renewal premiums. It clearly would have no such right. The contract could not stand annulled and in force at one and the same time. Then upon what reasonable ground can it be said that when the contract was annulled because of appellant's failure to discharge a duty it devolved upon him, whereby he was relieved of its burdens, it yet remained in force for the purpose of securing to him the benefits which it conferred upon him—the consideration for which, in part at least, was to have been the continued discharge by him of such burdens? Such a construction would operate to confer upon appellant a benefit as a reward for his failure to discharge a duty he had contracted to perform, and to punish

appellee for exercising its right to annul the contract. We do not believe it should be given such a construction, but, as suggested before, think it should be held that appellant, by reason of his failure to make the reports he had obligated himself to make, forfeited such rights as would have accrued to him and become perfected had the contract remained in force. This construction we think is amply supported by the authorities. *Ins. Co. v. Holloway*, 51 Conn. 311, 50 Am. Rep. 21; *Jacobson v. Ins. Co.*, 61 Minn. 330, 63 N. W. 740; *Scott v. Ins. Co.*, 103 Md. 69, 63 Atl. 377; *Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637; *Chase v. Ins. Co.*, 188 Mass. 271, 74 N. E. 325; *Andrews v. Ins. Co. (Ky.)* 70 S. W. 43; *Kling v. Raleigh*, 100 Mo. App. 1, 70 S. W. 251; 16 Am. & Eng. Ency. Law (2d Ed.) 919. It follows that we do not think that appellant's contention that his right to the commissions was a vested one, and therefore enforceable, notwithstanding he may have been rightfully discharged, should be sustained. Of the authorities cited by appellant, *Alabama Oil & Pipe Line Co. v. Sun Co. (Tex.)* 92 S. W. 253, decided by the Supreme Court of this state, and *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562, and *Singer Sewing Mach. Co. v. Brewer*, 78 Ark. 202, 93 S. W. 755, decided by the Supreme Court of Arkansas, are relied upon as most strongly supporting his contention. We do not think the case first mentioned above is of value in determining the question. The case turned upon the legal effect to be given an oral agreement to cancel and annul a contract. See 90 S. W. 202, where the case is more fully stated. The Court of Civil Appeals seems to have held that because the plaintiff, in agreeing to the cancellation, had not reserved the right to hold the other party liable for damages for its breach, he could not maintain a suit for such damages. The Supreme Court, in reversing the judgment of the Court of Civil Appeals, held that it erred in so holding without regard to the intention of the parties as it might have been manifested by the attending circumstances. The Supreme Court said that if it appeared from the circumstances that it was not the intention of the parties that the act of cancellation should have a retroactive effect to destroy previously vested rights, the contract should be so construed as to preserve those rights. If there was anything in the circumstances of the case before us, which, considered with reference to the language used by the parties in the writing evidencing their contract, indicated that they may have had any other intent than that a termination of the contract by appellee for "good cause" should operate to forfeit appellant's right to the commissions, the case cited would be of value in determining the question before us. There being an utter absence in the record of such a circumstance the case is not, we think, authority for appellant's contention. Nor do we regard the second of the cases cited as any

more in point on the question now being considered. The conclusion reached in that case was that if the evidence was sufficient to show that a breach of the granite company's contract had occurred it was sufficient also to show that Shall had waived the forfeiture thereby occasioned. In this case we have reached the conclusion that the evidence did show a breach by appellant of his contract, and that the forfeiture provided for in such an event was not waived. The other case relied upon by appellant more nearly supports his contention. There Brewer, as agent of the Sewing Machine Company, had sold machines to be paid for by the purchasers on the installment plan. His contract entitled him to a commission on the value of the machines he sold, the commission to be paid as the installments of the purchase price were paid. The contract provided that it might be terminated at the pleasure of either party to it, and that all claims by the agent for commissions should cease upon its termination. The machine company discharged Brewer, and his suit was for commissions on installments paid by purchasers after his discharge. The court held that the commissions sued for had been earned by Brewer while he was in the machine company's service, and that for that reason the term in the contract providing for a forfeiture did not apply to them. The distinction between that case and the one before us, we think, lies in the fact that the sales on which commissions were claimed were completed ones. So the sale of life insurance for a specified term would be; and if it appeared that appellant was here asserting a claim for commissions on such a sale, we would regard the Brewer case as authority for saying that appellee's contract should not be construed to deprive him of same, merely because the price on which such commissions were claimed was paid after the termination of his agency. But it does not so appear. The claim is for commissions on premiums paid on renewals of the contracts he negotiated. His right to such commissions, even had he remained the agent of appellee, depended on the willingness of the parties he as agent contracted with to renew and continue from year to year to purchase the insurance. No obligation rested upon the insured to continue the contract and pay for the insurance. Their liability to do so rested, not upon a contract appellant had negotiated and in which he had vested interest, but upon renewals made from time to time of such contract. It was not so as to the purchasers of machines from Brewer. They were bound by the contracts he negotiated with them to pay the installments from time to time, and it was by virtue of the contracts negotiated and completed by him that the company's right to the installments accrued, and not by virtue of renewals of that contract, with which Brewer had nothing to do, made from time to time. *Burleson v. Ins. Co.*, 86 Cal. 342, 24 Pac. 1064.

The record seems to establish the fact that appellant was the victim largely of undeserved confidence placed in Crain—his associate in business, and in legal effect, we think, his partner—from the consequences of which the law affords no relief. We think from an examination of the evidence that the conclusion cannot be escaped that it shows him to have been indebted to appellee in the sum of over \$800. The judgment rendered against him was for \$662.64. On appellant's complaint we do not think it should be held that the trial court erred in instructing the verdict on which the judgment was rendered.

We have not discussed, and will not discuss, the contention made that the suit for an injunction was not maintainable on the grounds alleged in the petition. We are inclined to think it was, and, if we entertained a contrary view, would regard the contention made as not a material one, in view of the course the case took. As we view it, the effect of appellant's cross-action, the amendment by appellee of its petition seeking the recovery of an indebtedness in its favor against appellant, and the judgment rendered, was to eliminate as of any importance in the case the question as to whether the suit as originally brought was maintainable or not. The judgment is affirmed.

HODGES, J. (dissenting). While concurring in the disposition made of most of the assignments of error in this case, I do not agree to the disposition made of the case itself. I think the appellant's sixth assignment should be sustained, that so much of the judgment of the district court as perpetuated the writ of injunction should be reversed and the injunction dissolved, and as to the remaining issues the case should be remanded for another trial with instructions to allow a recovery for so much of the appellant's claim as is founded on the renewals of premiums paid on policies procured by him during the continuance of his agency and collected by the company since his discharge, less any amount that may be due from him to the company on its counterclaim sued on. I think the commissions on the renewals form a part of his earned compensation, and that he is entitled to recover to the extent of such as the evidence may show has been collected by the appellee. I may write my views more at length later.

KING v. UNDERWOOD et al.

(Court of Civil Appeals of Texas. May 9, 1908.
Rehearing Denied June 20, 1908.)

1. PUBLIC LANDS—STATE LANDS—RIGHT TO PURCHASE.

Where, on the passage of Act April 15, 1905 (Laws 1905, p. 159, c. 103), relating to the disposition of state lands, and long prior thereto, the land in controversy was within plaintiff's inclosure, a preference right to purchase inured to her, which she could exercise at any time

within 90 days after she had been notified that the land had been surveyed, classified, and appraised.

2. SAME—NOTICE.

Plaintiff having applied to purchase land within 90 days from the date of classification and appraisal, whether notice thereof was served on her was immaterial.

3. SAME—RIGHTS OF CONTESTING CLAIMANT.

Where vacant unsurveyed school land was inclosed by plaintiff, defendant was entitled to apply to have the land surveyed and to purchase the same, subject to plaintiff's prior rights, without settling on or improving the land, and, in default of a purchase by plaintiff within the time limited by law, defendant would be entitled to the allowance of his application.

4. SAME.

The fact that defendant in fact settled on and improved the land did not give him any higher or better rights than he would otherwise have, nor defeat plaintiff's prior right to purchase within 90 days after the land had been surveyed, classified, and appraised.

5. SAME—TENDER.

Where plaintiff, having a prior right to purchase certain vacant state land which defendant procured to be surveyed, classified, and appraised, caused her agent to ask defendant the expense of such survey, and on being refused learned from the county surveyor the amount thereof, which he thereupon offered to pay defendant, but which defendant declined, there was a valid tender sufficient to protect plaintiff's prior right to the land.

6. SAME—RECORDS—EXPLANATION BY PAROL.

Where plaintiff's application to purchase certain state land, on file in the General Land Office, was objected to because the notary public's jurat failed to show that he was a notary public for any county in Texas, and a certified copy offered in evidence contained the word "seal" written in a scroll in connection with the notary's jurat, parol evidence of a witness, who had seen the original before it was sent to the land office, that the imprint of the seal thereon contained the words, "Notary Public Hunt County, Texas," was admissible.

7. SAME—LANDS OF STATE—RIGHT TO PURCHASE—ABANDONMENT.

Where B. settled on certain state land, but abandoned the same in 1896, and asserted no claim thereto until September 1, 1905, prior to which plaintiff was in possession through a tenant, when B. assumed possession by expelling plaintiff's tenant by threats, no equity survived his abandonment which would pass by a transfer of his rights, if any, to defendant, as against plaintiff's right to purchase the land on its being surveyed, classified, and appraised.

8. SAME—VOLUNTARY PAYMENT.

Where B. made payments on state land with full knowledge of plaintiff's prior right to purchase, and in collusion with another to deprive plaintiff of such right, the payment was voluntary, and B. could not therefore claim reimbursement by plaintiff as a condition to her right to a decree vesting the title in her as against defendants.

Error from District Court, Jones County; Cullen C. Higgins, Judge.

Trespass to try title of Virginia A. King against S. L. Underwood and others. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

This suit was brought in the court below in the form of trespass to try title by Virginia A. King, as plaintiff, herein styled plaintiff in error, against S. L. Underwood and other defendants in error on December 10, 1906, for the recovery of the 223 acres

of land in controversy. Defendants S. L. Underwood, M. J. Berryhill, and George Rissley answered by pleas of not guilty and general denial. Defendant Ed. H. Stevens answered by general denial, plea of not guilty, and special answers. Defendant Thomas L. Blanton answered by general denial and by plea in reconvention. The case was tried before the court without a jury, and judgment rendered July 23, 1907, against the plaintiff, Virginia A. King, and in favor of defendants. On application of plaintiff, the court filed findings of fact and conclusions of law. On September 17, 1907, Virginia A. King filed petition for writ of error and bond for writ of error. Defendants waived issuance and service of citation in error. Plaintiff filed assignments of error November 25, 1907, and the case is before this court for review.

The trial court's findings of fact and conclusions of law are as follows:

"First. That M. J. Berryhill, in 1892, fenced about 20 acres of the land in controversy, which he grubbed into a field, and upon which he built his house, where he lived and cultivated said land, claiming same under an old pre-emption file of W. D. Berryhill, which had been transferred to him. That he left said land in 1896, but returned to said land on September 1, 1905, and resumed possession of said 20-acre inclosure and occupied his said house from said date until February 10, 1906, when he transferred by contracts all of his equities thereunder to defendant Underwood.

"Second. That about the middle of September, 1905, defendant Underwood fenced all of the land in controversy, except the Berryhill 20 acres, to itself, with a fence made of two barbed wires, and built his house upon said land and grubbed about 30 acres into a field, and since said date has continuously resided upon said land with his family, and has had actual possession of same since about the middle of September, 1905. That said Underwood first made application to the county surveyor to survey said land in controversy as early as June, 1902, and has, since said date, continuously sought to purchase said land.

"Third. That on the 22d day of January, 1906, defendant Underwood made application in due form of law under act of 1905 to the county surveyor of Jones county, Tex., to have all the land in controversy surveyed, and that said application was filed in the General Land Office on February 14, 1906.

"Fourth. That said survey was duly made and the field notes returned to the General Land Office by the county surveyor of Jones county, Tex., and filed in said land office on February 14, 1906. That said survey was made on the 22d and 23d day of January, 1906.

"Fifth. That the Commissioner of the General Land Office, on the 23d day of April, 1906, notified the defendant S. L. Underwood that his field notes for the land in contro-

versy had been examined and approved on said date, and that the land was classified as dry agricultural and appraised at \$3.50 per acre.

"Sixth. That on the 27th day of April, 1906, S. L. Underwood made application in due and legal form of law to purchase the land in controversy, without settlement, giving the proper classification and appraisal, and executed his obligation for the balance of the purchase money on the land, at the price stated, as provided by law, and said application and obligation were received and filed in the land office on April 30, 1906, and awarded the same day by the Commissioner of the General Land Office to the defendant Underwood.

"Seventh. That the defendant forwarded to the State Treasurer, in due time and form of law, \$19.52 as first payment of $\frac{1}{40}$ of the purchase money for said land.

"Eighth. That on the 17th day of May, 1906, defendant S. L. Underwood and wife executed to Thomas L. Blanton a deed conveying all the land in controversy, duly acknowledged and recorded the 19th day of May, 1906, in the deed records of Jones county, Tex., and filed in the General Land Office on May 28, 1906.

"Ninth. That on the 5th day of June, 1906, T. L. Blanton paid to the state of Texas \$764.60, balance due on said land, in full to the state of Texas.

"Tenth. That on, to wit, the 12th day of June, 1906, the state of Texas, by her proper officers, issued patent No. 31, volume 2, to the land in controversy, to Thomas L. Blanton, as assignee of S. L. Underwood.

"Eleventh. That on the 15th day of June, 1906, for a valuable consideration, Thomas L. Blanton conveyed all the land in controversy to S. L. Underwood, cash consideration \$20.62, and four notes aggregating \$1,500.

"Twelfth. That on June 16, 1906, S. L. Underwood and wife, M. E. Underwood, conveyed by deed duly executed, acknowledged, and recorded, to Mrs. C. V. Rissley, 40 acres of the land in controversy.

"Thirteenth. That on the 16th day of June, 1906, S. L. Underwood and wife, by deed duly executed, acknowledged, and recorded, deeded to M. J. Berryhill 36.23 acres of the land in controversy.

"Fourteenth. That the W. D. Berryhill 160-acre pre-emption, as such, did show on the official map in the General Land Office on February 23, 1900, and that it is a part of the 223 acres in controversy; but none of the land shown on the map appeared as a vacancy.

"Fifteenth. That the land in controversy was vacant and unappropriated public domain at the time of the entry and taking into possession by both plaintiff and defendant, except the equities of M. J. Berryhill.

"Sixteenth. That on July 2, 1906, Virginia A. King, plaintiff in this cause, made and executed her application and obligation to pur-

chase the land in controversy, without settlement, at the price of \$5 per acre, and forwarded \$27.87 as first payment on the same to the State Treasurer. That said application was filed in the General Land Office on July 13, 1906, and rejected October 3, 1906, by said commissioner.

"Seventeenth. That the $\frac{1}{40}$ purchase money tendered by plaintiff was rejected and returned to her.

"Eighteenth. That plaintiff tendered to defendant Underwood \$10 as refund payment for surveying fees.

"Nineteenth. That plaintiff failed to adduce any proof of failure on the part of the land office to give her notice, or date of any notice, if any was given, that the land was on the market and subject to sale so they could claim their prior rights under the act of 1905.

"Twentieth. That all the lands were inside the outward inclosure of plaintiff in September, 1905, but were entered upon and fenced in, separate and apart from plaintiff's land, by defendant Underwood, in September, 1905, and that defendant Underwood, and not plaintiff, had possession of and under fence all the land in controversy from about September 15, 1905, continuously until parts of it were sold by him to the other defendants herein, and that he still owns and is in possession of the remainder, and the other defendants in possession of theirs.

"Twenty-First. That plaintiff had constructive notice through her son that the land had been surveyed, from the county surveyor of Jones county, Tex., and that defendant Underwood would make application for same, more than 90 days prior to the time the said lands were awarded to the defendant Underwood, and more than 90 days prior to the making of plaintiff's application and obligation to purchase said land, and that the son of plaintiff was the manager of all her business in this county at the time of such notice.

"Twenty-Second. That patent had been issued from the state to defendant's assignee before plaintiff's application to buy was made.

"Twenty-Third. That the defendant, S. L. Underwood, was acting in collusion with others at the time he made his application and affidavit to purchase the lands in controversy, and that he had previously agreed to sell part of it to M. J. Berryhill when acquired, and to convey part of it to Thos. L. Blanton as his attorney's fees for procuring it and defending title thereto, and made a written contract to that effect.

"Twenty-Fourth. That the county surveyor first valued the land in controversy at \$5 per acre, under oath, and that thereafter he authorized Thos. L. Blanton to make the change in value to \$2.50 per acre, and that said valuation was not made under oath, but was sent to the General Land Office, and the land was appraised at \$3.50 per acre by the commissioner.

"Twenty-Fifth. That plaintiff's attorney, C. C. Ferrell, had notice of S. L. Underwood's survey for more than 90 days prior to the time the land was awarded to the defendant, and more than 90 days prior to the application of the plaintiff.

"Twenty-Sixth. That plaintiff, by her agent and attorney, C. C. Ferrell, wrote the General Land Office for plaintiff about this land on February 23, 1906, and that plaintiff's agent and son, in charge of her business and affairs in this county, also wrote to the said commissioner on the 24th of February, 1906, and said son offered \$3 per acre for said land in his letter.

"Twenty-Seventh. That Thos. L. Blanton paid to the state of Texas the balance due on said land and other expenses the sum of \$801.12 of his own funds, at the instance of S. L. Underwood.

"Now therefore I conclude, as a matter of law, that plaintiff should take nothing by this suit, for the following reasons, to wit:

"First. Because the defendants claimed under a patent from the state of Texas, and the presumption of law is in favor of the patent, until plaintiff, who is attacking said patent, should not only show that the patent was illegally issued for some cause, but should further show that plaintiff was in every way qualified to make the purchase and had complied in every particular with the law in regard thereto.

"Second. That plaintiff not only failed to show that defendants' senior title was not good, but failed to show a legal right to purchase, herself.

"Third. That, though defendant S. L. Underwood was acting in collusion with other defendants in the purchase of the land, no one but the state can question the title by reason thereof, and especially when plaintiff fails to show proof on the strength of her own title, her right under the law to purchase.

"Fourth. That, though not necessary to a decision of the case, the defendant Underwood had the possession of and owned the improvements on the W. D. Berryhill preemption and was entitled to purchase the said 160 acres under the preference right in the law of 1905, and the plaintiff could not recover the remaining 63 acres without making an application for that amount, instead of for the entire amount."

Leggett & Kirby and C. C. Ferrell, for plaintiff in error. C. N. Steele and T. L. Blanton, for defendants in error.

PRESLER, J. (after stating the facts as above). Plaintiff's first assignment of error is to this effect: The court erred in not holding that plaintiff was entitled to recover the land in controversy, plaintiff having shown that she had a prior right to buy the land, and having in all things complied with the law entitling her to purchase the same, and assigns the following proposition thereunder:

"One in whose inclosure was situated vacant public domain, which vacancy was not disclosed by the official maps in use in the General Land Office on February 23, 1900, had a prior right, under Act 1905, § 8 (Laws 1905, p. 164, c. 103), to purchase said land at any time within 90 days after said land was surveyed and the owner of the inclosure notified that the land had been classified and appraised by the commissioner." We find from the evidence that the land in controversy was vacant and unappropriated public domain inside the outward inclosure of plaintiff on April 15, 1905, and that said land had been so inclosed in plaintiff's pasture for more than 10 years prior to the time of trial. Defendant Underwood testified: "When I first went over on that land, before I fenced any of it, it was in what is known as the King pasture." In September, 1905, defendant Underwood entered upon and fenced the land in controversy, separating the same from the surrounding portions of the King pasture. The land in controversy was not disclosed as a vacancy on the official map in the General Land Office on February 23, 1906, or at the time of the approval of the field notes and appraisement on April 23, 1906. On April 23, 1906, the commissioner approved the field notes of the survey made for S. L. Underwood, classifying the land as dry agricultural, and appraised it at \$3.50 per acre. On April 27, 1906, defendant Underwood made application in due form, executed his obligation, and paid the first payment on account of the purchase of said land. On June 12, 1906, the state of Texas issued patent to the land in controversy to Thomas L. Blanton, assignee of S. L. Underwood. On July 2, 1906, plaintiff Virginia A. King made and executed her application and obligation to purchase the land in controversy at the price of \$5 per acre, and forwarded \$27.87 as a first payment to the state treasurer. This application was filed in the land office July 13, 1906, and rejected October 3, 1906, by the commissioner of the land office. The purchase money so tendered by the plaintiff and rejected was returned to her. Plaintiff tendered to defendant Underwood \$10 as a refund payment for surveying fees of this land. There was no proof that the land office ever gave plaintiff any notice of appraisement of said land, or, if any was given, the date of the same; that the land was on the market and subject to sale, so that she could claim her prior rights under the act of 1905. The county surveyor had first valued the land in controversy at \$5 per acre under oath, which valuation was changed by Thomas L. Blanton to \$2.50 per acre, as authorized by the county surveyor, and said valuation of \$2.50 per acre was not made under oath, but was sent to the General Land Office, and the land was appraised at \$3.50 per acre by the commissioner.

As hereinbefore stated, on the passage of the act of April 15, 1905, and long prior

thereto, the land in controversy was situated in the inclosure of the plaintiff in error, and we are of the opinion that the preference right to purchase inured to her benefit, and that she had the right to exercise such right to purchase at any time within 90 days after it was surveyed, classified, and appraised, and she had received notice of such survey, classification, and appraisement. The land was classified and appraised April 23, 1906, and, while there was no evidence showing whether plaintiff was ever notified thereof, this is immaterial for the reason that her application was filed on July 12, 1906, and tender of first cash payment made within the 90 days allowed by the act of April 15, 1905. About September 15, 1905, defendant Underwood had moved on the land, inclosed the same, and built his house on it, which last was not required to entitle him to buy. Subject to plaintiff's prior right, he could have made his application for survey and his application to purchase without settling on or improving the land, and, in default of a purchase by plaintiff within the time limited by the law, he would have been entitled to the land. The mere fact that he did the acts of settlement and improvement not required by the law to fix his rights cannot give him any higher or better right than he would otherwise have had, nor can these acts have the effect to defeat plaintiff's rights theretofore accrued and fixed by the law. Until the land was surveyed, recognized as a vacancy by the Commissioner of the General Land Office, and classified and appraised on April 23, 1906, no one had a right to buy. The plaintiff had a preference right. Underwood subsequently filed an application in collusion with others, and on this application the land was sold and patented without regard to the prior rights of plaintiff, asserted afterwards, but within the time provided by law. We are unable to hold that such a purchase by Underwood is valid as against plaintiff.

It is strongly insisted, however, by defendants in error in their second counter proposition under the first assignment of error, that even where one is entitled to the 90 days' preference right to purchase vacant public domain, he must first reimburse the party having the land surveyed the reasonable fees and expenses incurred by him in surveying such vacancy, and that plaintiff wholly failed to reimburse, or to offer to reimburse, defendant Underwood for the reasonable fees and expenses which he had incurred and paid in getting such land surveyed. We are of the opinion that this contention on the part of defendants in error is not sustained by the evidence, which shows that plaintiff in error through her agent offered to pay the expense incurred by defendant Underwood in having the land surveyed, and applied to said defendant for information as to the amount he had expended, offering to pay the same, but was unable to secure any definite infor-

mation from defendant Underwood with relation to said expense, and that plaintiff then tendered to defendant \$10, having been informed by the county surveyor that such sum was the proper amount of such expense. Defendant Underwood testified with relation thereto: "After I had had this land surveyed, Clark King came to me for Mrs. King on the 26th day of June. He came to me this way: His words were: 'Do you know how much you was out on the survey of this land?' And I says: 'No, not exactly.' And he says: 'Craig says it is about \$10.' And I says: 'Well, I don't care for that.' And I turned and went down the hill and left him there. That was at the Quarry. So when I came back King was on the end car, and I didn't see if he pulled out any money and offered it to me, nor if he pulled out any money. As I walked off I didn't see it. If he did, he never did state that he would pay the \$10 or not. All I said to him was—I think I kinder laughed at him and walked off and got a stone and came up to the car. I never agreed to take the \$10 or any other sum from King for this matter. Blanton paid this money to Craig for the surveying, and I paid Blanton after that. Clark King said that he would pay my expenses for the surveying of that land and all of my expenses, but he never pulled out any money there that I saw. He said that he would do it." Clark King testified: "I tendered the money to Underwood for the expense that he was out for that survey, as I have stated. I asked him what it was, if he could tell me what the expenses of the surveying was, and he said that he couldn't tell me exactly, and I asked him if \$10 would cover it, and he said it would, and I offered him \$10 or \$15. I just pulled it out, and he just turned round and walked off laughing. And he said, 'No,' he would not take it. * * * I think I actually took out and offered Underwood a \$10 bill and a \$5 bill. When I offered him the money, I didn't tell him how much I tendered him. I asked him if he thought that \$10 would cover it. He didn't tell me that he didn't want any money from me at all. He just said that he couldn't take it. Mr. Craig had told me that the fee for surveying was about \$10, and I just asked him if that would cover it." We therefore feel warranted in concluding that plaintiff made a sufficient tender and effort to reimburse defendant Underwood the reasonable fees and expenses incurred by him in surveying the land, and that it is obvious from the record in this case that defendant Underwood did not intend to accept such reimbursement, but had elected, instead, to endeavor to hold the land in his own right.

Defendants, in their first cross-assignment of error, question the sufficiency of plaintiff's application to purchase said land, alleging that the jurat of the notary public taking the same failed to show that he was in fact a notary public for any county in Texas, and

in connection therewith the action of the court in permitting the witness A. H. Kirby, over defendants' objection, to testify that he had seen the original application before it was sent to the land office, and that the imprint of the seal on the same contained the words, "Notary Public Hunt County, Texas." The instrument objected to and offered in evidence, as shown by defendants' bill of exception, was a certified copy of said application; the application being at the time in the custody of the General Land Office, where it properly belonged as an archive of that department of the state government, and the word "seal," written in scroll, appears on the certified copy in connection with the jurat of the notary public. We are of the opinion that the evidence of the witness Kirby was properly admitted, and that the court did not err in overruling defendants' objection to the admission in evidence of the copy of the application offered in connection with said Kirby's testimony, and that said application is in all respects sufficient. Plaintiff in error's application to purchase was not rejected because of the insufficiency of the application, but because the commissioner had previously awarded the land to the defendant Underwood. *Smithers v. Lowrance*, 93 S. W. 1064, 15 Tex. Ct. Rep. 953.

Defendants, in their second cross-assignment of error, complain of the exclusion from evidence of the certified copy of a certain letter, of date February 27, 1906, written by the land commissioner to C. C. Ferrell, attorney for the plaintiff. In view of the fact that we are of the opinion that plaintiff was not required, in order to assert her preference right to buy the land, to make application therefor earlier than April 23, 1906, we regard the exclusion of this evidence, by which defendants sought to show that plaintiff had notice in February, 1906, of defendant Underwood's survey and intention to purchase, as immaterial, and said assignment is therefore overruled.

Defendants' third cross-assignment of error is of the same nature as the second, and relates to the same matter of notice prior to April 23, 1906, to wit, in February, 1906, and is here overruled for the same reasons as given in disallowing cross-assignment No. 2.

We are of the opinion that plaintiff's first assignment of error is well taken, and that the trial court erred in not holding that the plaintiff was entitled to recover the land in controversy, and that plaintiff showed that she had a prior right to buy the land and had in all things essential to the assertion of her preference right complied with the law and was entitled to purchase the land in controversy. Said assignment is therefore sustained.

The disposition here made of this assignment renders unnecessary further action on the remaining assignments of plaintiff in error. We shall, however, discuss briefly plaintiff's fifth assignment of error and proposi-

tion and statement thereunder, because of the question there discussed as to the equities claimed by defendant Underwood as acquired by him in his purchase from M. J. Berryhill of all rights and claims arising under the W. D. Berryhill pre-emption of 160 acres of land included in and forming a part of the 223 acres here in controversy; the trial court having held in its conclusions of law that S. L. Underwood was entitled to purchase said 160 acres of land under the act of 1905. The evidence shows that the defendant Underwood entered upon and inclosed and improved the land in controversy about the middle of September, 1905, and after plaintiff's preference right to purchase had been fixed by the act of April 15, 1905. We therefore conclude that by these acts he acquired no right to the prejudice of plaintiff's preference right to buy the land, and that the Berryhill pre-emption of 160 acres had been abandoned by Mr. J. Berryhill in 1896, and no right asserted by him under his claim thereto until September 1, 1905, and that whatever rights he may have had, if any, under his transfer from W. D. Berryhill, had been forfeited prior to September 1, 1905, when he resumed possession by expelling plaintiff's tenant therefrom by means of threats, and that no equities survived his said abandonment, and none passed by virtue of his transfer to said Underwood. We are therefore of the opinion that said fifth assignment of error should be, and the same is hereby, sustained.

We are of the opinion that defendants' fourth cross-assignment of error, attacking the finding of the court to the effect that, at the time S. L. Underwood made his application to purchase said land, he was acting in collusion with others, is not well taken, and is unsupported by the evidence, and said cross-assignment is therefore overruled.

Defendant in error Thomas L. Blanton by separate, independent proposition makes the contention, as also set forth in said defendant's plea in reconvention filed in the trial court, that, in the event this court should reverse and render judgment for plaintiff in error for the land in controversy, he, the said Thomas L. Blanton, should recover judgment requiring plaintiff to reimburse said defendant Blanton the sum of \$801.12, claimed to have been paid out by said Blanton at the instance of the defendant Underwood and necessary to be paid in order to have said land surveyed and patented, which amount said Blanton has not been repaid by any one, contending that by such judgment of reversal and rendition, unless plaintiff is so required to reimburse defendant in error, she would get a good title to 223 acres of patented land without paying one cent to the state or any one else. As authority for sustaining this contention, we are cited to Act April 15, 1905, § 8 (Laws 1905, p. 164, c. 103). We are of the opinion, however, that the act above referred to had reference only to the reimbursement of the reasonable fees and expense of

surveying such vacant land, which is stated in said defendant Blanton's plea in reconvention at the time as \$10, and as having been paid by said defendant at the instance and request of the defendant Underwood, who testified that he repaid this money to defendant Blanton. The trial court found that plaintiff tendered to defendant Underwood \$10 as refund payment for surveying fees, which finding is not called in question by assignment of error. It is apparent from the record in this cause that the defendant Blanton made the payments for which he prays reimbursement with full knowledge of the plaintiff in error's (Mrs. King's) legal rights in the premises, and we conclude that such payments, if any, were made by him as a volunteer and were not necessary in the protection or maintenance of any legal right to the land held either by himself or the defendant Underwood as against the plaintiff, but that such payments were made in furtherance of a collusive agreement and attempt to deprive the plaintiff of her preference right to buy the land. We therefore conclude that defendant Blanton is not entitled either in law or equity to reimbursement from plaintiff for such payments so made. *Gould v. McFall*, 118 Pa. 455, 12 Atl. 330, 4 Am. St. Rep. 603, and cases cited.

We are further of the opinion that, while the result of reversing and rendering this case for the plaintiff would have the effect of vesting in her such title as the defendants in error are possessed of, we are not prepared to hold that such title so acquired would vest in plaintiff a perfect and indefeasible title to the land in controversy as against the action of the state, if brought to cancel the patent under which defendants in error derails title because of the collusion of defendant Underwood with the other defendants in error in the purchase of the land, as shown by the evidence in this case.

We therefore conclude that under the law and the evidence the defendant Blanton is not entitled to judgment against plaintiff in any sum, and that his prayer for reimbursement of the moneys paid by him, as set forth in his brief, should be in all things denied, and that the judgment of the trial court awarding the land in controversy to the defendants in error should be here reversed, and judgment here rendered for said land in favor of plaintiff, which is accordingly done.

MISSOURI, K. & T. RY. CO. OF TEXAS v. KENNEDY.

(Court of Civil Appeals of Texas. June 3, 1908. On Rehearing, June 24, 1908.)

1. MASTER AND SERVANT—RAILROADS—INJURY TO ALIGHTING CONDUCTOR — INSTRUCTIONS.

In an action against a railway company for injury to a conductor who alighted from a moving train, it was not error prejudicial to the company to refuse to instruct that if, as he

alighted from the steps of the caboose, he was not looking where he was stepping, but at a brakeman on the platform of the caboose, and if an ordinarily prudent person would have looked where he was stepping, and if the conductor's failure to take such precaution was a failure to use ordinary care and caused or contributed to his injury, he could not recover, where the court instructed that if plaintiff was negligent in attempting to alight while the train was moving or in the manner in which he alighted, or if he held on to the caboose too long or failed to observe where he was stepping, or where he was going, he could not recover.

2. TRIAL—INSTRUCTIONS—REFUSAL.

Any instruction incorrect in any particular or covered by instructions given is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

3. MASTER AND SERVANT—RAILROADS—INJURY TO ALIGHTING CONDUCTOR—EVIDENCE—CUSTOM.

In an action against a railway company for injury to a conductor who alighted from a moving train at a station platform to perform a duty, alleged to have been caused by a defect in the platform, he could show that it was the custom of the company's conductors, upon their arrival at that station, to alight at the station while their trains were moving, to perform the same duty.

4. SAME.

A railway company having acquiesced in a custom of its conductors to alight from moving trains at a particular station in performing a duty was bound to use ordinary care to see that the station platform was free from such obstructions as might necessarily interfere with the performance of such duty in accordance with the custom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 207, 215-217.]

5. APPEAL AND ERROR—CURE OF ERROR—ADMISSION OF EVIDENCE.

Error in admitting testimony over objection is cured, where another witness is allowed to give the same testimony without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Personal injury action by S. M. Kennedy against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Craddock and Coke, Miller & Coke, for appellant. Yates & Carpenter, for appellee.

RICE, J. This suit was brought by appellee against appellant to recover damages for personal injuries received by him in alighting from a train at Hughes Station, one of its depots, while he was a conductor upon one of its freight trains. It is substantially alleged that on and prior to September 10, 1905, the day on which the accident occurred, that appellant was maintaining a depot for freight and passengers at Hughes Station on its line for the use of such persons as might have occasion to visit or be about the same, including its conductors; that said company had constructed at said place a platform, known as a "gravel" platform, composed of gravel, sand, and dirt, which it

permitted to become out of repair and unsafe for the use of its conductors, who were required in performance of their duties to use the same in connection with the operation of their trains, in that it permitted gravel and rocks of various sizes to be and remain upon said platform near the line of its railway, and at a place where its conductors frequently and commonly alighted from its trains; that such loose gravel and rock were of such sizes and shapes as to render the surface of the platform uneven, and to endanger the safe footing of those having occasion to pass thereon, and especially the appellant's conductors, whose duties frequently required them to alight from and to board trains while in motion. It was further alleged that said platform near the line of the track was not level, but was sloping from the line of the track a distance of some four or five feet away in the direction of its depot; that the condition of said platform in said particulars was known to appellant, or by the exercise of ordinary care would have been known to it, and was unknown to appellee. It was further alleged that appellee was in the employ of appellant in the capacity of conductor in charge of one of its freight trains on the 10th of September, 1905, and that on the arrival of the train at Hughes, in the discharge of the duties of his employment, he was in the caboose of the train, and that, when the caboose reached a point opposite the depot, it was his duty to alight therefrom for the purpose of registering the arrival of the train at the station; that while the train was moving slowly, and when the caboose reached a point opposite the depot, in pursuance of his duty, he did alight from the caboose upon the platform, and that, when he alighted, one or both of his feet stumbled upon or came in contact with the gravel or rocks lying upon the surface of the platform, and on account of the sloping condition of the platform, and on account of the condition of the platform in both of such particulars, he was thrown down and under the wheels of the train, seriously and permanently injuring him, setting forth the same in detail.

The appellant answered by general demurrer, general denial, and specially, to the effect that the platform was in good repair; that at the time of the appellee's injury, and for a long time prior thereto, he was perfectly familiar with the platform and the manner of its construction, and the material of which it was constructed, and had been using it for months prior thereto in the same condition that it was in at the time of the alleged injury; and that, if appellee attempted to and did alight upon the platform from a moving train, the same was under his immediate control and direction, and that he attempted to and did alight therefrom when it was going at a high rate of speed, and with full knowledge of all the circumstances and conditions then existing, whereby he

assumed the risk of so doing; and, further, that, if there were loose gravel or rocks upon the platform, he had full knowledge thereof before he attempted to alight, and that the same was open and obvious to common observation; that, if the platform was uneven and sloping, appellee had full knowledge thereof before he attempted to alight from said train, and that the condition thereof was open and obvious to common observation, and that he assumed the risk thereof in attempting to alight from said train under the conditions and circumstances surrounding him. It was further alleged that it was not necessary for him to alight from the train at the time and place where he did, but, before having done so, he directed the engineer in charge of the train to go to the coal chute and water station, a point beyond and some distance from where he alighted from the train, and that he could and should, in the exercise of proper care, have remained on the train until it stopped at the water station or coal chute, where he could have alighted with perfect safety; but that, instead of his doing so, he voluntarily chose to alight at the time and place he did while the train was moving at a high rate of speed, and that his fall resulted from his own want of care and carelessness, in that he attempted to and did alight from the train while it was moving at a rapid and high rate of speed, and in that he failed to use due care in stepping off the train, and carelessly and negligently held onto the same for too great a length of time, and negligently failed to observe just where he was stepping and what he was doing, and the injuries received by him were proximately caused and contributed to by his own negligence.

A jury trial resulted in favor of the plaintiff, from which this appeal is perfected.

By its tenth assignment of error, submitted as a proposition, appellant urges that the court erred in refusing to give special charge No. 8 requested by it, which is as follows: "If you believe from the evidence that as the plaintiff alighted from the steps of the caboose he was not looking where he was stepping, but that he was then looking at the brakeman on the platform of the caboose, and if you further believe from the evidence that a man of ordinary care and prudence would, before stepping from the caboose to the platform, have looked where he was stepping, and if you further believe from the evidence that the failure of plaintiff to look where he was stepping just before alighting from the steps of the caboose, if he did fall, was a failure to use such care and prudence for his own safety as an ordinarily careful and prudent man would have used under like or similar circumstances and surroundings, and that such failure, if any, caused or contributed to cause the injuries sustained by plaintiff, you will find for the defendant," because the defendant pleaded, among other

things, that the plaintiff was guilty of negligence contributing to the accident and injuries, in that he failed to use due care in stepping off the train, which was moving rapidly, and negligently failed to observe just where he was stepping and what he was doing, and that his injuries were proximately caused by his own want of ordinary care, and that there was evidence showing that the plaintiff, as he stepped from the caboose of the train, which was moving at the time, did not look and was not looking where he was stepping, that he failed to observe just where he was stepping and what he was doing, but instead was at the time that he stepped from the caboose to the platform looking in the opposite direction, and looking at and talking to the brakeman, who was standing on the platform of the caboose above him. The record discloses that, when said train reached said station, it continued in motion, and that while so moving plaintiff undertook to alight therefrom, his testimony showing that it was going at from six to eight miles an hour, and the evidence for appellant showing that it was moving at from 10 to 15 miles per hour. On cross-examination of plaintiff it appears that at the time and while in the act of stepping from the moving train to the platform he was not looking down at the platform, but that he was talking to and looking up at the brakeman, who was above him upon the platform of the caboose. It has frequently been held that a party has a right to have the facts and circumstances upon which he relies for a defense affirmatively presented to the jury, and that it is reversible error to refuse such a charge when requested. In the present case the appellant by its pleading and evidence had raised the issue of contributory negligence, predicated upon the plaintiff's failure to observe due care and caution in alighting from a rapidly moving train, charging, in effect, that he was guilty of contributory negligence in failing to observe where he was stepping at the very time of alighting therefrom. The requested charge clearly and affirmatively presented this issue, and in our opinion the trial court erred in refusing to give the same in charge to the jury. *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Railway Co. v. Rogers*, 91 Tex. 51, 40 S. W. 956; *Railway Co. v. Hall*, 98 Tex. 480, 85 S. W. 786; *Railway Co. v. Mangham*, 95 Tex. 413, 67 S. W. 765; *Railway Co. v. Lowe* (Tex. Civ. App.) 86 S. W. 1059.

By appellant's thirteenth and fourteenth assignments of error it is urged, in effect, that the court erred in permitting the plaintiff to show upon the cross-examination of defendant's witnesses Quigley and Alston that it was the usual custom of plaintiff's conductors, upon their arrival at the depot at Hughes Station, when they intended to stop their trains in either the east or west yards, to alight from their cabooses for the purpose of registering their trains at the said station

whilst the same were in motion and going anywhere from 8 to 12 or 15 miles per hour, because it was contended that said evidence was immaterial and irrelevant, and called for the opinion and conclusion of the witnesses upon a matter upon which it was the duty of the jury to pass, under all the facts and circumstances in the case. It appears from the record that the witnesses referred to in the above assignments were allowed, over objection of appellant, to testify that they knew what was the usual custom of defendant's conductors with respect to alighting from their trains for the purpose of registering their arrival at Hughes Springs, and that Qulgey, one of said witnesses, was allowed to testify, and he did testify, that it was the custom of defendant's conductors when passing the depot building with their trains, going anywhere from 8 to 15 miles per hour, to alight therefrom for this purpose. We do not believe that it was proper in this case, for the purpose of negativizing contributory negligence on the part of plaintiff as charged in alighting from the rapidly moving train without observing where he was stepping, to show that it was the usual custom of defendant's conductors in passing said station to alight from moving trains for the purpose of registering the same. In order to determine whether the plaintiff was guilty of contributory negligence, it was proper to show all the facts and circumstances surrounding him at the time of the alleged injury, which seems to have been allowed in this case. But we are unable to see what good purpose would be subserved by allowing proof on the part of appellee to establish the fact, if it be a fact, that it was the usual custom of other conductors upon this road to do the same thing in a similar manner. Their custom in alighting from rapidly moving trains in our opinion could throw no light upon the present inquiry; because the appellee's care, or want of care, in alighting from said train, must be shown by the facts and circumstances surrounding him at the time of the act of alighting from said train, and must be viewed from his standpoint at the time, and not by the custom of others.

In 21 Am. & Eng. Ency. Law (2d Ed.) p. 524, it is said: "It is well settled that usage or custom cannot excuse negligence; or, in other words, though the defendant's act or omission was customary, or was performed in the usual or customary manner, it may yet be deemed negligent, if not up to the standard of reasonable care. Not a few cases, indeed, hold that evidence of usage or custom is inadmissible on the question of negligence." In 1 Elliott on Evidence, § 186, it is said: "So the custom or practice of others to perform an act in the same negligent way is not admissible to show that the plaintiff was free from contributory negligence"—and authorities cited in note thereunder sustain the text. In Missouri, K. & T. Ry. Co. v. Johnson, 92 Tex. 382, 48 S. W. 568, Judge

Gaines says, in treating of this subject: "We think the rule is well settled that, when the question is whether or not a person had been negligent in doing or in failing to do a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion." In Railway Company v. Evansich, 61 Tex. 3, it was sought to hold a railway company responsible in damages for failing to lock or guard its turntable, and the following instruction was given: "The fact that it was not the custom upon other roads in Texas and in other states and upon defendant's road to fasten, lock, guard, or watch the turntables will not affect plaintiff's right to recover in this suit, if it is shown by the evidence that he has received damages, as alleged. It is the legal duty of the defendant to keep its turntables locked, fastened, or guarded to keep children without discretion from being injured thereon, without regard to the custom of railroads as to not fastening or guarding turntables." Judge Stayton, in delivering the opinion of the court, says: "It is certainly true that the habitual practice of negligent acts by any number of railways for any period of time cannot make a negligent act an act of due care and diligence. The charge in question does not inform the jury that a failure to perform a given act is negligence, but it does inform the jury, in effect, that the habitual practice of the appellant and of other railways not to fasten, guard, or watch turntables would not affect the right of the appellee to recover 'if it is shown by the evidence that he has received damages, as alleged.' The petition alleged that the injury was received through the negligent act of the appellant, and whether this was true or not was left to the jury to be determined by the evidence. The last part of the charge, though it refers to given methods of securing the turntable, could not have been understood by the jury otherwise than as instructing them that it was the duty of the railway company so to keep its turntable that children, not having sufficient discretion to know and avoid danger attending the use of it, could not use it. This is certainly the duty of a railway company, and it was not improper for the court so to inform the jury; the other conditions upon which the liability of the appellant depended having been given in the charge." The charge was held not error. In Gulf, Colorado & Santa Fé Railway Co. v. Rowland, 82 Tex. 166, 18 S. W. 96, it was held that it would seem that a custom or the habitual conduct of the defendant is not admissible to show the existence or absence of negligence in a given case. This fact, negligence, must be proved by the circumstances of the identical case under investigation. The same doctrine is held in Railway Co. v. Eason (Tex. Civ. App.) 35 S. W. 210. In discussing a similar question in the case of Railway Co. v. Robbins, 43 Kan. 145, 23 Pac. 113, where the

question was as to whether the deceased was negligent in climbing the ladder of a box car, evidence was offered as to the practice and custom of other employes in ascending ladders of box cars, the court said: "Neither was the testimony introduced in regard to how railroad men should and did ascend the ladder of a box car relevant nor competent. The practice followed by others throws no light on the care used by Patterson in this case. It is not claimed that the opinions of experts are necessary in the case, and to allow testimony as to how others climbed the ladder would be to create collateral issues as to the prudence of their conduct, and to unnecessarily protract the trial. The question whether Patterson was guilty of such negligence as would preclude a recovery was an issue before the jury, and the practice or usage of others would not tend to prove care on his part, and such testimony should not have been received"—citing many cases in support of the doctrine announced by the court, among others *Railway Co. v. Evansich*, supra.

In *Hughes v. Chicago & A. R. Co.*, 30 S. W. 127, 127 Mo. 447, which was an action against the railway company for personal injuries received by the plaintiff from a mail sack which was thrown from the defendant's train while it was in motion, the company sought to show as a matter of defense that it had been its custom to throw mail sacks from its trains while the same were in motion in passing the station where the injury occurred; and the court was asked to charge the jury that if the defendant company had been accustomed to throw mail sacks from its trains while in motion, and that no personal injury had occurred prior thereto to any person therefrom, the jury would not be warranted in finding that the mail sack in question was negligently thrown. The trial court refused to give said charge, and the Supreme Court of Missouri, Judge Robinson delivering the opinion, says: "That the giving of the instruction would amount to the assertion that the custom, however dangerous to human life it might be, had it been pursued for a period of eight months by defendant without injury to any one, might be interposed as a defense from the consequence of its dangerous continuance. The duty enjoined upon the defendant to exercise care, caution, and vigilance is not dependent upon the fact that upon some other occasion a like injury had happened at this place, and under similar circumstances and conditions. The act itself was dangerous, the consequences of which could have been reasonably foreseen, and injuries from it reasonably been avoided only by the exercise of the greatest care on the part of defendant to warn all persons on its platform to be on the lookout. There was a natural and probable connection between throwing the mail sack from the fast moving train upon a platform where passengers might be expected to be, and where they were invited and solicited to be by defendant itself, and the in-

jury which actually happened to this plaintiff. Neither the previous vigilance of defendant for the past eight months (if it was its vigilance that saved the plaintiff and others from a similar accident (nor the extraordinary vigilance and precaution of those who on former occasions had been present at its depot platform when its agents were discharging mail sacks from its rapidly moving trains, nor their skill as dodgers of flying mail sacks, nor that indefinable influence or agency that seems ever to attend the acts and doings of some parties and institutions (despite themselves) called 'good luck,' had they all conspired and combined to save defendant from the natural consequences of its dangerous undertaking, and prevented an injury to any one, could be called to the aid of defendant for its carelessness on that occasion. The danger of the undertaking was a continuing demand upon defendant to the exercise of the extremest care and precaution to avoid an accident, and no aid can be invoked from any custom or usage or former good behavior of others, or good luck of defendant, to shield it from the negligent act that resulted in plaintiff's injury"—holding that the trial court did not err in refusing said instruction.

In *Warden v. Louisville & Nashville R. R. Co.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552, which was an action to recover damages for an injury received by a brakeman while sitting on the cross-beam on the front of an engine, where the plaintiff sought to relieve himself from a charge of contributory negligence by showing a custom of other brakemen to ride in similar positions, but the evidence of which custom was excluded by the trial court, McClelland, Justice, delivering the opinion of the court, said: "It is insisted, however, that the case should be reversed because of the exclusion of certain testimony offered by the plaintiff going to show a custom on the part of himself and other head brakemen on that train to ride between stations on the pilot. The city court did not in our opinion err in the exclusion of this testimony. The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily rode upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence per se for persons to walk upon the track of railroads. Doubtless many persons are in the habit of using the track in this way; yet it has never been supposed, and it cannot be the law, that such custom would convert the track, which the law declares to be per se a dangerous place, into a safe place. So a person may be in the habit of crossing railway tracks without stopping and looking and listening for approaching trains, yet we have never heard it suggested such person, when he finally reaps the penalty of his lack of care, is,

because of such habit, not guilty of contributory negligence as a matter of law. Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated. And so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent"—holding that the court did not err in refusing to admit said testimony. Authorities might be multiplied upon this subject, but we deem it unnecessary to cite others.

In the present case, while the duty was charged upon the plaintiff of registering his train at Hughes Station, still, in order to comply therewith, it is not as alleged shown to have been necessary for him to have alighted therefrom while the same was in motion, but he could have waited until after the train had stopped at the water tank or coal chute before performing this duty. The train it is shown from the evidence was being run under his control and orders, and, if he saw fit in his effort to comply with this regulation in the particular instance by alighting from the moving train, this was an election, it would seem, on his part to adopt the more hazardous manner of doing the act required of him, and, where such is the case, it was certainly incumbent upon him to exercise reasonable care in alighting from the train. And when it is alleged that he failed to do so, as in the present case, then the issue of negligence vel non should be determined by the facts surrounding him at the time of the injury, without regard to what might be the custom on the part of other conductors to do a similar thing; and such custom cannot serve the purpose of illustrating the transaction under investigation, and for this reason it is not admissible.

The remaining assignments of error, the most of which are addressed to supposed errors in the charge of the court and the refusal of requested charges by defendant, are overruled because we think, in the main, the charge of the court correctly presents the law of the case, and is not open to the criticisms urged against it, but, on account of the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

KEY, J. I concur in the conclusion reached in this case, but do not concur in all that is said in the foregoing opinion on the subject of custom. The evidence complained of re-

lated to the custom on one road only, and therefore it was not admissible.

But, as bearing upon the question of contributory negligence charged against the plaintiff, I believe he would have the right to prove the general custom or practice of railroad conductors in the manner of performing the service in which he was engaged when injured. *Railway v. Harriett*, 80 Tex. 73, 15 S. W. 556; *Railway v. Reed*, 88 Tex. 449, 31 S. W. 1058; *Railway v. Pitts* (Tex. Civ. App.) 42 S. W. 255; *Railway v. Nelson*, 20 Tex. Civ. App. 536, 49 S. W. 710; *Gillett on Indirect and Collateral Evidence*, 128.

On Rehearing.

RICE, J. At a former day of this term this case was reversed and remanded on account of supposed errors of the court in refusing a special charge, and permitting the introduction of certain evidence. Appellee in his motion for rehearing has submitted for our consideration a very full and able brief and argument, urging that the court erred in sustaining appellant's assignments relative to the two matters hereinafter discussed. The special charge requested by the defendant, which we held in our original opinion should have been given, is fully set out therein, and it is not necessary to repeat it here. The appellee contends that the court's charge on this subject was as full as the law required, and more favorably presented the issue of plaintiff's contributory negligence than did the special charge referred to. After a more mature consideration of this subject, we are inclined to believe that appellee is correct in this respect, and that the main charge was sufficient. The court in its main charge told the jury that "if you believe from the evidence that the plaintiff was guilty of negligence in attempting to alight from the train while the same was in motion at the time and under the circumstances, or if you believe he was guilty of negligence in the manner in which he got off the train, or if you believe that he held on to the caboose for too great a length of time, or that he failed to observe where he was stepping or what he was doing, and if you further believe that he was guilty of negligence in either or any of such particulars, you will find for the defendant." By its answer defendant had raised the issue of contributory negligence on the part of plaintiff in failing to observe where he was stepping while alighting from the train. By the special charge the jury were not only required to believe that the plaintiff failed to look where he was stepping, but it also required the jury to believe that he was looking at the brakeman on the platform, before they could find for the defendant on this issue, thereby imposing a greater burden than the law really required, because, if plaintiff failed to observe where he was stepping when alighting from the caboose, and the injury was caused by reason thereof, it

was immaterial where or at whom he was looking. If the special charge was incorrect in any particular, or if the same had already been given in the main charge, the court was not required to give the same. We therefore hold that there was no error in refusing to give said special charge.

We also held in the original opinion that the court erred in permitting the plaintiff to show upon cross-examination of the defendant's witnesses Quigley and Alston that it was the usual custom of defendant's conductors, upon their arrival at the depot at Hughes Station for the purpose of registering their trains, to alight therefrom in passing said station while the same were in motion. We are inclined to believe that we are in error in so holding, because the evidence disclosed that there was a custom on the part of appellant's conductors to alight from moving trains while passing said station, for the purpose of registering the arrival of said trains at said station, registering their arrival being a duty required of them at this place, for it would seem that if the company, with the knowledge of their mode of performing this service, acquiesced therein, that then it was competent to show what was the custom of performing such duty or service at Hughes Station by their conductors generally. And certainly the company in this case, by their acquiescence in this manner of performance of such duties by their servants, where the same had grown into a custom, would owe them the duty of exercising ordinary care to see that its platform was free from such obstructions as might necessarily interfere with the performance of such duty in accordance with such custom, so acquiesced in by them; and the evidence would therefore be admissible on this branch of the case. But, apart from whether we were right or not in this respect, it appears upon a reinvestigation of this matter that the record discloses that another witness, Pomeroy, was allowed to testify, without objection on the part of defendant, to similar facts relative to the custom of appellant's conductors in alighting from their trains while in motion to register the arrival thereof at said station, which fact was heretofore overlooked by us; so that if the evidence of Alston and Quigley was objectionable, as urged by appellant, still, having permitted another witness, as above shown, to testify without objection to similar facts, the error, it seems to us, in admitting same was thereby rendered harmless, and appellant cannot now complain thereof. So believing, we hold that it was not error to overrule defendant's objection to said testimony.

These being the only assignments of errors on the part of appellant which were sustained in the original opinion, the others all having been overruled, and believing now that we were in error in our former holding upon these questions, appellee's motion for rehearing is hereby granted.

We find that the evidence is sufficient under the pleadings to sustain the judgment upon the issue of defendant's negligence, as submitted under the charge of the court, and the issue of contributory negligence on the part of plaintiff, which was fairly submitted by the court, is not sustained by the evidence. We find that, under the peculiar facts of this case, the verdict of the jury is not excessive. We are therefore constrained to believe that no error has been shown in the proceedings of the court below, and its judgment is therefore affirmed.

Motion for rehearing granted. Judgment below affirmed.

RAILROAD COMMISSION OF TEXAS et al. v. GALVESTON, H. & S. A. RY. CO.

(Court of Civil Appeals of Texas. May 6, 1908.
On Rehearing, June 24, 1908.)

1. JUDGMENT — ISSUES ON DEMURRER — OVER- RULING DEMURRER.

Where, in a proceeding to enjoin the enforcement of an order of the Railroad Commission ordering a railroad company to run more passenger trains, the petition, which was verified, alleged that the trains already provided were sufficient to transport all persons who applied for transportation and all property offered for transportation, and that the order was unreasonable and unjust, and, upon a general demurrer thereto being overruled, defendant declined to further answer, judgment was properly rendered for plaintiff.

2. RAILROADS — REGULATION BY RAILROAD COMMISSION — NUMBER OF TRAINS TO BE RUN — STATUTORY PROVISIONS.

Acts 28th Leg. (Laws 1903, p. 183, c. 117) provides that it shall be the duty of the railroad commissioners to see that every railroad carrying passengers for hire shall run at least one train a day, Sundays excepted, upon which passengers shall be hauled, and the Commission shall have no power to relax this provision, and shall further regulate passenger train service by requiring all such trains to stop for a sufficient time, etc., at such stations as may be designated by the commissioners, provided that four trains each way carrying passengers for hire, if so many are run daily (Sundays excepted), be required to stop at all county seat stations. *Held*, that the Commission is given power to require, if the circumstances and demands of the public require it, the operation of more than one passenger train a day each way, and hence, where the Commission is restrained from putting into effect an order requiring the operation of two trains daily each way, the judgment should not be made perpetual, since the order might be made and enforced hereafter, provided the public interests require it, and the circumstances exist that authorize it to be done.

On Rehearing.

3. SAME.

It is the duty of a railroad company to afford adequate facilities for the transportation of such business, both passenger and freight, as may be offered it, or at least be reasonably expected, and the company is given large discretion in determining questions as to the equipment and operation of its road, subject, however, to the authority of the state or Railroad Commission to control such discretion when the interests of the public require it.

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Suit by the Galveston, Harrisburg & San Antonio Railway Company against the Railroad Commission of Texas and others for an injunction. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

This is a suit for injunction brought by appellee railway company to enjoin the enforcement of an order of the Railroad Commission made on July 20, 1907, a copy of which is attached to appellee's first amended original petition as Exhibit A.

The appellee, prior to May 28, 1907, operated over that portion of its line extending from San Antonio, Tex., to Houston, Tex., via Victoria, Tex., and known as its "Victoria Division," a double daily passenger train service. On May 28, 1907, appellee discontinued the operation of said double daily passenger train service between Houston and San Antonio over the Victoria Division, and beginning on May 28, 1907, appellee operated only a single, daily passenger train service, consisting of one daily passenger train in each direction over said Victoria Division. On July 20, 1907, the Railroad Commission of Texas ordered appellee to reinstall and reestablish on or before the 1st day of August, 1907, the double daily passenger train service over the Victoria Division as same had existed and been supplied prior to May 28, 1907. This suit is to enjoin the enforcement of said order of the Railroad Commission of date July 20, 1907. A temporary restraining order was issued on July 23, 1907. Appellants filed a motion on the 2d day of August, 1907, to dissolve said temporary restraining order, but said motion was overruled, and said restraining order was continued in full force and effect. Upon the trial appellants filed a general demurrer to appellee's first amended original petition. The general demurrer was overruled by the court, and judgment entered restraining the enforcement of said order by the Railroad Commission of Texas.

The amended petition upon which the judgment below was rendered is as follows:

"Now comes the Galveston, Harrisburg & San Antonio Railway Company, and, first having obtained leave of the court therefor, files this its first amended original petition herein in lieu of and as a substitute for its original petition filed herein on the 24th day of July, 1907, against Allison Mayfield, Leonidas Jefferson Storey, Oscar Branch Colquitt, the Railroad Commission of Texas, and Robert Vance Davidson, the above-named defendants, and thereupon avers:

"(1) That the plaintiff, the Galveston, Harrisburg & San Antonio Railway Company, is a railroad corporation, organized and existing under the laws of the state of Texas, with its domicile and principal office and place of business in Houston, Harris county, Tex., and is a citizen and resident thereof, and that it owns and operates a line of railroad within the state of Texas hereinafter more particularly described.

"(2) That defendants Allison Mayfield, Leonidas Jefferson Storey and Oscar Branch Colquitt are citizens and residents of the state of Texas and of the city of Austin and county of Travis in said state, and are members of and together constitute the Railroad Commission of Texas. That they derive any and all power, authority, and character as such Railroad Commission of Texas from and under an act of the Legislature of the state of Texas approved April 3, 1891 (Laws 1891, p. 55, c. 51), entitled 'An act to establish a Railroad Commission for the state of Texas, whereby discrimination and extortion in railroad charges may be prevented and reasonable freight and passenger tariffs may be established; to prescribe and authorize the making of rules and regulations to govern the Commission and the railroads, and afford railroad companies and other parties adequate remedies; to prescribe penalties for the violation of this act and to provide means and rules for its enforcement,' a copy of which act is filed herewith and is prayed to be considered in connection with this bill of complaint as fully as set out at length herein and made a part hereof. That said act fixes and establishes the office of the Railroad Commission of Texas at the city of Austin in the county of Travis in said state, and constitutes said Railroad Commission of Texas a body corporate and politic, and a citizen and resident of said county of Travis in said state. That the defendant Robert Vance Davidson is a citizen and resident of the county of Travis in said state, and is the Attorney General of said state and claims, as such Attorney General, the right to exercise the powers and to perform the duties purporting to be conferred upon the Attorney General of said state by the Constitution and laws thereof, and especially by said act approved April 3, 1891, creating the Railroad Commission of the state of Texas and defining the duties thereof.

"(3) That the Legislature of the state of Texas did in the year 1850, by an act approved February 11, 1850 (Laws 1849-50, p. 194, c. 156), establish a body corporate under the name of the Buffalo Bayou, Brazos & Colorado Railway Company, and did on the 4th day of September, 1850 (Laws 1850, p. 13, c. 15), pass an act legalizing the organization of said company, and did on the 31st day of January, 1852 (Sp. Laws 1851-52, p. 68, c. 76), and on the 29th of January, 1853 (Sp. Laws 1853, p. 3, c. 2), and on the 4th of February, 1854 (Sp. Laws 1853-54, p. 69, c. 45), pass acts amending the said act incorporating the Buffalo Bayou, Brazos & Colorado Railway Company, and did on the 4th day of February, 1854 (Id., p. 70, c. 46), pass an act supplemental to an act to amend an act to incorporate the Buffalo Bayou, Brazos & Colorado Railway Company, and did on the 27th day of July, 1870 (Sp. Laws 1870, p. 45, c. 28), pass another act supplemental to the act to incorporate the Buffalo Bayou, Brazos & Colo-

rado Railway Company, and to the other special acts relating to said company, by which said last-named act it was enacted, among other things, that the name of said company was changed to that of the Galveston, Harrisburg & San Antonio Railway Company, and that the Legislature of the state of Texas did on the 10th day of March, 1875 (Sp. Laws 1875, p. 81, c. 56), pass an act granting further time to said railway company and allowing it to change the route of its said line of railway, all of which said legislative acts are referred to and prayed to be considered herewith as fully as if set out at length in this bill. That under and by virtue of said several legislative acts, plaintiff was organized and created and now exists as a corporation under the name of the Galveston, Harrisburg & San Antonio Railway Company, which by purchase, construction, and otherwise has acquired and now owns and operates as a common carrier of freight and passengers, both state and interstate, and international, a line of railway extending from Galveston, in Galveston county, through the counties of Galveston, Harris, Ft. Bend, Colorado, Fayette, Gonzales, Caldwell, Guadalupe, Bexar, Medina, Uvalde, Kinney, Maverick, Val Verde, Pecos, Brewster, Presidio, Jeff Davis, El Paso, Wharton, Matagorda, Jackson, Victoria, Calhoun, Goliad, Bee, De Witt, Karnes, and Wilson. That embraced in said mileage and constituting a part of the lines now owned and operated by plaintiff are the lines acquired by it under the provisions of an act of the Legislature of the state of Texas approved May 3, 1905 (Sp. Laws 1905, p. 502, c. 58), to which reference is here made, and it is prayed that the same may be considered in connection herewith as fully as if set out at length herein, to wit: The Galveston, Houston & Northern Railway Company, extending from Galveston, in Galveston county, to Houston, in Harris county, Tex.; the New York, Texas & Mexico Railway Company, extending from the town of Rosenberg, in Ft. Bend county, through the counties of Ft. Bend, Wharton, and Matagorda, to the towns of Tres Palacios and Hawkinsville, and through the counties of Jackson and Victoria, to the city of Victoria, a distance of 176.71 miles; the Gulf, Western Texas & Pacific Railway Company, extending from Cuero, in De Witt county, through the counties of De Witt, Victoria, and Calhoun to Port Lavaca, in Calhoun county, and through the counties of Goliad and Bee to Beeville, in Bee county, a distance of 111.42 miles; the Gonzales Branch, a tap line extending from Harwood, in Gonzales county to the city of Gonzales, a distance of 12.30 miles; and the San Antonio & Gulf Railway Company, extending from San Antonio, in Bexar county, to the town of Stockdale, in Wilson county, a distance of 36.93 miles. That plaintiff having, in compliance with the conditions of said special act of the Legislature, constructed a line of railway from Stockdale, in Wilson

county, to Cuero, in De Witt county, a distance of 47.1, has fully complied with all the terms and conditions of said act of the Legislature approved May 3, 1905, and is now engaged in the active operation of and the conduct of a railway business over each and all the lines formerly operated by all of said railways as set out in said special act and is now engaged in the business of a common carrier of freight and passengers, both state and interstate, over each and all of the lines aforesaid which have become and now are integral parts of the railway lines and system of this complainant.

"(4) That what is commonly known as the main line of plaintiff's railway extends from the city of Galveston, in Galveston county, through the city of Houston, in Harris county, and through the cities of Richmond, Rosenberg, Eagle Lake, Columbus, Flatonia, Seguin, San Antonio, Uvalde, Del Rio, and thence westwardly to El Paso. That a branch line of plaintiff's railway extends from Rosenberg, in Ft. Bend county, through the cities of Wharton, Edna, Victoria, Beeville, and through Cuero, and intervening cities and counties to San Antonio, and to Port Lavaca, and from Wharton through the cities of Van Vleck and Bay City to Palacios and to Hawkinsville.

"(5) That what is known and is hereafter termed the Victoria Division of plaintiff's said railway constitutes that portion thereof between the town of Rosenberg, in Ft. Bend county, extending thence through the counties of Victoria, De Witt, Gonzales, Wilson, and Bexar, to San Antonio, and through the counties of Victoria and Port Lavaca to the city of Port Lavaca, and through the counties of Wharton and Matagorda to Palacios and Hawkinsville.

"(6) That plaintiff does now and at the time when its original petition was filed herein, and at all times prior thereto, and at all times hereinafter mentioned, operate passenger railway trains on its main line as above set out, and upon each and all of its branch lines hereinabove enumerated. That said trains and cars for the transportation of passengers are now run, and were at each and all the times hereinafter mentioned run, at regular times and upon regular schedules fixed by proper public notice, and doth now furnish, and did at each and all the times above mentioned furnish, sufficient accommodations for the transportation of all such passengers as do now or did at any of the times hereinabove mentioned, within a reasonable time prior to the time established in such public notice and schedules, offer themselves for transportation at the places of starting and at junctions of other roads, and at sidings and stopping places established for receiving and discharging passengers. And plaintiff doth now take, and hath at all times heretofore taken, transported, and discharged all such passengers at, from, and to such places as have made due payment of the tolls,

freight, and fare legally chargeable therefor.

"(7) That defendants Allison Mayfield, Leonidas Jefferson Storey, and Oscar Branch Colquitt, acting together as the Railroad Commission of Texas, and claiming to act as such under and by virtue of the authority conferred upon them by the act of the Legislature hereinbefore referred to, and laws amendatory thereof, did on July 20, 1907, make and enter an order compelling plaintiff, the Galveston, Harrisburg & San Antonio Railway Company, on or before the 1st day of August, 1907, to reinstall and reestablish a double daily passenger train service between the cities of Houston and San Antonio over the said Victoria Division of its railway, via Victoria, as they supplied it prior to May 28, 1907, and that the said Galveston, Harrisburg & San Antonio Railway Company arrange its schedule for said double daily passenger train service and file a copy of the same with the Railroad Commission of Texas, as required by said order, it also being provided in said order that the same become effective August 1st, 1907, all of which will more fully appear from an original of said order served upon this plaintiff, a copy of which is attached to this petition marked 'Exhibit A.' That thereby defendants Allison Mayfield, Leonidas Jefferson Storey, and Oscar Branch Colquitt, and the Railroad Commission of Texas, ordered the Galveston, Harrisburg & San Antonio Railway Company, plaintiff herein, to install and operate another and an additional passenger train to the then existing passenger train then and at that time in operation between the cities of San Antonio and Houston, via Victoria, and thereby compelling plaintiff to install and operate over its said railway between Houston and San Antonio, via the city of Victoria, another and additional passenger train in addition to the passenger train which was then and there already being operated in full compliance with the laws of the state of Texas by this complainant between said cities of Houston and San Antonio, via Victoria, and compelling plaintiff thereby to operate a double daily service of two passenger trains in each direction each day over said Victoria Division of plaintiff's said railway, between the said cities of San Antonio and Houston, and compelling plaintiff to rearrange its published schedules of its trains then and there operating over its said divisions and the schedules of all connecting trains.

"(8) That said order of defendants, of date July 20, 1907, and contained in said Exhibit A hereinabove referred to, is wholly void and of no effect, for the following, among other reasons, to wit:

"(1) That said plaintiff was at the time of making and entering said order, and at the time of filing the original petition herein, and at all times prior thereto and since said time, and now, operating over said

Victoria Division and between the said cities of Houston and San Antonio, via the city of Victoria, and over that portion of plaintiff's railway to which said order applied, one passenger train each way during each 24 hours, which said train was then operated, and had been at all times theretofore operated, and has been continuously and since and is now operated, at regular times and in accordance with written and duly published schedules in full compliance with all the laws of the state of Texas and all valid orders of the Railroad Commission thereof, all of which will more fully appear from plaintiff's time table No. 10, which became effective May 28, 1907, and is filed herewith; said schedule having been made public, and due notice thereof having been given as required by law. That said train service of one passenger train each way each day which was then and there operated and conducted upon the regular schedule above set out, and which has been so continuously so conducted and is now so conducted, did then, and at all the times mentioned, and doth now, furnish sufficient accommodation for the transportation of all such passengers and property as, within a reasonable time previous to the departure of said trains in accordance with plaintiff's said published schedule, offer themselves for transportation at the place of starting and at junctions of other roads at sidings and stopping places established for receiving and discharging passengers and property. And that the passenger train service over that portion of complainant's said railway covered by said order prior to the making of said order, and at the time thereof, continuously since and now, was installed and conducted in full compliance with the laws of the state of Texas, and that thereby this complainant was at each and all the times aforesaid, and at each and all the times involved herein, fully discharging its duties to the public in accordance with its charter and the laws of this state as a common carrier of freight and passengers.

"(2) The defendants, Allison Mayfield, Leonidas Jefferson Storey, and Oscar Branch Colquitt, and the Railroad Commission of Texas, are now and at the times aforesaid wholly without jurisdiction, power, or authority to make the order aforesaid and to compel this plaintiff to install and operate additional passenger trains in excess of and over and above one passenger train each day sufficient for the transportation of such passengers and property as shall have presented themselves for transportation at points regularly established for their reception prior to the scheduled time of departure, for that the act of April 3, 1891, hereinabove referred to, was passed by the Legislature of the state of Texas in pursuance of section 2 of article 10 of the Constitution of the state of Texas, adopted November 5, 1890, which is as follows: 'Sec. 2. Railroads heretofore construct-

ed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies common carriers. The Legislature shall pass laws to regulate freight and passenger tariffs, to correct abuses and to prevent unjust discrimination and extortion in the freight and passenger tariffs on the different railroads in this state and enforce the same by adequate penalties and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.' That acting under said constitutional provision, the Legislature of the state of Texas passed said act approved April 3, 1891, in which the powers of the Railroad Commission of Texas are specially set out. That neither said constitutional amendment, nor the legislative act aforesaid, confers any right, power, or authority upon defendants to make or enforce the order herein complained of. That under the provisions of article 4580 of the Revised Civil Statutes of 1895 of the state of Texas, as amended by the act of the 28th Legislature, approved April 1, 1903 (Laws 1903, p. 183, c. 117), it is provided that: 'It shall be the duty of the commissioners to see that upon every railroad and branch of same carrying passengers for hire in this state shall be run at least one train a day (Sundays excepted) upon which passengers shall be hauled and the Commission shall have no power to relax this provision and shall further regulate passenger train service by requiring all passenger trains carrying passengers for hire to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the commissioners, provided that four trains each way carrying passengers for hire if so many are run daily (except Sundays) be required to stop as aforesaid at all county seat stations.' That article 4494 of the Revised Statutes of the state of Texas for 1895, as amended by Act May 1, 1903 (Laws 1903, p. 21, c. 11), passed at the First-Called Session of the Twenty-Eighth Legislature of the State of Texas, is as follows: 'Art. 4494: Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and at stopping places established for receiving and discharging way passengers and freight, and shall take, transport and discharge such passengers and property at, from and to such places on the due payment of the tolls, freight and fare legally authorized therefor. Failure on the part of the railroad companies to comply with the requirements of this article shall be deemed

an abuse of their rights and privileges and subject to the correction and regulation of the Railroad Commission.' That under the provisions of said articles 4580 and 4494 of the Revised Civil Statutes of the state of Texas of 1895, as thus amended, it is the duty of this plaintiff to run one train a day (Sundays excepted) over its said line upon a regularly published schedule, which train shall be sufficient to accommodate those offering themselves for transportation at places regularly established for their reception within a reasonable time prior to the schedule time of departure, and that the Railroad Commission of Texas has no power, authority, or jurisdiction to regulate such passenger train service other than to require plaintiff to run one train a day sufficient as aforesaid, and to require all passenger trains to stop for a sufficient time to receive and let off passengers at such stations as may be designated by the Commission, and that further than this the Railroad Commission of Texas, and these defendants as such, are absolutely without authority or jurisdiction in the premises. That subject to the limitations of said articles 4494 and 4580 of the Revised Civil Statutes of the state of Texas of 1895, this plaintiff has the absolute right to conclusively determine the number of its own trains for the transportation of passengers, and the schedules upon which the same shall be run. That article 4484 of the Revised Civil Statutes of the state of Texas of 1895 provides that: 'Such corporation shall have the right to regulate the time and manner in which the passengers and property shall be transported and the compensation to be paid therefor, subject nevertheless to the provisions of this or any other law that may be enacted.' That said order herein complained of compels this plaintiff, in plain violation of the statutes hereinabove referred to, to install and operate another and different and an additional passenger train each way each day between the cities of Houston and Victoria as provided in said order, notwithstanding defendant has now, did have at the time said order was made, and has had at all times prior thereto, in operation under and in accordance with regularly filed and published schedules one passenger train each way each day over that portion of its line covered by said order, which train was fully adequate for the reception, accommodation, and transportation of all passengers offering themselves for transportation thereon, and this complainant was thereby fully complying with all laws of the state of Texas, and with all of its duties as a common carrier under its charter applicable in the premises. Plaintiff therefore says that defendants were, and are, without power, authority, or jurisdiction to make said order, in that the same is in violation of said section 2, article 10, of the Constitution of the state of Texas, is unauthorized by and in violation of the railroad commission act approved April 3, 1891,

and is in direct violation of articles 4494, 4580, and 4484 of the Revised Civil Statutes of the state of Texas of 1895 and is therefore void and of no effect.

"(3) That said order herein complained of is unjust and unreasonable in this: That plaintiff has now, did have at the time said order was entered, and has had at all times hereinbefore mentioned, in operation between the cities of Houston and San Antonio, via the city of Victoria, and upon that portion of its railway covered by said order, to wit, over its Victoria Division, one passenger train each way in every day of 24 hours. That said train furnishes, and did furnish at each and all of said times, ample and adequate accommodations for the transportation of all passengers and property which are now offered or have at any time heretofore been offered for transportation at the regularly established depots of plaintiff with a reasonable time prior to the time of departure thereof in accordance with its regularly published schedules, and which said trains were operated in full compliance with all the laws of the state of Texas, and that it is now, and was at each and all the times above mentioned, unjust and unreasonable to require the installation of other and additional trains, and that it is an unjust and unreasonable interference with the business of this plaintiff to undertake to compel it to install and operate, as demanded by said order, another and an additional passenger train as provided in said order, and that therefore said order is in all things unjust and unreasonable.

"(4) Plaintiff further says that said order, which compels it to install and operate one additional passenger train each way each day of 24 hours between San Antonio and Houston, via Victoria, is violative to the fourteenth amendment to the Constitution of the United States, which is as follows: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law'—in this: That, as hereinbefore alleged, plaintiff has now had, at the time of making said order, and has at all times heretofore had, in operation upon all its lines in the state of Texas, and especially upon that portion of same covered by said order, passenger trains, as above set out, fully adequate to the reasonable accommodation of all persons and property offering themselves as above set out for transportation, which said passenger trains were installed, operated, and conducted in full compliance with all the laws of the state of Texas, and in full compliance with the charter obligations of this plaintiff, and that thereby this plaintiff was at the time of said order, has continuously since, and is now, fully and in all things discharging its duties to the public as a common carrier of passengers, and that said order, which seeks to impose upon this complainant

the burden of installing, operating, and conducting another and an additional passenger train, invades the private and individual rights of plaintiff to conduct and manage its private and individual affairs as it sees fit, and is an unwarranted invasion of its private and individual rights by governmental agency. And plaintiff alleges that for the same reason said order is violative of section 19, art. 1, of the Constitution of the state of Texas, in that it is thereby deprived of its life, liberty, property, privileges, and immunities without due course of law.

"(5) Plaintiff further alleges that the several legislative acts under and by virtue of which it was chartered to act as a common carrier of freight and passengers hereinabove set out constitute and are a valid contract by and between the plaintiff and the state of Texas, under and by virtue of which it is permitted to conduct the business of a common carrier of freight and passengers subject only to the reasonable exercise of the police power of the state, and that, subject to such power, it has the right to conduct its private and individual business and affairs without interference by the Railroad Commission of Texas or other governmental agency thereof. That the order complained of is an unreasonable, unjust, and unwarranted interference with such rights, and deprives complainant of the rights to manage its own business, and renders it unable to discharge its duties either to the public or its owners, and is therefore violative of paragraph 1 of section 10 of article 1 of the Constitution of the United States, which provides that: 'No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts or granting any title of nobility.' And that for the same reason said order is violative of section 16, art. 1, of the Constitution of the state of Texas, which provides that no bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made."

"(9) That under the provisions of article 4576 of the Revised Civil Statutes of the state of Texas for 1895, as amended, it is provided that: 'If any railway doing business in this state shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for every such act of violation it shall pay to the state of Texas a penalty of not more than five thousand dollars.' That said penalty is so grossly excessive in amount and so out of due proportion to the offense denounced as to constitute excessive fines and cruel and unusual punishment, forbidden by section 13 of article 1 of the Constitution of the state of Texas, which provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted, and deprives plaintiff of due process of law, and denies it the equal protection of the law, contrary to the fourteenth amendment to the

Constitution of the United States. That it is uncertain from the terms of the order herein complained of, and from the terms of said article 4576 of the Revised Statutes of the state of Texas of 1895, as amended, whether each day that plaintiffs fail to run two passenger trains provided thereby shall constitute a violation of said order punishable by said penalty of not more than \$5,000, or whether the state is entitled to recover but one penalty therefor. And it is further uncertain from the terms of said order when the same shall become effective—whether immediately, or at such reasonable time as may be necessary to obtain equipment and publish the schedule demanded thereby. That for said reasons said order, as well as said statute 4576, is unjust, unreasonable, null, and void. That under the provisions 6 and 7 of said act of April 3, 1891, being articles 4565 and 4566 of the Revised Civil Statutes of 1895, a right of action is given to any railroad company dissatisfied with any order or regulation adopted by the Commission to determine whether or not the same is reasonable or just by action filed against the same in any court of competent jurisdiction in Travis county, Tex., and that under the provisions of said acts of April 3, 1891, being article 4579 of the Revised Civil Statutes of the state of Texas of 1895, it is made the duty of the Railroad Commission to enforce all orders made by it and report the same to the Attorney General of the state of Texas, who will thereupon institute suit for the recovery of such penalties as may have accrued by reason of such violation. That unless the relief hereinafter prayed for is granted, plaintiff is informed and believes, and upon such information and belief charges, that said Robert Vance Davidson, the Attorney General of the state of Texas, and defendant herein, will, under instruction of his codefendants, undertake to prosecute successive suits for the collection of such penalty of \$5,000, claiming a violation of such order for each successive day that plaintiff fails to install and operate each train as provided in said order herein sought to be enjoined, and that thereby this plaintiff will be subjected to a multiplicity of suits and subjected to a great and needless annoyance and vexation. And that if the plaintiff awaits the action of the Attorney General of the state of Texas herein, it will subject itself to successive prosecutions for penalties under the statutes aforesaid.

“(10) That plaintiff's said original petition, in paragraph 10 thereof, prayed that defendants and each of them be cited according to law and for immediate issuance of temporary writ of injunction restraining and enjoining the Railroad Commission of Texas and the said defendants Mayfield, Storey, and Colquitt from putting in force or continuing in force the order hereinabove complained of, and enjoining and restraining them and each of them from instructing the said Robert Vance Davidson, defendant, to institute, or

cause to be instituted, against this plaintiff, any suit or suits for the violation of said order, and restraining and enjoining them and each of them or their agents from delivering to the said Robert Vance Davidson, or any other person, any copy of said order, certified or otherwise, or from certifying to or in any manner whatsoever reporting to the Attorney General or other officers of the state of Texas, any evidence or facts showing that plaintiff, its officers or agents, have not observed, or do not observe, said order, and from restraining and enjoining the said Robert Vance Davidson from instituting, or causing to be instituted, against plaintiff, its officers or agents, any suit, prosecution, or proceeding of any character whatsoever for the collection of any penalty or penalties for the violation of said order or compelling the performance thereof, and restraining and enjoining the said Railroad Commission of Texas, the said Mayfield, Storey, and Colquitt, from making any other order or doing any other act or thing in and about the matter embraced therein, pending the action of this honorable court, and that, upon final hearing herein, plaintiff have judgment perpetuating said injunction and declaring said order hereinabove referred to to be unreasonable, void, and of no effect, and for costs and all such other relief, general and special, as it might be entitled to, either at law or in equity, for which see paragraph 10 of such original petition on file herein. That said petition and prayer for injunction was presented to the judge of the Twenty-Sixth judicial district of Texas on July 23, 1907; the same having been duly sworn to by Thornwell Fay, vice president of complainant, the Galveston, Harrisburg & San Antonio. That thereupon said judge of the Twenty-Sixth judicial district made and entered thereon the following order, to wit: ‘In Chambers, Georgetown, Texas, July 23, 1907. Upon the filing of a good and sufficient bond for the sum of \$10,000 to be conditioned as required by law, and to be approved by the clerk, the clerk will issue a temporary restraining order in terms as follows, viz.: Restraining the Railroad Commission of Texas and defendants Mayfield, Storey, and Colquitt from putting in force or continuing in force or effect the order complained of in the foregoing petition, and enjoining the defendants and each of them from instructing Robert Vance Davidson to institute, or from causing to be instituted, against plaintiff, any suit or suits for the violation of said order, and restraining the said Davidson from instituting, or causing to be instituted, against plaintiff, its officers or agents, any suit, prosecution, or proceeding of any character for the collection of any penalties for the violation of said order or compelling the performance thereof, and restraining the said Commission, Mayfield, Storey, and Colquitt, from making any other order or doing any other act or thing in or about the order complained of in plaintiff's petition until the fur-

ther order of this court, acting in term time or vacation. It is hereby expressly provided that said restraining order shall remain in force until further hearing of this cause, only to be had either in term time or in vacation, and each of the defendants are hereby, as a condition on which this order is granted, given the right to appear and move a dissolution of this order at any time, and to have motion heard on such terms as the undersigned may see fit to impose upon its presentation. [Signed] V. L. Brooks, Judge 28th Judicial District of Texas.' To which said order, as duly indorsed on plaintiff's original petition herein, reference is here made. That complainant having made and filed its bond payable to defendant in the sum of \$10,000, as demanded by said order of said court, same having been duly approved by the clerk of this court, and said original petition having been duly filed herein on the 24th day of July, 1907, said restraining order was duly issued and served upon each of the defendants herein. That thereafter said defendants having by motion duly filed herein on the 2d day of August, 1907, moved to dissolve said restraining order, said motion was in all things overruled, and said restraining order was continued in full force and effect and is now in full force and effect.

"(11) Wherefore plaintiff prays that it have judgment declaring said order hereinabove referred to be unjust, unreasonable, void, and of no effect, and that the Railroad Commission of Texas, the said Allison Mayfield, Leonidas Jefferson Storey, and Oscar Branch Colquitt, be perpetually enjoined from putting in force or from continuing in force and effect said injunction to be effective as of date July 23, 1907, the order herein complained of and enjoining and restraining them and each of them from instructing the said Robert Vance Davidson, Attorney General of the state of Texas, defendant herein, to institute, or cause to be instituted, against plaintiff, any suit or suits for the violation of said order, and restraining and enjoining them and each of them and their agents from delivering to the said Robert Vance Davidson, his agents or attorneys, or any other person, any copy of said order, whether certified or otherwise, and from certifying or in any manner whatsoever reporting to the Attorney General, or other officer of the state of Texas, any evidence or facts showing that plaintiff, its officers or agents, have not observed or do not observe said order, and restraining and enjoining the said Robert Vance Davidson, Attorney General, from instituting, or causing to be instituted, against plaintiff, its officers or agents, any suit, prosecution, or proceeding of any character whatsoever for the collection of any penalty or penalties for the violation of said order, or compelling the performance thereof, or from restraining and enjoining the Railroad Commission of Texas and the said Mayfield, Storey, and Colquitt, from making any other order or doing any

other act or thing in or about the matter embraced therein.

"Plaintiff further prays for judgment, for costs, and for all such other and further relief, both general and special, as it may be entitled to, either at law or in equity."

This pleading was properly verified by affidavit.

The Exhibit A, referred to, constituting the order of the Railroad Commission, is as follows:

Exhibit A.

"Office of Railroad Commission of Texas, Austin, Texas, July 20, 1907. Hearing No. 749, relating to Passenger Service on the G., H. & S. A. Ry. Co.'s Line West of San Antonio to El Paso, and between San Antonio and Houston, via Victoria. The above-numbered hearing having been called by the Commission on July 9, 1907, in pursuance with notice duly given in accordance with law, and the complainants herein and respondent railway company being duly represented by their duly authorized attorneys and officers, and the Commission having heard the evidence offered and the arguments presented pertaining to the matters in controversy herein, and having duly considered the same, the Railroad Commission of Texas finds as follows: (1) That prior to May 28, 1907, the Galveston, Harrisburg & San Antonio Railway Company operated over that portion of its line of road extending from the city of San Antonio, Tex., to Houston, Tex., via the city of Victoria, Tex., and known as its Victoria Division, a double daily passenger train service for the accommodation of the traveling public over said Victoria Division; the said double daily passenger service consisting of trains Nos. 301, 302, 303, and 304 between Victoria and Houston, and all of said trains being operated in accordance with published schedules, as contained in Employees' Time Table No. 9, issued by said respondent railway company and filed with the Railroad Commission of Texas. (2) We find that on May 28, 1907, the said respondent railway company discontinued the operation of the double daily passenger train service between the stations above named, to wit, Houston and San Antonio, over the so-called Victoria Division, as above described, and beginning on said date the said Galveston, Harrisburg & San Antonio Railway Company installed and began the operation, over said Victoria Division, of a single daily passenger train service, to wit, one daily passenger train only in each direction for the accommodation of the traveling public and passenger business arising at and destined to points on said Victoria Division; the said single daily service being comprised of trains Nos. 303 and 304, running between San Antonio and Victoria, and trains Nos. 301 and 302 between Victoria and Houston, and all of said trains being operated in accordance with the published

schedule, as contained in Employees' Time Table No. 10, issued by said railway company and filed by it with the Railroad Commission of Texas. (3) The Railroad Commission of Texas further finds that the passenger service which was installed as hereinbefore set forth by said Galveston, Harrisburg & San Antonio Railway Company on May 28, 1907, is the same passenger service that is now being afforded by said railway company on and over said Victoria Division, which service, in the opinion of the Railroad Commission of Texas, is inadequate and insufficient to accommodate the needs of the traveling public and patrons of said railway company on the line of its said division, and is not such passenger service as said railway company should supply and afford to the traveling public and its patrons on said Victoria Division. We find that the same is not such reasonably adequate and sufficient service as is demanded and required for the proper accommodation of said traveling public and patrons of said railway company, and said single daily service does not furnish and supply connection with the main line of said Galveston, Harrisburg & San Antonio Railway Company and its connections at Houston and San Antonio for points beyond said stations. (4) All the facts being considered by said Commission, it is hereby ordered by the Railroad Commission of Texas that the Galveston, Harrisburg & San Antonio Railway Company, on or before the 1st day of August, 1907, reinstall and re-establish the double daily passenger train service between the cities of Houston and San Antonio over the Victoria Division, via Victoria, as they supplied it prior to May 28, 1907, and that the said Galveston, Harrisburg & San Antonio Railway Company arrange its schedules for said double daily passenger train service, and file a copy of same with the Railroad Commission of Texas, as required by this order and the law. (5) This order shall take effect August 1, 1907, and repeals the order of this Commission on the same subject dated July 16, 1907."

The following is the only answer interposed by the appellants:

"Now come the defendants, and, by leave of the court first had and obtained, file this their first amended original answer in lieu of the answer and motion to dissolve temporary restraining order, filed August 2, A. D. 1907, and say: Defendants demur to plaintiff's first amended original petition filed herein, and say that same is insufficient in law to entitle them to the relief prayed for and presents no cause of action, and of this they pray the judgment of the court."

Upon overruling this general demurrer, the trial court entered final judgment as follows:

"On this the 17th day of January, 1908, came on to be heard the above styled and numbered cause, and the plaintiff appearing by its attorneys of record, and the defendants appearing by their attorneys of record,

and all parties having announced ready for trial, the defendants presented to the court their general demurrer to the plaintiff's first amended original petition, and after argument by all parties, the court being of the opinion that said general demurrer is not well taken, it is by the court ordered, adjudged, and decreed that said general demurrer be and the same is hereby in all things overruled. Thereupon the defendants announced in open court that they would decline to amend, and that they desired to make no further answer in the cause, and it appearing to the court that the allegations of plaintiff's petition are duly verified, and not denied by any pleading filed by the defendants, the court is of the opinion that judgment should be rendered for the plaintiff. It is therefore by the court further ordered, adjudged, and decreed that the order of defendant, the Railroad Commission of Texas, of date July 20, 1907, directing the plaintiff, the Galveston, Harrisburg & San Antonio Railway Company, on or before the 1st day of August, 1907, to reinstall and re-establish a double daily passenger train service between the cities of Houston and San Antonio, over the Victoria Division of its railway, via Victoria, as they supplied it prior to May 28, 1907, and that the Galveston, Harrisburg & San Antonio Railway Company arrange its schedule for said double daily passenger train service, and file a copy of same with the Railroad Commission of Texas; said order to become effective August 1, 1907, be declared unjust, unreasonable, void, and of no effect. And it is by the court further ordered, adjudged, and decreed that the defendants, the Railroad Commission of Texas, Allison Mayfield, Leonidas Jefferson Storey, and Oscar Branch Colquitt, be perpetually enjoined from putting in force, or from continuing in force or effect, said order; this injunction to be effective as of date July 23, 1907. And it is further ordered, adjudged, and decreed by the court that said defendants and each of them be and are hereby restrained from instructing defendant Robert Vance Davidson, Attorney General of the state of Texas, to institute or cause to be instituted against plaintiff any suit or suits for the violation of said order, and that they and each of them and their agents be restrained and enjoined from delivering to the said defendant, Robert Vance Davidson, his agents or attorneys, or any other person, any copy of said order, whether certified or otherwise, and from certifying, or in any manner whatsoever reporting to the Attorney General, or any officer of the state of Texas, any evidence or facts showing that plaintiffs, its officers or agents, have not observed, or do not observe, said order. And it is further ordered, adjudged, and decreed by the court that the defendant Robert Vance Davidson, Attorney General of the state of Texas, be and is hereby enjoined and restrained from instituting or causing to be instituted against plaintiff, its officers or

agents, any suit, prosecution, or proceeding of any character whatsoever for the collection of any penalty or penalties for the violation of said order or compelling the performance thereof. And it is further ordered, adjudged, and decreed by the court that said defendants, the Railroad Commission of Texas, Mayfield, Storey, and Colquitt, be enjoined and restrained from making any other order, or doing any other act or thing in and about the matter embraced in said order. It is further ordered, adjudged, and decreed by the court that defendants pay all costs of this suit. To all of which judgment and to each and all of said orders the defendants in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas."

R. V. Davidson, Atty. Gen., and Claude Pollard, Asst. Atty. Gen., for appellants. Gregory & Batts, Baker, Botts, Parker & Garwood, and Clarence H. Miller, for appellee.

FISHER, C. J. (after stating the facts as above). The plaintiff's petition, which is verified by affidavit, contains a distinct averment stating the facts upon which it is based: That the rule or order of the Commission which requires the operation of more than one passenger train each way a day is unreasonable and unjust. The defendants by answer did not see fit to deny this fact or controvert it in any manner, but were content with merely meeting the plaintiff's case with a general demurrer, and, when the same was overruled, declined, so the judgment states, to further answer. The general demurrer admits the truth of the facts well pleaded, and, the petition being verified, the trial court, in accordance with the usual practice in such cases, properly rendered judgment against the defendants. *School Incorporation v. School District*, 81 Tex. 148, 152, 16 S. W. 742.

It is not believed that the law that announces, in effect, that the rules of the Commission are held to be prima facie correct, and that one attacking same shall only prevail when the evidence satisfactorily establishes the fact that such rules are unjust and unreasonable, was intended to control or abrogate the well-settled rules that prevail in cases of this kind, which entitle the plaintiff to judgment when no answer is filed, and when the petition is verified and a general demurrer is overruled. Whatever other reasons may have influenced the court below to render judgment in plaintiff's favor, the one just discussed is sufficient upon which to base our affirmance, and, but for the fact that the judgment below went a little too far, we would not feel the necessity of expressing any opinion as to the authority of the Railroad Commission to pass and promulgate the order in question.

The judgment restraining the defendants from putting into operation and effect an order requiring the operation of two trains a

day each way seems to be perpetual, and, if this is its correct construction, it went too far, provided the law authorized the Railroad Commission to pass and enter such an order. While the judgment rendered in this case is a bar to the enforcement of the order up to date, if the law authorized the passage of such an order, it could be made and enforced hereafter, provided the public interests required it, and the circumstances exist that authorize that to be done. Thus, it will be seen, it becomes proper, if not necessary, to pass upon the question whether the Commission was authorized by law to make and pass such an order, or would be authorized in the future to make a like order, if public necessities required it.

We have examined the act of the Twenty-Eighth Legislature, on page 183, c. 117, of the Session Laws of 1903, and conclude that one of its objects was to confer upon the Railroad Commission the power to require, if the circumstances and the demands of the public require it, the operation of more than one passenger train a day each way. As the jurisdiction of this case is not limited to this court, it would serve no useful purpose to enter upon a discussion of this question, or give the reasons that influence us in placing this construction upon the statute; but, however, we desire to emphasize the fact that we believe the Commission derives no power from the common law, but can find authority for the order in question in the statute referred to, and further exercise of this authority is a question to be determined hereafter by the Commission.

We find it unnecessary to pass upon the objections to that part of the decree that seeks to restrain the Attorney General from bringing suits to enforce the statute prescribing penalties for a breach of the orders and rules passed by the Commission, for, under the disposition made of the case, he certainly could not act to recover a penalty for the violation of an order which the court below and this court has determined should not, up to the final determination of this case, be enforced on the ground, as above said, that as to the facts existing up to the time of this judgment the order has been judicially ascertained to be unreasonable and unjust. What may occur hereafter, if anything, looking to the making and enforcement of an order, based upon facts arising since this judgment, which in the opinion of the Commission may in the public interest require more than the operation of one train, is a question not before us.

Let the judgment be affirmed, as modified by this opinion.

On Rehearing.

In the original opinion, in holding that the Commission could exercise only such authority as was expressly or impliedly conferred upon it by statute, we did not intend to hold that the state in its sovereign capacity, acting through its proper channel, could

not, by mandamus or other appropriate remedy, proceed against a railway corporation to require it to perform those duties for which it was chartered, and to furnish those facilities for transportation that the needs of the public required. *State v. Atlantic & Coast Line R. R. Co.*, 53 Fla. 650, 44 South. 213. In the case before us we were not required to pass upon that question, as, in our opinion, it was not in issue. We are still of the opinion that the averments of the petition, when tested by the general demurrer, were sufficient. It is substantially alleged that the trains provided by the road were sufficient to transport all persons who applied for transportation, and to transport all property offered for transportation. This is about all that could be required of the road, and it certainly ought not to be required to operate trains for which there is no need. The case cited, quoting from *Lorraine v. Pittsburg, J., E. & F. Ry. Co.*, 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502, uses this language: "There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair and in a safe condition, nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. This is equally true with respect to passengers and freight. As to the extent or sufficiency of these facilities, including the number and frequency of trains, that is to be judged of and governed chiefly by the amount of business on the line of the road. The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road." *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. 347, 30 Am. & Eng. Ry. Cases, 509. This, in our opinion, expresses the correct view upon that question, subject, however, to the authority of the state, or the Railroad Commission, in a proper case, to control such discretion when the interests of the public require that this should be done.

Motion overruled.

MCLEAN v. STITH et al.†

(Court of Civil Appeals of Texas. April 22, 1908. On Rehearing, June 17, 1908.)

1. APPEAL AND ERROR—PLEADING—OBJECTIONS—WAIVER.

Objections to a petition will be considered waived on appeal unless brought forward in appellant's brief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

2. JUDGMENT—VACATION—INSANITY.

Where, in a suit to vacate a judgment in favor of plaintiff, the petition alleged that plaintiff was insane at the time the judgment was recovered, such allegation being general was sufficient to make the question of insanity relevant for all purposes in the case, and not to limit it to the issue of limitations.

† Writ of error refused by Supreme Court.

3. LIMITATION OF ACTIONS—JUDGMENT—VACATION—BILL OF REVIEW—SALES.

A bill of review to set aside a judgment for fraud and also to set aside sales of land thereunder is only barred after four years.

4. SAME—SUSPENSION AND LIMITATION—INSANITY.

Limitations could not run against plaintiff's action to set aside a judgment for fraud together with certain sales of land thereunder during the time plaintiff was insane, nor until his sanity was restored.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 413, 414.]

5. INSAANE PERSONS—ACTIONS—JUDGMENT—VACATION—FRAUD.

Certain notes secured by a vendor's lien were pledged by plaintiff to M., who deposited the notes with a bank for safe-keeping merely, neither plaintiff nor M. being indebted to the bank. Thereafter the bank, without any interest in the notes, and without the knowledge and consent of either plaintiff or M., and while plaintiff was insane, instituted suit on one of the notes in plaintiff's name for the benefit of itself and M., and obtained a judgment on the note and for foreclosure of the lien. *Held*, that the judgment was voidable at plaintiff's election on his being restored to sanity.

6. VENDOR AND PURCHASER—VENDOR'S LIEN—FORECLOSURE—SALE—VACATION.

A national bank, while the holder, merely as bailee, of certain notes secured by a vendor's lien, sued thereon in the name of plaintiff, the owner, without his consent, while he was insane, and obtained a judgment of foreclosure and an order of sale under which it purchased the property for an inadequate consideration. The bank paid no part of its bid except the costs, and later transferred the property to defendant who acted as the bank's attorney in the sale of the land under the judgment, and who had knowledge of plaintiff's insanity. *Held*, that defendant was charged with notice of the invalidity of the judgment, and that the sale was voidable at plaintiff's election.

7. EXECUTION—SALE—RIGHTS OF PURCHASERS—PURCHASERS FROM EXECUTION PURCHASER—DESTRUCTION OF JUDGMENT—EFFECT.

When a party to a judgment purchases at a sale thereunder at a time when the judgment is subject to reversal or review by a proceeding for that purpose, his title terminates on the destruction of the judgment, which result is not affected by the fact that a sale has been made by the purchaser under the execution to an innocent purchaser for value.

On Rehearing.

8. LIS PENDENS—TERMINATION.

Lis pendens does not necessarily terminate on the rendition of judgment, but may continue for a reasonable time thereafter to allow the perfection of an appeal or the prosecution of a remedy to set the judgment aside.

9. VENDOR AND PURCHASER—VENDOR'S LIEN—FORECLOSURE SALE—VACATION—LACHES.

When an action is instituted to set aside a sale on foreclosure of a vendor's lien within the period of limitations prescribed by law, laches is no defense.

10. JUDGMENT—CONFORMITY TO PETITION—PRAYER.

In a suit to set aside a judgment on a note secured by a vendor's lien decreeing the foreclosure of the lien, a prayer for general and special relief will authorize a judgment setting aside a sale of the land under such judgment.

11. VENDOR AND PURCHASER—RIGHTS OF PURCHASER.

A purchaser who has notice of a fact that will avoid the title of his grantor accepts the risk of having his title defeated.

12. EXECUTION — SALE—VACATION—INADEQUACY OF PRICE.

When an execution sale is attacked, it is not necessary to show affirmatively that the ground relied on to avoid it in connection with inadequacy of price occasioned the inadequacy, as such natural connection can be presumed.

13. VENDOR AND PURCHASER—VENDOR'S LIEN—FORECLOSURE — SALE—VACATION—INADEQUACY OF PRICE.

Where a bank without authority sued on a note belonging to plaintiff secured by a vendor's lien at a time when plaintiff's insanity was generally known and fraudulently procured a sale of the land to itself at a grossly inadequate price, plaintiff's mental capacity not being an issue settled by the fraudulent judgment obtained by the bank, should be regarded as having deterred bidders at the sale, and as causing to some extent the inadequacy of the price for which the land was sold.

Appeal from District Court, Llano County; Clarence Martin, Judge.

Action by Knight Stith and others against J. H. McLean. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action by appellee Stith in the nature of a bill of review to set aside and annul a certain judgment rendered by the district court of Llano county, in cause No. 901 on December 18, 1895, and to set aside a sale made under an order of court based on that judgment. The judgment was predicated upon a petition wherein it is alleged that appellee Stith brings suit for himself and the use and benefit of Mrs. S. E. Maffet and the Iron City National Bank on a promissory note against Ben Collins. It is alleged that this is one of three notes given in consideration for the purchase price of a certain tract of land sold by appellee Stith to Collins, each of the notes being for \$2,500. A foreclosure of the vendor's lien on the land represented by the notes was prayed for, and there is an averment and prayer to the effect that Stith had, prior to that time, recovered a judgment on the first of the three notes against Ben Collins, and foreclosed his lien, but no order of sale had ever been issued, and it is asked that an order of sale issue, and that the land in question be sold, and the proceeds arising from the sale be apportioned between the plaintiffs in cause No. 901 and the judgment formerly recovered by appellee Stith. This petition was filed on November 4, 1893, and was signed by Miller, Dalrymple & Flack, attorneys for plaintiff. As before said, judgment was rendered in this cause on December 18, 1895, providing for a recovery in favor of appellee Stith for the use and benefit of Mrs. S. E. Maffet and the Iron City National Bank on the \$2,500 note sued on, providing for an order of sale of the land in question, and that the proceeds be apportioned to the judgment formerly recovered by Stith and also the judgment rendered in this cause. It appears that an order of sale was issued upon the judgment rendered in cause No. 901, and the land in question was purchased by the Iron City National Bank for the sum of \$153, which appears to be the amount bid, as shown by the return of the officer. This sale under the or-

der was on July 6, 1897. Thereafter the Iron City National Bank, by deed of date October 11, 1897, sold and conveyed the land in question to appellant, McLean, for a recited consideration of \$500. This suit was instituted by appellee Stith against Mrs. Sarah Collins, Benton Collins, Richard Collins, and Francis Collins, the heirs and representatives of Ben Collins, deceased, and against T. J. Moore and W. J. Moore, the assignees of and successors to all the rights, assets, and liabilities of the Iron City National Bank, and Mrs. S. E. Maffet and her husband, S. L. Maffet, and J. H. McLean. These are all of the parties that had any interest in this controversy, and that were necessary to be joined in order to complete the bill, as a direct attack upon the judgment rendered in cause No. 901 and the sale made under it. Judgment was rendered in favor of appellee against all the defendants in the court below, setting aside and canceling the judgment rendered in cause No. 901, and also setting aside and annulling the sale made under the order of sale to the Iron City National Bank of the land in question, and also the deed from the bank to the appellant, McLean. Appellant, McLean, only, from this judgment perfected an appeal.

Appellee's petition attacking the judgment and sale is somewhat confusing, but, after omitting some minor objections to the judgment attacked, we extract from it the following as the principal grounds for relief: Appellee Stith alleges that he was the owner of the tract of land in question, and he sold the same to Ben Collins, deceased, for the sum of \$10,000, \$2,500 cash, and the balance in three notes of \$2,500 each; that when the first of these notes became due he brought suit upon it, and recovered a judgment against Collins with a foreclosure of his vendor's lien on the land in question; that he was the owner of the other two notes, the second of which he indorsed to Mrs. Maffet as security for a loan of \$400; that his note to Mrs. Maffet for the sum of \$400, together with the note that he had indorsed to her as security for same, was deposited by Mrs. Maffet in the Iron City National Bank merely for safe-keeping; that neither he nor Mrs. Maffet was indebted to the Iron City National Bank in any sum, nor did the Iron City National Bank own any interest in the note so deposited with it by Mrs. Maffet for safe-keeping, but notwithstanding this, the Iron City National Bank, without the knowledge or consent of appellee Stith or of Mrs. Maffet, and without their authority, instituted the suit known as cause No. 901 in the district court of Llano county in the name of appellee Stith and for the use and benefit of Mrs. Maffet and the Iron City National Bank; that said suit and judgment, and foreclosure proceedings that followed under it, was a fraudulent scheme on the part of the bank to acquire title to the land, and to defraud Mrs. Maffet and the plaintiff Stith. It is

also averred that the bank caused to be issued an order of sale upon this judgment, and the land to be sold and at the sheriff's sale became the purchaser for a grossly inadequate consideration. Appellant, McLean, is charged with notice of the fraudulent purpose upon the part of the bank and of all the other facts which it is claimed were sufficient to entitle the plaintiff to have the judgment and sale annulled. It is also averred that neither plaintiff nor Mrs. Maffet knew of the pendency of the suit known as cause No. 901, nor of the judgment recovered, nor of the sale made under it until long afterwards. It is also averred by appellee that, at the time of the institution of cause No. 901, the rendition of judgment, and the sale made under it, and the sale to McLean and long afterwards, he was insane.

The findings of fact and conclusions of law of the trial court are as follows:

"Findings of Fact.

"First. I find that on the 17th day of March, 1892, the plaintiff Knight Stith was the owner of the land described in his seventh amended original petition; it being the identical land claimed by defendant J. H. McLean through purchase from the Iron City National Bank by deed dated October 11, 1897, and being the land described in the judgment rendered in this cause, and that plaintiff being the owner of said land conveyed the same to Ben Collins by deed dated the 17th day of March, 1892. The said Ben Collins, vendee, paying to plaintiff Knight Stith therefor the sum of \$2,500 cash, and executed as part payment for said land his three certain promissory notes for the sum of \$2,500 each, due six, twelve, and twenty-four months after date respectively, each note bearing interest at the rate of 8 per cent. per annum and providing for 10 per cent. additional as attorney's fees, etc., if placed in the hands of an attorney for collection, each and all of said notes being secured by a vendor's lien retained on said land to secure payment thereof according to their tenor, effect, and reading, and that said deed conveying said land and retaining vendor's lien to secure payment of each and all of said notes was delivered by plaintiff Knight Stith to Ben Collins and duly recorded in deed records of Llano county, Tex., and that said land was situated in Llano county, Tex., and described as set out in plaintiff's petition and defendant J. H. McLean's answer, and that there is no issue as to the identity or description of said land between plaintiff and defendant.

"Second. I find that said first note for \$2,500 and interest having become due, and the said Ben Collins having failed to pay off and discharge the same or cause it to be done, the plaintiff Knight Stith, as plaintiff in cause No. 836 on the docket of the district court of Llano county, in a suit entitled 'Knight Stith v. Ben Collins,' instituted suit on said note and secured judgment for \$2,-

194.74, the amount due on said note, and all costs of suit, said judgment providing for the foreclosure of the vendor's lien existing on said land to secure payment of said first note, and that said judgment was properly and legally entered upon the minutes of the district court of Llano county, Tex., on the 26th day of May, 1893, Record Book E, page 24, after due and legal service on the defendant Ben Collins in that case, said judgment further providing for an order of sale that said land be sold under the terms of said judgment, and the proceeds of sale applied to the payment of judgment therein rendered on the note sued on in that case. I find that no execution was issued on said judgment until 19th day of July, 1895, and alias execution issued 17th of March, 1902, and pluries execution issued June 13, 1902. I find that order of sale issued but the land upon which the vendor's lien was retained was not sold to satisfy said judgment. I find that on the ——— day of March, 1893, the plaintiff Knight Stith borrowed \$400 from Mrs. S. E. Maffet, due 12 months after date bearing 12 per cent. interest, and delivered to her the second note for \$2,500 given by said Collins, which had been executed and delivered by Collins to Stith in payment for said tract of land, and which was secured by vendor's lien on same as collateral security to secure payment by Stith to Mrs. S. E. Maffet of said \$400 note. I find that Mrs. Maffet, who was a married woman, deposited said two notes with the Iron City National Bank, a national bank incorporated under the laws of the United States, for safe-keeping in April or May, 1893, she at no time owing said bank any sum of money whatever, nor being guarantor for any one else at said bank for any sum of money. I find that said third note for \$2,500 had been deposited by plaintiff with the Iron City National Bank as security for some business transactions with said bank, but that on the 4th day of November, 1893, the plaintiff owed said bank no sum of money whatever, and said third note for \$2,500, and which retained a vendor's lien on said land, was the property of plaintiff, and no other person had any interest therein at the time judgment in cause No. 901 was rendered, and if same was in possession of said Iron City National Bank at said date that it held same on deposit in trust for the plaintiff Knight Stith and had no interest therein. I find that on the ——— day of April, 1893, the plaintiff Knight Stith became of unsound mind and continued in said state of unsound mind up to the 30th of June, 1899, and during all of said time was incapable of contracting and was mentally unable to know what he was doing. I further find that subsequent to June 30, 1899, he was at many times of unsound mind and unable to understand the ordinary transactions of life up to January, 1902, though he was rational at times during said latter period. During all of the other period from April, 1893, until

June 30, 1899, I found him to have been of unsound mind. I find that the Iron City National Bank directed its attorneys to institute suit in the district court of Llano county, Tex., on said second note for \$2,500 as above described, and on the 16th of December, 1895, said bank had filed in said court a suit numbered 901 on the docket of said court, and entitled 'Knight Stith, Plff., for the Use of Mrs. S. E. Maffet and Iron City National Bank, vs. Ben Collins'; that said suit was brought to secure judgment and foreclosure of vendor's lien on the land above described for the amount of said second note then due. I find that at the date of the institution of said suit that the plaintiff Knight Stith was of unsound mind and that no guardian had been appointed for him. I find that at said date the said Knight Stith nor the said Mrs. S. E. Maffet, nor either of them, owed the Iron City National Bank any sum of money whatever, nor they or either of them in any wise obligated or responsible to said bank for any other person's obligation. I find that neither of said parties requested or authorized said bank to institute suit on said second note in the name of Knight Stith, as plaintiff, for the use of said bank and said Mrs. S. E. Maffet. I find that Mrs. Maffet who was a married woman, having been informed that said bank was about to sue on said note, went to the officers of said bank and demanded possession of said second note of plaintiff for \$2,500 and also her note of \$400, and said bank refused to deliver said notes or either of them, and forcibly retained possession of same against her will, and when said Mrs. S. E. Maffet learned that said notes had been placed in the hands of an attorney she demanded same of said attorneys for said bank, and demanded that if any suit had been commenced on said notes that it be withdrawn. After having served said notice and demand on said bank and its attorneys, Mrs. Maffet left Llano for her home, and never secured possession of said notes, nor learned or knew of any suit instituted thereon, never had any notice of same, gave no authority to bring said suit nor knew of its existence, until this suit was filed July 5, 1902, except that some person, long after judgment rendered in cause No. 901, told her that the bank had sued on said second note; the Iron City National Bank at that time having liquidated its business affairs, and had been succeeded by T. J. and W. J. Moore, defendants herein.

"I find that at the institution of said suit No. 901 that said Iron City National Bank had no interest whatever in said note nor any part thereof, that it did hold same for any security for any debt due it or to become due, and that said note was the property of plaintiff Knight Stith, and at date of rendition of judgment in cause No. 901 Knight Stith did not owe said bank any sum whatever. I find that said cause was tried and judgment secured for the sum of \$3,483.32½ due on said note and foreclosing the vendor's lien

on said land above described, and providing for order of sale of the land to satisfy said judgment. I further find that said judgment in said cause No. 901 expressly finds and provides that the plaintiff Knight Stith (same plaintiff as in cause No. 836) had procured judgment in cause No. 836 in district court of Llano county for the sum of \$2,194.74, and foreclosing vendor's lien on the same land, which said judgment was then unsatisfied and a valid subsisting judgment, and that there was also outstanding a third note for a similar amount also secured by vendor's lien, all of equal dignity and effect, that for that reason the judgment in cause No. 901 directed that the proceeds of the sale of the land be prorated to the payment of both judgments as no sale had been made under judgment 836 which was rendered prior to that in No. 901. I find that said judgment in cause No. 901 expressly recites the validity and legality of plaintiff's judgment in cause No. 836 in this court entered of record at a former term. I find that under such judgment the order of sale was issued and the land was bought in at said sale for \$155 by said bank; that it was then a national bank, and had no interest whatever in the notes sued on, and that said bank at said sale became the purchaser of real estate under a judgment in which it had no interest, right, or title. I find that said sum of \$155 was a wholly inadequate price for said land, and that it was worth at the time of said sale from \$500 to \$1,000. I find that the order of sale was prepared by J. H. McLean, the defendant in this suit, who was then acting as attorney for said Iron City National Bank, and that said McLean attended to the legal work and advice attending said purchase by said bank under the judgment in cause No. 901. I further find that defendant J. H. McLean was not the attorney for the bank at the institution of suit No. 901, and knew absolutely nothing about the transaction except what was brought to his notice by an examination of the records in cause No. 901, and what was brought to his notice as an attorney in preparing the order of sale under said judgment and attending to the purchase by the bank as its attorney, dating from shortly prior to July 6, 1897, and that he was in no wise connected with said suit No. 901 prior thereto. I find that said bank had said land deeded to it by the sheriff of Llano county under sale by virtue of said judgment in cause No. 901 on the 6th day of July, 1897, and took possession of the land as its property under said deed. I find that no cash was paid at said sale, except costs of court though said judgment in No. 901 provided for the sum realized to be prorated to cause No. 836, and I find that no sum whatever was paid on cause No. 836, and no one entitled to receive balance ever received any sum. I find, in addition to the judgment in cause No. 901 admitting and specifying the validity and providing for the protection of judgment in

cause No. 836, that on inspection of the petition in cause No. 901 filed therein, while it is styled 'Knight Stith, for the Use of the Iron City National Bank and Mrs. S. E. Maffet,' expressly alleges that Knight Stith was the owner of all the notes given for the purchase money of the land; that he had reduced the first of said notes to a judgment in said district court on the 26th day of May, 1893; that it was a valid, subsisting, and unsatisfied judgment, and that said Stith was the owner of said second note sued on, and also of the third note that was not then due and was still outstanding and unsatisfied, and said petition which was on file among the papers in the case upon which judgment was rendered, also specifying the validity of Stith's judgment in No. 836, and order of sale prepared by defendant J. H. McLean, attorney for said Iron City National Bank—in no wise contained any allegation or statement of any fact that would show any right of title or interest whatever in either said bank or Mrs. S. E. Maffet to any portion of said note sued on. I find, on the other hand, that the petition and judgment both positively and clearly assert the sole title to be in plaintiff Knight Stith. I find that said Iron City National Bank then sold the land in question to the defendant J. H. McLean by deed dated 11th day of October, 1897, for which defendant exchanged to said bank other lands valued at \$500, and that defendant has been in possession of said lands under his deed duly recorded and paying all taxes thereon due ever since said date, having the same inclosed by wire fence. I find that prior to defendant McLean's purchase of the land from said bank he sent one Tom Moore to plaintiff to ask him where said third note was which was outstanding against the land, and that said Moore told defendant McLean that plaintiff Stith said the bank owned everything.

"I find that said Moore did go to plaintiff at the request of defendant McLean and ask plaintiff where said third vendor's lien note was, and plaintiff replied that the bank owned everything. I find that said Moore was a successor of said Iron City National Bank. I find that at the time plaintiff made said statement to said Moore he had not recovered from his unsound condition of mind, and that he was not mentally capable of transacting business affairs or anything else with any intelligence whatever. I find that this suit was instituted on the 5th day of July, 1902, less than four years since the rendering of the judgment in cause No. 901 on the docket of the district court of Llano county, under which judgment the defendant J. H. McLean claims the land in controversy, after deducting the time during which plaintiff was of unsound mind, to wit, from April 1893, to June 30, 1899. I find that after deducting the time that plaintiff was of unsound mind that the defendant J. H. McLean has not been in peaceable, adverse possession of the land in controversy for five years under the five-year

statute of limitation, prior to the institution of this suit; that he went into possession of the same under his recorded deed on October 11, 1897, and that this suit was instituted on the 5th day of July, 1902, and that during that time the plaintiff was of unsound mind from April, 1893, until the 30th day of June, 1899, and thereafter was of unsound mind at times until January, 1902, and not competent to transact business. I find that Mrs. S. E. Maffet was the owner of the \$400 note given by plaintiff to her and as collateral thereto he had delivered the second note of the series for which the land in controversy herein was sold—had never parted with the title to the same, and at the time of this trial she has surrendered title and possession of said second note to this plaintiff, and surrenders all claim that she ever had thereto, and also surrenders to plaintiff his said \$400 note given by him to said Mrs. S. E. Maffet for said amount acknowledged payment of the same in full by plaintiff. I find that Mrs. S. E. Maffet was never paid anything by said Iron City National Bank; that said bank willfully and fraudulently secreted her note and refused to surrender it to her; that it was never returned to her; and that she has never learned nor can she ascertain what has become of it, except that said bank retained possession of same over her protest and with no interest in it whatever. I find that she never knew of said suit No. 901 being instituted until after judgment obtained, and then only as a rumor, and that the land had been sold without her knowledge or consent, and she had no notice thereof. I find that the plaintiff Knight Stith never knew of said cause No. 901 being on the docket of the district court of Llano county, or of judgment rendered therein or of sale of land thereunder until some time in the year 1902, when he had partially recovered from his unsound condition of mind. I find that plaintiff Knight Stith is the owner of all the notes given for the purchase money of said land in controversy herein, and that he is the owner of the prior judgment in cause No. 836, which is a valid, subsisting, and unsatisfied judgment, and that he now owns all of said notes and said judgment together with the vendor's lien existing against said land to secure payment of same, and that no other person owns any right, title, or interest therein. I find that Ben Collins is dead, and that he had left surviving him his wife, Sarah Collins, and three children, Benton, Francis, and Richard Collins, his only heirs. I find that Ben Collins was absent from the state of Texas since 1893, and has been absent ever since except about one year.

"From the foregoing facts I deduce the following:

"Conclusions of Law.

"That judgment No. 836, Knight Stith v. Ben Collins, in the district court of Llano county, wherein judgment was rendered fore-

closing the lien on the land in controversy in this suit, on the 26th day of May, 1893, should be revived, and said lien established and become in full force and effect, and that plaintiff Knight Stith be entitled to a judgment so declaring and decreeing that the vendor's lien existing to secure payment of said first note be foreclosed and said land be sold under order of sale of this court to satisfy said judgment, protecting therein the rights given by vendor's lien on said land to secure payment of said two other \$2,500 notes owned by plaintiff. That the judgment in cause No. 901, Knight Stith, for the Use of the Iron City National Bank and Mrs. S. T. Maffet, v. Ben Collins, is absolutely void. Plaintiff being of unsound mind at the institution of same, and said bank having no authority to bring said suit, and having no interest in the subject-matter; that the institution of said suit by said bank was a willful and fraudulent conversion of said note without the consent of the owner, and done with the fraudulent intent to convert and apply the proceeds thereof to its own use and benefit, and that neither plaintiff nor Mrs. S. E. Maffet were parties to said suit, and that said judgment obtained thereby is void, and can convey no right of title whatever; that said bank having no interest, directly or indirectly, in said note for any purpose, as affirmatively shown by the judgment and petition on file in said cause No. 901, the sale to it of real estate is absolutely void, it being prohibited from purchasing real estate in the transaction of its business affairs, except for certain purposes enumerated by law, and the judgment clearly showing that no such purchase was made in that case; that the judgment in said cause No. 901, and the sale made thereunder should be canceled and set aside as a cloud upon plaintiff's title to said land and his right to foreclose his said lien in cause No. 836, as aforesaid; that defendant McLean, although he was not advised as to the fraudulent acts and conduct of said Iron City National Bank in fraudulently converting plaintiff's property to its own use and benefit, was in law compelled to take notice of the judgment in cause No. 901 when he, as attorney for said bank, prepared the order of sale, and directed the legal steps consummating said sale to said bank under said judgment, and said judgment expressly providing for the protection of plaintiff's rights in a prior judgment No. 836, foreclosing a lien on the same land, and for the protection of the third note similarly secured, was sufficient notice to defendant of plaintiff's rights therein, and would demand of him an inspection of the papers in said cause wherein the petition disclosed plaintiff's sole title to said note and no interest to the same, whatever, in said bank; that the plaintiff having been of unsound mind from April, 1893, until June 30, 1899, the statutes of limitation would not run against him; that the defendant McLean having acted as attorney for said bank in its

attempted purchase of plaintiff's land, and preparing the order of sale issued therein, in law was put upon notice of plaintiff's rights and title to said land, and could not claim to be an innocent purchaser for value; that plaintiff being the owner and holder of all rights under said three notes given for the purchase money of said land, and being at the time of this trial the exclusive owner of them all, is entitled to elect to have his vendor's lien foreclosed to secure payment of his original judgment in cause No. 836, and at the same time let the judgment of foreclosure provide that order of sale provide that proceeds should be prorated to the payment of said other two notes, if any other holder there be, the third note having been lost or stolen from plaintiff; that defendant is entitled to judgment against all of the defendants foreclosing his lien on all the land to secure payment of his judgment in cause No. 836, for order of sale to satisfy same, and for judgment canceling and setting aside all proceedings had in cause No. 901, and canceling deed by the Iron City National Bank to the defendant J. H. McLean, and for all costs of suit; that should it be held that said judgment in cause No. 901 aforesaid is only voidable and not absolutely void, then that it was obtained by fraud and deception, and the illegal acts of said Iron City National Bank with intent to defraud plaintiff and Mrs. S. E. Maffet out of their just rights can and should be set aside for such fraud, and the suit having been instituted within the four years, after deducting the time of plaintiff's unsound condition of mind, should be set aside; that the defendant J. H. McLean, though having no notice of such fraud on the part of the bank directly or indirectly by participation therein, yet the law would impute notice to him by reason of the acts and steps he took in the procedure in said cause No. 901 as the attorney for said bank, and said judgment being voidable only could be set aside as to him as well as to said bank."

C. H. Miller and Sam'l Spears, for appellant. John C. Oatman, for appellees.

FISHER, C. J. (after stating the facts as above). Before reaching the principal question upon which we dispose of this appeal, we desire to say that, in some respects, the petition upon which appellee went to trial is not altogether definite, but there are no assignments of error complaining of the action of the court in overruling appellant's demurrers. The petition in the main states a cause of action, and, if it was subject to objections, they must be considered as waived, because not brought forward in appellant's brief. We do not agree with appellant that the averments of the plaintiff's petition on the question of insanity can only be considered on the issue of limitation. The averments do not expressly confine the insanity to this question, and it is broad enough to permit

the court to consider appellee's insanity for all purposes for which this question could be considered in a case of this nature.

We also notice the fact that the question suggested by the evidence of the appellant, McLean, that when he purchased from the bank he relied upon the statement made by Stith that the bank owned the Collins notes, is not presented by an assignment of error. In other words, appellant does not claim by an assignment that appellee Stith would be estopped to assert the fact that the bank did not own the notes when he (McLean) purchased. As to this question, however, the court found that the statement so made by Stith was at a time when he was not mentally responsible. At this stage we will dispose of the questions of limitation raised by appellant. The remedy here invoked, so much of it as is in the nature of a bill of review to set aside the judgment, as well as the remedy to set aside the sales made to the bank and by it to McLean, is only barred within four years (*Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 901; *Rose v. Darby*, 33 Tex. Civ. App. 341, 76 S. W. 799), and limitation would not operate against appellee, a lunatic, until his sanity was restored. *Fleming v. Seeligson*, 57 Tex. 532; *Brown v. Rentfro*, 57 Tex. 333; *Denni v. Elliott*, 60 Tex. 339.

The findings of fact of the trial court are, in the main, supported by the evidence, but, in order to affirm the judgment, we are not required to approve the findings in every respect, nor is it required that we should agree to the legal conclusion reached by the court below that the judgment rendered in cause No. 901 was void. Nor is it necessary, in reaching a conclusion favorable to appellee, that we should base our action on the same grounds and for the same reasons given by the trial court. But there are three facts which are conclusively and definitely settled by the findings which have ample support in the evidence: (1) That the cause of action in No. 901 was instituted by the Iron City National Bank without the knowledge and consent of appellee Stith and Mrs. Maffet; and that the bank had no interest or right in the note sued upon in that case, and that the judgment procured in that case partially in favor of the bank was a fraud upon the rights of appellee, and was, therefore, voidable. (2) That the bank purchased the land in question at sheriff's sale under this fraudulent judgment for an inadequate consideration, and paid nothing in discharge of the judgment owned by Stith, and that neither Stith nor Mrs. Maffet received any benefit from that sale; that they neither had any knowledge of the judgment or sale of the property until about the time stated by the court in its findings of fact. (3) That appellee Stith, during all of this time, and at the time of the sale by the Bank to appellant, McLean, and long afterwards, was insane, and had no notice or knowledge that his right to the property in question was affect-

ed by a judgment or sale made under it, or of the conveyance by the bank to McLean.

It is difficult at times to determine just when *lis pendens* ceases, as there is no arbitrary rule by which this fact can be measured, but if under the peculiar facts of this case, considering the insanity of Stith and the absence of notice of the fraudulent suit and judgment, and the fact that the vice in the judgment could not have been reached by appeal or writ of error, and the inability and incapacity of Stith to act in order to protect his rights be of any force in keeping alive the controversy, then, as authority for affirmance of judgment against McLean, we might rest upon the cases of *Debell v. Foxworthy*, 9 B. Mon. (Ky.) 228; *Earle v. Couch*, 3 Metc. (Ky.) 454, 455; *Clarey v. Marshall's Heirs*, 4 Dana (Ky.) 96 (cited with approval in *Harle v. Langdon's Heirs*, 60 Tex. 564); *Benedict v. Auditor General*, 104 Mich. 271, 272, 62 N. W. 364; *Cook v. French*, 96 Mich. 528, 530, 56 N. W. 101; *Smith v. Burns*, 72 Miss. 969, 18 South. 483; *Marks v. Cowles*, 61 Ala. 299; *Harle v. Langdon's Heirs*, 60 Tex. 564; *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247, 61 S. W. 415 (writ of error refused); *Glaze v. Johnson*, 27 Tex. Civ. App. 116, 65 S. W. 663; and *Adams v. Odom*, 74 Tex. 212, 12 S. W. 34, 15 Am. St. Rep. 827—although McLean may have for value purchased from the bank without notice of the facts, which would have authorized appellee to set aside the judgment in a proceeding for that purpose. These cases proceed upon the principle that, when a party to a judgment purchases at a sale thereunder at a time when the judgment was subject to reversal or review by a proceeding for that purpose, his title terminates upon the destruction of the judgment, and this result cannot be affected by the fact that a sale by such party had been made to an innocent purchaser. Judge Freeman, in section 347 of volume 3 (3d Ed.) of his work on Executions, upon this subject says: "But surely, all persons are chargeable with notice of the law, and hence of the times within which appeals may be perfected or writs of error prosecuted, and that the title held by the plaintiff is subject to destruction by the reversal of the judgment upon which it rests. Public policy does not require that third persons shall purchase this title, or, if they do so, that they shall acquire it free from the risks upon which he held it, and we believe the better opinion is that any purchaser from the plaintiff necessarily receives the title subject to the conditions under which it was held by him."

In some of the cases cited the ruling was applied to sales made under judgments, which, on appeal or error, were reversed, and in others where the judgment was vacated by a proceeding in the nature of a bill of review; but we need not enter upon the debatable ground whether these cases will apply to the facts of this case, or to the remedy which the plaintiff has invoked for his relief,

for there is another ground upon which the judgment may be affirmed, and one which, in our opinion, is conclusive.

The trial court found that the purchase by the bank at the sheriff's sale was based upon a grossly inadequate consideration, and it appears from the facts that neither appellee Stith nor Mrs. Maffet received any of the proceeds of that sale, and the sheriff who made the sale, in effect, testified that no money was received by him, except an amount sufficient to cover the costs. It is apparent from this that the bank reaped whatever benefit and profit that resulted from the sale of the land. The trial court did not expressly find that the bank was aware of the insanity of Stith, but it is clear from the evidence that it must have known this fact, or, if such was not the case, the want of knowledge was not essential in order to set aside the sale upon a proper suit brought for that purpose by appellee. As to this question, the case of *Houghton & Robinson v. Rice*, 15 Tex. Civ. App. 561, 40 S. W. 349, 1057, is decisive. A writ of error was refused in this case. A discussion of the grounds or a statement of reasons why the appellee would be entitled to set aside the sale would be a mere repetition of what we said in the case referred to. Therefore, we are content with merely a reference to that decision for the reasons that would justify setting aside the sale as to the bank. This being true, how does the matter stand with reference to the right of appellant McLean? It appears from his own evidence that at the time he purchased from the bank he owned a part of the land in question, and was familiar with its condition and its value. He does not dispute the finding of fact of the trial court to the effect that the bank purchased for a grossly inadequate consideration; and upon this subject there is no greater disproportion between the amount bid by the bank and the real value of the land than there was in the cases of *Johnson v. Crawl*, 55 Tex. 573, and *Kauffman & Runge v. Morris*, 60 Tex. 121, both of which are cited in *Houghton & Robinson v. Rice*. There is evidence justifying the conclusion that while he was not attorney for the bank in cause No. 901, he was attorney for the bank when he prepared the return of the officer on the order of sale. There is no express finding of the trial court that McLean knew at the time of his purchase and at the time that the bank purchased that appellee Stith was insane, but the facts in the record could justify no other conclusion but that McLean had knowledge or notice that Stith's mind was affected. They lived in the same town together, and it appears were well acquainted and had during that period business transactions; and McLean was in as good position to acquire knowledge of Stith's insanity as any of the witnesses who, without contradiction, have testified to that fact. There is no dispute upon the question of insanity, and there can be no question, in our opinion, but that Mc-

Lean must have known that fact. In other words, what we have said in the case of *Houghton & Robinson v. Rice* upon this subject is applicable here in discussing the phase of the case that affects McLean's rights.

We can assume for the purpose of disposing of this case that McLean had no notice or knowledge whatever of any fraud practiced by the bank in obtaining its judgment, but he must have known at the time that he purchased that the circumstances under which the bank purchased, coupled with the gross inadequacy and the insanity, would entitle the appellee to set aside the sale made to the bank. If he knew of the facts and circumstances that would justify the assertion of this right, he would take his title subject to the action that might be instituted by the appellee to avoid this sale. In other words, under the facts of this case he occupies no better attitude than did the bank, so far as affects the right of appellee to have the sale set aside. Under the ruling announced in *Houghton & Robinson v. Rice* and *Williams v. Sapleha*, 94 Tex. 433, 61 S. W. 115, there is nothing in the facts of this case that would require appellee to refund any of the purchase price of the land paid, either by the bank or McLean. The appellee in neither instance received any of the proceeds or any benefit from those sales. This ruling having eliminated McLean's supposed title, and there being no appeal by any of the other parties to the judgment, we find no error in the judgment of the trial court, and it should be in all things affirmed; that is, vacating and setting aside the judgment rendered in cause No. 901, and reviving the old judgment formerly obtained by Stith, and in setting aside the sale made to the bank and by the bank to McLean.

Judgment affirmed.

On Rehearing.

1. *Lis pendens* does not necessarily terminate upon rendition of judgment, but may continue for a reasonable time thereafter to perfect appeal or remedy to set it aside; and this, as to time, must depend upon the facts of the particular case. 2 Pom. Eq. (2d Ed.) §§ 634 to 641, 21 Am. & Eng. Ency. Law (2d Ed.) pp. 618, 619, and note 3.

2. As additional authorities on the question that the four-year statute of limitation applies, we cite *Cetti v. Dunman*, 26 Tex. Civ. App. 433, 64 S. W. 789 (writ of error refused); *McCampbell v. Durst*, 15 Tex. Civ. App. 522, 40 S. W. 317; *National Bank v. McLane*, 96 Tex. 48, 70 S. W. 201. When an action is instituted to set aside a sale within the period prescribed by law, laches has no application; and if, in the face of such a statute, any effect can be given to a rule that requires such suits to be instituted within a reasonable time after sale, or the time that the same could have been discovered or was discovered, such time should, by

analogy, be held to the period prescribed by the statute. *Garvin v. Hall*, 83 Tex. 303, 18 S. W. 731; *Storer v. Lane*, 1 Tex. Civ. App. 257, 20 S. W. 852. In *New York & Texas Land Co. v. Hyland*, 8 Tex. Civ. App. 616, 28 S. W. 206, this court, in effect, said that, if the law prescribes a period of limitation in which an action may be brought, the statute will govern, and laches and stale demand will not apply, and for this ruling cites cases mentioned in the opinion. A writ of error was refused. If the statute has prescribed a period of limitation in which a party is entitled to sue to set aside a judgment or sale under it, we fail to appreciate the reason for a rule that will abrogate or control such statute by shortening the time for suit, on the ground that the plaintiff did not act within a reasonable time.

3. A prayer for general and special relief will authorize a judgment setting aside a sale. *Garvin v. Hall*, 83 Tex. 301, 18 S. W. 731.

4. A purchaser who has notice of a fact that will avoid the title of his grantor accepts the risk of having his title defeated. *Milby v. Regan*, 16 Tex. Civ. App. 355, 41 S. W. 372; *Snow v. Hawpe*, 22 Tex. 171; *Ayres v. Duprey*, 27 Tex. 603, 86 Am. Dec. 657; *Marks v. Cowles*, 61 Ala. 305.

5. When an execution sale is attacked it is not necessary to show affirmatively that the ground relied upon to avoid it in connection with inadequacy of price occasioned such inadequacy; the natural connection can be presumed. *Weaver v. Nugent*, 72 Tex. 279, 10 S. W. 458, 13 Am. St. Rep. 792.

6. The mental capacity or incapacity of Stith was not an issue settled by the fraudulent judgment obtained by the bank, but was a fact that existed at the time of the sheriff's sale; and as it was generally known that he was mentally incapacitated, that fact could and should be considered as deterring bidders, and as causing, to some extent, the gross inadequacy of price for which the land was sold. *Crosby v. Bannowsky*, 95 Tex. 449, 68 S. W. 47.

7. *Searcy v. Hunter*, 81 Tex. 647, 17 S. W. 372, 28 Am. St. Rep. 837, holds that the right of a minor to disaffirm or set aside a sale made by him when a minor cannot be defeated on the ground that his vendee has sold for a valuable consideration the property to an innocent purchaser. Query: Why should not the same rule apply when a conveyance executed by an insane person is sought to be set aside?

8. We repeat that the principle decided in *Houghton & Robinson v. Rice*, 15 Tex. Civ. App. 562, 569, 40 S. W. 349, 1057, and the reasons there stated are peculiarly applicable to this case. Rice was insane, and his property was sold under execution for an inadequate consideration, without substantial benefit to him, at a time when he

had no representative present to protect his interests. The principle decided was that as the sale was essentially unfair to him, and he being a lunatic, that was sufficient ground for setting it aside.

In this case the sale to the bank, under the facts as found by the trial court and stated by this court, was for a grossly inadequate consideration, and from which Stith received no benefit. Therefore, it was, as to him, essentially unfair, which fact, coupled with his insanity, would be sufficient ground upon which to base a suit for setting aside such sale. McLean, when he purchased from the bank, must have known of the existence of the facts that would authorize Stith, as against the bank, to set the sale aside. He was familiar with the land and its value, and knew that the bank had purchased it for a grossly inadequate consideration; and if, under such a state of facts, the absence of knowledge of the insanity of the party whose land is sold, could in any case operate as a defense to a purchaser from the one who purchased at execution sale, such a rule should not apply in this instance, because there could be no question but that McLean knew of the mental incapacity of Stith. He and McLean were attorneys living in the town of Llano and were well acquainted, and during the period of insanity had business transactions together; and the insanity was so well known in the community that it is unreasonable to suppose that McLean did not know or hear of it. The town of Llano where they resided is a comparatively small place, and it is not likely that one of the attorneys there located who had become insane could conceal that fact from his brother attorneys, and that they would not become aware of his condition. *Houghton & Robinson v. Rice*, supra.

The insanity of Stith was an important issue in the trial of the case, and McLean testified in person at the trial, and whilst he had the opportunity to do so, he did not deny the fact but what he possessed knowledge of the mental condition of Stith. His testimony shows that he was well acquainted with Stith during that time, or part of it, at least, and he says: "At that time I knew Mr. Stith had been complaining, but at that time he was very sprightly, so far as I could see." This could be taken as an admission that he knew of Stith's condition, and also as an expression of his opinion that at the time preceding his purchase from the bank, Stith appeared to be sprightly. Without going further than this admission, it is sufficient to fix upon McLean a knowledge of the condition of Stith; and, when we consider the testimony of other witnesses, that condition is shown to be one wanting in mental capacity.

Motion overruled.

BREWER v. JOHNSON et al.

(Supreme Court of Arkansas. July 6, 1908.)

1. WITNESSES—CREDIBILITY.

The admission of a witness that he wrote letters to creditors of an insolvent, making untrue statements, for the purpose of deceiving them, lessened the credibility of his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1125.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—ACTIONS AGAINST ASSIGNEE—EVIDENCE.

In an action to charge defendants as trustees for a portion of the assets received by them as assignees for creditors, evidence held to support the finding of the chancellor that there was an agreement between plaintiff and defendants whereby plaintiff's claim was to be excluded until the other debts of the insolvent had been paid.

3. PARTNERSHIP—DISSOLUTION—FIRM ASSETS—DISPOSITION—RIGHTS OF CREDITORS.

In an action to charge defendants as trustees, it appeared that plaintiff had been a member of a firm, and had sold his interest to his co-partner, taking a note for the price, but that no notice of dissolution was given, leaving him liable for firm debts. Subsequently the remaining partner conveyed the firm assets to defendants on their agreement to convert the same into money, and apply the proceeds to the payment of the creditors pro rata. Defendants converted the assets and paid off all the creditors, whose claims they purchased at a discount, and paid all of their own claims against the firm, except a small amount, but paid plaintiff nothing on his note. In his complaint plaintiff alleged that it was part of the agreement that he was to share pro rata with the other creditors, which allegation was denied by defendants. Held, that even if there were such an agreement, as plaintiff was liable for the obligations of the firm, he was not entitled to enforce it against defendants in equity, as all the proceeds and more were required to pay defendants' claims against the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 318.]

Appeal from Lee Chancery Court; Jesse C. Hart, Special Chancellor.

Suit by H. T. Brewer against S. D. Johnson and another. From a decree for defendants, plaintiff appeals. Affirmed.

On the 1st of January, 1905, E. H. Brewer and R. M. Boon were partners in a grocery business, under the firm name of E. H. Brewer & Co. Appellant was the brother of E. H. Brewer, and, through the latter as his agent, purchased the interest of Boon in the business. When he went into the business with his brother, he assumed the liabilities of the firm of E. H. Brewer & Co., amounting to about \$4,500, including \$1,600 to Lee County Bank, \$2,000 to one Johnson, and \$900 to Memphis and St. Louis creditors. Appellant became dissatisfied with the business, and sold his interest to his brother, E. H., taking his note in the sum of \$1,550 for the purchase money, on which \$140 had been paid. There was no notice of dissolution when appellant sold out his interest to his brother, and creditors had no notice that the firm had been changed and did not agree to release appellant from his liability to them.

On January 15, 1906, E. H. Brewer sold out his stock of merchandise, book accounts,

etc., to appellees Boon and Johnson. This lawsuit grows out of a controversy between appellant and appellees Boon and Johnson as to the terms of that sale. Appellant contends, and his evidence tends to show, that his brother turned over his stock of merchandise, fixtures, book accounts, etc., which invoiced \$6,803.80, to appellees, Boon and Johnson, upon the understanding that they should convert the assets into money and apply the proceeds to the payment of his creditors pro rata; that he gave them a list of his creditors showing that the amount due them was \$7,048.70, and that the amount due appellant was on the list; that appellant was to be considered a creditor and share "equally with the rest." The appellees Johnson and Boon contend, on the other hand, and their evidence tended to show, that E. H. Brewer sold to them with the understanding that they were preferred creditors, and were to be paid in full out of the assets; that they should "take care of the other creditors, and wind up the business as best they could," and that appellant was not to be considered a creditor at all; that his claim was stricken from the list of liabilities furnished them by E. H. Brewer. The appellees converted the assets and paid off all the creditors whose claims they purchased at 75 cents on the dollar. They paid all of their own claim except \$68.78, and appellant was paid nothing. He brought this suit in equity, setting up the alleged understanding and agreement between his brother, E. H., and appellees as above set forth, in detail, and charging that appellees deliberately conspired "to cheat, defraud, and dishonestly deprive him of his just rights," alleging that they "are liable to appellant as trustees for such proportion of the assets received by virtue of the alleged agreement as his claim bore to the assets so received, and praying that they be required to pay same over to him."

The appellees answered, denying the allegations of the complaint, and setting up the agreement from their view point as mentioned supra, and alleging that appellant was responsible for all the debts of the concern, and should take nothing till all were paid, that they had received nothing except their just and undisputed claims, and they prayed to be discharged, etc. The chancellor found for the appellees and dismissed appellant's complaint, from which decree this appeal is prosecuted. Such other facts as may be necessary are stated in the opinion.

H. F. Ralison and Jno. W. & Jos. M. Stayton, for appellant. P. D. McCulloch, for appellees.

WOOD, J. (after stating the facts as above). After the assets of E. H. Brewer were turned over to appellees, Johnson, in an effort to have the creditors acquiesce in the arrangement that had been entered into between E. H. Brewer and appellees as to

the payment of their claims, wrote the creditors a letter, in which, among other things, he says: "We hold everything in the way of assets to make them do all it is possible, and will as quickly as we can get everything in cash pay over to each creditor his or their pro rata alike, including our own claims and treating them the same as all the rest." In this letter he further said that the total assets of E. H. Brewer & Co. were \$8,603.80, and "their total liabilities are, so far as we can learn, including taxes, \$7,083.35." And in another letter written for the purpose of trying to buy the claims of other creditors for 75 cents on the dollar, Johnson again says: "His [E. H. Brewer's] liabilities, so far as we now know, amount to \$7,096.01." Placing the liabilities of E. H. Brewer at this amount included the claim of appellant. Counsel for appellant, therefore, argue with great plausibility that this statement of Johnson sustains his contention that the agreement was that appellant's claim should be treated as a liability of E. H. Brewer, and that appellant should be considered as a creditor and settled with by appellees as they settled with other creditors.

Johnson in his testimony says these statements of his letter were not true, and reiterates that it was distinctly understood that H. F. Brewer was not to be a creditor, and explains that the "letters were written out of kindness to Earnest Brewer. He was to get the benefit of the transaction." This testimony of Johnson's in which he confesses that he wrote something that was untrue to deceive other creditors, in order to favor E. H. Brewer, greatly lessens the credibility of his testimony, and, were his the only evidence to establish the contention of appellees, our conclusion might be different as to the fact of whether or not the agreement was as contended by appellees. But the testimony of Boon was equally emphatic in asserting that it was expressly understood that appellant's claim against E. H. Brewer should not be considered in settling with the other creditors, and that appellants should get nothing out of the proceeds of the assets, unless there should be something left, after the other claims were settled. Boon did not see the letters Johnson wrote to the creditors, says he was not asked about it, and that the arrangement between him and Johnson was that they were to go ahead, collect the money, and pay off everybody as far as the money would go, figuring that after they were paid there would be enough to pay the other creditors from 70 to 75 per cent., and that appellant was not to be paid. There is nothing in the record to impair the credibility of Boon. He was the intimate friend of E. H. Brewer, had given him the benefit of his (Boon's) individual credit at the bank, and had shown him favors in his business relations, so that, when Boon says that the arrangement was made to get in the claims of other creditors in order to help

E. H. Brewer and to keep any judgments from being taken against him, there is no reason to disbelieve his statement. His testimony is consistent throughout. It is more in accord with the logic of the situation surrounding the parties, and the reasonable course for them to pursue under the circumstances, for Johnson's debt was well secured. Boon was bound to him for it, and appellant also was bound to both Johnson and Boon, under the undisputed evidence that he had assumed the liabilities of the partnership when he bought the interest in it. The creditors had not released him as a partner when he silently withdrew without notice to them of dissolution. See *Rector v. Robbins*, 74 Ark. 437, 86 S. W. 667. Then what possible inducement could there have been for Johnson and Boon to have agreed to take him in and treat the individual indebtedness of E. H. Brewer to him as a partnership liability and on an equality with their claim against the partnership? The chancellor's finding that the agreement was as contended by appellees is certainly not against the clear weight of the evidence. Moreover, even if the agreement were as contended by appellant, what right would he have in a court of equity to enforce it as against appellees? None whatever. He was liable to appellees for the very obligations which they held against the firm of E. H. Brewer & Co. and which they paid off by the proceeds of the assets which E. H. Brewer turned over to them. As it took all the proceeds and more to pay the debt to appellees for which appellant was liable, how can he be injured, or be heard to complain?

The chancellor did not err in dismissing appellant's complaint for want of equity, and his decree is therefore affirmed.

SANGER et al. v. McDONALD et al.

(Supreme Court of Arkansas. July 13, 1908.)

1. WILLS—FRAUD AND "UNDUE INFLUENCE"—REQUISITES.

Fraud or undue influence exercised over testator to avoid a will must be directly connected with its execution, the influence which law condemns being not the legitimate influence springing from natural affection, but the malign influence which springs from fear, coercion, or any other cause depriving testator of free agency in disposing of his property, and the influence must be specially exerted to procure a will in favor of particular persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 375-385.]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

2. SAME—"FRAUD."

Fraud, in the inducement of a will, consists of willful, false statements of fact which are intended to and do induce testator to execute the instrument which he does execute with full knowledge of its nature and contents, and, where fraud is in the inducement as distinct from the execution, the same considerations ap-

ply to the validity of the will obtained thereby as to a will executed under a mistake of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 371.]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7636.]

3. SAME—JURY QUESTION.

Whether a will was procured by undue influence is, in the last analysis, a jury question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 789.]

4. SAME.

To defeat a will on the ground of undue influence exercised over testator, it must be shown that fraud or undue influence was practiced, and that either or both resulted in producing the will, and hence the question of undue influence may be viewed from the double aspect suggested by those two classes of fact to be proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 387.]

5. SAME—EVIDENCE.

Where the procurement of a will by undue influence or fraud is alleged, the nature of relations and dealings between testator and the beneficiaries, the extent of his property, his social and commercial standing, his family connection, the claims of particular persons upon his bounty, the situation of the beneficiaries, social and pecuniary, testator's situation and mental condition, the nature and contents of the will itself, and all the circumstances under which it was executed may be considered as facts from which fraud and undue influence may be inferred or disproved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 403-414.]

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that fraud or undue influence was exercised over a testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 421-437.]

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Will contest by Mollie E. McDonald and another against Will Sanger and others. From a decree for contestants, proponents appeal. Reversed and remanded, with directions to dismiss.

This is an issue of *devisavit vel non* from the circuit court of Howard county. The case has been here before and is reported in 82 Ark. 432, 102 S. W. 690. In its opinion then the court expressly declined to consider any of the numerous assignments of error, except that upon which the reversal was based, viz.: Error in permitting one of the attorneys for contestants in his closing argument to allude to the fact that one of the attorneys for the contestees, who had prepared the will, had not testified, and to comment on this omission as a circumstance to be considered as against the contestees. The court having taken this view on the former appeal, the case may be said to be here now as if for the first time.

The will in controversy was executed by Mrs. Mary J. Johnson on the 26th day of November, 1906, and is attacked on the ground of fraud and undue influence. The proponents of the will are Will Sanger, Laura Sanger, Blanche Withrow (born Sanger), Libbie Sanger, and George P. Sanger, children and heirs at law of the said Mary J. Johnson.

The contestants are Mollie E. McDonald and Lula Wolff, also the children and heirs at law of Mary J. Johnson.

The will is as follows:

"I, Mary J. Johnson, of Nashville, Arkansas, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all other wills and codicils.

"First. I direct that all my lawful and just debts be paid out of my estate.

"Second. I give, devise and bequeath to my son, George P. Sanger, ten dollars.

"Third. I give, devise and bequeath to my daughter, Lula Wolff, seventy-five feet off of the east end of the north half of block No. 281 in the city of Little Rock, Arkansas.

"Fourth. I give, devise and bequeath to my daughter, Mollie E. McDonald, seventy-five feet off of the west end of the north half of block No. 281 in the city of Little Rock, Arkansas.

"Fifth. I give, devise and bequeath to my daughters, Libbie, Laura and Blanche Sanger, the home place on which I now live in the town of Nashville, Arkansas, together with all the furniture and household goods in the said house in which I now live.

"Sixth. I give, devise and bequeath to my children, Will Sanger, Libbie Sanger, Blanche Sanger and Laura Sanger, all the residue and remainder of my property, real, personal and mixed, wheresoever situate.

"And fully understanding and comprehending all the provisions and effect of this will, and being fully satisfied therewith, I do now execute and publish the same and in the presence of the witnesses, W. C. Rodgers and J. S. Corn. I do declare to them that this is my last will and testament by me freely made and fully understood.

"In testimony whereof, I do now sign and execute the same, this 26th day of November, A. D. 1906.

Mary J. Johnson.

"We, W. C. Rodgers and J. S. Corn, witnesses, do hereby certify that the above and foregoing will was executed by the testatrix in our presence, and that at the time of the execution thereof, she declared to us that the above was and is her last will and testament, and requested that we attest the same as witnesses, which we now do this 26th day of November, A. D. 1906.

"W. C. Rodgers, Witness.

"J. S. Corn, Witness."

The following agreed statement of facts was read to the jury: "It is admitted by the contestants that the will was executed in proper form, that at the time of the execution thereof the testatrix was competent to make the will, that the will was executed legally, and that the testatrix was mentally able to make the will and was of sound and disposing mind."

The will in question was executed under the following circumstances: Mrs. Mary J. Johnson was a widow residing in Nashville, Ark. She was 66 years old and was afflicted

with uterine cancer. She was advised by her physicians that the only hope of prolonging her life was an operation, and that the operation would be an extremely dangerous one. Will Sanger, an unmarried son, and her three unmarried daughters, Libbie, Laura, and Blanche Sanger, all children by her first husband, resided with her, and had done so all their lives. Her two married daughters, the contestants, who had been advised of her critical condition, had left their homes in Little Rock and had come to her bedside. The will was executed on November the 26th. The operation was performed on the 2d day of December and she died on the following day.

Mollie E. McDonald, a married daughter, and one of the contestants, testified, substantially, as follows: "I live in Little Rock, and have been married 21 years. My mother lived in Little Rock two or three years after my marriage. She then moved to Mineral Springs, and later to Nashville, Ark. I was with my mother about a week during her last sickness. I was not with her when she died. I had left about two days previously. Mother was very weak when she executed the will in controversy. I had been advised of her condition by my brother, Will Sanger, and had come to see her in response to a telegram sent by her. There were only four of us present when mother signed the will, viz., W. C. Rodgers, who drew the will, my brother Will, Dr. Corn, her attending physician, and myself. The first intimation I had that a will was to be executed was one morning before breakfast when my brother Will called to us. He told sister Lula and myself, as mother was growing weaker, he thought best to make her will. He said he thought \$1,000 each would be an equal share of mother's property, and said that everything she had was heavily incumbered, even to the home place. I began to ask him about the property. He didn't tell me all. Only said that there was one piece of property not incumbered. I told him that I would rather have property than money. He said that he would give us 100 feet off of block 281 in Little Rock. He told me that this was the only property mother owned that was not heavily incumbered. He studied awhile, went out and had a conversation with Dr. Corn, and when he came back said he couldn't give us 100 feet, but would give us 75 feet. He said the property was valuable. I told him that I would not take 75 feet, and asked him by what right he was going to make mother's will anyway. He said that he was doing it to cut George Sanger out, because he had already received his part. I then said: 'I am going in and tell mamma what you are trying to do.' He said: 'Before I would have you go in and broach mamma on this subject, I would have my right arm cut off.' I didn't go in to see mamma. When Mr. Rodgers came, Willie banded him the data for the will. I don't know where he had gotten

it. Mr. Rodgers handed mamma the will, and she only read one or two lines, and she got so weak she couldn't read. She handed it back to Mr. Rodgers, and he read it to her, and then she signed it. The relations between mother and myself were always friendly. I was at mother's bedside about four days before the will was signed."

Mrs. Lula Wolff testified: That she was a daughter of Mrs. Johnson and resided at Bingen, Ark.; that she was married 13 years ago. She and Charles McDonald, a son of Mrs. Mollie McDonald, testified that they heard the conversation between Mollie McDonald and Will Sanger on the morning the will was executed. In the main, they corroborated the testimony of Mrs. McDonald.

Will Sanger testified as follows: "I am 40 years old. I have lived with my mother all my life. I am not married. Those who constituted the family of my mother at the time of her death and who lived at the home place were her unmarried daughters, Libbie, Laura, and Blanche, and myself. Mother and I supported the family. Her sources of income were limited. Her average net income was about \$200 per year. I contributed the remainder of the money which was required to support the family. I had been at work for wages for about 15 years prior to her death. I did not save anything, but contributed my earnings to the support of the family. On the morning the will was executed, I went in, and mamma told me that she had requested Dr. Corn to bring Mr. Rodgers down to write her will, and that she had put it off as long as she was going to. She said: 'Willie, I want you to go and see what Mollie and Lula (meaning the contestants) are expecting.' I went to the room where they were and said: 'Mollie, mamma is sending me out to see what you and Lula are expecting. She is going to make her will, and has sent Dr. Corn after Mr. Rodgers.' Mollie spoke up and said: 'I want two lots off the half of block 281 in Little Rock.' I went into mamma's room and told her that Mollie wanted two lots. She said: 'I can't do that.' Mrs. Ben Smith was in the room at the time. I went out and told Mollie that mamma said that she could not give her two lots; that that was too much. Mollie then asked me if mamma had sold any of the property that was inherited from Aunt Julia, and I told her 'No.' She then asked me about the Texas land. I told her about it, and said that the sheriff of the county where it was situated said it was worth \$1,500. She then asked about the black land farm, and I told her that mamma had given it to me. She then asked about the Stiff property. I told her that it was mortgaged for \$2,250. I told her there was a mortgage on the home place, but that there was not much due on it. I told her that there was no mortgage on block 281. She then said she would be satisfied with a lot and one-half off of the corner of block 281. I then went and told mamma

that Mollie had requested a lot and one-half, and that if she would give her that she would be satisfied. Mother then said I intended to give her a lot, but said she would give her a lot and one-half. She then told me to 'put down \$10 for brother George, for he has already had his part.' She said: 'I want the home place for the girls. I don't want to leave them without a shelter (meaning Laura, Libbie and Blanche).' She told me to put the other property down for them and myself. I put it down as she dictated, handed the data to Mr. Rodgers, and from it he drew the will."

The unmarried daughters testified that they heard the conversation between Mrs. McDonald and Will Sanger about the provisions of the will, and their testimony is substantially the same on that point as that of Will Sanger.

Dr. Corn testified: That he was the family physician of Mrs. Johnson. That Mrs. Johnson worried about her business and wanted to get it fixed up. That she spoke to him several times about it, early in the morning of the day on which the will was executed. She requested him to send Mr. Rodgers to her to prepare her will. That Mrs. Ben Smith was the only other person in the room at the time. That he complied with her request.

Mrs. Ben Smith testified: That she had been assisting in taking care of Mrs. Johnson for 38 days prior to her death; that she was in the room all the morning on the day the will was executed; that she heard the conversation between Dr. Corn and Mrs. Johnson, and also the conversation between Will Sanger and his mother a little later on the same morning. She said no one else was present, and gave the same version of the conversation as those given by Dr. Corn and Will Sanger.

A detailed statement of the property owned by Mrs. Johnson and its value is set out in the former opinion in the case. The testimony on the second trial was substantially the same on that point. There was a jury trial and a verdict for contestants, and judgment was rendered accordingly. The case is brought here by appeal.

W. C. Rodgers, W. P. Feazel, W. S. Eakin, Ratcliffe & Fletcher, and J. D. Conway, for appellants. D. B. Sain, Hal L. Norwood, J. S. Lake, and Scott & Head, for appellees.

HART, J. (after stating the facts as above). The testamentary capacity of the testatrix is admitted, and the sole ground upon which the probate of the will was contested is that of fraud and undue influence alleged to have been exercised by the appellant, Will Sanger, upon the testatrix, their mother, in the execution of the will. The proponents of the will insist that there was not sufficient evidence upon which to submit to the jury the question of fraud and undue influence. This issue, together with numerous other assign-

ments of errors, was presented to the court for its consideration on the former appeal of this case; but the court expressly declined to consider any of them except the one upon which was based the reversal of the case. Therefore the issue of the sufficiency of the testimony to support the verdict confronts us at the threshold of the case. In the case of *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590, in discussing the question of fraud and undue influence in procuring the execution of a will, the court said: "As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which springs from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and the influence must be specially directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relation with them at the time of its execution." "Fraud in the inducement consists of willfully making false statements of fact which are intended to and do induce the testator to execute the instrument which he does execute, with full knowledge of its nature and contents. Where fraud is in the inducement as distinct from the execution, the same considerations apply to the validity of a will obtained thereby as to a will executed under a mistake of fact." Page on Wills, § 124. "The question whether the will was procured by undue influence is, in the last analysis, a question of fact to be determined by the jury. It must be shown to their satisfaction on all the facts in evidence that: First, fraud or undue influence was practiced; and, second, that either, or both in conjunction, resulted in producing the will. Hence the question of undue influence may be viewed from the double aspect suggested by those two classes of facts which are to be proved." 1 Underhill on the Law of Wills, par. 126. "Undue influence upon a testator consists in substituting virtually the will of the person exercising it for that of the testator. Fraud upon the testator consists in making that which is false appear to him to be true, and so affecting his will." 1 Big. on Fraud, p. 571. "In all cases where the procurement of a will by undue influence or fraud is alleged, the evidence, whether direct or circumstantial, should be permitted to take a very wide range. The nature of the relations and dealings between the testator and the beneficiaries, the extent of the property of the testator, his social and commercial standing, his family connections, the claims of particular persons upon his bounty, the situation of the beneficiaries, social and pecuniary, the situation and mental condition of the testator, the nature and the

contents of the will itself, and all the circumstances under which it was executed, may be considered as facts from which fraud and undue influence may be inferred, or by which they may be disproved." 1 Underhill on Wills § 132, p. 189. This rule of evidence was recognized and approved in the case of Tobin v. Jenkins, 29 Ark. 151. It has been followed by this court ever since. Tested by these general principles as applied to the facts of this case, the court is of the opinion that the evidence does not establish fraud or undue influence.

Counsel for appellees contend that the evidence shows that the testatrix had determined to make her will in accordance with the wishes of her children, and that, pursuant to this desire on her part, her son, Will Sanger, undertook to agree with his sisters on the terms of the will and to report that agreement to her. We do not think the evidence establishes this. The undisputed testimony is: That, early in the morning of the day on which the will was executed; Mrs. Johnson told Dr. Corn, her attending physician, that she wanted to make her will; that she wanted him to bring down Mr. Rodgers to prepare the will; that she had tried to get her son Will to attend to it, but that he had put her off, thinking it might worry her. This shows that the idea of making a will of some sort originated in her own brain, and the testimony shows that the idea culminated in action in anticipation of the probable fatal results of the surgical operation to be performed upon her. Mrs. Ben Smith was in the room with her all the morning and heard her conversation with Dr. Corn. She heard the conversation with Will Sanger later in the morning in regard to what she intended to give her two married daughters. She said that Will told his mother that Mollie wanted two lots, and that his mother replied: "Willie, I can't do that." And that Willie then went out. Mrs. Smith was a disinterested witness, unimpeached and uncontradicted, and her testimony was not weakened by cross-examination. Will Sanger's testimony was to the same effect on this, the turning point of the case, and there is no contradiction, direct or indirect, of this testimony. Without contradiction of this testimony, there is no evidence that any fraudulent representations of Will Sanger to his sisters were a factor in the making of a will. The undisputed evidence shows that the statements made by Will Sanger to Mrs. McDonald as testified to by her, in regard to the condition of his mother's property, were never communicated to his mother and did not influence her in making her will.

The facts and circumstances adduced in evidence do not disclose that Mrs. Johnson signed the will because she believed that its provisions were approved by Mrs. McDonald; but they do establish the fact that the wishes of Mrs. McDonald did not control her, for without any suggestions from any source she

refused to accede to the terms proposed by her daughter. The will was rewritten by a reputable attorney of the testatrix's own selection and was witnessed by him and her attending physician. The provisions of the will were reasonable and natural, considering the fact that the most of her property was incumbered, that her married daughters were already comfortably provided for, and that her son had always lived with her and for a great number of years had assisted her in the management of her business and in the support of his three unmarried sisters. Her partiality in giving them the larger share of her estate might well be expected under the circumstances. The court considers the provisions of the will only as showing the reasonableness of the uncontradicted testimony of the testatrix's intentions towards her minor daughters. While she was weak from her physical ailment, the mind of the testatrix was unimpaired. This is admitted to be true and is evidenced by the fact that learned physicians consulted with her about performing a dangerous surgical operation upon her. She evidently knew the condition of her property, for she had always been actively engaged in the management of it, even to the extent of supervision after she became too ill to leave her room. The facts are not only consistent with an uninfluenced exertion of the free will of the testatrix, but afford no inference that the will was procured by false statements to her that the will had been agreed upon by or was satisfactory to the children. Wills are rarely ever satisfactory to the family or friends of the testator, but a careful examination of the testimony leads us to the conclusion that there was not sufficient evidence upon which to submit the issue of fraud and undue influence to the jury. The case has been twice tried before a jury, and we may assume that all the testimony has been procured that would shed any light upon the question.

The cause is therefore reversed and remanded, with directions to dismiss.

SHIREY v. SHIREY.

(Supreme Court of Arkansas. July 13, 1908.)

1. DIVORCE—GROUNDS—DEFENSES—CONDONATION.

A wife who, after leaving her husband because of cruelty, and returning to live with her mother and brothers, received frequent visits from her husband, and submitted to sexual intercourse, condoned thereby the offense of mistreatment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 175.]

2. SAME.

Continued cohabitation will condone acts of cruelty, as well as any other ground for divorce, except in cases where the life or health of the innocent party is involved, or where cohabitation is continued without separation of the spouses, in the hope of better treatment.

3. SAME.

A single voluntary act of sexual intercourse by the innocent spouse, after separation on account of cruel conduct constituting grounds for divorce, operates to condone the cruelty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 175.]

4. SAME.

A husband who, with knowledge of his wife's adultery, induced her to dismiss a suit by her for divorce, by promising to take her back again as his wife, condoned the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 176.]

5. SAME—ALIMONY.

An independent suit for alimony may be maintained, and where a decree for divorce is denied because of condonation, alimony may be awarded to the wife for her maintenance, where the husband refuses to support her.

6. SAME.

Where alimony is awarded a wife who is denied a divorce because of condonation, the allowance should be a continuing one for monthly payments of the amounts, subject to modification on a change of circumstances, and not a permanent division of the husband's estate, as provided by statute in case of divorce.

7. SAME.

The amount of alimony awarded a wife who is denied a divorce is within the discretion of the court, after considering the husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing on the cause of separation.

8. SAME.

The allowance of attorney's fees in a suit by a wife for divorce is within the discretion of the court, in view of all the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 645.]

9. HUSBAND AND WIFE—MARRIAGE SETTLEMENT—ANTENUPTIAL CONTRACTS—INFANCY.

An antenuptial contract is voidable on account of the incapacity of the wife by reason of infancy.

10. SAME—VALIDITY.

Fairness and good faith must characterize an antenuptial contract, and an antenuptial contract, whereby a man, worth from \$200,000 to \$250,000, settled on his intended wife, in consideration of the marriage and in lieu of all marital rights, a farm of small value, will be set aside on account of its unreasonableness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 165.]

11. SAME.

The court, in annulling a marriage settlement, on the ground of infancy of the wife, or because of the inadequacy of the provisions made for her, will restore to the husband the property settled on the wife, if she has not parted with the title thereto, and she has it in her possession.

Appeal from Lawrence Chancery Court; Geo. T. Humphries, Chancellor.

Action by Fairbelle Shirey against A. W. Shirey, to set aside an antenuptial contract, and for divorce and alimony. Consolidated with an action by A. W. Shirey against Fairbelle Shirey for divorce. From a decree in favor of the wife and dismissing the husband's complaint, he appeals. Affirmed as to dismissal of husband's complaint, and otherwise reversed and remanded.

John B. McCaleb and Campbell & Suits, for appellant. W. P. Smith, W. A. Cunningham, John S. Gibson, and Morris M. Cohen, for appellee.

MCCULLOCH, J. Appellant A. W. Shirey brings up for review a decree of the chancery court against him, in favor of his wife, Fairbelle Shirey, for divorce and alimony and suit money.

Appellant and appellee intermarried on February 29, 1904, the former being then about 70 years old, and the latter about 15 years. Appellant lived at Minturn, a small village in Lawrence county. He was, and is, a man of considerable wealth, estimated at from \$200,000 to \$250,000 and was engaged in the mercantile business and farming. Appellee lived with her mother and two brothers, as tenants, on one of appellant's numerous farms in the vicinity of Minturn, and the two had been acquainted with each other for several years. Prior to the marriage appellee instituted an action, in the circuit court of Lawrence county, against appellant to recover damages for seduction, and this action was pending, but was dismissed, at the time of the marriage. Appellee's mother instituted the action for her as next friend. On the day of the marriage they entered into an antenuptial contract, whereby appellant settled upon her, in consideration of the marriage and in lieu of all other marital rights in his property, a farm of small value. Appellee being then an infant, the contract was executed for her by a guardian appointed, on that day, by the probate court. It was also signed by her mother. They lived together only about three months. Appellee left the home of her husband in Minturn in May, 1904, and returned to her mother, and on June 15, 1904, she commenced a suit against him for divorce and alimony, on the alleged ground of cruel treatment and indignities. They never lived together after that time, though appellant visited her occasionally at her mother's home, during the months of July, August, and September, 1904, and on January 11, 1905, they entered into another written contract, whereby she agreed to dismiss the pending suit for divorce, and not to again employ the attorneys, who then represented her in that suit, "in any suit, either in law or equity, that she may hereafter bring or defend against the said A. W. Shirey," and he agreed to pay her the sum of \$25 per month for her maintenance.

The chancery court had previously made an order, in the divorce case, directing appellant to pay fees of appellee's attorneys in the sum of \$500, and the sum of \$25 per month for her maintenance during pendency of the suit; and it appears that, at the time of this agreement between them referred to above, in January, 1905, they compromised the allowance made to her by the court for attorney's fees, so as to cheat the attorneys out of it, and divide it between themselves. Pursuant to the aforesaid agreement the divorce suit was, the next day, dismissed. A short time afterwards appellant declined to pay the stipulated monthly allowance, and on February 16, 1906, appellee instituted against her

husband a suit in chancery, to cancel and set aside the antenuptial contract, and to recover permanent alimony. She alleged in her complaint that she was an infant, and therefore incapable legally of entering into a binding contract; that her consent to the execution of the contract was obtained by fraud; that her husband had, in May, 1904, "without cause whipped her openly, in the public streets of Minturn where they lived, cursing her and threatening to kill her, driving her from his home, causing her great suffering of mind and body, from the effects of which she still suffers, rendering her partially unable to earn her living by hard labor, and causing her the necessity of expenditure of a great deal of money, which he has failed and refused to furnish her, but to the contrary has caused to be published in the 'Blade' a weekly newspaper published in Lawrence county, a notice saying he would not pay her debts"; and that, after the execution of the agreement, on January 11, 1905, he had refused to pay her the amount stipulated therein, and had refused to live with her or support her. She asked for a decree for a permanent monthly allowance of \$175. Subsequently, on September —, 1907, she amended the prayer of her complaint, by asking for a decree for divorce, on the grounds already set forth, and for one-third of her husband's estate. Appellant answered the complaint, denying all the material allegations thereof, and, on February 16, 1906, he instituted a separate suit against appellee for divorce, alleging in his complaint, as grounds for divorce, that she had wholly failed to perform her duties as a wife, and had offered such indignities as rendered his condition intolerable, by treating him with unmerited reproach, rudeness, studied neglect, open insult, etc. On May 31, 1907, after a considerable part of the testimony had been taken in the cases, appellant amended his complaint, so as to charge adultery, committed by appellee with various individuals named in the complaint, on various dates, and with other individuals at different times, whose names were to him unknown. Appellee answered the original and amended complaint, denying all the allegations thereof relating to misconduct on her part. These suits were consolidated by order of court and consent of parties, and at the final hearing the court dismissed, for want of equity, appellant's complaint for divorce, and granted the prayer of appellee's complaint for divorce and alimony, decreeing to her as alimony one-third of appellant's personal property, irrespective of debts which he may owe, and one-third of his lands for and during her life. The court further ordered appellant to pay into court the sum of \$1,000, as fees for her attorneys.

We are of the opinion, after a careful consideration of the voluminous evidence in this case, that neither of the parties have shown themselves to be entitled to a divorce. Appellee's prayer for divorce is based upon

harsh and cruel treatment, to which she is alleged to have been subjected by her husband during the brief period of time they lived together, principally in whipping her with a rod or switch publicly in the streets of Minturn. She testified that while they lived together he repeatedly used harsh, insulting, and threatening language to her, but he denies it, and her testimony lacks corroboration, except as to the one incident of the public whipping referred to above. There is a conflict in the testimony concerning the circumstances surrounding this incident, and as to the extent of the chastisement inflicted. According to appellee's version of the incident, appellant was not justified; but, according to his version, he inflicted chastisement upon his wife under circumstances not void of provocation for the act. They had been living together about three months, and on a certain afternoon she, in company with a young woman of questionable morals and unsavory reputation in the community, went strolling or walking to the outskirts of the town, where they encountered two traveling men, and while they were talking to the men, appellant, whose attention had been called to the situation, came up where they were. One of the men, who was talking to Mrs. Shirey, fled precipitately, and appellant gathered a rod or switch, and thrashed his wife with it. The testimony is, as already stated, conflicting as to the severity of the whipping. Appellee denies that the meeting with the men was prearranged, and the only one of the men who testified in the case made the same statement as to the meeting. He said that he and the other man stopped and talked to the two women 10 or 15 minutes. The other woman testified that she went out to the place at Mrs. Shirey's solicitation, and that when they saw the men Mrs. Shirey attracted their attention, and sought an introduction; that they arranged to meet them in the cemetery, and were there talking to them when appellant came upon them. It is established beyond dispute that appellee, with the other woman, was in company with these men under circumstances calculated to excite the jealousy and anger of her aged husband. That he unbridled his temper, and so far disregarded the proprieties as to administer corporal punishment to his wife, does not obscure the fact that she, too, was not free from fault. While the testimony does not prove any criminal conduct on her part on the occasion, and does not even establish clearly any immoral design, yet she must have known that her conduct, taking the most charitable view of it, was calculated to subject her to criticism, and to arouse the displeasure of her husband.

But conceding that appellant's conduct on this occasion afforded just grounds for divorce, she subsequently condoned it. This was in May, 1904, and she at once left him, and instituted suit for divorce, which she afterwards dismissed. She lived with her moth-

er and brothers, but permitted appellant to visit her frequently, and, according to her own testimony, submitted to his embraces. She gave birth to a child in the latter part of May, 1905, which she asserts was begotten by him on the occasion of some of his visits to her at her mother's home in July, 1904. He denies that he had sexual intercourse with her at any time, but he admits that he visited her several times while she was at her mother's home. If what she says is true, she condoned his offense of mistreatment. Continued cohabitation will condone acts of cruelty, as well as any other ground for divorce, the only exception being found in cases where the life or health of the innocent party is involved, or where cohabitation is continued without separation of the spouses, in the hope of better treatment. A voluntary resumption of cohabitation by the innocent spouse after separation, on account of cruel conduct constituting grounds for divorce, operates as a condonation of the cruelty, and there need not be long-continued matrimonial intercourse in order to constitute condonation. A single act of sexual intercourse may be sufficient. 14 Cyc. pp. 640, 641; 2 Bishop on Mar. & Div. § 302 et seq.; Clague v. Clague, 46 Minn. 461, 49 N. W. 198; Dunn v. Dunn, 26 Neb. 136, 42 N. W. 279. The strict rule is sometimes relaxed where the wife is the innocent party, but circumstances call for no relaxation of the rule where, as in this case, the wife has separated herself from her husband on account of alleged cruelty, and while living apart from him in the home of her kindred she voluntarily and repeatedly submits to sexual intercourse. The reason of thus relaxing the rule in favor of an injured wife is stated to be because of the greater difficulty accompanying her withdrawal from the domicile of her husband, arising from her greater dependence on him for protection and support, but this reason disappears where she has already withdrawn from him, and then voluntarily resumes cohabitation under the circumstances shown in the present case. 2 Bishop on Mar. & Div. § 307; Polson v. Polson, 140 Ind. 310, 39 N. E. 498; Clague v. Clague, 46 Minn. 461, 49 N. W. 198; Armstrong v. Stovall, 28 Miss. 279.

There is testimony in the record tending strongly to establish the commission of adultery by appellee, but the adulterous conduct which is more convincingly established occurred prior to the execution of the contract of January 11, 1905, and this, together with appellant's conduct in inducing appellee to enter into the contract and dismiss her suit for divorce by promising to take her back again as his wife, condoned her wrongdoing. That he knew or had good reason to believe at that time that she had been guilty of adultery there can scarcely be a doubt, for he then had in his possession a letter, claimed to have been written by her to another man, which, if their authenticity be treated as established,

proved indubitably her adulterous conduct. There is evidence tending to establish acts of adultery which occurred after that time, but appellant has himself so obscured the issue, by introduction of the testimony of perjured witnesses, that we are unable to separate the true from the false, and determine where the truth abides. Appellant shows himself to be a man who believes in spiritualism, foreknowledge, fortune telling, and other occultisms which made him an easy prey to designing men and women, who ingratiated themselves into his confidence only to betray it, and who lent him their aid in procuring false testimony only to desert to his adversary, and disclose upon the witness stand his wrongdoing in that respect. Nevertheless his own guilty participation in those schemes has rendered it impossible to determine, with that degree of certainty which should accompany a solemn decree of court, whether or not he has proved the charges of adultery which are said to have occurred subsequent to the aforesaid condonations. Learned counsel for appellant in their argument concede, with becoming candor, that some of the testimony introduced by their client is unworthy of belief, but argue that there is enough trustworthy testimony in his favor to sustain his charges. In this, however, we cannot agree with them. Upon the whole, we are convinced that the only true course to pursue in this case is to hold that neither of the parties have shown themselves entitled to a divorce. The chancellor erred in granting appellee's prayer for divorce, but was correct in denying appellant's prayer. Appellee's prayer for alimony stands upon more substantial grounds. Appellant condoned her offense, and induced her to dismiss her former suit and come back to him only to cast her off again. After condoning her offense he refused to support her.

Her unsatisfactorily explained visit afterwards to Kansas City, Mo., where she entered a lying-in hospital under an assumed name, and gave birth to a child, only proves an act of adultery occurring prior to said condonation. As the case stands, therefore, appellee is, since the act of condonation, deemed to be free from further fault, and appellant still disowned her and refused to support her. An independent suit for alimony may be maintained, and in the state of the case as just described appellee is entitled to a decree for alimony. Wood v. Wood, 54 Ark. 172, 15 S. W. 459. Though a decree for divorce be denied because of condonation, still alimony may be awarded to the wife for her maintenance, where the husband refuses support. 14 Cyc. pp. 768, 769. Under those circumstances, however, the allowance should be a continuing one, for monthly or other periodical payments of amounts fixed by the court, subject to modification on a change of circumstances, and not a permanent division of the husband's estate, as is provided for by statute in case a divorce is granted. Kurtz v. Kurtz,

38 Ark. 119; *Brown v. Brown*, 38 Ark. 324; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42. By this method he is given the opportunity to return to his duty, and offer, in good faith, to take the wife back and support her. This he may do at any time, and if she refuses the offer without just cause, that would be such a change of circumstances as would justify an abrogation of the allowance. The amount of such allowance is within the sound discretion of the court, and all the circumstances of the particulars should be considered in fixing it. The husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing upon the cause of separation should all be considered. We have concluded, after considering all the facts of this case, that an allowance of \$50 per month is the proper one to be made.

The chancery court ordered appellant, during the pendency of the suit, to pay appellee's attorneys the sum of \$250, which has been paid, and made a further order in the final decree for payment of the additional sum of \$1,000. We think this was an excessive allowance. This, too, is a matter within the discretion of the court, considering all the circumstances. Appellee failed in her suit for divorce, but succeeds in defeating her husband's prayer for divorce and in obtaining alimony. An allowance of the sum of \$500 as attorney's fees, in addition to the sum heretofore paid, is sufficient.

The antenuptial contract is voidable on account of the incapacity of the wife by reason of infancy. "Marriage settlements being merely civil contracts, all defenses which could be properly set up against other contracts may be set up against them, such as the statute of frauds, laches, want of consideration, incapacity of parties, fraud, and duress." 21 Cyc. p. 1271; 22 Cyc. p. 537. Fairness and good faith should characterize such a contract, and the provisions in this one for the benefit of the wife are so inadequate that a court of equity should set it aside on account of its unreasonableness, even if the wife possessed the legal capacity to enter into it. *Achilles v. Achilles*, 151 Ill. 136, 37 N. E. 693. The court should, in annulling marriage contracts on the grounds hereinbefore indicated, restore to the husband the property settled upon the wife, if she has not parted with the title, and still has it in her possession.

The cost of the litigation, including the cost of this appeal, should be decreed against appellant.

The decree, in so far as it dismisses appellant's complaint, is affirmed. In all other respects the decree is reversed, and the cause is remanded, with directions to the chancery court to enter a decree in accordance with this opinion. It is so ordered.

WOOD, J., concurs in the judgment.

BROWN et al. v. NELMS et al.

(Supreme Court of Arkansas. March 23, 1908.
Opinion on Modification, June 15, 1908.)

1. STATUTES—CONSTRUCTION—MEANING OF TERMS—INTENTION OF LEGISLATURE—STATUTORY PROVISIONS.

Under Kirby's Dig. § 7792, providing that all general terms and expressions used in statutes shall be liberally construed so that the true intent of the General Assembly may be fully carried out, the terms of a statute must be given such a meaning, consistent with a reasonable interpretation of the language used as will carry out the real intention of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259, 266-269.]

2. WILLS—VALIDITY—PROVISION FOR CHILDREN.

Kirby's Dig. § 8020, provides that where a testator omits to mention in his will the name of a child, if living at the time of the execution of the will or its legal representatives, he shall be deemed to have died intestate as regards the child, and it shall be entitled to such a share of testator's property as it would have been entitled to if he had died intestate. *Held*, that it was the legislative intent to declare intestacy as to unmentioned children of a testator unless he expresses a contrary intention in his will, and that such intention may be expressed by providing for them as a class without naming them separately or by naming them without providing for them, and hence a will devising one half of testator's property to his wife and the other half to his children, as a class, without naming them, was in compliance with the statute and valid.

3. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—LIMITATION.

Kirby's Dig. § 224, requiring executors and administrators to make final settlement of their administration within three years from the date of letters, is directory only, and does not divest the probate court of jurisdiction to complete administration after that time, and under the statute providing generally that if the personal estate of a decedent shall be insufficient to pay the debts the executor or administrator may apply to the court for a sale of real estate, the court may order a sale of decedent's land for the payment of debts after the expiration of three years, seven years being the shortest period of delay which will bar the right to such a sale, in the absence of circumstances excusing the delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1376-1378.]

4. SAME—EFFECT OF IRREGULARITY IN ALLOWING CLAIMS.

Where there are valid and subsisting claims against an estate duly probated, errors and irregularities in the allowance of claims will not vitiate a probate sale of lands regularly made to pay debts, nor deprive the court of jurisdiction to order the sale, and Kirby's Dig. § 3793, providing that all probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions, shall be voidable, does not contemplate such a result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1337, 1545.]

5. SAME—JURISDICTION OF COURT AT SUBSEQUENT TERM.

Where the probate court acquired jurisdiction to determine a petition for a sale of decedent's land to pay debts, the jurisdiction was not lost by lapse of the term, and an order of sale was not invalid because made at a term

subsequent to the one at which the petition was first presented.

6. SAME—ALLOWANCE OF CLAIMS—CHANGE OF ADMINISTRATOR.

Payment of claims against estates, once allowed by the probate court, can be enforced without revivor against a new administrator, since they continue until paid as subsisting judgments against the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 849.]

7. SAME—POWER TO ENFORCE PAYMENT OF CLAIMS.

The provision of Const. 1874, conferring upon probate courts exclusive jurisdiction over decedents' estates, abrogated the statute authorizing the issuance of execution for the enforcement of judgments against executors and administrators as such, which necessitated that such a judgment should be revived against a successor before execution could issue against him, and vested in the court exclusive power to enforce claims against estates.

8. SAME—WASTE OF ASSETS BY ADMINISTRATOR—REMEDY OF CREDITORS.

The fact that an administrator has wasted assets of the estate sufficient to pay the debts will not deprive creditors of the right to resort to other assets unadministered for the payment of their debts, and to procure a sale of decedent's land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1340.]

9. SAME—SALES—PERSONS WHO MAY PURCHASE—APPRAISERS.

Kirby's Dig. § 196, provides that before an executor or administrator shall sell lands, he shall cause them to be appraised by three disinterested householders of the county. *Held*, that the disqualifying interest may be either in the sale or the purchase, and an appraiser when he accepts the office disqualifies himself from becoming a purchaser, though he have no intention of purchasing at the time, and since the rule rests upon public policy, and not upon the actual perpetration of fraud, it is no defense to the invalidity of a purchase by such a one that he intended no wrong and perpetrated no actual fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1503.]

10. SAME—PURCHASE BY DISQUALIFIED PERSON—EFFECT.

While a confirmed sale of land by an administrator is valid without any appraisal having been made, the confirmation does not heal the incapacity of the purchaser but the sale is voidable at the instance of the heirs after confirmation within a reasonable time, or within a reasonable time after an infant heir attains his majority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1498-1503, 1535.]

11. LIMITATION OF ACTIONS—OPERATION AND EFFECT—PERSONS BOUND.

One entitled to subrogation is substituted in the place of the original holder of the right, with no greater rights or equities than he had, and hence where the right of mortgagees to enforce their lien had been barred by limitation the right of one entitled to be subrogated to their lien was also barred and the fact that such person was an infant was immaterial.

12. EXECUTORS AND ADMINISTRATORS—SALES—PAYMENT OF PURCHASE MONEY.

The fact that purchasers at an administrator's sale made payment by crediting the amount of the purchase price on their probated claim instead of paying in money did not invalidate the sale, where it was reported to and duly confirmed by the court and it did not appear that

the interests of any other creditor were prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1511, 1512.]

13. HOMESTEAD—TRANSFER—CONSTITUTIONAL PROVISIONS.

The constitutional provision that the homestead left by a decedent shall be exempt from sale for debts of decedent, and that the rents and profits thereof shall vest in the widow for life and the children during minority, merely exempts it from sale for debt either during the lifetime of the owner or after his death during the lifetime of his widow or minority of his children, and does not prohibit the original owner of the homestead from dismembering it by grant or devise at least so far as his children are concerned, since the homestead right of children is a transmitted or wholly derivative one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 249, 250.]

14. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RIGHTS OF SUBSEQUENT GRANTEE WITHOUT NOTICE.

A person mortgaged land which was subsequently sold under execution against him and purchased by sureties on his stay bond. He also quitclaimed the land to the sureties the deed, though absolute in form being either executed as security for the amount paid on the stay bond or under an agreement that the lands should be reconveyed to him on repayment of that amount. The sureties' interest was subsequently conveyed to the mortgagee's agent. The mortgagee or its agent had no actual notice of the secret agreement between its mortgagor and his sureties as to the character of the conveyance to them and it did not appear that any facts were brought to their attention which would charge them with notice of the agreement. *Held*, that they were not bound by the agreement so as to subject their title to the secret equities of the mortgagor.

15. SAME—NOTICE—DEFECT IN TITLE—QUITCLAIM DEED.

The fact that a deed in the chain of title was only a quitclaim did not of itself give notice of defect in the title or secret equities of the grantor.

16. MORTGAGES—RECORDING—FAILURE TO RECORD.

Where a person executed a mortgage which was not recorded until after he had deeded the property to others, the title conveyed by the deed took precedence over the mortgage.

17. POWERS—EXECUTION—CONVEYANCES.

A conveyance of property, vested in a person with power to sell for certain purposes, though containing no reference to the power, should be construed as an execution of the power, and hence where a will authorized a person not named as executrix to control property and sell it to provide a home for herself and children, and she conveyed it as executrix instead of as trustee by a deed which did not refer to the power but recited that the purchase price was to be used to purchase a home for herself and children, the deed should be construed as an execution of the power.

18. APPEAL AND ERROR—RECORD—NECESSITY FOR BILL OF EXCEPTIONS.

Where parties before trial agreed that all the records in the probate court in the administration of an estate might be read in evidence on investigation of the settlement accounts of a guardian and administrator, and the final decree recited that the cause was heard upon the agreements of counsel on file and the several records, and no bill of exceptions appears in the record on appeal identifying and bringing upon the record the various records read in court, and upon which the chancellor based his decree, they cannot be considered, and the decree on that

question will be presumed to be warranted by the evidence.

Battle, J., dissenting in part.

Opinion on Modification.

19. IMPROVEMENTS — COMPENSATION — GOOD FAITH OF OCCUPANT—STATUTORY PROVISIONS.

The betterment act (Act March 8, 1888, Kirby's Dig. §§ 2754-2757), entitled "An act for the better quieting of titles," provides that if any person believing himself to be the owner either in law or equity under color of title has peaceably improved any land which, upon judicial investigation, shall be decided to belong to another, the value of the improvement, and the amount of all taxes which may have been paid on the land by such person, shall be paid by the successful party to such occupant to be offset by the owner's damages and mesne profits, but no account for any mesne profits shall be allowed the owner unless they have accrued within three years next before the commencement of the suit. *Held*, that a person so improving land must be a bona fide occupant, acting in actual good faith.

20. SAME—"BONA FIDE OCCUPANT."

A "bona fide occupant" of land is one who not only supposes himself to be the true proprietor, but who is ignorant that his title is questioned by some other person claiming a better right to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Improvements, §§ 4-7, 13.

For other definitions, see Words and Phrases, vol. 1, p. 824.]

21. SAME—GOOD FAITH OF OCCUPANT.

An appraiser of land sold at an administrator's sale, who purchased it in good faith, though he was in law disqualified to do so, and was innocent of any actual intention to defraud in the appraisement or purchase, was a bona fide occupant, and upon setting aside the sale, the decree for rents and profits against him should be limited to a period of three years next before the commencement of the suit.

22. LIMITATION OF ACTIONS.

The statute applies to infants as well as adults.

23. SAME.

The statute is one to adjust the equities between the owners of lands and persons who have occupied them under color of title, believing themselves to be the owners, and is not a statute of limitation.

24. EXECUTORS AND ADMINISTRATORS — SALES UNDER ORDER OF COURT—VACATING—RIGHTS OF PURCHASER.

Taxes paid by the occupant and also the purchase price of the land, with interest thereon, should be credited to the occupant, but inasmuch as his right to credit for the purchase price results from the fact that the payment contributed to the assets of the estate, and is not dependent upon the terms of the betterment act, mesne profits for the full period of occupancy may be set off against his claim for reimbursement, on the theory that where the occupant has been reimbursed out of the profits of the land, he cannot make further claim for the same payment.

25. COSTS—PERSONS ENTITLED—SUBSTANTIAL RECOVERY.

Where a plaintiff obtains a substantial recovery by the suit, she is entitled to costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 47, 108.]

Hill, C. J., dissenting.

Appeal from Crittenden Chancery Court; Edward D. Robertson, Chancellor.

Consolidated actions by Ruth Earle Nelms and another against W. N. Brown, Jr., and others, by the state, for the use of W. W.

Sweptson, administrator, in succession of Louisa R. Earle against Ben R. Earle and others, by Ruth Earle, by her guardian, Charles L. Lewis, against George P. Diehl and others, and by the Edgewood Distilling Company and another against Ben R. Earle and others. Pending suit, defendant Brown died, and as to his interest the suit was revived in the name of his administratrix, Ida Earle Brown, and his two children. There was a decree and plaintiff Ruth Earle Nelms and certain defendants appeal. Affirmed in part, and reversed and remanded in part.

This is an appeal from a decree of the chancery court of Crittenden county which involves, so far as concerns the disposal of the case here, separate controversies between the plaintiffs below and the various defendants, though there are some questions in common to be disposed of.

Josiah F. Earle resided in Crittenden county and owned a large body of lands situated there. He died in the year 1884, leaving, surviving, his widow, Louisa R., and four children, Louisa, Jerry, Ben R., and Ruth. The two children first named died intestate and without issue during the lifetime of their mother, leaving the other two, Ben R. and Ruth, as their heirs at law. Josiah F. Earle left a last will and testament, which was duly probated, and contained the following disposition of his property without otherwise mentioning the devisees: "I give my wife one half of all my property and one half to my children. I authorize and direct my wife to sell all the real property and reinvest in some better county for herself and children. I direct that she control and manage and sell the same, and reinvest when she can get a fair price to satisfy her—the same as if she were sole owner. I owe but little, and wish that little paid out of my life policy." Louisa R. Earle died intestate in the year 1891, leaving surviving her two children, Ben R. and Ruth as her heirs at law; and during that year the said Ben R. Earle was appointed administrator of her estate and also guardian of the person and estate of his sister, Ruth. He executed separate bonds as administrator and as guardian, with John R. Chase and A. H. Ferguson as his sureties; and executed to Chase a mortgage on all his interest in lands in Crittenden county to indemnify the sureties against loss by reason of their liability as sureties on his said bonds. The mortgage was not filed for record until November 13, 1895. On January 16, 1894, the probate court revoked the letters of administration held by Ben R. Earle, and on October 15, 1894, issued letters of administration in succession to W. W. Sweptson on the estate of said Louisa R. Earle, deceased. The probate court made an order directing Sweptson, as administrator of the Louisa R. Earle estate to sell, for the payment of the debts of the estate, certain lands owned by said Louisa R. Earle by in-

heritance from her father and her undivided half interest in certain of the lands devised to her by the will of Josiah F. Earle. The sale was made by the administrator on the date named in the order of court, after the lands had been appraised. W. N. Brown, Jr., became the purchaser of one of the tracts at the sale; L. Pickett, who subsequently conveyed to Brown, became purchaser of certain other tracts; J. F. Rhodes became the purchaser of certain other tracts; and J. M. Williams as trustee for Stone & Tyler became the purchaser of other tracts. These sales were duly reported to the probate court by the administrator, and the sales were by the court confirmed, and deeds were executed to the respective purchasers pursuant to orders of the court. The undivided interest of Ben R. Earle in some of the J. F. Earle lands was sold under levee tax decrees, and purchased by W. N. Brown, Jr.

On February 8, 1894, Ben R. Earle executed to T. W. Paxton a deed conveying his interest in certain other tracts of the J. F. Earle lands to secure the payment of a debt of \$684.26 to the Edgewood Distilling Company. This deed was executed subject to lien of a judgment for about \$300 in favor of one W. P. Conner against Ben R. Earle, rendered on October 21, 1892. S. A. Martin and E. E. Williford became sureties on a bond to stay this judgment, and, on expiration of the stay, execution was issued and levied on said interest of Ben R. Earle in the tracts of the J. F. Earle lands conveyed, as aforesaid, to Paxton as trustee. The lands were sold under the execution, and Martin and Williford became the purchasers for the amount of the judgment and costs. The sale was made on December 1, 1894, and on May 2, 1895, Ben R. Earle conveyed, by quitclaim deed, his interest in the lands to Martin and Williford. This deed is alleged to have been intended by the parties as a mortgage. Martin afterwards quitclaimed to Williford, and the latter conveyed the lands on January 3, 1897, to George P. Diehl for a cash consideration of \$389.50. On July 22, 1897, the sheriff of the county executed to Diehl, as assignee of Martin and Williford, a deed to the lands pursuant to the execution sale. Diehl was acting for the Edgewood Distilling Company, and the title he took under the deeds to him is conceded to be for the use and benefit of that company. On September 23, 1890, Louisa R. Earle conveyed a quarter section of the Josiah F. Earle lands to W. R. Barksdale. The deed recites that it was executed by said Louisa R. Earle in her own right and as executrix of the estate of Josiah F. Earle, and that the purchase price of the land was to be used in the purchase of a home for herself and children in Memphis, Tenn. In 1895 the Edgewood Distilling Company and T. W. Paxton, trustee, instituted suit in the chancery court of Crittenden county against Ben R. Earle to foreclose said trust deed exe-

cuted by him to Paxton as trustee to secure the payment of indebtedness to the Edgewood Distilling Company. S. A. Martin and E. E. Williford were parties defendant, and the complaint prayed that said execution sale of the Ben R. Earle lands be canceled on account of alleged fraud and irregularities in the sale. On October 4, 1895, W. W. Swepston, as administrator in succession of the estate of Louisa R. Earle, deceased, instituted suit in said chancery court against Ben R. Earle and the sureties on his bond as administrator of the estate of Louisa R. Earle to surcharge and falsify the accounts of Ben R. Earle as such administrator, and to recover the amount alleged to be due by him to the estate. On August 21, 1899, C. L. Lewis, as guardian of Ruth Earle, instituted suit in said chancery court against George P. Diehl, J. M. Williams, trustee, and Stone & Tyler for partition of the lands held by them as tenants in common. The complaint set forth the last will and testament of said Josiah F. Earle and the devise of one-half of said lands to Louisa R. Earle and the remainder to the children of the testator. It also alleged that Diehl was the owner of the Ben R. Earle fourth interest in certain tracts of said lands through the deed from Ben R. Earle to Martin & Williford. The complaint also set forth a claim of homestead rights in said lands, and prayed that the same be set apart, and that an accounting of rents and profits be had.

On November 29, 1902, Ruth Earle Nelms (née Earle) instituted suit in said chancery court against the respective parties in interest, praying in her complaint the following relief: (1) That the interests of plaintiff in the several tracts of the Josiah F. Earle lands be ascertained and fixed, and her title quieted and confirmed, and all adverse claims of title canceled, and that she have an accounting of the rents and profits, and decrees against the defendants liable for the sums they owe on account of the rents; and also for waste committed. (2) That the amount due her from the estate of Louisa R. Earle on account of her administration of the estate of Josiah F. Earle, and her guardianship of plaintiff as a tenant in common of the lands, be ascertained and fixed, and that plaintiff have a decree therefor against the administrator of the estate of Louisa R. Earle, and the sureties on her bond as administratrix, and the sureties on her bond as guardian, for their liabilities, and that the sums for which she might obtain decrees be declared liens superior to all other liens on all the lands of which Louisa R. Earle was the owner at the time of her death, and that such lands be sold for the payment thereof. (3) That the amounts owing plaintiff by Ben R. Earle on account of his administration of the estate of Louisa R. Earle, and on account of his administration of the estate of Josiah

F. Earle, and as her guardian, and as tenant in common with her of the lands, be ascertained and fixed, and that she have decrees therefor against Ben R. Earle, and the sureties on his bond as administrator, and as guardian, according to their respective liabilities, and that the amounts decreed her be declared liens superior to all other claims and liens on the lands of Ben R. Earle. (4) That plaintiff be decreed the benefit of the mortgages made by Louisa R. Earle to John R. Chase, as trustee, and by Ben R. Earle to John R. Chase, as trustee, and that the mortgages be foreclosed for the payment of what is decreed due her. (5) That an account be taken with Swepston, and the amount he owes plaintiff be ascertained and fixed, on account of his administration of the estate of Louisa R. Earle, and his sales of the land belonging to that estate, and for rents collected belonging to plaintiff, and on the other accounts stated in the complaint, and that she have a decree against him and the sureties on his bond as administrator, and also decrees for the sums owing Ben R. Earle on the same accounts assigned her by him. (6) That an account be taken between plaintiff and Lewis as her guardian, of his guardianship, and that the amount he is owing her be fixed, and she have a decree for the same against him and the sureties on his bond. (7) That all the sales of all the lands belonging to the estate of Louisa R. Earle, made by Swepston as administrator (1) to L. Pickett, (2) to William N. Brown, Jr., (3) to John F. Rhodes, and (4) to J. M. Williams, as trustee for Stone & Tyler, be set aside and canceled, and it be ascertained what amounts of rents the several purchasers owe on account of the lands, both to plaintiff and Ben R. Earle, and that plaintiff have decrees against them respectively, for the sums found to be due. (8) That the sale of the south half of sec. 17, township 5 north, range 8 east, to J. M. Williams, trustee, be set aside and canceled on the ground that the same was the homestead of Josiah F. Earle at his death, and was not liable to be sold during the minority of plaintiff. (9) That the mortgage by Ben R. Earle to T. W. Paxton as trustee, be decreed void and of no effect as to plaintiff, or her liens, and claims upon the lands in it, and that such mortgage, and the quitclaim deed made by Ben R. Earle to Williford and Martin, and the quitclaim deed made by Williford to George P. Diehl and the Edgewood Distilling Company, and the deed made by the sheriff to George P. Diehl be all canceled, and the amount of the rents received by George P. Diehl, or the Edgewood Distilling Company, be fixed, and that she have decrees against them therefor, and for any waste committed. (10) That the sales under the decrees for the levee taxes, at which Pickett and Brown became the purchasers, and the deeds made them, respectively, by Holloway as commissioner,

be all decreed void and set aside. (11) That the deed from Louisa R. Earle to William R. Barksdale be construed and its effect declared, and that it be decreed that Barksdale took no title to the lands, and that the deed be canceled.

These four cases were, by an order of the court, consolidated and tried together. W. N. Brown, Jr., died during the pendency of the suit, and as to his interest it was revived in the name of his widow and administratrix, Ida E. Brown and his two children. The decree rendered by the court was in favor of the plaintiff Ruth Earle Nelms against the widow, administratrix, and heirs of W. N. Brown, Jr., setting aside the sales of land by Swepston as administrator of the estate of Louisa R. Earle, deceased; and against the plaintiff as to the lands purchased by W. N. Brown, Jr., at levee tax sale, and also against the plaintiff as to a tract of land held by the Southwestern Improvement Association, grantee of W. N. Brown, Jr., the court holding that Josiah F. Earle had no title to that tract. The decree was also in favor of the plaintiff against the Edgewood Distilling Company and George P. Diehl, setting aside the conveyance to them by Ben R. Earle and E. E. Williford. In all other respects, the decree was against the plaintiff, dismissing the complaint for want of equity. A reference to the master was made to state an account of the rents and profits received by W. N. Brown, Jr., and by the Edgewood Distilling Company and George P. Diehl; and upon report of the master decrees were rendered in favor of the plaintiff for amounts of rents received by those parties respectively, after giving credits for amounts to which they were found to be entitled. The plaintiff, Ruth Earle Nelms, appealed from so much of the decree as was adverse to her claim, and the widow, administratrix, and heirs of W. N. Brown, Jr., and the Edgewood Distilling Company, and George P. Diehl also appealed.

W. D. Wilkerson, R. G. Brown, and N. W. Norton, for appellants. Moore, Smith & Moore, for appellees.

McCULLOCH, J. (after stating the facts as above). This appeal involves separate and distinct controversies between Ruth Earle Nelms, the plaintiff below, and the several defendants, and they will be treated separately in this opinion, though there are some points in common between the various parties to the different controversies.

Ruth Earle Nelms v. W. N. Brown, Jr.

The first question presented, and one which is a common matter of concern to all the parties, is a construction of the last will and testament of Josiah F. Earle. Most of the lands purchased by Brown and Pickett, at the sale by Swepston, as administrator in

succession of the estate of Louisa R. Earle, were those inherited by Louisa R. Earle from her father; but Brown also purchased her half interest in one tract devised by the will of Josiah F. Earle. It is contended on behalf of appellee Ruth Earle Nelms that the devises contained in the will of Josiah F. Earle were void and that he died intestate because of the omission of the names of his children from the will. The will purports to devise one half of the testator's property to his wife and the other half to his children, without naming them. Is the provision for the children, as a class, a sufficient naming of them to comply with the statute concerning the execution of wills?

The statute is as follows: "Whenever a testator shall have a child born after the making of his will, either in his lifetime or after death, and shall die, leaving such child, so afterborn, unprovided for in any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of his father's estate, real and personal, as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised or bequeathed to them by such will." Section 8019, Kirby's Dig. "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections." Section 8020, Kirby's Dig. This feature of the statute has not been passed upon by this court, though it was referred to in *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563, but the court expressly declined to decide the question. In that case the will contained neither mention of the children's names nor provision for them.

In the present case, the will of Josiah F. Earle contains a substantial provision for his children, naming them as a class, but does not mention their names individually.

Reliance is expressed by counsel, in the case of *Branton v. Branton*, 23 Ark. 569, as sustaining the contention that making provision in a will for children as a class is not equivalent to naming them, and does not constitute a valid testament as to the children whose names are omitted. We do not think the case sustains that contention, though the

opinion contains dicta indicating that that was the construction to be placed on the statute. In that case the testator bequeathed all of his property to his wife, and made no reference in his will to his children, either by providing for them or by mentioning them by name or as a class. It was contended in support of the validity of the will that the statute was intended only to provide for children whose names were accidentally omitted, either from oversight or forgetfulness, and that the terms of the will in question manifested an intention on the part of the testator to disinherit his children. The court rejected that contention and held that the will was invalid. In disposing of that case, the court said in the opinion that the law makes compulsory provision for children, as in intestacy, unless the testator "shall express a contrary intention toward any child and its children by naming it, or them, in the will." This construction of the statute would invalidate a bequest of practically all the property of a testator to his children because of a failure to mention the names of the children, individually, in the will. We cannot believe that the lawmakers intended any such construction to be placed on the language used, and we should not attribute to them an intention to restrict the power of alienation by so technical a requirement, unless that intention plainly appears from the language used. We think it is manifested that what was intended by the statute was to declare intestacy as to children of a testator, and thus provide compulsory provisions for them, unless the testator expresses a contrary intention in the will toward the children. Such an intention may be expressed by the testator in his will by providing for them as a class without naming them separately, or by naming them without providing for them. Either method is equivalent to the other, and neither the one or the other clearly excludes any intention on the part of the testator to omit his children from the testament. It would, we think, be disregarding entirely the purpose of the statute and would be putting form over substance to say that the names of children must be individually mentioned in a will which provides substantially for each and all of them.

A section of the Revised Statutes declares that "all general provisions, terms, phrases and expressions used in any statute, shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." Kirby's Dig. § 7792. It is therefore our duty to construe the terms of the statute under consideration consistent with a reasonable interpretation of the language used, so as to carry out the real intention of the Legislature. "Wills," said Judge Walker in *Cockrill v. Armstrong*, 31 Ark. 581, "are liberally construed, and every conclusion which may be legitimately indulged in order to reach a just and equitable conclusion, is not only permissible, but is required. Words and sentences are to be

considered and construed, so as to reach the real intention and purpose of the testator. So strong is the presumption that a father would not intentionally omit to provide for all his children, that in case the name of one or more of the children is left out of the will, by statute it is held to be an unintentional oversight, and the law brings them within the provisions of the will, and makes them joint heirs in the inheritance." The statutes of this state declare in general terms, what was already the inherent right of mankind, that all persons of sound mind and of mature age may devise all of his or her property by last will and testament. The statute having reference to omitted children was designed to apply only to presumed intestacy, and to provide a rule whereby intestacy may be conclusively presumed. It would therefore be unreasonable to say that a testator who has made substantial provision in his last will for his children, is presumed to have intended intestacy as to them because he failed to mention their names. There is a paucity of authority on this precise question because of the dissimilarity of our statute in this particular from those of other states.

The view taken by the Missouri courts fully sustains the view we have expressed. A statute of that state concerning wills, enacted in 1815, was similar to our statute, and provided that "when any person shall make his or her last will and testament, and omit to mention the name of any child or children," etc., the testator shall be deemed to die intestate as to such child or children. In 1825 the Legislature changed the statute so as to read that "if any person shall make his or her last will and testament, and die leaving a child or children, or the descendants of any such child or children (in case of their death), not provided for in such will, although such child or children be born after the death of the testator, every such testator, so far as regards any such child or children, or their descendants, not provided for as aforesaid, shall be deemed to die intestate."

Construing the statute last quoted above, the Supreme Court of Missouri in Block v. Block, 3 Mo. 407, held that if a testator declares in his last will that one of his children, stating the name of the child, shall take no part of his estate, that was a sufficient provision under the statute for the child, and that the testator would not be deemed to have died intestate as to such child. The court said that when the child was mentioned in the will and excluded, that was a provision within the meaning of the statute. The Legislature of Missouri subsequently changed the statute so as to read that "if any person make his last will and die leaving a child or children, or descendants of any such child or children (in case of their death) not named nor provided for in such will," etc., he shall be deemed to die intestate, etc. In Beck v. Metz, 25 Mo. 70, the court had under consideration a will which, after a devise to

the wife of the testator of all his property, contained the following clause: "In every other respect I leave it entirely to the will and judgment of my said wife, Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child surviving whose name was not mentioned in the will except in the general terms quoted above; and the court held the language quoted above named the child within the meaning of the statute. The court, speaking through Judge Ryland, said: "The testator expressly mentions his child—'as well with reference to our child.' They had but one—the daughter. The wife had one by a former husband; even he is named. Now this mentioning his child, and the giving the power to his wife to provide for this child by disposing of the estate according to her own judgment, must be considered within the spirit of our statute, as a naming or providing for his child. He cannot be said to have omitted to mention his child. True, he did not name her by her name, but she is sufficiently designated, they having but a daughter."

In Hockensmith v. Slusher, 26 Mo. 237, the court held that a bequest to a son-in-law, though he was not designated as such in the will, was a naming of the daughter of the testator within the meaning of the statute. The court said: "The statute extends only to a case of entire omission, and the mention of a child without a legacy or other provision for him is sufficient to cut him off from a distributive share of the estate; and whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator, and was not forgotten or unintentionally omitted." The same conclusion was reached in Woods v. Drake, 135 Mo. 393, 37 S. W. 109, where it was held that a bequest to children, naming them by name, of an adopted daughter without mentioning her by name, was sufficient to a mention of her name. The Supreme Court of Oregon in Gerrish v. Gerrish, 8 Or. 351, 34 Am. Rep. 585, construing a statute of the state which was copied from the Missouri statute quoted herein, followed the construction laid down by the Missouri court, and held that the mention in a will of children as a class was sufficient naming of them within the meaning of the statute. We do not have to go as far as the Missouri courts have gone in order to sustain the will in the present case. We hold that the provision in the will of Josiah F. Earle for his children was sufficient compliance with the statute, and that all the devises contained in the will were valid.

An attack is made upon the validity of the sales of land made by Swepston as administrator in succession of the estate of Louisa

R. Earle on numerous grounds, some of which are not of sufficient importance to discuss. As shown in the foregoing statement of the facts, Ben R. Earle was appointed administrator of said estate in the year 1891, and in 1894 (more than three years thereafter) his letters were revoked, and Swepton was appointed administrator in succession. The order of sale was made by the probate court upon the petition of the administrator, and it is contended that the order was void because not made within three years from the date the administration began. It is conceded that an order of sale may be made after three years on petition of creditors, but not on petition of the administrator. We find no such distinction or limitation in the statute. The statute provides generally that if the personal estate of a decedent shall be insufficient to pay the debts, it shall be the duty of the executor or administrator to apply to the probate court by petition for sale of real estate to raise funds for that purpose. There is no restriction as to time, but this court has repeatedly held that in the absence of circumstances excusing the delay, seven years is the shortest period of delay which will bar the right to sell lands of a decedent for the payment of debts. *Mayo v. Mayo*, 79 Ark. 570, 96 S. W. 165, and cases cited therein. No distinction is made in any of those cases between the power of the probate court to order sales on petition of the executor or administrator and on petition of creditors. The statutes further provided (Kirby's Dig. § 204 et seq) that any creditor may, after demand made upon the administrator and his refusal to comply, petition the probate court for sale of the decedent's lands for the payment of debts; but no time is specified within which this may be done, and no time is specified to elapse before it may be done. Executors and administrators are required by statute to make final settlement of their administration within three years from the date of letters (Kirby's Dig. § 224); but this statute is only directory. It does not divest the probate court of jurisdiction to complete the administration of estates after that time and to make any necessary orders to that end for the disposition of assets of the estate.

The validity of the probate sales is also challenged on the ground that some of the claims against the estate were probated after the expiration of two years from commencement of administration. It cannot be denied that there were, when the order of sale was made by the court, valid and subsisting claims against the estate which had been duly probated within the two years prescribed by law. The record shows this: Petition was made to the probate court by the administrator in succession for sale of the lands, the order was duly made, the sales were made and reported to the court and the court confirmed them. Errors and irregularities in the allowance of claims did

not vitiate the sale or deprive the court of jurisdiction to order the sale of lands. The act of 1891 (Kirby's Dig. § 3793), providing that "all probate sales of real estate made pursuant to proceedings not in substantial compliance with statutory provisions shall be voidable," whatever it may mean, does not mean that defects in the allowance of claims against estates will avoid a sale of real estate. The proceedings referred to in that statute are those pertaining to the sale and not to the allowance of claims, whenever the court has acquired jurisdiction of the corpus of the estate. *Jackson v. Gorman*, 70 Ark. 88, 66 S. W. 846. The order of sale was not invalid because made at a term of the probate court subsequent to the one at which the petition was first presented. The court acquired jurisdiction to hear and determine the prayer of the petition, and jurisdiction was not lost by lapse of the term. It was not even an irregularity to grant the prayer of the petition at a subsequent term.

It is contended that before an order of sale could be made on petition of Swepton to pay debts probated during the administration of his predecessor, Ben R. Earle, the judgments of allowance must have been revived against Swepton as administrator in succession. Payment of claims against estates, once allowed by the probate court, can be enforced without revivor against a new administrator. Notwithstanding a change in the administration they continue until paid, as subsisting judgments against the estate and can be enforced, as such, without revivor. Prior to the adoption of the Constitution of 1874 which abrogated it, there was a statute authorizing issuance of execution for the enforcement of judgments against executors and administrators as such. It was held under that statute that judgment against an administrator must be revived against his successor before execution could issue against the latter. *Meredith v. Scallion*, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812; *Adamson v. Cummins*, Adm'r, 10 Ark. 541. But, as we have already said, the provision of the Constitution of 1874, conferring upon probate courts exclusive jurisdiction over the estates of decedents, abrogated that statute, and vested in that court exclusive power to enforce claims established against estates of decedents. *Meredith v. Scallion*, supra. The fact, if established, that Ben R. Earle while acting as administrator had wasted assets of the estate sufficient to pay the debts did not, as contended by appellee, deprive the creditors of the right to resort to the assets unadministered, for the payment of their debts, and to procure sale of the land. *Conger v. Cook*, 56 Iowa, 117, 8 N. W. 782; *In re Bingham*, 127 N. Y. 296, 27 N. E. 1055; *Smith v. Brown*, 99 N. C. 377, 6 S. E. 667.

The principal attack upon the probate sales to Brown and Pickett is grounded upon the fact that they were appraisers of the real estate to be sold. The statute provides that

before an executor or administrator of an estate shall sell lands he shall cause the same to be appraised by three disinterested householders of the county, and that the appraisers, before they enter upon their duties, shall make and subscribe an affidavit "that they will well and truly, according to the best of their abilities, view and appraise the lands." Kirby's Dig. § 196, 197. The statute further provides that the lands shall be reserved from sale unless sold for two-thirds of the appraised value thereof. Kirby's Dig. § 190.

Nothing is found in the statute forbidding appraisers from becoming purchasers at the sale; and if they are prohibited by any principle of law it must result from some inconsistency in their relations as appraiser and purchaser, and not from any positive statutory inhibition. Is there any such inconsistency? They have no duty to perform concerning the sale except to appraise the property, and that duty is fully performed before the sale occurs. But it is an important duty and one which the statute requires shall be performed by wholly disinterested persons. The disqualifying interest which the statute forbids may be either in the sale or the purchase and one who expects to become a purchaser at the sale has such an interest. It is true that an appraiser may at the time he performs his duty harbor no intention to become a purchaser at the sale, and may, therefore, be entirely disinterested at that time, and may conceive the design to purchase after he completed the appraisal; but as that design may be hidden in his own breast how can it be shown when he conceived it? In making the appraisal he performs an important and substantial service for the protection of the estate, and we deem it to be the soundest policy to hold that when he accepts the office he disqualifies himself from becoming a purchaser. That rule works no hardship to the appraiser, and it shuts the door to opportunity for concealed fraud. The rule which forbids one who has a duty to perform with reference to such a sale rests upon sound public policy and not upon the actual perpetration of fraud. One of the forbidden class who purchases will not be heard to say that he intended no wrong and perpetrated no actual fraud. The only authority which we find directly in point is a decision of the Supreme Court of Ohio, and the reasons therein stated are, we think, unanswerable: "The disability of the appraisers in the present case, if it exists," says the court, "arises under those general principles of equity, which prevents those from acquiring a title, to whose discretion or agency the management of a sale is confided. The application of the doctrine to trustees, executors, attorneys, and agents, is familiar in all the books. A majority of the court unite in the opinion that the principle of exclusion attaches to every person, to whose integrity and judgment is committed the execution of

any step needful in making the sale. Where the law creates fiduciary relations, it seeks to prevent the abuse of confidence by insuring the disinterestedness of its agents. It holds the relation of judge and party, of buyer and seller, to be inconsistent. The temptation to abuse power for selfish purposes is so great that nothing less than that incapacity is effectual, and thus a disqualification is wrought by the mere necessity of the case. Fullness of price, absence of fraud, and fairness of purchase, are not sufficient to countervail this rule of policy. To give it effect, it is necessary to recognize a right in the former owner, to set the sale aside in all cases on repayment of the money advanced. * * * The appraiser of land is interposed between the buyer and seller in judicial sales, to prevent sacrifices, at undue prices, to the detriment of those interested in its value. If he were permitted to profit by his position, the law would lose its strongest security for his integrity. *Armstrong v. Huston's Heirs*, 8 Ohio, 552.

It has been decided by this court that a confirmed sale of land by an administrator or executor is valid without any appraisal at all having been made (*Bell v. Green*, 38 Ark. 78); but the confirmation does not heal the incapacity of the purchaser. The sale is voidable at the instance of the heirs and may be avoided after confirmation. This must ordinarily be done, of course, within a reasonable time; but the plaintiff was an infant at the time of the sale, and she commenced this suit to set aside the sale within a reasonable time after she attained her age of majority, and she is entitled to do so as to her interest in the land which she inherited from her mother. She inherited one half of her mother's land and Ben R. Earle inherited the other half. She claims, and the chancery court decreed to her, a lien on the Ben R. Earle interest, by subrogation to the rights of his mortgagees, the sureties on his bond as her guardian and as administrator of the Louisa R. Earle estate, for the amount found to be due by him as such guardian and administrator. The defendants pleaded the five-year statute of limitation under the probate (judicial) sale. Ben R. Earle as well as the mortgagees themselves were barred at the time of the commencement of this suit. Was Ruth Earle Nelms, the infant, also barred of her right to subrogation? We hold that she was barred.

It is said that the right of subrogation is peculiarly a doctrine of equity jurisprudence and is founded on natural justice and the facts and circumstances of each particular case. 27 Am. & Eng. Enc. L. p. 203; 4 Pomero's Equity Jurisprudence, § 1419. The doctrine is variously applied. To sureties who pay debts of their principal and may be subrogated to the securities, liens, etc., held by the creditor; to creditors who may be subrogated to securities and liens held by sureties; to persons interested in incumbered

estates who pay off the incumbrances; and to persons paying or advancing money to discharge incumbrances on other's property, under an agreement that he may hold the discharged incumbrance as security for repayment. One entitled to subrogation is substituted in the place of the original holder of the right, with no greater rights or equities than he had. *Rodman v. Landrum*, 44 Ark. 504. "The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of a party under whom subrogation is claimed. Subrogation contemplates some original privilege on the part of him to whose place substitution is claimed, and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based. While a surety who pays the debt of his principal is subrogated to the rights of the holder of the claim, he takes such rights subject to all disqualifications and limitations which attached to them in the hands of his predecessor." 27 Am. & Eng. Enc. P. p. 206. A surety who pays the debt of his principal and seeks subrogations to the securities held by the creditor, or a creditor who seeks subrogation to the lien of securities held by a surety, must take steps to enforce his right of subrogation within the period of limitation which would have barred the right of enforcement while in the hands of the original holder of the securities. There can be no subrogation to a lien, the enforcement of which is barred by limitations. *Rodman v. Sanders*, supra; *Sheldon on Subrogation*, § 176. The subrogated right to enforce a lien is a derivative right and must be exercised within the period of limitation allowed to the original holder of the lien. Exceptions may take a case out of that rule, as in *Neff v. Elder*, 84 Ark. 277, 105 S. W. 260, where one who purchased land in ignorance of a defect in the title and whose money was used in paying off a valid incumbrance was held to be entitled to be subrogated to the lien on discovering the defect in his title, and that the statute did not bar his right before he discovered the defect. The plaintiff could not be subrogated to greater rights under the mortgage executed by her brother, Ben R. Earle, than the mortgagees themselves. Her minority does not enlarge her right over those possessed by those to whom she seeks to be subrogated.

The validity of the levee tax sales to Pickett and Brown under decree of court, are attacked on the alleged ground that Ben R. Earle, whose interest in the land was sold, was a resident of the county and occupied the land but was not personally served with process. *Van Etten v. Daugherty*, 83 Ark. 534, 103 S. W. 737. Ruth Earle Nelms also claims a lien on the land by right of subrogation. The five-year statute of limitation is pleaded as to these lands, and for the reasons already indicated we hold the statute bar to be complete.

It results from the views herein expressed, that the chancery court erred in its decree in so far as a lien in favor of Ruth Earle Nelms is declared on the interest of Ben R. Earle in the lands purchased by Pickett and Brown at the probate sale of Sweptston, administrator, and to that extent must be reversed. In all other respects the decree settling the controversies between the plaintiff and W. N. Brown, Jr., and the Southwestern Improvement Company is correct, and will be affirmed.

Ruth Earle Nelms v. Stone & Tyler.

J. M. Williams as trustee for Stone & Tyler, who were creditors of the Louisa R. Earle estate, purchased at Sweptston's sale, as administrator, the interest devised to Louisa R. Earle under the will of Josiah F. Earle in certain tracts of land. The sale is attacked on all the grounds set forth in the attack on the sales to Pickett and Brown except as to the appraisement made by those parties; and in addition thereto the validity of the sale is attacked on the ground that the claim of Stone & Tyler against the estate was improperly allowed, and that Stone & Tyler paid the purchase price by crediting the same on their judgment instead of paying the money according to orders of the court. The allowance of the claims of Stone & Tyler against the estate cannot be drawn in question collaterally in the attack on the validity of the sale by the administrator, there being valid claims duly allowed against the estate, and the probate court having jurisdiction to order the sale. *Jackson v. Gorman*, 70 Ark. 88, 66 S. W. 346. Nor did the fact that payment was made by credit on the probated claim of the purchasers instead of payment in money invalidate the sale. Only creditors who were prevented from obtaining satisfaction of their probated claims on account of the excessive payment to Stone & Tyler could complain at this, and their remedy, if any, was against the administrator. The sale was reported to the probate court and duly confirmed, and it does not appear that the interests of any other creditor were prejudiced by this method of accounting for the purchase price of the land. The lands purchased by Stone & Tyler in part constituted the homestead of Josiah F. Earle, and it is claimed that the sale of the Louisa R. Earle interest in the land was void on this account. The land, it will be noted, was not sold to pay debts of the J. F. Earle estate, but the half interest devised to Louisa R. Earle under the will was sold by her administrator. The Constitution provides that the homestead left by a decedent shall be exempt from sale for debts of the decedent and that the rents and profits thereof shall vest in the widow for life and the children during minority. This provision of the Constitution does not, however, prohibit the original

owner of the homestead from dismembering it by grant or devise—at least, so far as his children are concerned. Whether or not he can do so in so far as it affects the homestead rights of the widow we need not decide, as that question is not involved. The homestead right of children is a transmitted or wholly derivative one and may be cut off by grant or devise of the parent. There is some conflict, we are aware, in the authorities on this question, but the previous decisions of this court lead to the conclusion herein expressed.

The Supreme Court of Mississippi held that the provision in the exemption laws for the enjoyment by the widow of exempted property did not interfere with the husband's right to dispose of the property by will. *Turner v. Turner*, 30 Miss. 428. The same court in *Morton v. McCannless*, 68 Miss. 810, 10 South. 72, said: "The whole object of the exemption laws of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist." This court in *Merrill v. Harris*, 65 Ark. 357, 46 S. W. 538, 41 L. R. A. 714, 67 Am. St. Rep. 929, quoted with approval the above language and said: "Such is the view we take of it. The Mississippi law on the subject, while different from ours in some particulars, yet is so far like ours as to render the same principles applicable in all essential particulars." In *Merrill v. Harris*, the question was as to the power of the probate court to order the sale of the homestead for the benefit of a minor on petition of the guardian. This court held that the language of the Constitution exempting the homestead during minority of the children did not forbid the sale of it under orders of the probate court for their benefit. Chief Justice Bunn in the opinion said: "The Constitution does not, in terms, seek to do more than protect from the grasp of the creditor. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors."

We think the same principle controls in the present case. The framers of the Constitution manifestly had in mind only the exemption of the homestead from sale for debt either during the lifetime of the owner or after his death during the lifetime of his widow or minority of his children. There is no purpose manifested to restrict the power of alienation, and only by virtue of supplementary legislation is it that any restriction is placed on the right of alienation and this reached only to the requirement that the wife must join in and acknowledge the execution of the conveyance by the husband of the homestead. Kirby's Dig. § 3901. It would be engrafting upon the constitutional provision with reference to exempt property something which the framers thereof did not intend and which the language does

not warrant, to hold that it prevented the parent from disposing of the homestead by will. The statutes of this state have ever given unlimited power of alienation by last will and testament except as to marital rights of the spouse; and it requires clear language in subsequent enactments in order to restrict the right. We do not find anything in the Constitution inconsistent with the power of alienation.

The decree of the chancellor as to Stone & Tyler is correct and will be affirmed.

Ruth Earle Nelms v. John F. Rhodes.

Rhodes purchased lands at Swepton's sale as administrator and there is an attempt to show collusion between him and Pickett and Brown, but the chancellor found against that contention, and we think that the evidence supports the finding. The decree in favor of Rhodes will therefore be affirmed.

Ruth Earle Nelms v. Edgewood Distilling Company and George P. Diehl.

Ben R. Earle mortgaged his interest in certain tracts of the lands to the Edgewood Distilling Company. The same lands were afterwards sold under execution against him, and were purchased by Martin and Williford the sureties on his stay bond. He also conveyed the lands, by quitclaim deed to Martin and Williford—Martin subsequently conveyed his interest to Williford, and Williford in turn conveyed to Diehl, who was agent for the Edgewood Distilling Company. The last-mentioned deed contained a special warranty of the grantor against any incumbrances on the land done or suffered by her.

It is shown that the deed from Ben R. Earle to Martin & Williford, though absolute in form, was executed either as security for repayment of the amount which they were required to pay for him in satisfaction of the stay bond, or under an agreement that the lands should be reconveyed to him on repayment of that amount. We need not determine whether the deed was intended to be a mortgage or conditional sale, under the doctrine announced by this court in *Hays v. Emerson*, 75 Ark. 551, 87 S. W. 1027. We dispose of this branch of the case on other grounds. It is undisputed in the evidence that Diehl and the Edgewood Distilling Company had no actual notice of the secret agreement between Ben R. Earle and Martin and Williford concerning the conveyance of the land, and no facts are shown to have been brought to their attention from which they would be chargeable with notice of that agreement. The price paid by the Edgewood Distilling Company, when added to their mortgage debt, to which the land was subject, is not shown to be so grossly inadequate as to put them upon notice of any frailty in the title conveyed. The fact that a deed in the chain of title was only a quitclaim did not, of itself, give notice of defects in the title or secret equities of the grantor. *Miller v. Fra-*

ley, 23 Ark. 735; Bagley v. Fletcher, 44 Ark. 153; Chapman v. Sims, 53 Miss. 154; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350; United States v. Cal. & Oregon Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354. The mortgage executed by Ben R. Earle to the sureties on his bond as administrator and guardian, to the lien of which Ruth Earle Nelms claims the right of subrogation, was not filed for record until after the execution of his deed to Martin and Willford, therefore the title conveyed by the latter takes precedence over the mortgage.

The decree against the Edgewood Distilling Company and George P. Diehl was erroneous, and must be reversed.

Ruth Earle Nelms v. William R. Barksdale.

Louisa R. Earle conveyed a quarter section of the J. F. Earle lands to Barksdale, and the plaintiff seeks to have this conveyance set aside in so far as it affects her interest in the land.

Learned counsel have not, in their brief, favored us with an assignment of the grounds of their attack upon this conveyance, but we assume that it is because the deed of conveyance does not expressly refer to the powers contained in the will of J. F. Earle, and that the grantor undertook to convey as executrix and not as trustee under the will. The grantor, Louisa R. Earle, purports to convey in her individual right and as executrix of the will of J. F. Earle; and it recites that the purchase price is to be used in the purchase of a home for herself and her children. She was not named in the will as executrix, but the will authorized her to control the property and to sell it for reinvestment or to provide a home for herself and children. It is well settled now that a conveyance containing no reference to a power should be construed as an execution of the power. *Lanigan v. Sweany*, 53 Ark. 185, 13 S. W. 740; *Martindale on Conveyancing*, § 135; 1 *Sugden on Powers*, pp. 247, 367; 4 *Kent's Comm.* p. 335; *Campbell v. Johnson*, 65 Mo. 439. The only exception is "where there is an interest and a power existing together in the same person over the same subject, and the act be done without reference to the power, it will be applied to the interest and not to the power, unless an interest to execute the power may be found." *Martindale on Conveyancing*, § 135. This court in *Lanigan v. Sweany*, *supra*, even limited this exception by laying down the rule that if such a conveyance would have some effect if referred to an interest, but would not have full effect without reference to a power, it should have effect by virtue of the power. The deed in this instance shows an intention to execute the power but the grantor made the mistake of describing herself as executrix and not as trustee. It is manifest, from the language of the deed, that she intended to execute the power contained in the

will, and the deed should be so construed.

The decree on this branch of the case should be affirmed.

Ruth Earle Nelms v. W. W. Swepstson et al.

The complaint against Swepstson and the sureties on his bond as administrator, and C. L. Lewis as guardian and his sureties, involves an investigation of their respective settlement accounts filed in the probate court and the various records, papers, and accounts in that court relating to the administration and guardianship.

The parties, before the trial below, entered into the following written agreement which was filed as a part of the record in the case: "It is further agreed that the record of the administration of the estate of Louisa R. Earle, by W. W. Swepstson as administrator, remaining in the probate court of Crittenden county, including the bonds given, the inventories filed, appraisements, accounts of sales, settlements, the allowances and classification of claims against the estate, and all orders of the probate court, and as to all other matters, or any part of such record, may be read in evidence by or on behalf of either party without filing copies in this suit, and that where copies have been filed by either party of said records, or any portion of the same, such copies shall be taken to be true, subject, however, to the right of either party to produce the original in evidence, or show the copy filed to be incorrect."

The final decree recites that the cause was heard upon "the agreements of counsel on file and the several records, deeds and writings therein mentioned, consisting of parts of the original records of the probate court of this county * * * and the original tax sale records of this county, which said original probate and tax sale records were brought into open court, and orders and judgments and parts thereof and extracts therefrom read orally in open court without filing copies thereof, under the agreement of counsel above mentioned," etc. No bill of exceptions appears in the record identifying and bringing upon the record the various records and documents read orally in court and upon which the chancellor based his decree. The clerk had no authority to copy into the transcript records and documents read to the chancellor at the trial chambers but which had not been made a part of the record in the case either by bill of exceptions or by filing copies. We are, therefore, unable to determine from the transcript whether the decree is right or wrong, as we have not before us the evidence which the chancellor had. We must, until it is shown to the contrary, assume that the decree was warranted by the evidence. It is therefore ordered that the decree against the widow, administratrix, and heirs of W. N. Brown, Jr., deceased, and the Southwestern Improvement Company to the extent in-

dictated in this opinion and against the Edgewood Distilling Company and George P. Diehl be reversed with directions to enter a decree in accordance with this opinion. In all other particulars, the decree of the chancery court is affirmed.

BATTLE, J., dissents from so much of the opinion and judgment as holds that the will of Josiah F. Earle was valid as to his children without having named them; and also as holds that the devise by Josiah F. Earle of the homestead was valid. He agrees to the opinion on all other questions, and concurs in all of the judgment not affected by the questions stated above.

Opinion on Modification.

MCCULLOCH, J. We are now asked to consider certain questions incidental to the main issues in the case which escaped our attention on the former consideration, but which were briefly called to our attention in the argument.

The principal one is that as to the amount chargeable against the estate and heirs of W. N. Brown, Jr., and the Southwestern Improvement Company of the rents and profits of the lands decreed to Mrs. Nelms. The chancery court decreed an undivided half of the lands to her and the rents and profits thereof for five years before the commencement of the suit. We held that she was entitled only to an undivided one-fourth of the lands, and remanded the case, with directions to enter a decree for that interest only. This necessarily calls for a change in the decree for rents, reducing it from one-half to one-fourth of the rents of the land. Shall the decree for rents and profits be confined to a period of three years before the commencement of the suit? The provisions of the statute known as the betterment act (Act March 8, 1883, Kirby's Dig. §§ 2754-2757), restricting the right of recovery to three years' rent, are invoked; and, on the other hand it is contended that as Mrs. Nelms, on account of her minority, is not barred by this statute. The title of the statute is "an act for the better quieting of titles," and the sections essential to a determination of the present question read as follows:

"Section 1. That if any person believing himself to be the owner either in law or equity, under color of title, has peaceably improved, or shall peaceably improve any land which, upon judicial investigation shall be decided to belong to another, the value of the improvement made as aforesaid, and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims shall be paid by the successful party to such occupant, or the person under whom, or from whom, he entered and holds before the court rendering judgment in such proceeding shall cause posses-

sion to be delivered to such successful party.

"Sec. 2. That the court or jury trying such cause shall assess the value of such improvements in the same action in which the title to said lands is adjudicated; and on such trial the damages sustained by the owner of the lands from waste, and such mesne profits as may be allowed by law, shall also be assessed, and if the value of the improvements made by the occupants and the taxes paid as aforesaid shall exceed the amount of said damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid; and such amount shall be a lien on the said lands, which may be enforced by equitable proceedings at any time within three years after the date of such judgment.

"Sec. 3. That in recoveries against such occupants no account for any mesne profits shall be allowed unless the same shall have accrued within three years next before the commencement of the suit in which they may be claimed."

It will be seen that none of the provisions of the statute are applicable except in favor of an occupant such as is described therein, that is to say a "person believing himself to be the owner, either in law or equity, under color of title." The question which first engages our attention is whether or not Brown's occupancy was of the character described in the statute. He was one of the appraisers of the property sold by the administrator and purchased it at the sale. He had knowledge, of course, of the fact which disqualified him from becoming a purchaser, and which rendered his purchase voidable. We conclude, however, from the testimony in the case that he was innocent of any actual intention to defraud in the appraisement and purchase and that the charges in this respect against him were unfounded. He manifestly purchased in good faith, believing that he had the legal and moral right to do so. This court had never before decided that being an appraiser disqualified a person from purchasing at a judicial sale of land. The question was one of grave doubt and gave us much difficulty in solving it. We were able to find only one reported case on the question from the courts of the country—the decision referred to in our former opinion.

The statute says that the occupant who, "believing himself to be the owner, either in law or equity, under color of title, has peaceably improved or shall peaceably improve any land," etc. This means that he must be, in fact, a bona fide occupant, and this court in a case decided soon after the passage of the statute quoted with approval the following definition of the term "bona fide occupant" given by Mr. Justice Washington in *Green v. Biddle*,

8 Wheat. (U. S.) 79, 5 L. Ed. 547: "He is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is questioned by some other person claiming a better right to it." *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560.

This court, in defining the meaning of the words declaring in what cases the statute applied, said: "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyance of title, as when we speak of a bona fide purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself the true proprietor. It must be an honest belief, and an ignorance that any other person claims a better right to the land." *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701.

In *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563, the court held that a last will and testament defective on its face is color of title within the meaning of the betterment act, and that a bona fide occupant thereunder could claim the benefit of the statute. Mr. Justice Riddick, speaking for the court in that case, said: "Now, though the defect in this will appeared on its face, still its invalidity is not so obvious as must necessarily have been noticed by a person of ordinary information not skilled in the law; and Strauss, while holding under it, was holding under color of title, within the meaning of the betterment statute." Chief Justice Cockrill in delivering the opinion of the court in *Shepherd v. Jenigan*, 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50, concerning the provision of this statute said: "If, however, the defendant has improved the land in good faith under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of the title, such as is implied from the registry of the deed, is not of itself sufficient to preclude an occupant from its benefits." The statute contemplates actual good faith in order to invoke its benefits. An occupant cannot on the one hand "shut his eyes, and say he believed in good faith that he had title, when he was informed that he did not have" (*White v. Stokes*, 67 Ark. 184, 53 S. W. 1060); nor on the other hand will constructive notice of the infirmity of his title cut off his assertion of good faith and deny him the benefits of the statute. We are of the opinion that the facts of this case bring it within the terms of the statute. The statute has been held to apply to those under the disability of infancy as well as to adults. *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Shirey v. Clark*, 72 Ark. 539, 81 S. W. 1057; *Tobin v. Spann*, 109 S. W. 534. In *Tobin v. Spann*, supra, being a suit brought to disaffirm a conveyance made during infancy and recover the land conveyed, we held that there could be no recovery of rents which accrued

before disaffirmance but that three years' rent could, under the betterment statute, be set off against the claim of the occupant for improvements. The present case is somewhat different, as Mrs. Nelms is entitled to recover rents and profits prior to commencement of her suit.

It is contended that the statute, as far as the restriction upon recovery of rents is concerned is a statute of limitation, and that it falls within the general statute excepting infants, while laboring under that disability, from the operation of statutes of limitation. Act April 17, 1899, Kirby's Dig. § 5075.

We are of the opinion, however, that this is not a statute of limitation with which we are now dealing. It is one to adjust the equities between the owners of lands and persons who have occupied the same under color of title, believing themselves to be the owners—bona fide occupants. The Legislature, in the title to the act, declared it to be, "an act for the better quieting of titles." It does not purport to fix a period of limitations within which actions to recover lands or the rents and profits thereof may be brought, but it provides that one who occupies land in good faith under color of title shall be paid the value of improvements and amount of taxes paid on the lands, less three years' mesne profits. In other words that when the occupant holds in good faith under color of title the owner can recover the land and mesne profits for three years, and the occupant can recover the value of his improvements and amount of taxes paid. This is the theory upon which the constitutionality of the act was upheld. *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560. In the case just cited, the court said: "Upon the principle that the Legislature may interfere with the private rights for the purpose of adjusting 'the equities of the parties as near as possible according to natural justice,' the betterment laws of many states have been sustained." The Legislature could undoubtedly pass a statute of this character containing no exceptions as to infants. "That such exceptions are commendable, and evince a proper, just, and humane regard for the rights and interests of a large and helpless class of landowners, cannot be controverted. But they are within the powers of the Legislature to grant or withhold, and its exercise of the power cannot be restrained or varied by the court to subserve principles of justice and humanity." *Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623.

The statute applies in the present case, and the chancery court erred in allowing for rents which accrued more than three years before the commencement of the suit. Taxes paid by the occupant and also the amount of purchase price paid for the land at the administrator's sale together with interest thereon should be credited to the occupant. But inasmuch as the right of the occupant to have

credit for said purchase price results from the fact that the payment contributed to the assets of the estate and is not covered by or dependent upon the terms of the betterment act, mesne profits for the full period of occupancy, without restriction as to him, may be set off against the purchaser's claim for reimbursement. This, upon the principle that where the occupant has been reimbursed out of the profits of the land he cannot make further claim for the same payment. Mrs. Nelms obtained a substantial recovery by the suit, and was entitled to decree for costs in the court below. We will not disturb the adjustment of cost made by the chancellor between her and the Brown interest as it is not shown to be an unjust distribution of the cost.

The former judgment of this court having been set aside for the purpose of considering the petition to modify the judgment, the judgment heretofore rendered will now be re-entered, but with further directions to render a decree concerning improvements, taxes, etc., and rents in accordance with this opinion.

HILL, C. J. (dissenting). The three years in the betterment act is, in my opinion, a limitation on the right of recovery of rents to cases where it applies. Consequently an infant may bring his suit without regard to it under the saving provision in his favor of section 5075, Kirby's Dig. This saving of his action by reason of his infancy should be read into the limitation in the betterment act as it is read into all the other statutes of limitations.

NEIMEYER et al. v. CLAIBORNE et al.

(Supreme Court of Arkansas. July 6, 1908.)

1. INSURANCE—WAIVER OF FORFEITURE—OTHER INSURANCE ON PROPERTY—ACTIONS—COMPLAINT.

A policy of insurance contained a stipulation that the policy should be void if there should be other insurance on the property without the written consent of the insurer indorsed on the policy, and another stipulation that by the "acceptance of this policy, the assured covenants that the application hereof and the by-laws on the back of this policy shall be and form a part hereof, and a warranty by the assured, and the company shall not be bound by any act or statement made by an agent or solicitor unless inserted in this policy." In the complaint in an action on the policy, the administratrix of the estate of assured alleged that defendant was notified on a given date that the amount of concurrent insurance on the property had been increased to a specified amount, and demand was made that the policy be amended to authorize such increase, or canceled and the unearned premium returned, and that defendant at that time promised to make such amendment, and, for the purpose of making such amendment, defendant kept such policy in its possession from such date until the date of the destruction of the property, over a month later. *Held*, that the facts set up in the complaint constituted a waiver of the forfeiture; it being impossible to abolish the law of waiver by contract.

2. SAME—ALLEGATIONS OF CAUSE OF ACTION ON BOND TO STATE.

A complaint in an action on an insurance policy alleged the execution and delivery of the policy, the destruction of the property, the failure of the insured or its sureties to pay the loss, the execution of a bond to the state by defendant sureties conditioned for the prompt payment of all claims by insured during the term of the bond, and that the bond was in full force and effect on and after the date on which the policy took effect. *Held*, that the complaint set forth a cause of action on the policy and for breach of the bond, and did not show, when read in connection with Kirby's Dig. § 4339, providing that insurance companies shall annually give a bond conditioned for prompt payment of all claims arising and accruing during the term of the bond, that the bond had expired, and was sufficient to admit evidence of a bond executed under that section, and that it was in force on the date on which the loss occurred.

3. PLEADING—DEFECTS—REMEDY BY MOTION.

If a complaint in an action on a policy of insurance, and the bond given to the state by the insurance company to secure prompt payment of claims, is defective in not setting forth the bond or a copy thereof, or in not stating the reasons for failing to do so, the defect is one of form, which may be remedied on motion.

4. INSURANCE—ACTION ON POLICY—FAILURE OF PROOF—DEFAULT JUDGMENT.

In an action on a policy of insurance and the bond given to the state by the insurance company to secure prompt payment of claims, if the bond presented in evidence in taking a default judgment shows that it is not in force, there is a failure of proof, but the complaint is not affected thereby.

5. APPEAL AND ERROR—REVIEW—PRESUMPTION—DEFAULT JUDGMENT.

Where a default judgment is taken, it will be presumed that whatever proofs were necessary to support it were introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3778.]

6. SAME—NATURE OF DECISION—DEFAULT JUDGMENT.

The only question presented for review on appeal from a default judgment is, were the allegations of the complaint sufficient to authorize the judgment?

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3462, 3463.]

7. INSURANCE—ACTIONS—VENUE—SUIT AGAINST SURETIES.

Kirby's Dig. § 4376, provides that the sureties on the bond of an insurance company may be made parties defendant, and final judgment rendered against them at the same time, and in like manner, as against the company. Section 4377 authorizes a suit on a fire insurance policy to be brought in the county where the loss occurred. *Held*, that sureties on an insurance company's bond, joined with the company in a suit on the policy, may be sued in the county in which the loss occurred; section 6072, requiring actions not specified in the foregoing sections to be brought in the county in which defendant, or one of several defendants, resides or is summoned, not applying.

Appeal from Circuit Court. Garland County; W. H. Evans, Judge.

Action by M. A. Claiborne and others against Charles Neimeyer and others. Judgment by default, and defendant Neimeyer appeals. Affirmed.

Judgment by default was rendered against appellant on the following complaint: "Comes Mrs. M. A. Claiborne in her own behalf and as administratrix of the estate of D. W.

Claiborne, deceased, and by leave of the court first had and obtained, in lieu of and as a substitute for her amended complaint, herein states: That she is the widow of D. W. Claiborne, who departed this life on the 1st day of January, 1905, and that she was duly appointed, by the probate court of Garland county, administratrix of his estate on the — day of —, 1906. That the defendant Security Mutual Insurance Company was, at the time of the issuance of the policy herein sued on, and at all times subsequent thereto, a corporation organized and doing business under the laws of the state of Arkansas. That as a prerequisite to its right to do business in the state of Arkansas, the defendant Security Mutual Insurance Company gave a bond to the state of Arkansas in the sum of \$20,000, conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by said defendant upon any property situated in this state, which bond was in full force and effect on and all times after the 7th day of April, 1903, and was signed by the defendants Alex C. Hull, Damon C. Clarke, Geo. B. Allis, and Chas. Neimeyer, sureties for the Security Mutual Insurance Company. That the said D. W. Claiborne, on the 7th day of April, 1903, and at all times subsequent thereto to the date of his death, was the owner, as tenant by entirety and in fee simple, of the premises in the city of Hot Springs, Ark., known as Nos. 303 and 305 Ouachita avenue, in said city and of the buildings and improvements erected thereupon, and was also the owner of the household furniture therein contained. That in and by its certain policy of insurance, numbered 3,499, duly executed by said defendant Security Mutual Insurance Company, on the 7th day of April, 1903, and delivered to said D. W. Claiborne, said defendant, in consideration of the sum of \$45 to it then paid by said D. W. Claiborne, did insure him, against loss by fire, to the amount of \$1,000 on his two story frame dwelling and rooming house, and \$500 on the furniture therein, which house was situated on a part of lot 8 in block 97, and described as 303 and 305 Ouachita avenue, in the city of Hot Springs, Garland county, Ark., and the said defendant, in and by the said policy of insurance, did promise and agree to make good unto said plaintiff all such loss or damage, not exceeding in amount the sum insured as aforesaid, as should happen by fire to the property therein and herein specified during the term of three years, from the 7th day of April, 1903, at 12 o'clock noon, and to be paid within 60 days after notice and proof thereof. A copy of said policy is hereto attached, marked 'Exhibit A' and made a part hereof, the same as if set out herein in full. That on the 12th day of September, 1904, said defendant, at the

request of D. W. Claiborne, made an amendment to said policy, by which amendment said defendant granted permission to said D. W. Claiborne, until the 1st day of November, 1904, to make alterations and repairs under the usual precautions as to removing shavings and keeping the premises closed at night, and under and by virtue of this amendment to said policy, the said D. W. Claiborne changed the house insured by said policy from a two story to a three story frame dwelling and rooming house. A copy of said amendment is hereto attached, marked 'Exhibit B', and made a part hereof, the same as if set out herein in full. That on the 21st day of January, 1905, the plaintiff requested the defendant the Security Mutual Insurance Company to make an amendment to said policy, stating that, D. W. Claiborne, the original owner of the property insured under said policy, being deceased, Mrs. M. A. Claiborne, in her own right, and as administratrix of the estate, should be made the assured under said policy, and at the same time said defendant was notified by the plaintiff that the total amount of concurrent insurance on said building and furniture had been increased to the sum of \$7,500, and demanded that these amendments be made to her policy, or that said policy be canceled, and the unearned premium for the same be returned to her. And said defendant, at that time, promised to make these amendments to said policy, and for the purpose of making said amendments said defendant kept said policy in its possession from the 21st day of January, 1905, until after the loss herein stated occurred, and that if the said amendments were not made to said policy, it was due solely to the negligence of said defendant, and is in no wise chargeable to any failure or neglect on the part of this plaintiff. That on the 25th day of February, 1905, said dwelling house and rooming house and furniture were wholly destroyed by fire. That on the 21st day of April, 1905, the plaintiff made out and furnished to the defendant Security Mutual Insurance Company a correct written proof of her loss, as required by the terms of said policy. That the said D. W. Claiborne and plaintiff were, at the time said policy was executed, husband and wife, and the owners by entirety of said land and premises, and that upon the death of said D. W. Claiborne the plaintiff became, and at the time of the loss herein mentioned was the absolute owner of the same, and that the furniture contained in said house, and insured by said policy, was the property of D. W. Claiborne until his death, and at the date of said fire belonged to his estate. That by reason of said contract of insurance and loss of said property by fire, the defendant Security Mutual Insurance Company as principal, and Alex C. Hull, Damon Clarke, Geo. B. Allis, and Chas. Neimeyer as sureties, became and

now are indebted to the plaintiff, individually, and as administratrix aforesaid, in the sum of \$1,500. That the plaintiff has duly performed all conditions required on her part by the terms of said policy, and that more than 60 days have elapsed since the delivery by plaintiff to said defendant of notice and proof of loss. Wherefore, plaintiff prays for judgment against the defendants the Security Mutual Insurance Company, and Alex C. Hull, Damon Clarke, Geo. B. Allis, and Chas. Neimeyer, for \$1,500, together with all costs of this suit, and for damages and for a reasonable attorney's fee, and for all other and further legal and equitable relief." The policy sued on and the by-laws of the Security Mutual Insurance Company, were made Exhibit A to the above complaint, and a part thereof. Neither the original, nor a copy of the bond, was made an exhibit and filed as a part of the pleading. This appeal is to reverse the judgment based on the above complaint.

Buzbee & Hicks, for appellant. Hogue & Catham, for appellees.

WOOD, J. (after stating the facts as above). First. One of the stipulations of the policy was: "If there is or shall be other, prior, concurrent or subsequent insurance (whether valid or not) on said property, or any part thereof without the company's written consent indorsed hereon, etc., this policy shall be held null and void." Another provision was: "By the acceptance of this policy, the assured covenants that the application hereof and the by-laws on the back of this policy shall be and form a part hereof, and a warranty by the assured, and the company shall not be bound by any act or statement made by an agent or solicitor unless inserted in this policy." Appellant contends that the allegations of the complaint show affirmatively that appellee had no cause of action under the above provisions. True the allegations of the complaint show forfeitures of the policy under the stipulations mentioned supra, but the allegations also show that there was a waiver of these forfeitures according to the doctrine of this court, recently announced by Judge Riddick in *Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751, as follows: "Though the conduct of the insurer may not have misled the insured to his prejudice, or into an altered position, yet if, after knowledge of all the facts, its conduct has been such as to reasonably imply a purpose not to insist upon a forfeiture, the law, leaning against forfeitures, will apply the peculiar doctrine of waiver, invented probably to prevent them, and will hold the insurer irrevocably bound by an election to treat the contract as if no cause of forfeiture had occurred." The facts set up in the allegations of the complaint clearly constituted a waiver of the forfeitures. The law of waiver cannot

be abolished by contract. Therefore the stipulation that "the company shall not be bound by any act or statement made by an agent or solicitor unless inserted in this policy" cannot avail to effect a forfeiture where the facts are sufficient, under well-recognized rules of law, to establish a waiver. Such is the condition here. *Alabama State Mut. Assur. Co. v. Long*, 123 Ala. 667, 26 South. 655, and cases cited; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *People's Fire Ins. Association of Arkansas v. Goynes*, 79 Ark. 315, 96 S. W. 365.

Second. The appellant contends that the complaint does not allege a cause of action against him on the bond. The complaint alleges: "That as a prerequisite to its right to do business in the state of Arkansas, the defendant Security Mutual Insurance Company gave a bond to the state of Arkansas, in the sum of \$20,000, conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by said defendant, upon any property situated in this state, which bond was in full force and effect on and all times after the 7th day of April, 1903, and was signed by the defendants Alex C. Hull, Damon Clarke, Geo. B. Allis, and Chas. Neimeyer, sureties for the Security Mutual Insurance Company." As this was a suit against appellant on the bond, the breach of the bond was the foundation of the action, and the rules of good pleading under the statute (section 6128, Kirby's Dig.) required that the original, or a copy of the bond, be filed as a part of the complaint, if within the power of the party plaintiff to produce it, and, if not, that the reason thereof be stated. The breach of the bond consisted in the failure of the insurance company, the principal, and appellant, the security, to pay the amount of the loss sustained, which, by the terms of the policy and the bond, they were required to do. We are of the opinion that the complaint sufficiently set forth a cause of action on the policy, and for breach of the bond. See *Euper v. State*, 85 Ark. 223, 107 S. W. 179.

Appellant contends that the allegations of the complaint, when read in connection with the law (section 4339, Kirby's Dig.), show that the bond had expired. But not so. The loss under the policy, and the liability for such loss on the bond, is stated in the allegations above set forth, which show that a bond was executed by appellant, conditioned for the payment of all claims arising on the policy during the term of the bond, and that the bond was in "full force and effect on and all times after the 7th day of April, 1903." If the complaint was defective in not setting forth the original bond, or a copy thereof, or in not stating the reasons for failing to do so, the defect was one of form, not substance, and could have been

remedied by a rule of court, on motion of appellant. See *Nordman v. Craighead, Guard., etc.*, 27 Ark. 369; *Egan v. Tewksbury*, 32 Ark. 43; *State v. Aetna Fire Ins. Co.*, 68 Ark. 480, 51 S. W. 638. The allegations of the complaint were sufficient to admit evidence of a bond executed under section 4339, Kirby's Dig. Proof of the bond would have shown whether or not it was executed under that section, and whether or not it had been renewed as the statute requires, and was in full force and effect when the loss occurred under the policy. The allegation that the bond was "in full force and effect on and at all times after the 7th day of April, 1903," was sufficient to admit evidence that the bond was in full force on the 25th day of February, 1905, the day it is alleged the loss occurred. If the bond, when presented in evidence, had shown that it was not in full force and effect, then there would have been a failure of the proof to meet the allegations of the complaint, but the complaint would still be good. "Where a judgment is entered by default, it will be presumed that whatever proofs were necessary to support it were duly presented and taken." 23 Cyc. 763. The only question here is, were the allegations of the complaint sufficient to authorize the judgment? *Benton v. Holliday*, 44 Ark. 56; *Euper v. State*, 85 Ark. 223, 107 S. W. 179.

Third. The appellant contends that the Garland county circuit court had no jurisdiction over him because he neither resided nor was summoned in that county. Section 4376, Kirby's Dig., provides: "That the sureties on the bond of an insurance company may be made parties defendant, and final judgment rendered against them at the same time and in like manner as against the company." Section 4377, Kirby's Dig., expressly authorizes a suit upon a fire insurance policy, to be brought in the county where the loss occurred. It is not contended that the Garland county circuit court did not have jurisdiction of the insurance company, the principal defendant, and of the subject-matter. The loss occurred in Garland county, and the suit was brought there. Under the above sections the suit was properly brought against appellant in Garland county, and the circuit court of that county had jurisdiction of his person. This special statute applies to suits against sureties on the bond of fire insurance companies, and not section 6072, Kirby's Dig., which applies to other actions. The sureties under the above statute may be made parties defendant in the suit against the principal, and service had upon them in any county in which the principal may be served; i. e., in any county of the state. The words "in like manner" evidently refer to the process or procedure for bringing the defendants, sureties, into court, as well as any and all other procedure necessary and incident to obtaining final judgment against them.

Affirmed.

MAMMOTH VEIN COAL CO. v. LOOPER.

(Supreme Court of Arkansas. July 13, 1908.)

1. MASTER AND SERVANT—DUTY OF MASTER TO INSPECT.

Every part of an entry of a coal mine being a passageway for miners, the duty of the master to inspect the roof extends to a point in the roof, under which the miners do not usually pass.

2. SAME—ASSUMPTION OF RISK.

A miner, being sent to change the location of a prop in an entry of a mine, has the right to assume the master has exercised care to keep the roof in a safe condition, and does not assume the risk in going under it without knowledge of its dangerous condition any more than he would in passing under it to go into his room to dig coal.

3. SAME—NEGLIGENCE—EVIDENCE.

The condition of a rock, which fell from the roof of an entry of a mine, injuring a miner, a "water-slip" rock, showing that water had been running over it some time, warrants a finding that, if the master had made proper inspection, the dangerous condition of the rock would have been discovered before the miner was sent to the place.

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by O. T. Looper against the Mammoth Vein Coal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are the instructions referred to in the opinion:

The court instructed the jury on his own motion as follows: "(1) The presumption is that the mine owner, the defendant here, has done its duty by furnishing a safe place for its employé, the plaintiff, and if the place furnished for the plaintiff's employment was not safe, and was defective, there is a further presumption that defendant had no notice of the defect, and was not negligently ignorant of it, and it devolves upon the plaintiff to show that the mine in which the alleged injury occurred was not safe, and the defendant had knowledge of it, or by the use of ordinary care and inspection could have had knowledge of it. (2) If the plaintiff was not engaged in the mining of coal, but was engaged in or preparing to remove props or timbers at the time of the alleged injury, he assumed the risk, and defendant would not be liable."

And upon motion of plaintiff the court instructed the jury as follows: "(1) It was the duty of the defendant to exercise ordinary care to keep the roof of the entry or approach into the room where plaintiff was injured in safe condition, as passageways, for its employés. (2) It was the duty of the plaintiff to inspect the roof of the entry or approach into the room where he regularly worked, and he had a right to assume that it was kept in proper condition by the defendant. (3) If you find from the evidence that the roof of the entry or approach into plaintiff's room where he was hurt was unsafe and dangerous, and that defendant's mine foreman knew it, or by the ordinary exercise of care could have known it, then it was negligence for defendant to permit

plaintiff to pass or work under the same without warning him of the condition. (4) If the roof of the entry or approach into plaintiff's room was unsafe and dangerous, and defendant's mine foreman knew it before plaintiff went under it, and while under it, without knowledge of its danger, was injured by the fall of rock from the roof, then you will find for the plaintiff. (5) Where a servant is ordered by his master to leave his regular work, and change temporarily, in other duties not in the line of his regular employment, the servant has a right to rely upon the assurance, which the law implies from the giving of said order, that the place to work is reasonably safe, and in such a case the servant need not inspect such a place. (6) If you find for plaintiff, you will assess his damage at a sum which, in your judgment, under the evidence will compensate plaintiff for the pecuniary loss he has suffered by the reason of the injury; and, in determining that, you will take into consideration what he expended for medical aid, together with his loss of time occasioned by the injury, and you will also consider his claim for damages on account of mental anguish, pain, and suffering undergone by him, caused by the injury, and award him such sum, in addition to his pecuniary loss, as in your judgment under the evidence will offset said mental anguish, pain, and suffering, in a sum not greater than that claimed by him in his complaint."

Read & McDonough, for appellant. Jesse A. Harp, for appellee.

HILL, C. J. Looper was a coal miner, working in the mine of the appellant company, and was injured by a rock falling from the roof in an entry. He brought suit against the company, and recovered judgment, and the company has appealed.

The principal question argued is the sufficiency of the evidence to sustain the verdict. The coal company introduced no testimony, and the case was tried on the evidence introduced by the plaintiff, which showed this state of facts: Looper was engaged in digging coal in a room on the second east entry, and, owing to a prop sustaining the roof being placed in the entry where the mine track turned into his room, the mine cars were unable to get into his room to carry out his coal. On the morning of the accident he made repeated demands for cars, and one was taken into his room by lifting it off the track; and, when it was loaded, and he desired to send it out, it could not be taken out, on account of this prop. He made demand for the prop to be removed, and the mine foreman sent word to him to do it himself. He then went under the rock supported by the prop, in order to change its location, but before he had done anything, the rock fell upon him, and injured him. The evidence shows that it is the duty of a mine-

owner to keep the entries in safe condition, and it is the duty of the miner to care for his room, as he is constantly changing its roof and face in doing his work. The rock, supported by the prop which fell, while not in the direct path of the miners in using the entry as a passageway of the mine, was in the entry, and the proper care of the whole entry was the duty of the master. Looper testified that he did not know that the rock was dangerous; that he had never noticed it, and had made no test of it to ascertain whether it was loose. He had not gotten ready to examine it nor begin his work when it fell. He described it as it appeared after it had fallen, as follows: "The rock seemed to be a water-slip rock—water run over this rock—could see kind of settlings on it. Yellowish settlings, something like copperas, showed that the water had been running over it for some time." The other witness, who was a driver in the mine, and had carried the car into Looper's room, testified that he had not noticed the condition of the rock before it fell, but he described it, as he saw it after it had fallen, as a flat rock and a "water-slip" rock.

What was said in *St. L. S. F. Ry. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738, applies here: "The only question is whether the evidence showed a defect which the defendant could, by proper inspection, have discovered; for under no other circumstances could it be held responsible for the injury which resulted. Negligence of the company cannot be inferred merely from the occurrence of the accident. That must be proved, and the burden of establishing it is on the party who alleges it"—citing authorities. In *St. L., I. M. & S. Ry. Co. v. Andrews*, 79 Ark. 437, 96 S. W. 183, it was said: "It is the duty of the master to exercise care in furnishing a reasonably safe place in which the servant is required to work, and to exercise ordinary care in discovering defects and in repairing them. The burden is upon the injured servant to show negligence on the part of the master in this regard, before recovery can be had for the injury. Nor can negligence be inferred merely from the occurrence of the injury." In performing the duty of inspection, the master must use ordinary care and prudence to see that the working place is safe; and this care and prudence must be tested by the business in which he is engaged, and the circumstances surrounding it and commensurate to its requirements. *Ultima Thule, Ark. & Miss. Ry. Co. v. Calhoun*, 83 Ark. 318, 103 S. W. 726.

Applying these settled principles to the facts at bar, it cannot be said that the jury was unauthorized to find a lack of care, commensurate to the duty required of the company, to provide a safe roof for the entry. All parts of the entry were a passageway for the miners. It mattered not that they did not usually pass under this rock. It was

over their passageway; and Looper was sent there, not to repair a dangerous place, but merely to change the location of the prop in order that the car might pass into his room. This being in the entryway, he had a right to assume that the master had exercised care in keeping the roof in a safe condition, and his going under it without a knowledge of its dangerous condition was no more an assumption of the risk than if he had passed under it going into his room to dig coal. The condition of the rock—a "water-slip" rock, as described by the witnesses—was sufficient to justify the jury in believing that, had the company made proper inspections of the place, in order to perform their duty of seeing that the roof was safe, the dangerous condition of this rock would have been discovered before Looper was sent under it to make the change in the location of the prop. The question of fact here is not unlike that in *St. L. S. F. Ry. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738, *Ultima Thule, Ark. & Miss. Ry. Co. v. Calhoun*, 83 Ark. 318, 103 S. W. 726, and *K. C. S. Ry. Co. v. Henrie* (Ark.) 112 S. W. 967.

The instructions, which may be found in the statement of facts, were in accord with the principles herein quoted and referred to, and fairly presented the case to the jury. The evidence was sufficient to sustain the verdict, and the judgment is affirmed.

WESTERN COAL & MINING CO. v. GARNER et al.

(Supreme Court of Arkansas. July 18, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

The placing of cans of powder in an entry of a mine, a junction point from which distribution was made, was not negligence; it not being shown that there was any danger to employes by reason of such place being made a storeroom for the powder, but any danger to them therefrom being from the way the powder was handled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 209.]

2. SAME—ASSUMPTION OF RISK.

Any danger to mine operatives from powder being located for distribution in an entry, a junction point, being palpable and necessary to the business, was assumed by them when they gathered around it, though the employer had repeatedly promised to remedy the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-640.]

3. SAME—NEGLIGENCE.

There is no negligence in a master placing cans of powder near electric wires, provided the wires are properly erected and insulated.

4. SAME—PROXIMATE CAUSE.

The proximate cause of the explosion of cans of powder, injuring employes, and any actionable negligence of the master, in case the accident occurred, as claimed, by the crossing of electric wires over the powder, was failure to properly erect the wires.

5. SAME—RES IPSA LOQUITUR.

The proof showing that electric wires, the crossing of which over cans of powder was

claimed to have caused an explosion, injuring employes, were properly separated when erected, and that there was no reason to contemplate that they would become crossed in so short a time after being erected, and it not being shown that the wires were in such condition before the accident that ordinary care in inspection would have disclosed any defect, and there being evidence that men smoking were gathered around the cans, the doctrine of *res ipsa loquitur* does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 955.]

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by Lee Garner and others against the Western Coal & Mining Company. Judgment for plaintiffs. Defendant appeals. Reversed and remanded for new trial.

These actions were brought by the appellees, to recover damages for injuries alleged to have been received by them at the hands of the appellant, by reason of a powder explosion in one of its mines at Denning, Ark., known as "Mine No. 2." The averments of ownership of the mine, operation of its system of electric wires and currents in the mine, and negligence of the appellant in the operation and maintenance of the system of electricity in said mine are the same in each of the complaints, and all of the causes were consolidated and tried together. Verdicts for each of the appellees was returned by the jury, aggregating \$750. The complaints, after alleging the ownership by appellant of the mine in which the explosion occurred, the operation by it of a system of electric wires therein, the employment of appellees, the discharge by them of their respective duties, and the exercise of ordinary care by them, at the time of the accident, for their own protection and the nature of the injuries received, charge negligence as follows: "That it allowed and permitted a large amount of powder to be stored in said entry, under and near the said electric wires; that it allowed and permitted the insulation on said wires to become loose, peeled, and skinned off, rotten and decayed, so that when said wires came together, they would form a short circuit, and by reason of the electricity, burn into and fall to the ground or bottom of said entry; that it allowed and permitted the said wires to become too loose, and that by reason of becoming too loose they were easily and readily caused to come in contact and form a short circuit as aforesaid; * * * that on the said 26th day of March, 1906, the said wires, by reason of said condition, did come in contact with each other and formed said short circuit, and one of said wires was burned in two, and thereby caused to fall in and upon one of the kegs in which said powder was contained, thereby coming in contact with said powder with a spark of electricity from said wire, and thereby causing the powder to explode and produce the burns and injuries of plaintiff, as here-

in complained of." The answer of defendant specifically denied each allegation of the complaint, and in addition, pleaded contributory negligence, assumed risk, and that plaintiffs, when injured, were at a place where they had no right to be, and were not injured while in their lines of duty.

The evidence on behalf of appellees tended to prove that the injury to them was caused by the burning of electric wires over a can of powder, around and about which appellees were gathered; that the wires were crossed, making a short circuit, causing them to burn, part, and fall to the can of powder beneath, that the explosion was caused by the sparks from the burning electric wires igniting grains of powder that were about the can, or else the end of the wire, charged with a current of electricity, coming in contact with the can, burned a hole through same, and thus ignited the powder. One of the witnesses for the appellees, describing the accident, said: "I saw the wires burning in two, I saw the sparkling, and took it for that. I did not see the wires fall, but I saw it afterwards. I did not see it down till after the explosion. They were all right until this wire burned in two. The sparkling I saw was on the ground after the wire fell. I was sitting facing the west, and the wire was out to one side, and I heard this sparkling, and, as I turned my eyes, I saw this sparkling then it went up.

* * * I know the wire that was burned in two was the main current wire. * * * When the wire burned in two, I saw sparkles of fire; then I heard a frying noise like it was in a barrel. These frying noises lasted a few seconds. It was a very few minutes after the frying noise that the explosion took place." This witness further testified, in part, as follows: "I know enough about electricity to tell what it takes to constitute a short circuit. I helped run the motor for 14 months. That gave me some knowledge of the nature of electricity. If a wire or anything would burn or fall on anything wet or damp, that would make a short circuit. A wire charged with electricity and comes on the ground you can tell that it is a live wire by the sparkling and fire that it throws. Wire insulated like this would cause a short circuit if it came in contact with the wall if the wall was damp, and the wall was damp. The roof was sweating very bad, and if this wire was charged with 260 volts, it would burn right in two and fall to the ground. * * * I do not know about how much voltage was on that day, but I have been on top, and looked at the voltage register, and it showed 260. * * * I know if a cold wire and a hot one cross, if it was not insulated heavy enough, it would cause a short circuit. If the wire had been insulated heavy enough, it would not have short circuited. What I mean by insulation is a substance that keeps it from making ground connection." Another wit-

ness for appellees testified in part as follows: "I was right by the keg of powder when the explosion took place. I saw the keg of powder. I had been sitting on 't. That was before the lights came on. The lights came on and the explosion took place all in the same moment. I first noticed sparklings up towards the roof. They were kind of sparks of fire. The explosion took place at the same instant I saw this fire in the roof." Another witness for appellees testified: "I was running the electric locomotive that hauls the coal; had been operating it about four years. The dynamo is supposed to carry 250 volts. If a wire that is carrying a current of 250 volts is grounded, or forms a short circuit, if it hits a piece of iron, it will burn it. I have been foreman of the light and powerhouse at Ft. Smith. Worked there one year. My work has given me experience with wires that were charged with electricity. If a wire charged with a current of electricity should fall upon an iron keg setting upon the ground, it would burn the keg as long as the wire would last. Those powder kegs were made of sheet iron. If the wires they were using for lights were to fall on an iron keg, I think it would have the effect to burn a hole in the keg. It would either burn a hole in the keg or burn in two. If the wire was short circuited, it would explode the powder."

On behalf of the appellees it was shown that it was the duty of the pit boss to look after the powder and to remove it (if it was necessary to be removed); that complaint was made to him during the week or 10 days that the can of powder was there, to remove it; that he said he would move it, and for the men to go on to work. One witness speaking to this point said: "I went to see Mr. Hogan several different times about some powder in that entry. I went to him, off and on, for about a month. I went to him because there was danger in the way they handled the powder, and he promised to move the powder, and I told the men he had promised to move it. I spoke to Mr. Hogan about it on Thursday, before the explosion took place, and he said he would have it remedied. On cross-examination this witness testified: "The powder had to be unloaded at some point for distribution, and the junction point was made the point of distribution ever since I have been there—three years. The powder I am talking about was cans of powder. They distributed it from that point, but they left it there under the wires." On re-cross-examination, this witness testified: "I was complaining because I did not want any powder left there. Powder has been distributed at this point for the last three years. I first saw Pierce, and then I found Hogan, and asked him to move it." On behalf of appellant there was evidence which showed that the wires were fastened to a block

In the rib, the wires were five or six inches apart and kept apart by wooden cleats. A witness, who assisted in putting up the wires, testified as follows: "Blocks were put in between the wires, so that they could not come together. Was down there three or four times after they were put up, and found them in the same condition, and know of nothing wrong with them before the explosion. We got a wire which was insulated with a nonconductor, that looks to me like silk or cotton, from the machine shop, off of a spool, and Mr. Pierce and I put it up. The wire shown in court was the kind of wire used." This witness further testified: "If a wire was noninsulated, and fell to the ground, that would make a circuit. If it came in contact with the earth at a point where it was insulated, it would create a short circuit; it would make a spark. Never tried it to see if a spark would set powder on fire. To burn a can of powder, you would have to get both the positive and negative wire on the can. If the ground is damp, and the can sitting on the damp ground, it would create a short circuit, and if you put the wire on the ground, the can would carry the current into the ground. Never tried to see if it would burn the can." The evidence on behalf of appellant is uncontradicted that the wires when put up were properly separated from each other by wooden cleats. When first erected they were so constructed that they could not come in contact with each other. There was evidence on behalf of appellant that tended to show that the powder can could not have been burned into by the wire, even if it had been burned in two, and had fallen to the ground, as described by the witnesses for appellees, and the evidence for appellant also was to the effect that a wire, insulated as the wires were shown by it to have been, could not have burned in two without destroying more of the insulating material or fiber than was shown to have been destroyed on the wire exhibited. The evidence, both by the witnesses for the appellees and the appellant, showed that the parties congregated about the powder can had open lamps, and several were smoking at the time of the accident. In rebuttal appellees showed that before the explosion, the wires could touch the coal between the blocks of wood by which they were separated.

Ira D. Ogleoby, for appellant. Sam R. Chew, for appellees.

WOOD, J. (after stating the facts as above). It is not shown that the appellant was negligent in the matter of placing the powder for distribution to the employes in the mine. It "had to be unloaded at some point for distribution, and the junction point had been made the point of distribution for three years." Presumably this was selected

as the distributing point because it was regarded as the most suitable and convenient location. It is not shown that there was any danger to the employes by reason of the place where the powder was stored or kept. The danger, if any, was in the way the powder was handled. But if there was danger to the operatives by reason of the powder being located for distribution at the point designated, it was a palpable risk or danger, which they assumed when they congregated about it. If there was danger in the place of storing, it was such a danger as no employe would be warranted in assuming for one moment, even under a promise of the master to remedy or discontinue. If we should concede that there might have been danger in connection with the location of the powder, it was a danger absolutely necessary to the business, and one that the employes assumed when they entered upon the employment. The evidence does not warrant a finding of negligence against the appellant "in permitting a large amount of powder to be stored in the entry, under and near the electric wires," as charged in the complaint. There was no danger of an explosion being produced by the electric wires coming in contact with the power, provided the wires were properly erected and insulated. So the proximate cause of the injury complained of in this case, if it resulted in the manner set up in the complaint, was by the crossing of the electric wires, and the actionable negligence, if any, was in not properly erecting the wires. But in our opinion the evidence fails to show a cause of action in this particular. This is not a case where the doctrine of *res ipsa loquitur* applies. The proof affirmatively shows, without contradiction, that the wires were properly separated when erected, and that there was no reason to contemplate that they could become crossed in so short a time after they were erected. A sufficient time had not elapsed for the decay of the cleats or blocks that separated the wires; there was no reason to anticipate that they should become loose and cross each other in the time intervening their erection and the accident. They were shown to be in perfect order, but a short while before the accident. The appellees do not show that the wires were in such condition before the accident that the exercise of ordinary care in their inspection would have discovered any defect. *Mammoth Vein Coal Co. v. Looper* (Ark.) 112 S. W. 390.

Negligence cannot be presumed, under the facts shown here, from the mere happening of the accident. *St. L., I. M. & S. Ry. Co. v. Andrews*, 79 Ark. 439, 96 S. W. 183; *St. L. & S. F. Ry. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738, and cases cited. The proof does not disclose that, in the usual course, the accident could not have happened but for appellant's negligence. On the contrary, the evidence shows that men were gathered about the powder can smoking, and that this was

not an unusual occurrence. That undisputed fact itself furnishes a most reasonable explanation of how the accident might have happened, aside from any negligence of appellant.

So we are of opinion, upon the whole record, that there is no evidence to sustain the verdict. The judgment is therefore reversed, and the cause remanded for new trial.

ROWE et al. v. ALLISON.

(Supreme Court of Arkansas. July 13, 1908.)

1. APPEAL AND ERROR—RECORD—ORAL TESTIMONY IN CHANCERY SUIT—SUFFICIENCY OF PRESERVATION.

Oral testimony taken and reported in a chancery suit, even if authenticated by the stenographer's certificate, is not sufficiently preserved for consideration on appeal unless it was treated as depositions and filed and identified as such.

2. SAME—REVIEW—PRESUMPTIONS—EVIDENCE NOT SHOWN BY RECORD.

Where it appears that the evidence in a chancery suit was partially in the form of oral testimony, which is not preserved in the record on appeal, and there are no recitals thereof in the judgment, it will be conclusively presumed that the evidence sustains the decree so far as it may be sustained under the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

3. SAME—JUDGMENTS—VALIDITY.

A decree not responsive to the issues is void, and if without the issues, or if the complaint does not state a cause of action, the presumption that the evidence not preserved in the record is sufficient to sustain the judgment cannot avail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

4. SAME—QUESTIONS PRESENTED FOR REVIEW—LIMITATION BY SCOPE OF RECORD.

Where the oral testimony in an equity suit is not preserved in the record on appeal, the court must determine the case upon the face of the record; for if the decree is within the issues, the evidence will be presumed sufficient, and otherwise it is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

5. QUIETING TITLE—RIGHT OF ACTION—CONDITIONS NECESSARY—GROUND OF EQUITABLE RELIEF.

To remove a cloud from a title, plaintiff must show that he is in possession of the land, that his title is an equitable one, or that the land is wild or unoccupied; and a chancery court cannot remove a cloud where plaintiff asserts a legal title, and defendant is in possession, since there is an adequate and complete remedy at law, though a court of chancery may administer complete relief, notwithstanding a part thereof is legal, if other grounds for equity jurisdiction exist.

6. APPEAL AND ERROR—TRIAL IN WRONG FORUM BELOW—WAIVER BY FAILURE TO DEMUR OR MOVE FOR TRANSFER—STATUTORY PROVISIONS.

Where a complaint, in a suit to remove a cloud on title, does not state an equitable cause of action, if defendant does not demur or move to transfer, but takes issue on the allegations of the complaint, the court on appeal will proceed to consider the case as if tried in the proper forum, notwithstanding Kirby's Dig. § 5991, providing that an error as to the kind of pro-

ceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by amendment and transfer to the proper docket, and section 1282, providing for transfer from the circuit court to the chancery court, or vice versa, where there is error as to the forum in which the action is brought.

7. ACTION—NATURE AND FORM—ERROR AS TO FORM—TRANSFER OF CAUSES—STATUTORY PROVISIONS.

If chancery jurisdiction is challenged by a demurrer, which discloses that no cause of action in equity is stated, but a cause at law is stated, the trial court should transfer the cause to the circuit court, though, in the absence of the provisions cited, a demurrer should be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 312, 313.]

8. EQUITY—DEMURRER—DETERMINATION—EFFECT.

If it appears on consideration of a demurrer that a complaint in equity shows no cause of action, either at law or in equity, the court should dismiss the complaint, or authorize an appropriate amendment.

9. APPEAL AND ERROR—DISPOSITION OF CAUSE—REVERSAL—NECESSITY OF NEW TRIAL.

On reversing a decree for plaintiff for want of an equitable cause of action, the court will consider the sufficiency of the complaint, as if brought in the proper forum, for the case will not be remanded for transfer unless a cause of action at law is stated, or may be stated by proper amendment.

10. DESCENT AND DISTRIBUTION—PRETERMITTED CHILD OR ISSUE OF CHILD—RIGHTS—SALE BY EXECUTOR UNDER POWER—EFFECT.

Kirby's Dig. § 8020, provides that when a will fails to mention the name of a child, if living, or the legal representatives of such a child, born and living when the will was made, the testator shall be deemed intestate as to those omitted. *Held* that, where plaintiff's father, S., was dead at the time his mother died, leaving a will which omitted reference to S., or his legal representatives, plaintiff had an absolute right to a share of the estate, which could not be divested by a sale under the power in the will, nor by act of the beneficiaries, whatever might be the effect of a sale under order of the probate court to pay debts, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 126.]

11. SAME.

Kirby's Dig. § 8020, provides that when a will omits to mention the name of a child, if living, or the legal representatives of such child, born and living at the execution of the will, the testator shall be deemed to have died intestate so far as regards such child, and that he may recover from the devisees and legatees in proportion to the amount of their distributive shares, and the probate court is vested with jurisdiction to decree such distribution. *Held*, that the object of the provisions was to give a pretermitted child such share as he would have received had there been no will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 126.]

12. SAME—EXCLUSIVENESS OF STATUTORY REMEDY.

While Kirby's Dig. § 8021, provides that a writ of scire facias shall issue against the devisees or legatees in case they refuse to pay the share due a pretermitted child, that provision was intended merely to authorize the probate court to enforce distribution, and the remedy provided is not exclusive; for there is nothing in the statutes to indicate that it was intended to limit the pretermitted child solely to his remedy in the probate court.

13. LIMITATION OF ACTIONS — RUNNING OF STATUTE—MINORITY OF ISSUE OF A PRETERMITTED CHILD.

Where there is no reference to a deceased child or his representatives in a testator's will, the statute of limitations will not run against a minor heir of the deceased child, nor can he be estopped to claim his inheritance by any conduct during minority.

14. INFANTS—PROPERTY—ESTOPPEL.

A minor heir cannot be estopped to claim his inheritance by any conduct during his minority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 37-40.]

15. INFANTS — BONA FIDE PURCHASER — DEFENSES AS AGAINST INFANT.

The defense of innocent purchaser cannot be set up by one purchasing at a sale under a power in a will, as against the incapacity of an infant heir of a pretermitted child.

16. ACTIONS—FORM—LEGAL OR EQUITABLE.

A complaint in chancery alleged that M. died seised of certain realty; that plaintiff was an owner of an undivided interest therein, by inheritance from S., a son of M., whom M. survived; that M. left a will, which omitted to mention the representatives of S., though they were living at the time of the execution of the will; that M., therefore, died intestate as to plaintiff; and that he was entitled to the share of the estate which he would have received had M. died wholly intestate; that R., M.'s administrator, knowing plaintiff's existence and interest in the land, sold it to P., under a power in the will, and not to pay debts, and that P. subsequently sold it to C., who was then in possession, and denying plaintiff's interest. The prayer was for the cancellation of the deeds so far as they affected plaintiff's interest in the land. *Held*, that the complaint did not state an equitable cause of action, but it did state a cause of action at law.

17. APPEAL AND ERROR—TRIAL IN WRONG FORUM—EFFECT.

Where a complaint does not state an equitable cause of action, and is attacked by demurrer, a court of equity has no jurisdiction to entertain the suit, and in such case a decree for plaintiff will be reversed on appeal, notwithstanding a cause of action at law is stated.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Suit by George Allison against R. A. Rowe and others, to remove a cloud on title. From a decree for plaintiff, defendants appeal. Reversed and remanded, with directions to transfer to the circuit court, to be tried at law.

Geo. S. Evans and Geo. W. Dodd, for appellants. Holland & Holland, for appellee.

HILL, C. J. George Allison brought this suit in the chancery court of Sebastian county for the Greenwood district against R. A. Rowe, as administrator with the will annexed of Martha Allison, R. T. Powell, and the Cherokee Construction Company. He alleged that Martha Allison died seised and possessed of certain described lands in the Greenwood district of Sebastian county, and that he is the owner of an undivided one-tenth interest therein, by inheritance from Samuel M. Allison, a son of the said Martha Allison, and that the said Samuel M. Allison had died intestate prior to the death of Martha Allison, leaving, as his sole heirs, the plaintiff and

his sister, Laura Allison; that he was a minor from the time of the death of the said Martha Allison to the date of bringing this suit; that Martha Allison left a will, which omitted to mention the legal representatives of said Samuel M. Allison, her son, which representatives were living at the time of the execution of the will; and that by reason thereof the said Martha Allison had died intestate as to the plaintiff, and that he was entitled to the share of the estate which he would have received had she died wholly intestate; that Rowe, as administrator, had sold the lands to R. T. Powell, under directions contained in the will, and not for the purpose of paying debts; that Rowe knew of the existence of the plaintiff and his interest at the time he executed the deed to Powell; that Powell had sold the land to the Cherokee Construction Company, which is in possession of it, and denying plaintiff's interest therein, and prayed that the deeds from Rowe, as administrator, and the deed from Powell to the Cherokee Construction Company, and all other deeds whereby it is sought to convey an undivided one-tenth interest in the lands, be canceled in so far as they affect the title of the plaintiff. Each of the defendants demurred to the complaint, which demurrers were overruled, and their exceptions noted of record. They then filed answers as follows: Rowe disclaimed any interest in the matter, but fully answered the complaint, and admitted that he was administrator with the will annexed of Martha Allison; denied that the plaintiff was the owner of an undivided one-tenth interest in the land as an heir of Samuel M. Allison; denied knowledge as to whether S. M. Allison died intestate; denied that the plaintiff was a child of said S. M. Allison, and alleged that Laura E. Allison was the only child and heir of said S. M. Allison; denied that the plaintiff was a minor at all times since the death of Martha Allison; denied knowledge of any interest of the plaintiff, and alleged that the will of Martha Allison mentioned all and the only heirs of said Martha Allison. Powell answered, likewise denying all the material allegations of the complaint, and alleging purchase from Rowe under the power of sale contained in the will; that a deed to him had been made and duly recorded, and admitted that, by sundry mesne conveyances, the whole of the estate had been conveyed to the Cherokee Construction Company, which he alleged to be the owner thereof, and pleaded res adjudicata of the matters alleged in the complaint, by reason of an ejectment suit brought in the circuit court by the plaintiff against the Cherokee Construction Company, a copy of the pleadings and judgment in which case were filed as exhibits to the answer. (It appears from the judgment that the dismissal was without prejudice.) The Cherokee Construction Company adopted the answer of Powell. The decree recites that

"this cause is presented by the parties, upon the complaint of the plaintiff and separate answers of each of the defendants, the depositions, exhibits, proofs, and oral evidence," following which the court proceeds to find the facts and declare the law. Judgment was entered in favor of the plaintiff for the recovery of an undivided one-tenth interest, for the possession of which a writ of possession was awarded, "to which findings and decree of the court the defendants severally excepted, and prayed an appeal to the Supreme Court which is granted, and they are allowed 60 days for bill of exceptions."

There is no bill of exceptions in the record, but there is copied into the transcript what purports to be the testimony taken in open court by agreement of the parties and the consent of the court, and reported by W. C. Holland. This testimony is not even authenticated by a stenographer's certificate. But, even if it were, that would be insufficient to preserve oral testimony in a chancery case, unless the same was treated as depositions, and filed and identified as such. The subject of the record on appeal in chancery cases has recently been considered at some length, and the long-established principles governing the same applied and explained in *Meeks v. State*, 80 Ark. 579, 98 S. W. 378, *Jones v. Mitchell*, 83 Ark. 77, 102 S. W. 710, *Beecher v. Beecher*, 83 Ark. 424, 104 S. W. 156, and *Murphy v. Citizens' Bank*, 84 Ark. 100, 104 S. W. 187, 934. There is no oral testimony before the court, and there are no recitals of evidence in the judgment, and therefore a conclusive presumption must prevail that the evidence sustains the decree of the court so far as it is possible for a decree, based on the complaint, to be sustained by evidence. If the decree is without the issues, or the complaint does not state a cause of action, this presumption cannot aid the appellee. *Jones v. Mitchell*, 83 Ark. 77, 102 S. W. 710. Where the decree is not responsive to the issues, it is void. *Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674; *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913. Therefore, the court must determine the case upon the face of the record.

Before a suit to remove cloud from title can be sustained by a plaintiff, he must show that he is in possession of the land, or that his title is an equitable one, or that the land is wild and unoccupied. Where a defendant is in possession, and the plaintiff asserts a legal title, a chancery court is without jurisdiction to remove the cloud upon it, as there is an adequate and complete remedy at law. But if other grounds for equity jurisdiction exist, which give the chancery court jurisdiction, it may proceed to administer complete relief, although a part of that relief is purely legal. *Apperson & Co. v. Ford*, 23 Ark. 746; *Branch v. Mitchell*, 24 Ark. 431; *Sale v. McLean*, 29 Ark. 612; *Lawrence v. Zimpleman*, 37 Ark. 643; *Bryan v. Winburn*, 43 Ark. 28; *Mathews v. Marks*, 44 Ark. 436;

Ashley v. Little Rock, 56 Ark. 391, 19 S. W. 1058; *Brown v. Bocquin*, 57 Ark. 97, 20 S. W. 813; *Brown v. Norvell*, 74 Ark. 484, 86 S. W. 306; *St. L. R. & W. G. Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852; *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 92 S. W. 534. These established principles, applied to the admitted facts, demonstrate that the plaintiff had no equitable cause of action.

Section 5991, Kirby's Dig., provides that "an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket." Section 1282 provides that the transfer shall be from the circuit to the chancery court, or the chancery to the circuit court, as the case may be, where there is error as to the forum in which the action is brought. Had the defendants taken issue upon the allegations of the complaint, and not demurred to the complaint, nor moved to transfer, then, under the decisions in *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244, *Collins v. Paepcke-Leicht Lbr. Co.*, 74 Ark. 81, 84 S. W. 1044, and *Ware v. White*, 81 Ark. 220, 108 S. W. 831, the court would proceed to consider the case as if tried in the proper forum. But the defendants challenged the jurisdiction of the chancery court by demurring, on the ground that the complaint did not show a cause of action. These demurrers should have been sustained, and the complaint dismissed if it were not for the provisions of the Code above cited. Instead of assuming jurisdiction of the cause, the court should have transferred the action to the circuit court, when the demurrers developed that there was no cause of action in equity, if a cause of action at law was stated. *Weaver v. Ark. Nat. Bank*, 73 Ark. 462, 84 S. W. 510; *Brown v. Norvell*, 74 Ark. 484, 86 S. W. 306; *Gaither v. Gage*, 82 Ark. 51, 100 S. W. 80; *Newman v. Mountain Park Land Co.*, 85 Ark. 208, 107 S. W. 391. If the complaint shows no cause of action at law, the court should dismiss it, or authorize an amendment (if such a case where amendment would be proper); for it would be idle to reverse the decree for want of an equitable cause of action, and send the cause for trial in another court, if the allegations showed that the plaintiff had no cause of action there. Therefore the court will consider the sufficiency of the complaint if brought at law.

The rights of the omitted child could not be divested by the sale of the estate under the will, for the will was as to him inoperative. Had the property been sold under orders of the probate court for the purpose of paying debts, or any other purpose over which the probate court would have jurisdiction, then different questions would be presented. But the only titles which the defendants have were obtained through a sale under the power of sale in the will. It is insisted that the statute which renders the will

inoperative gives a remedy against devisees and legatees. This is true, but it does not follow that it is the only remedy. It does not exclude an omitted child or grandchild from recovering land from purchasers of those devisees or legatees, or from purchasers under the power of sale contained in the will. The statute makes the will absolutely inoperative as to such omitted child, and provides that he shall be entitled to such share and portion of the estate as if the ancestor had died intestate. It provides, further, that he shall be entitled to recover of the devisees and legatees in proportion to the amount of their respective shares, and vests the probate court with power to decree such distribution, and provides, further, that a writ of scire facias shall issue against the devisees or legatees in case they refuse to pay. Sections 8020, 8021, Kirby's Dig. But there is nothing in the statute to indicate that it was intended to remit the child solely to this action in the probate court, against the devisees or legatees; and such a construction would enable devisees and legatees to defeat the whole purpose of the statute. The object of the statute is to give such omitted child such share as he would have received had there been no will. And these provisions for relief against devisees and legatees are merely to enable the probate court, which would not otherwise have jurisdiction, to make the distribution and enforce the same. The share of the child is absolute, and such share cannot be defeated by being conveyed away, either under a power of sale in the will or by the devisees or legatees.

The complaint alleges that, while these titles were being acquired against the plaintiff, he was a minor. Therefore the statute of limitations could not run against him, nor could he be estopped by any conduct during his minority to claim his inheritance. *Tobin v. Spann*, 109 S. W. 534. Nor can the defense of innocent purchaser be set up against the incapacity of an infant. *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Van Deusen v. Sweet*, 51 N. Y. 378; *Seaver v. Phelps*, 28 Mass. 304, 22 Am. Dec. 372; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705; 1 Jones on Law of Real Property in Conveyancing, § 70.

The conclusion which the court reaches is that the complaint shows a good cause of action to recover an undivided interest in the land, in an action at law, against plaintiff's co-tenants, who are in possession, who are holding it against him, but that there is no jurisdiction in a court of equity to entertain such a suit as framed in the pleadings. It was beyond the issue to render judgment for the possession of the land, and beyond the jurisdiction of a chancery court to entertain this suit. Therefore the decree is reversed, and the cause remanded, with directions to transfer it to circuit court, and there to proceed according to law.

CRAWFORD COUNTY BANK v. BOLTON et al.

(Supreme Court of Arkansas. July 13, 1908.)

1. EXECUTORS AND ADMINISTRATORS—SALES—EFFECT OF PURCHASE BY ADMINISTRATOR.

A purchase by an executor or administrator at his own sale is not void, but is voidable at the election of those who may be interested in the estate, and his purchase, whether directly or indirectly, at private sale or public auction, and regardless of his motive or intent, makes him a trustee for the beneficial owners, by whom the sale may be avoided at their option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 579, 580.]

2. ACTION—ACTIONS TO ENFORCE PURCHASER'S RIGHTS—NATURE OF DEFENSES.

Where a sale by an administrator is made to a bank, of which he is a stockholder and the cashier, the administrator's interest could not be interposed as a defense in a suit at law by the purchaser to recover the land, for, the sale being merely voidable at the election of the beneficial owners of the estate, and not void, upon the beneficial owners' election to avoid the sale, the purchaser would be entitled to credit for the payments, and the doctrine of granting relief upon terms or conditions imposed is purely a creature of equity, and not one at law.

3. PLEADING—DEMURRER—GROUNDS.

An equitable defense to an action at law is not demurrable; for, under Kirby's Dig. § 6098, it is the duty of a defendant, when sued at law, to make all the defenses on his behalf legal and equitable.

4. ACTION—NATURE AND FORM—EQUITABLE DEFENSE TO ACTION AT LAW—EFFECT OF DEMURRER.

A demurrer to an equitable defense, in an action at law, should be treated as a motion to transfer to the chancery court.

5. APPEAL AND ERROR—DISPOSITION OF CAUSE—REMANDING ON REVERSAL—ACTIONS TRIED IN WRONG FORUM.

Where a demurrer to an equitable defense, in an action at law, is not sustained, and the decree is for defendants, on reversal of the decree the cause will be remanded for transfer to the proper forum.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Ejectment by the Crawford County Bank against U. S. Bolton and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

This is an action of ejectment, brought by the Crawford County Bank against U. S. Bolton and Belzora Bolton in the Crawford circuit court, for the recovery of 40 acres of land, situate in Crawford county. The defendants answered, setting up, among other defenses, that the lands were held by the bank as trustee for them. The plaintiff filed a demurrer to the answer of the defendants, but no action was ever taken on it by the court. The following is the statement of facts, as agreed upon by the parties to this action, and upon which the said cause was submitted to the court for its decision: "W. H. H. Lovett died on or about the 12th day of August, 1891, in the county of Franklin, Intestate, leaving a wife, who died shortly thereafter, on the ——— day of

—, 1896, and the following children: Belzora Bolton, wife of U. S. Bolton, and one of the defendants, J. C. Lovett, Angeline Branner, née Lovett, Reida Nelson, née Lovett, B. R. Lovett, the last three of whom were minors at the time of the death of the deceased. That said Lovett died seised and possessed of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, Sec. 2, T. 10 N., R. 29. That on the 28th day of January, 1886, the deceased entered into a contract with the Little Rock & Ft. Smith Railway for the purchase of the N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, Sec. 2, T. 10 N., R. 29 W., which adjoins said last tract on the east, and went into possession of the same under his contract, and was in possession, at the time of his death, as part of his homestead. That the legal title to the said N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, Sec. 2, T. 10 N., R. 29 W., was in the Little Rock & Ft. Smith Railway at the time of the death of the said W. H. H. Lovett, subject to the terms of the said contract of purchase, and subject to foreclosure for non-payment of any of the yearly payments or interest due on said land. That all of the said lands were in Franklin county at the death of the said deceased. That afterwards, by an act of the General Assembly of the state of Arkansas, at its session of 1895, said N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, Sec. 2, T. 10 N., R. 29 W., was detached from Franklin, and made a part of Crawford county, where it remains. That at the time of the death of the said W. H. H. Lovett, he was living upon and occupying the said 120 acres of land as his homestead. That on the said contract for the purchase of the said N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, Sec. 2, T. 10 N., R. 29 W. (the land in controversy in this action), the deceased, prior to his death, had paid thereon the sum of \$43.48. That after the death of the deceased the widow and heirs of said Lovett paid the remainder of said contract price, to wit, \$53.90. The last payment having been made on the 1st day of November, 1892, the said Little Rock & Ft. Smith Railway Company, on the 1st day of November, 1892, executed its deed for the same to W. H. H. Lovett, over the protest and objection of the heirs of said deceased, who demanded that the deed be made and executed to them. That after the death of the widow of the deceased the defendants, with their minor children, moved on said land, which had been occupied by the widow and children since the death of the said Lovett, and continued to live jointly thereon, with the said minor children, until the youngest became of age, since which time the defendants have occupied the same exclusively. That the defendant Belzora Bolton took deed from the heirs of W. H. H. Lovett, deceased, as per her exhibit to her answer for the lands mentioned therein. That the said W. H. H. Lovett died intestate, leaving no personal estate in excess of that by law allowed to be retained by the widow as her absolute

property, and that said 120 acres of land occupied by him as a homestead does not exceed in value the sum of \$2,500. That S. A. Pernot was, on the 24th day of January, 1900, duly appointed, by the probate court of Franklin county, as administrator of the said estate of W. H. H. Lovett, deceased. That he applied to the said probate court for an order to sell the said N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, Sec. 2, T. 10, R. 29 (the land in controversy), for the purpose of paying the debts probated against said estate. Order of sale was made on the — day of November, 1905, a day of the November term, 1905, the land sold on the 20th day of December, 1905, to the Crawford County Bank for the sum of \$200, the sale confirmed by the probate court of Franklin county, February 12, 1906, and deed made by the administrator March 20, 1906. S. A. Pernot, at the time of his appointment as such administrator, and sale made by him, was a stockholder and cashier of the Crawford County Bank, a corporation organized and operating under the laws of the state of Arkansas. That B. R. Lovett, the youngest of the children of said W. H. H. Lovett, deceased, reached the age of 21 years on the — day of —, 1890 or 1900." The cause was tried before the court without a jury. The court found that the deed of the administrator to the plaintiff was void, and of no effect, and that the plaintiff for that reason was not entitled to recover the land. The court, therefore, adjudged that the plaintiff take nothing by its action. Plaintiff has appealed.

L. H. Southmayd and Jesse Turner, for appellant. Sam R. Chew, for appellees.

HART, J. (after stating the facts as above). The plaintiff and defendants in this case derive title from a common source. Plaintiff became the purchaser of these lands at an administrator's sale, made by the administrator of the estate of W. H. H. Lovett, deceased. The purchase money was paid, and the sale was duly confirmed by the probate court. At the time of the sale the administrator was cashier and a stockholder in the plaintiff bank. The plaintiff contends that this did not in any way affect the validity of the sale. We do not think this position can be successfully maintained. The rule is firmly established, both by the text-writers and the adjudicated cases, that a purchase by an executor or administrator at his own sale is not void, but is voidable at the election of those who may be interested in the estate. 3 Pomeroy's Equity Jurisprudence, par. 1077 (3d Ed.); 11 A. & E. Enc. of Law, 1148; McGaughey v. Brown, 46 Ark. 25; Gibson v. Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17; Montgomery v. Black, 75 Ark. 184, 86 S. W. 1006. This is true without regard to the motive or intent of the administrator. It is an an-

cient and well-settled doctrine that his purchase, either directly or indirectly, no matter how honest, whether at private sale or public auction, makes him a trustee for the beneficial owners, and the sale may be avoided by them at their option. The reason for the rule is thus aptly stated by one learned text-writer: "However innocent the purchase may be in the given case, it is poisonous in its consequences." A stockholder, and more especially the cashier, who is largely responsible for its success, is interested in the financial prosperity of a bank. Whether the interest is large or small is of no moment; for what would appeal to the cupidity of one man would be no temptation to another. The rule is that the executor or administrator stands in a fiduciary relation to those interested in the estate. It is his duty to conduct the sale, and to report to the court any fraud or collusion in bidding, or any other facts or circumstances that would warrant the court in not confirming the sale. The rule stands "upon one great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

The sale being merely voidable, and not void, the defense could not be interposed in a suit at law; for the avoidance is at the election of the cestui que trust, and upon exercising his election to avoid the sale, the purchaser is entitled to be credited with payments for the purchase, if applied in the administration of the estate for taxes, necessary repairs, etc. 2 American Law of Administration (Woerner) p. 1088. Courts of law have no power to set aside a sale because the administrator was interested in the purchase. This is for the reason that the sale is not void, but merely voidable at the election of the beneficial owners of the estate; and, if they seek to set it aside,

they must observe the maxim of "he who seeks equity must do equity." The doctrine of granting relief upon terms or conditions imposed is not known at law, but is purely a creature of equity. In the case of Harkrider et al. v. Harvey, 8 Ind. 104, the court held that a sale of land, by an administrator for the payment of debts, will not be set aside, at law, because the administrator himself became the purchaser. In discussing the subject the court said: "We have found no case where such a purchase has been held void at law, and there seems to be weighty reasons why it should be set aside only in equity." In the case of Jones et al. v. Graham et al., 36 Ark. 384, the court held that if an administrator purchases land sold at a trust sale for a debt due his intestate, he holds the land as trustee for the benefit of the estate; and the probate court had no power to denude him of the trust. In the case of Horsley et al. v. Hilburn et al., 44 Ark. 458, the court, in effect, held that it is imperative upon the circuit court to transfer a case to the equity docket setting up a defense exclusively cognizable in chancery. See, also, Newman v. Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391; Rowe v. Allison (delivered this day) 112 S. W. 395. The demurrer to the answer should not have been sustained; for the averments of the answer presented an equitable defense; and, under our statutes, it is the duty of a defendant, when sued at law, to make all the defenses he has, both legal and equitable. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063; Kirby's Dig. § 6098.

The court should have treated the plaintiff's demurrer as a motion to transfer to the chancery court. Therefore the cause is reversed, with directions to transfer it to the proper chancery court.

BIBB v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 10, 1908.)

1. ROBBERY — INDICTMENT — ISSUES, PROOF, AND VARIANCE.

Under Cr. Code Prac. § 128, providing that an erroneous allegation as to the owner of property taken is not material where the offense is in other respects sufficiently described, the variance between an indictment charging accused with robbing "D. E. L." and the proof that prosecutor's name is "B. E. L." is not material; the offense in other respects being described with sufficient certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 27.]

2. CRIMINAL LAW — IMPROPER ARGUMENT OF COUNSEL—REVIEW—BILL OF EXCEPTIONS.

Errors based on the improper argument of the prosecuting attorney must be shown by bill of exceptions and cannot be brought upon affidavits filed on motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2804, 2819.]

3. SAME — ERRORS ON TRIAL — BILL OF EXCEPTIONS.

Errors of the court on the trial must be shown in the bill of exceptions and cannot be shown by affidavits filed on motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2804.]

4. ROBBERY—FORCE OR VIOLENCE—STEALTH.

One who, without using force or violence, stealthily placed her hand in the pocket of another and took therefrom a sum of money before the latter could take hold of her, was not guilty of robbery, but of larceny only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 6.]

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Ella Bibb was convicted of robbery, and she appeals. Reversed and remanded.

Louis I. Ingleheart, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth.

HOBSON, J. Ella Bibb was indicted for robbery. She was convicted and her punishment fixed at four years' confinement in the penitentiary.

She was charged with robbing D. E. Lester by forcibly and feloniously taking from his person his pocketbook or purse containing money of the United States. The proof showed that the man's name was B. E. Lester, but this was not a material variance, under section 128 of the Criminal Code of Practice, as the offense was in other respects described with sufficient certainty to identify the act. Section 128 is as follows: "If an offense involve the commission of, or an attempt to commit an injury to person or property, or the taking of property and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured or as to the owner of the property taken or injured or attempted to be injured, is not material."

Complaint is made of the argument of the commonwealth attorney in his concluding

speech to the jury; but nothing of this is contained in the bill of exceptions. A matter of this sort can only be brought to this court by the bill of exceptions. It cannot be brought here upon the affidavits filed on the motion for new trial. The errors of the court on the trial of the case must be shown in the bill of exceptions, not by the affidavits filed on the motion for new trial.

The facts shown on the trial were that Lester and another negro named Scott Driscoll were in Owensboro, and while there went into a house where there were two negro women, one of whom was Ella Bibb. Lester's statement as to what occurred after he got in is as follows: "But when we got in there I did not see anything but these two women, and I says to my friend, 'We have no business in here,' and one of the women came around where I was, and I guess she saw the print of my pocketbook on the outside of my pants, and she came up and made a dive at my pocket and ran her hand in and got the pocketbook before I could take hold of her, and I felt in my pocket and found that the pocketbook was gone, and I says to her, 'You have got my pocketbook,' and she says, 'No, I haven't,' and I says, 'Yes, you have.'" He said that there was \$8.10 in the pocketbook, and that he went down and got a policeman, who came up and arrested the woman and got his money back for him. He said, in his cross-examination, that when he felt her hand in his pocket he grabbed at her arm, but that he did not catch her arm, that she then had his pocketbook, and she stepped up by the side of him, ran her hand in his pocket, and got the pocketbook out before he could grab her arm. In *Jones v. Commonwealth*, 115 Ky. 592, 74 S. W. 263, 103 Am. St. Rep. 340, Tilton, the prosecuting witness, had \$10 in his vest pocket. The defendant was standing in front of him with his back to him, while he was looking at a bulletin. While in that position, he felt something touch his breast. He immediately grabbed and gave a look down, when he saw defendant's hand, which he had grabbed, a foot from his vest pocket. The defendant pulled and slipped the money to his other hand. It was held that the defendant was not guilty of robbery, but of stealing from Tilton by stealth. In *Dawson v. Commonwealth* (Ky.) 74 S. W. 701, the defendant, a woman, was talking with a man at the gate of the house where she lived. She put her hand in his pocket, when he grabbed her hand and said: "Don't play with my money in that way." She said: "I haven't got your money." He replied: "Yes, you have." Then she laughed. He let her take her hand out, and said to her: "Give me my money now." She refused to do it and threatened to shoot him. It was held that the facts showed that the accused was guilty of petty larceny, and not robbery. These cases are conclusive here. There was no putting of

Lester in fear. There was no force used upon his person. The woman simply stealthily put her hand in his pocket and took out his money before he knew what she was doing. There are cases where force is used to push a person or to pull him about so as to distract his attention, and in this way to rob him. See *Snyder v. Commonwealth*, 55 S. W. 679, 21 Ky. Law Rep. 1538. But in these cases there is force applied to the person. In the case at bar it was simply a stealing by stealth, and under the facts the defendant should only have been convicted of petty larceny.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

BLACK v. ROBERSON.

(Supreme Court of Arkansas. July 13, 1908.)

1. PAYMENT—PAYMENT IN GOODS—MISLEADING INSTRUCTIONS—PASSING OF TITLE.

Defendant delivered certain cotton to plaintiff, and claimed that she told plaintiff she wanted to settle for a certain mule therewith, and that defendant agreed thereto. Plaintiff claimed that the cotton was delivered, to be held for a rise in the market, and that defendant was to benefit by the rise, or stand the loss of a change in the market price. The cotton in question, after being kept for some months, was sold for less than it was worth when delivered to plaintiff. The court instructed that if defendant consented that the cotton be held for a rise in the market, and that it was so held, and afterwards sold, she was only entitled to the amount actually brought when sold, but if the cotton was turned over to plaintiff, and defendant had no further control of it, plaintiff should be charged with the cotton at the price it was worth at the time of the delivery, whether defendant's indebtedness to plaintiff was canceled or not. *Held*, that the instructions, taken together, fairly presented to the jury the issue of the amount of credit defendant should receive, and were not erroneous for referring to control of the cotton without indicating whether physical control or absolute power of disposition was intended.

2. REPLEVIN—GROUNDS OF RECOVERY—TITLE.

In replevin, the plaintiff must recover on the strength of his own title, and not on the weakness of defendant's, and it is necessary for him to establish either general or special ownership in the property in question, before he is entitled to its possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 45–68.]

3. PROPERTY—POSSESSION AS EVIDENCE OF TITLE.

Possession of personal property is prima facie evidence of ownership.

4. PAYMENT—EVIDENCE—BURDEN OF PROOF.

The burden of proving payment is upon the party pleading it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 196.]

5. SALES—CONDITIONAL SALES—ACTIONS FOR RECOVERY OF PROPERTY SOLD—BURDEN OF PROOF—CONTINUANCE OF INDEBTEDNESS.

In an action for the recovery of property alleged to have been conditionally sold, where the sale and reservation of title are not admitted, the burden of proving continuance of the indebtedness is on plaintiff.

Appeal from Circuit Court, Lafayette County; Geo. W. Hays, Judge.

Replevin by Dick Black against Abbie

Roberson. From a judgment for defendant, plaintiff appeals. Affirmed.

Warren, Hamiter & Smith, for appellant.

HILL, C. J. Black brought a replevin suit against Abbie Roberson, suing for the recovery of a mule. The defendant, familiarly called by the witnesses "Aunt Abbie," was a tenant of Black's, and purchased of him a mule, the title to which Black claims was reserved until the purchase money should be paid. Aunt Abbie raised 10 bales of cotton on the place, and brought to him first 3 bales, and afterwards 7. He says that she directed him to hold the cotton for a rise in the market, and that she was to get the benefit of the rise if there should be one, and to stand the loss if the market fell. At the time she delivered the cotton at the gin, it was worth 10¼ cents per pound. He kept it for some months, and sold it for 7¼ cents. She denies the statement that Black was to hold the cotton for a rise in the market. She says when she turned over the first 3 bales that she told him she wanted to settle the mule debt with them, and he agreed thereto. One-fourth of the cotton delivered was rent, and three-fourths was her share. Her three-fourths would have paid for the mule, at the time the bales were delivered, at the price then prevailing. The court instructed the jury that, if the defendant consented that the cotton she delivered be held for a rise in the market, and that it was so held and afterwards sold, she was only entitled to the amount the cotton actually brought when sold; and, on the other hand, instructed the jury that if they believed that the cotton was turned over to the plaintiff, and defendant had no further control of it, the plaintiff should be charged with the cotton at the price it was worth at the time delivery was made, whether the indebtedness of the defendant was canceled or not. These two instructions, taken together, fairly presented the issue to the jury. The latter instruction is criticised for referring to the control of the cotton without indicating whether the physical control of the cotton was meant by it being left to the plaintiff to sell, or whether his absolute power of disposition was intended; but, when taken in connection with the first instruction, the jury could not have been misled by it. The issue was sharply drawn by the court in these instructions, as it was in the testimony, as to whether Aunt Abbie directed her landlord to hold the cotton until there should be a rise in the market, or whether they mutually agreed to settle the mule debt with the first three bales.

The court also told the jury that the plaintiff must recover on the strength of his own title, and not on the weakness of defendant's; and that it was necessary for him to establish either general or special ownership in the property before he was entitled

to its possession; and that possession of personal property is *prima facie* evidence of ownership. These instructions were right. The case was brought in a justice court, and there were no formal pleadings there other than the affidavit in replevin; and when tried in the circuit court, there were no other pleadings, and the plaintiff undertook to make out all of the allegations of his affidavit for replevin by establishing the sale of the mule and the reservation of the title, and that the purchase price had not been paid, thereby entitling him to recover. On the other hand, payment was sought to be established. The burden of proof is upon the party pleading payment to establish it; and, had the pleadings or admissions of the parties admitted the sale of the mule and the reservation of the title, then the burden would have been upon the defendant to prove payment, and it would not have been necessary for the plaintiff to have carried the burden of proving a continuance of the indebtedness. The burden on that issue would then have rested on the defendant. *Fairst v. Waldo*, 57 Ark. 270, 21 S. W. 436. But no such admissions were made, either in the pleadings or otherwise, and the plaintiff had to carry the burden of establishing his case. He would have been entitled to an instruction that, if the jury believed that he had sold the mule, and reserved the title thereto, the defendant would have the burden of proving that the purchase price had been paid; but no such instruction was asked, and the burden throughout the whole case rested upon the plaintiff, as it should have done.

Finding no error, and the evidence being sufficient to sustain the verdict, the judgment is affirmed.

ALLEN v. PHILLIPS.

(Supreme Court of Arkansas. July 13, 1908.)

1. ADVERSE POSSESSION—HOSTILE NATURE OF POSSESSION—EVIDENCE—SUFFICIENCY.

Evidence in ejectment held to warrant a finding that defendant was not a trespasser on the land in controversy, holding merely casually and temporarily, but that he was in possession under bona fide claim of title.

2. EJECTMENT—TITLE OF PLAINTIFF—BURDEN OF PROOF.

Where the evidence for defendant in ejectment is sufficient, in itself, to show defendant's possession under a bona fide claim of title, the burden of proving title in himself is upon plaintiff, and he cannot rely upon the weakness of defendant's title.

3. SAME—TITLE—EVIDENCE—SUFFICIENCY—LAND COMMISSIONER'S DEED.

A deed from the Commissioner of State Lands is merely *prima facie* evidence of title in the grantee, and it is overcome by proof that the sale of the land to the state, in overdue tax proceedings, was never confirmed by the court, for in such case no title passed to the state under the sale.

4. EVIDENCE—DOCUMENTARY EVIDENCE—"COURT RECORDS"—MATTERS NOT FOUND IN THE RECORD.

Where all the records relating to overdue tax proceedings are in existence, and all those

covering the time in question are produced, and the clerk in charge of the records testifies that he has examined them to see whether there was any order confirming a certain overdue tax sale, and that he had examined the papers on file in his office, and had failed to find either the complaint, or the commissioner's report of the sale, and that he found no confirmation of sales under the overdue tax proceedings relating to the land in question, and that confirmation of sales containing no numbers of lands, which were found, seemed to refer to reports of commissioners which did not include the particular tract, it was sufficient to show that there had been no confirmation of the overdue tax sale in question, for no other evidence could be adduced, showing that the sale was not confirmed, and the purpose of a "court record" is to preserve a memorial; and be the evidence of the proceedings had by the court (citing *Words and Phrases*, vol. 4, p. 3866).

Appeal from Circuit Court, Cleburne County; Brice B. Hudgins, Judge.

Ejectment by J. H. Allen against A. L. Phillips. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant sued appellee at law, to recover possession of the northeast quarter of section 34, township 9 north, range 9 west in Cleburne county, Ark. Appellant deraigned title from the state, through a deed from the Commissioner of State Lands to one J. W. Lewellen, and from Lewellen to him. The deed of the State Land Commissioner to Lewellen, filed with the complaint as Exhibit A, recites that the land in question was sold to the state of Arkansas, under a decree rendered by the Van Buren chancery court, under the overdue tax law, which sale was certified to the clerk of Van Buren county by the commissioner of said court, and duly certified by the clerk to the State Land Commissioner, and that the time of redemption had expired. It further recited a consideration of \$400. The deed from Lewellen to plaintiff, a copy of which was filed as Exhibit B, was a warranty deed showing a consideration of \$5,000. The appellee answered deraigning his title also from the state, through one Jesse Russell, who was the sole heir of Martha Russell, who it is alleged held under a donation deed. Appellee tenders in his answer, this deed as Exhibit A. Appellee set up that the donation deed to Martha Russell had been lost or destroyed, and in lieu of this deed exhibited a duly certified transcript of a portion of the record of sales and donations in the office of the Commissioner of State Lands, which he designates as "Exhibit B." The appellee, in his answer, denied that appellant was the owner of the land in question, and denied that the state was the owner of the land at the time of her deed to Lewellen, and denied that appellee was in the wrongful possession, etc. Appellant, to maintain the issues on his part, introduced in evidence the deed of the Commissioner of State Lands and of Lewellen, which he had made an exhibit. The appellee introduced in evidence a certified copy of a portion of the record of the Commissioner of State Lands, showing the donation on September 6, 1872, by Martha Louisa Rus-

sell, of the land in controversy. Appellee then introduced J. A. Thomas, who testified as follows: "I am the circuit clerk of Van Buren county, and as such have charge of the records of the chancery court, which contain the record entries in the overdue tax proceedings had in that county in 1882 and 1884. I have the records of that court before me from 1860 to the present time, and have examined the same for the purpose of seeing whether or not there is any order on these records confirming the sale of this land at overdue tax sale. Have also examined the papers on file in my office, and failed to find either the complaint or commissioner's report of the sale of the same. I find a record of the warning order against the northeast quarter of section 34, township 9 north, range 9 west, also entry of an order pro confesso, and the entry of a decree condemning this land to be sold; but I find no confirmation of sales under the overdue tax proceedings embracing the numbers of this land. I find confirmation of sales under the overdue tax proceedings, which contain no numbers of lands, but they seem to refer to reports of commissioners, which did not include this particular tract." The appellee then adduced evidence, tending to prove that he had been in possession of the land since the 28th of July, 1903, exercising acts of ownership over it. A house was built on the land, and was occupied by tenants of appellee, who worked at his mill. Appellee testified that usually, when one tenant moved out, another moved in. There was evidence in rebuttal to show that the house had only been occupied at intervals by hands who were working at appellee's mill, and while they were cutting the timber from the land. One witness testified that appellee told him that he knew, just before or about the time he began cutting the timber on the land in controversy, of appellant's claiming title thereto. The court gave instructions, to which there was no objection, telling the jury that the burden of proof was on appellant to show that he was the owner and entitled to the possession of the land in controversy, and that the deeds from the Commissioner of State Lands to Lewellen and from Lewellen to appellant were prima facie evidence of title in appellant. Also, over the objection of appellant, gave the following: "The court further instructs you that, while the deeds above referred to show a prima facie title in the plaintiff, still you should find for the defendant if you should find from a preponderance of the evidence that the sale of the land to the state, by the commissioner of the chancery court of Van Buren county, was never confirmed by said chancery court." The court, among other prayers for instructions, refused the following: "If the jury believe from the evidence that the plaintiff has proven by a preponderance of the evidence that he holds title to the land in controversy by a prima facie perfect title, which has been recorded, you must find for the plaintiff, J.

H. Allen. You are instructed that, in ordinary tax sales, objections may be made to the proceedings leading to the sale in a cause of this character, but when the state acquires title by virtue of a sale under the decree of a chancery court, as appears in the state deed produced in this cause, the same cannot be assailed in a collateral way, or in this proceeding. You are instructed that ordinarily, possession of land raises a presumption of a lawful holding; but, if you find from the evidence that the defendant knew of the plaintiff's title or claim, you must further find that said defendant has a better title than the plaintiff has proven in this cause, before you are warranted in bringing a verdict for defendant." The verdict and judgment were for appellee, and this appeal followed.

Moore, Smith & Moore and Mitchell & Thompson, for appellant. J. O. Johnston, for appellee.

WOOD, J. (after stating the facts as above). The pleadings and the evidence warrant a finding that appellee was not a trespasser upon the land in controversy holding same casually and temporarily, but that he was in possession under a bona fide claim of title. Whether he was in fact the true owner was immaterial for the purposes of this case; for his possession under the circumstances cast upon the appellant the burden of proving title in himself. He could not rely upon the weakness of the title of his adversary. *Cook v. Ziff Colored Masonic Lodge*, 80 Ark. 31, 96 S. W. 618. The deed of the Commissioner of State Lands upon which appellant relied was prima facie evidence of title in him. But it was no more than this. *Cracraft v. Meyer*, 76 Ark. 450, 88 S. W. 1027, and appellee has overcome the prima facie title by showing that the sale of the land in controversy was never confirmed by the court, and therefore no title passed to the state under such sale. *Neal v. Andrews*, 53 Ark. 445, 14 S. W. 646; *Neal v. Wideman*, 59 Ark. 5, 26 S. W. 16. The proof was sufficient to show that there had been no confirmation of the overdue tax sale. All the records of the chancery court were produced, that should have shown such confirmation had it taken place, and they did not show it. This is not a case where the clerk shows that he could not find in his office certain records, that might or should have contained the evidence of the confirmation, as in *Scott v. Mills*, 49 Ark. 266, at page 276, 4 S. W. 908. But here the records are all in existence, and all produced, as the proof affirmatively shows, and they do not show that the sale was confirmed. This is evidence, and the only evidence that could be adduced, showing that the sale was not confirmed. The purpose of the court records is to preserve a memorial, and be the evidence of the proceedings had by the court. 2 Chit. Bl. Comm. 264; *Words & Phrases Judicially Defined*, p. 3866.

We find no error in the instructions of the court, and the verdict was sustained by the evidence. The judgment is right. Affirmed.

TAYLOR et al. v. McCLINTOCK.

(Supreme Court of Arkansas. June 22, 1908.)

1. WILLS — "TESTAMENTARY CAPACITY" — TEST.

The test of "testamentary capacity" is that testator have capacity to retain in memory, without prompting, the extent and condition of his property, and comprehend to whom he is giving it, and be capable of appreciating the deserts and relations to him of others, whom he excludes as beneficiaries; the test relating, not to the moral quality of the act done, but to testator's mental capacity to do what he did, and not whether he actually appreciated the deserts of and relation to him of one excluded, but whether he had the capacity to do so, and it not being required that he correctly ascertain the legal status of each person apparently standing in natural relation to him. In the exercise of reason he may move upon false or insufficient evidence, or by mistake of law, and thus exclude from his bounty those whom, but for his error, he would have recognized; but stupid error, either in his reasoning or conclusion, is not lack of testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 98-100.]

For other definitions, see Words and Phrases, vol. 3, pp. 6929-6931.]

2. SAME—RIGHT TO WILL PROPERTY.

Every one has the untrammelled right to dispose of his property by will as he pleases, within statutory limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1.]

3. SAME—MORAL AND MEDICAL INSANITY.

Moral or medical insanity, manifested in jealousy, anger, hate, or resentment, however violent and unnatural, will not defeat a will, unless an emanation of a delusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 71-82.]

4. SAME—"MEDICAL INSANITY"—"MORAL INSANITY."

"Moral insanity" or "medical insanity" is a perversion of the sentiment and affections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 76.]

For other definitions, see Words and Phrases, vol. 5, p. 4579.]

5. SAME—NECESSITY FOR EQUAL JUSTICE TO BENEFICIARIES.

Testators need not mete out equal and exact justice to all expectant relations, and the motives of partiality, affection, or resentment by which they naturally may be influenced are not subject to judicial review; and, if one has the required testamentary capacity, he may make his will as eccentric, injudicious, and unjust as caprice, frivolity, or revenge can dictate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 203.]

6. SAME—EVIDENCE.

Since mind is represented by feeling, thought, and volition, and any departure from their normal relations tends to show mental disorder, when the mental capacity of a testator respecting a particular person is questioned, it is always proper to show the state of his feelings and thoughts, as manifested by his words and acts towards such person, and generally in so far as these tend to prove mental capacity, or the lack of it, in making a will, and whether testator at the time was dominated by delusions concerning such person that caused him to make it; a wide range of inquiry being permissible

into facts and circumstances before and after the making of the will, to enable a jury to determine the probable state of testator's mind, and the extent and force of the restraint, when the will was executed, including the will's contents, the manner in which it was written and executed, the nature and extent of testator's estate, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claim of particular persons, the situation of testator himself, and the circumstances under which the will was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 111-133.]

7. SAME—TESTATOR'S SANITY.

The test of testamentary capacity is the same, whether testator's insanity be attributable to dementia or insane delusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 71-82.]

8. SAME—QUESTIONS FOR COURT AND JURY.

Where a testator's testamentary capacity is questioned on the ground of delusion or insanity, it is for the court to define delusions, pronounce the rules for their ascertainment, and declare their effects, and for the jury to find whether a delusion existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 763.]

9. SAME—"PARANOIA."

"Paranoia" is a term used by medical experts, alienists, and authors on medical jurisprudence to designate the form of insanity characterized by systemized delusions; the term taking the place of "monomania" or "partial insanity."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 78.]

For other definitions, see Words and Phrases, vol. 6, p. 5166.]

10. SAME—"SYSTEMATIZED DELUSION."

A "systematized delusion" is one based on a false premise, pursued by a logical process of reasoning to an insane conclusion; there being one central delusion, around which other aberrations of the mind converge.

11. SAME.

The mere existence of a delusion in a testator's mind will not invalidate his will, unless the delusion is shown to have influenced the will's provisions; one being possessed of a delusion fatal to his will, where he conceives something extravagant and believes it as a fact, when in reality it does not exist, but is purely a product of the imagination, and where such belief is so persistent and permanent that he cannot be convinced by any evidence or argument to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 79.]

12. SAME.

An insane delusion, as affecting one's testamentary capacity, cannot be based upon any purely esoteric and abstract subject, since beliefs concerning such subjects are speculative, and cannot be proven false.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-85.]

13. SAME—DELUSION AS TO FILIAL LOVE.

An insane delusion, such as will defeat one's will, may be based upon a belief that his daughter does not care for him or love him as well as she does others, or is ungrateful to him; but a belief that she does not care for him "as much as he wishes," or "as much as his daughter should," or that she is not "as grateful as he wishes," or "as grateful as she should be," cannot be shown to invalidate his will, since it is a belief as to the degree of affection and gratitude not subject to measurement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 80.]

14. SAME—EVIDENCE.

Testator's daughter's conduct and declarations, showing her mental attitude towards testator and others, are original evidence on an issue as to the falsity of his belief that she did not care for him, or was ungrateful to him, etc., as affecting his testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 129, 135.]

15. EVIDENCE—BODILY OR MENTAL FEELINGS.

When one's bodily or mental feelings are in issue, the usual expressions of such feelings as made at the time in question are original evidence; and if they are the natural language of the affections, whether of body or mind, they furnish satisfactory evidence.

16. SAME—"EVIDENCE"—DEFINITION.

"Evidence" is the means by which facts are proved.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2521-2524; vol. 8, p. 7655.]

17. SAME.

That which no sane man would believe is not "evidence."

18. WILLS—TESTATOR'S SANITY—EVIDENCE.

A belief in something that no sane man could believe is evidence of insanity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 83.]

19. EVIDENCE—NATURE.

Evidence, in a legal sense, is external, being brought into the mind, through the senses, by the mental faculty of perception, and appropriated by the faculty of reason.

20. WILLS—TESTATOR'S SANITY—"INSANE DELUSION."

A belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason; and in such cases, no matter how imperfect the reasoning process may be, or however erroneous the conclusion reached, it is not an "insane delusion" (citing Words and Phrases, vol. 4, p. 3644).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-81.]

21. SAME—TESTAMENTARY CAPACITY—BURDEN OF PROOF.

Testamentary capacity being presumed, the burden of proof is on one attacking a will on the ground of insanity; and, if testator's general capacity is conceded, the proof must be of the clearest and most satisfactory kind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110, 138.]

22. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Instructions should be confined to the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

23. SAME—INSTRUCTIONS AS A WHOLE.

Instructions in a case should be considered as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

24. SAME—APPLICABILITY TO EVIDENCE.

Each party has the right to have the theory of the case he contends for, and which he has adduced evidence to support, submitted to the jury upon proper instructions, unless the court in its general charge has declared the law so that the respective contentions may be presented in argument to the jury without unfairness or prejudice to either party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 477, 478, 524-527.]

25. WILLS—TESTATOR'S MENTAL CAPACITY—INSTRUCTIONS.

Where testator's mental capacity was questioned on the ground that he had an insane delu-

sion that his daughter did not care for him, etc., it was improper to refuse to instruct that belief founded on any evidence is not a delusion, though almost the converse of the proposition was stated in the instructions, but not so tersely and clearly, especially since the jury might have been misled by testimony of medical experts, who defined a delusion as "a belief, an idea, held by a person against such ordinary average information or experience as would to the ordinary average individual prove sufficient to cause him to give up the idea," which testimony did not meet the legal requirements of a delusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 779-781.]

26. SAME—SCOPE OF INQUIRY.

Where a will was contested by testator's daughter on the ground of his testamentary incapacity, arising from an insane delusion that she did not care for him, etc., it was improper to refuse to limit the inquiry as to mental incapacity, and testator's consequent failure to comprehend his daughter's deserts, to that brought about by the delusion, where there was testimony tending to show at least moral perversion or medical insanity on testator's part, if a delusion did not exist, since the jury might have felt authorized to find against the will because of what they considered great moral perversity of testator towards his daughter, which might in their opinion have rendered him incapable of comprehending her deserts.

27. SAME—INSTRUCTIONS.

A will being contested by testator's daughter, proponents requested an instruction that the particular expressions by testator of apprehensions or belief that his daughter did not care for him, etc., made in a spirit of anger after some exciting provocation, and not becoming a fixed and abiding belief, controlling his actions respecting his daughter, would not be a delusion; that, before the jury could find that there was any delusion, it must find that there was an insane delusion, which was fixed and enduring, and which controlled testator's mind and act; and that, to invalidate the will on that account, it must appear that the delusion existed, and that it influenced the making of the will as affecting the daughter. The instruction was given with a modifying statement that if, taking all the evidence together and in connection with the will itself, the jury should find that testator was not of sound mind and capable of understanding and comprehending his daughter's deserts, the will was invalid. Held, that it was error to modify the instruction, since the modification was not germane to the paragraph modified, but presented an independent proposition of law, which should have been given separately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 779-781; vol. 46, Trial, §§ 668-672.]

28. TRIAL—INSTRUCTIONS—REQUESTS.

Instructions covered by those given are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

29. WILLS—TESTAMENTARY CAPACITY—INSANE DELUSIONS.

Where one's testamentary capacity is attacked on the ground that he possessed an insane delusion, it is not enough that his belief was false; but it must also have been adhered to against all evidence and argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-81.]

30. SAME.

One may be entirely sane mentally on all subjects or as to all individuals save one, and as to that his mind may be so diseased as to render it impossible to say that he is of sound mind and capable of reasoning and exercising a sound judgment respecting the subject of his

delusion, or of comprehending the obligations he may owe to such subject; and, in considering the mental soundness of a testator and his capacity to make a will, on his will being contested by testator's daughter on the ground that he possessed an insane delusion that she did not care for him, etc., the jury could consider all the facts and circumstances adduced at the hearing bearing upon his relations to his daughter and his alleged delusion, and if he entertained an insane delusion respecting her, which in any way affected his will, the will was invalid, though he was perfectly sane in all other respects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-81.]

31. SAME.

No disorder of the moral affections, feelings, or propensities will affect one's testamentary capacity, unless accompanied by an insane delusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 76.]

32. SAME—ARGUMENTATIVE INSTRUCTIONS.

An instruction that one has the absolute right to will his property as he sees fit; that the law does not attempt to say who should be the objects of his bounty, nor inquire whether the will is reasonable, just, or natural, in dealing with what might be deemed by others the natural objects of his affections; that though testator exhibited likes and dislikes among his relatives for which the jury might not discern an intelligible reason, or that his regard for his daughter was not such as would be expected from a father towards his child, or that he was prejudiced against her, and that the disposition of his property was unnatural or unjust, or that if his affections were disordered, that was no ground for invalidating his will, since even moral insanity—that is, disorder of the moral affections or propensities—alone, unless accompanied by insane delusions, is not sufficient to invalidate a will, was properly refused as being argumentative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 779-781; vol. 46, Trial, § 561.]

33. SAME.

The court in a will contest having instructed that, if testator did not have sufficient mental capacity to understand his natural obligations to his daughter and to comprehend her deserts, he was of unsound mind and incapable of making a will, it was error to refuse to instruct that, if a testator has capacity to understand his obligations to his children, his mere disregard of such obligation does not invalidate his will, and that in such case he may make such disposition as he pleases, whether equal or unequal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 779-781.]

34. SAME—EVIDENCE—JURY QUESTION.

On a will contest by testator's daughter, evidence held to require submission to the jury of an issue as to whether her marriage caused testator to discriminate against her in his will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 767.]

35. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence was harmless error, where the information sought had already been substantially elicited on cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

36. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Kirby's Dig. § 3093, providing that in civil actions no witness shall be excluded because a party to the suit, etc., except that in actions by or against executors, etc., in which judgment may go for or against them, neither party may

testify against the other as to any transactions with or statements of testators, etc., unless called to testify by his adversary, does not apply to a will contest, but is intended to protect decedents' estates from attacks of persons having had or claiming to have had transactions with decedent prior to his death, or who seek to establish claims against his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 565.]

37. SAME—HUSBAND AND WIFE—"BUSINESS TRANSACTED."

Kirby's Dig. § 3095, authorizing a husband or wife to testify for the other respecting any "business transacted" by the one for the other in the capacity of agent, did not authorize the husband of a will contestant to testify concerning a copy of a letter written by contestant to testator; the term "business transacted" referring to business transactions with third persons, and not with each other, and the statute being designed to enable a husband or wife who had transacted business with a third person through the other as agent to prove such business by the agent who transacted it, the principal not having personal knowledge thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 645, 646.]

38. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—EVIDENCE.

In a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, etc., it was improper, but not prejudicial error, to allow her to state whether she failed to give testator her confidence when with him as stated in his letter, and what was her course respecting advising testator as to her relations with her husband before their marriage; contestant answering that the statement in the letter was not correct, and that she was perfectly frank with testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

39. SAME.

It was improper, but not prejudicial error, to allow contestant's witness to state whether the contestant exhibited "at any time any greater fondness for any person than she did for her father."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

40. WILLS—CONTEST—TESTAMENTARY CAPACITY—EVIDENCE.

On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, proponents claiming that he discriminated against her because of her marriage, testimony showing her husband's character and reputation was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 123.]

41. SAME.

Where a testator's mental capacity is questioned on the ground of dementia, the inequalities of his will and the nature and extent of his estate and the sources of its acquisition are properly considered; but where delusion is alleged as the ground of the incapacity, such matters can only be shown to show that testator, if the delusion be established, was dominated by it when the will was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 123, 129.]

42. SAME.

On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, she could show what property of her mother passed to testator, and its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 123.]

43. TRIAL — MOTION TO EXCLUDE EVIDENCE — MOTION PARTLY BAD — EFFECT.

A motion to exclude all of a witness' testimony is properly overruled, where part of the testimony is competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 248.]

44. EVIDENCE — OPINION EVIDENCE — EXAMINATION OF EXPERTS — SCOPE OF ANSWERS.

On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, it was prejudicial error to allow experts' testimony to assume an argumentative form on the moral phases of testator's conduct towards the daughter and her rights.

45. WILLS — TESTAMENTARY CAPACITY — EVIDENCE.

On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, it was not error to exclude testimony of one called to testify as to testator's sanity as to what was the general character of the issues in a lawsuit in which witness was counsel and in which testator did all the work of preparation, looking up witnesses, etc., nor to exclude testimony as to whether the issue in such suit was whether one from whom testator acquired land was a monomaniac.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 131.]

46. SAME.

Questions asked proponents' witnesses as to whether they had ever heard testator's sanity questioned until after his death were properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 127.]

47. APPEAL AND ERROR — REVIEW — HARMLESS ERROR — EVIDENCE.

Though, on a will contest by testator's daughter on the ground that he had an insane delusion, it was improper to allow contestant to ask a witness called by proponents to prove testator's sanity whether witness had found farming profitable, the error was not prejudicial; the testimony appearing to have been offered to contradict testator's statements in some of his letters that during certain years he made no money, or to prove that he had made money farming.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

48. WILLS — TESTAMENTARY CAPACITY — EVIDENCE.

On an issue as to testator's sanity, a witness stated that testator was very painstaking, etc., and that as a bank director witness thought he went to extremes by seeking information of bookkeepers that should have been obtained from the cashier, and that testator had been sued as a director. *Held*, that it was not error to exclude evidence for proponents showing that the principal charge against testator and his co-directors was that they accepted the statements of officers, instead of going to the books and the bookkeepers; such testimony being offered by proponents to explain why testator did what witness criticised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 131.]

49. EVIDENCE — HEARSAY.

It was not error, in a will contest, to exclude a question asked a witness as to whether it was understood that testator owned certain real estate in 1863 or earlier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1220.]

50. WILLS — CONTEST — EVIDENCE.

On a will contest by testator's daughter, it was not error to exclude a question asked by proponents of the attorney who prepared the will as to whether he intended to reduce the

benefit contestant would receive, when he suggested to testator that he substitute an absolute gift for the annuity he named in his first directions as to the will.

51. SAME.

It was not error to receive evidence tending to show that testator acquired his fortune through his wife from a third person, nor to exclude testimony of one who had examined the probate records that such person's estate was wholly insolvent and paid a very small dividend to the creditors.

52. SAME.

It was improper to allow contestant to show that her stepmother did not send her any notice of testator's last illness, if the daughter could have shown that testator did not request that she be notified of his illness.

53. TRIAL — RECEPTION OF EVIDENCE.

It is not proper to ask a witness an incompetent question as preliminary to one that is competent.

54. APPEAL AND ERROR — REVIEW — HARMLESS ERROR — EVIDENCE.

In a will contest, it was harmless error to allow contestant to show that one from whom testator acquired a large estate had 3,000 bales of cotton burned in 1863.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

55. WILLS — TESTATOR'S MENTAL CAPACITY — EVIDENCE.

Where testator's mental capacity was in issue, it was not error to exclude a question asked by proponents of an expert as to what difficulty testator's friends, family, and acquaintances would have experienced in detecting that he was insane between 1895 and 1904, based on the supposition that he was in the first stages of paranoia in 1880, when he was about 50 years old, and that he lived after the disease developed 24 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 117.]

56. EVIDENCE — OPINION EVIDENCE — MENTAL CAPACITY.

Where a testator's mental capacity was in issue, it was not error to exclude questions asked physicians, who had stated that they were physicians in general practice and had never made a specialty of treating diseases of the mind and nervous system, as to whether a general practitioner is as competent to express an opinion upon a case of doubtful mental disorder as one of ability, who has made a specialty of diseases of the brain and nervous system for a great many years, and whether witness believed that they were as capable of passing upon a case of doubtful mental disorder as if since the beginning of their practice they had devoted themselves as specialists to the study and practice of such diseases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2314.]

57. SAME.

It was not error to allow a physician to state his opinion as to the condition of testator's mind, and that testator was not competent to dispose of his property so far as contestant was concerned, nor to deal with matters concerning her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2314.]

58. WITNESSES — IMPEACHMENT — CROSS-EXAMINATION.

Under the general rule that, when a witness is cross-examined on a collateral matter, he cannot be subsequently contradicted by the party asking the question, where, in a will contest by testator's daughter, her stepmother, one of the proponents, denied on cross-examination that she had told contestant about a year after the will was made, and after testator's death, that tes-

tator had not left any word for contestant, that he had spent his life trying to forget her, and that the stepmother had tried to make his life as happy as she could, contestant could not contradict such testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1273.]

59. SAME—IMPEACHMENT—METHODS.

It was improper to allow contestant, for the purpose of affecting the credibility of a witness, whose deposition was taken upon cross-interrogatories, to show that an attorney and brother-in-law of one of the proponents was present when the deposition was taken, and that there was no one present representing contestant, etc., as contestant's remedy was to quash the deposition, if it was not taken according to Kirby's Dig. § 3181, providing that, where a deposition is taken upon interrogatories, neither party nor his agent nor attorney shall be present unless both parties are present or represented, or unless the opposite party or his agent or attorney has been notified of the time and place of taking depositions, or the party attending has been notified to attend; and the error was accentuated by the court refusing to instruct that the attorney had a right to be present at the taking of the deposition.

60. EVIDENCE—OPINION EVIDENCE—MENTAL CAPACITY—HYPOTHETICAL QUESTIONS—SUFFICIENCY.

In a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, etc., which led him to discriminate against her, her hypothetical case was defective, where it omitted the facts that his stepchildren had sued him for an interest in their mother's estate, that the suit aroused bitter feeling in the family with whom the contestant was living against testator, and that an attorney in the suit did not speak to testator up to his death, where without such facts a reason for testator's taking contestant from the custody of one of his stepchildren did not appear, thus supporting contestant's claim that he was mentally unsound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2369-2374.]

61. SAME.

A hypothetical question, based on facts not proven, is defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2373.]

62. SAME.

Hypothetical questions must fairly reflect the evidence, and unless they do so the resultant opinion evidence is not responsive to the real facts and can have no probative force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2370.]

63. SAME.

A hypothetical case must embrace undisputed facts essential to the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2370.]

64. SAME.

In taking the opinion of an expert on a hypothetical question, either party may assume as proved all facts which the evidence tends to prove, and an opinion may be elicited upon the whole evidence, or any part thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2371.]

65. SAME.

When a party seeks to take an expert opinion upon a hypothetical question based upon the whole or any selected part of the evidence, the court must so control the form of the question that there may be no abuse of his right to take the opinion; the right being subject to abuse by allowing the opinion to be so given as to mislead the jury, by concealing the real signifi-

cance of the evidence, or by unduly emphasizing certain favorable or unfavorable data.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2369-2374.]

McCulloch and Hart, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

In the matter of C. M. Taylor's estate. Maud J. McClintock contested a will offered for probate by Julia P. Taylor and another, executors. From a judgment of the circuit court for contestant on appeal from the probate court, proponents and others appeal. Reversed, and remanded for a new trial.

Proponents' third requested instruction, as modified and given, referred to under point 3 of the second subdivision of the opinion, reads as follows:

"Periodical expressions by Dr. Taylor of apprehensions, or even belief, that his daughter did not love him or had been disobedient, or was undutiful, or had deceived him, which were made in a spirit of anger after some exciting provocation, and which did not become a fixed and abiding belief, controlling his actions with reference to his daughter, would not be a delusion. Before the jury can find that there was any delusion, it must find that there was an insane delusion, which was fixed and enduring, and which controlled the mind and acts of Dr. Taylor with reference to his daughter; and, to invalidate the will on that account, it must appear that such a delusion existed, and that it influenced the making of the will so far as it affects the contestant.

"On the other hand, if, taking all the evidence together and in connection with the provisions of the will itself, the jury shall find that C. M. Taylor was not of sound mind and capable of understanding and comprehending the desert of his daughter at the time the will was executed, you are instructed that it was not his will."

Instruction 8, given for contestant and referred to under point 7 of subdivision 2 of the opinion, reads as follows:

"A person may be entirely sound mentally on all subjects or as to all individuals save one, and as to that particular subject or individual his mind may be so diseased as to render it impossible to say that he is of sound mind and is capable of reasoning and exercising a sound judgment in regard to the subject of such delusion, or of comprehending the obligations he may owe to the individual who is the subject of the delusion; and the jury are instructed, in considering the question as to the mental soundness of C. M. Taylor and his capacity to make a will at the date of the paper offered for probate, they should take into consideration all the facts and circumstances adduced at this hearing bearing upon his relations to his daughter and his alleged delusion in regard to the state of her affection for him. And if you find that he entertained an insane delusion in regard to her,

which in any way affected the disposition made by him of his property in his will, you will find for the contestant, notwithstanding you believe he was perfectly sane and sound mentally in all other respects, and was so regarded by his friends and business associates."

Proponents' seventh requested instruction, referred to under point 9, subdivision 2, of the opinion, reads as follows:

"No disorder of the moral affections, feelings, or propensities, unless it is accompanied by insane delusion, will incapacitate a person to make a will, or invalidate a will when made by him."

Proponents' seventeenth requested instruction, referred to under point 9, subdivision 2, of the opinion, reads as follows:

"You are instructed a person has the absolute right to dispose of his property by will as he sees fit, and the law does not attempt to say who should be, or who should not be, the objects of his bounty; nor does it inquire whether the will is reasonable or unreasonable, just or unjust, or even whether it is natural or unnatural, in dealing with what might be deemed by others the natural objects of his affections. And although that Dr. Taylor exhibited likes and dislikes among his relatives or members of the family for which you might not discern an intelligible reason, or that his regard for his daughter was not such as you would expect from a father towards his child, or that he was prejudiced against her, and that the disposition of his property by the will was unnatural or unjust, or if you find that his affections were disordered, this is no ground on which the law will avoid his will; for even moral insanity—that is, disorder of the moral affections or propensities—alone, unless accompanied by insane delusion, is not sufficient to invalidate a will, or to incapacitate a person to make one."

Contestant's requested instruction No. 2 and proponents' twenty-first requested instruction, referred to under point 10, subdivision 2, of the opinion, read as follows, respectively:

"(2) If the jury believe from all the evidence that C. M. Taylor did not, at the time the paper offered for probate was executed, have sufficient mental capacity to understand his natural obligations to his daughter, the contestant, and to comprehend her deserts as his daughter, he was of unsound mind within the meaning of the law, and incapable of making a will, and they should find for the contestant."

"(21) If a testator has the capacity to understand his obligation to his children, his mere disregard of such obligation does not render his will invalid. In such case he may make such disposition as he pleases—one which makes an unequal distribution amongst his children, as well as one which makes an equal distribution."

Under point 4, subdivision 3, of the opinion, proponents complain that the court err-

ed in permitting contestant to answer the question of her counsel: "In this letter it is stated that you failed to give your father your confidence when you were with him. Please state if the statement in the letter is correct"—which she said was not correct, and also in permitting her to answer the question, "I wish you to state what your course was in regard to advising and informing your father of your relations with Mr. McClintock, during the entire period of your correspondence and engagement to him, before your marriage," her answer being, "I was perfectly frank and sincere with him."

Under point 5, subdivision 3, of the opinion, proponents complain that the court improperly permitted contestant to ask a witness to answer the question, "Did she exhibit at any time any greater fondness for any person than she did for her father?" witness' answer being, "She did not."

Under point 13, subdivision 3, of the opinion, it appears that, on a witness called to testify as to testator's sanity being asked to state the general character of the issues in the lawsuit in which witness was testator's counsel and in which testator did all the work of preparation, looking up witnesses, etc., objection was sustained to the question, and that objection was also sustained to a question as to whether the issue in such lawsuit was one of monomania of one from whom testator acquired land.

Under point 14, subdivision 3, of the opinion, contestant complained of the exclusion of a question asked witnesses as to whether they had ever heard testator's sanity questioned until after his death.

Under point 15, subdivision 3, of the opinion, it appears that a witness called by proponents to prove testator's sanity was asked, over proponents' objection, if he had found farming profitable; the testimony appearing to have been offered to contradict testator's statement that during certain years he made no money, or to prove that he had made money farming.

Under point 16 of the third subdivision of the opinion it appears that a witness stated that testator was very painstaking, etc., and that as a bank director witness thought he went to extremes by seeking information of bookkeepers that should have been gotten from the cashier, and that testator had been sued as a director. Proponents attempted to show by witness that the principal charge against testator and his co-directors was that they accepted the statement of officers, instead of going to the books and bookkeepers, as explaining why testator did what witness criticised; but the court excluded such testimony.

Under point 18, subdivision 3, of the opinion, proponents complain that the court erred in not permitting them to ask the attorney who prepared the will whether he intended to reduce the benefit contestant would receive when he suggested to testator that tes-

tator substitute an absolute gift of \$10,000 for the annuity he named when giving his first directions as to the will.

Under point 19, subdivision 3, of the opinion, proponents complain of the admission of evidence that testator acquired his fortune through his wife from one Dr. Jordan, and of the exclusion of testimony of one who examined the probate records that Dr. Jordan's estate was insolvent and paid but a very small dividend to his creditors.

Under point 21, subdivision 3, of the opinion, contestant complained that, to show that Dr. Jordan was a man of great wealth and that testator had gotten from him so large an estate that his belief as to his daughter's affections became disordered and incapacitated to make a will, a witness was permitted to state that "in 1863 they burned 3,000 bales of cotton belonging to Dr. Jordan."

Under point 22, subdivision 3, of the opinion, proponents complain because a witness was not allowed to state what difficulty testator's friends, family, and acquaintances would have experienced in detecting that he was insane between 1895 and 1904, based on the supposition that testator was in the first stages of paranoia as early as 1890, when he was about 50 years old, and that he lived after the disease developed 24 years.

Under point 23, subdivision 3, of the opinion, proponents complain of the exclusion of questions asked experts on cross-examination, after each had stated that he was a physician in general practice and had never made a specialty of treating diseases of the mind and nervous system, as to whether they felt that one engaged in general practice is as competent to express an opinion upon a case of doubtful mental disorder as a man of ability, who has made a specialty of diseases of the brain and nervous system for a great many years, and as to whether they believed that they were as capable of passing upon such a case as if since the beginning of their practice they had devoted themselves as specialists to the study and practice of mental and nervous diseases.

Under point 23½, subdivision 3, of the opinion, proponents complain because a physician was permitted to state his opinion as to the condition of testator's mind, and that testator was not competent to dispose of his property so far as contestant was concerned, nor to deal with matters concerning her.

Ratcliffe & Fletcher and Rose, Hemingway, Cantrell & Loughborough, for appellants. Allen & Duncan, C. J. Bronston, and Moore, Smith & Moore, for appellee.

WOOD, J. Appellee contends that her father, at the time the will was executed, was under the insane delusion "that she did not love him, did not love him as a daughter should, or love him as well as she loved other persons with whom she was intimately associated, and that she was ungrateful for and unappreciative of the great love and care

that he had bestowed on her." Appellants contend that Dr. Taylor was sane when he executed his will, and that its provision discriminating against her was because of her marriage. Conceding that the evidence tended to support the respective contentions, we will consider the law applicable to such cases, and then apply it to the instructions in the case at bar.

I. The test of testamentary capacity as declared by this court is that the testator shall have capacity "to retain in memory, without prompting, the extent and condition of his property, and comprehend to whom he was giving it, and be capable of appreciating the deserts and relations to him of others whom he excluded from participation in the estate." *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 536. This rule is supported by the weight of authority. 1 Wharton & Stille's Med. Jurisprudence, § 67, and note; 1 Clevenger, Med. Jurisprudence of Insanity, § 287, and note 1. The test relates, not to the moral quality of the act done, but to the mental capacity of the testator to do what he did; not whether the testator did actually appreciate the deserts of and relation to him of the one excluded, but whether he had at the time the capacity to do so. "It is not required that he shall in fact correctly ascertain the legal status of each person who apparently stands in natural relation to him. In the exercise of reason, he may move upon false or insufficient evidence, or by mistake of law, and thus exclude from his bounty those whom, but for his error, he would have recognized. Stupid error, either in his reasoning or conclusion, is not lack of testamentary capacity." *Smith v. Smith*, 48 N. J. Eq. 568, 25 Atl. 11; 1 Wharton & Stille's Med. Jur. p. 73, § 767. There is a clear distinction between having the capacity to comprehend deserts and actually comprehending them. The former the law requires; the latter it does not. Jurors, in their desire to "even up" what may seem to them the gross inequalities of a will, are apt to take the one for the other, and treat them as convertible terms. Care, therefore, should be taken by the courts to see that the distinction mentioned is observed; for it is precisely the one that public policy dictates and the law requires in order to preserve the right and power of testamentary disposition. *Greenwood v. Greenwood*, 7 Curt. Ecc. Rep. 434; *In re McDivitt's Case*, 95 Cal. 17, 30 Pac. 101; *King v. Rowan*, 82 Miss. 1, 34 South. 327; *Riggs v. Am. Tract Soc.*, 95 N. Y. 511.

Every man has the untrammelled right to dispose of his property by will as he pleases, with only such limitations as the statute may impose. The "English law," said Lord Chief Justice Cockburn, "leaves everything to the unfettered discretion of the testator, on the assumption that though, in some instances, caprice or passion, or the power of new ties, may lead to the neglect of claims that ought

to be attended to, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a disposition prescribed by the stereotyped and inflexible rule of general law." *Banks v. Goodfellow*, L. R. 5 Q. B. 549. Therefore nothing short of mental unsoundness, when measured by the test above announced, will avoid a will. Moral—or what the books term "medical"—insanity, a perversion of the sentiments and affections, manifested in jealousy, anger, hate, or resentment, however violent and unnatural, will not defeat a will, unless the emanation of a delusion. *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Schouler on Wills*, 162, 163; 1 *Wharton & Stille's Med. Jur.* 78; 16 *Am. & Eng. Enc. (2d Ed.)* 563; *McClintock v. Curd*, 32 Mo. 411-421, 422; 1 *Jarman on Wills*, —; *Frere v. Peacocke*, 1 Rob. Eccl. Cas. 448; *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 307; *Boardman v. Woodman*, 47 N. H. 120; *In re Forman's Will*, 54 Barb. (N. Y.) 274; 3 *Witthaus & Becker's Med. Jur.* 183. "Testators are not required by law to mete out equal and exact justice to all expectant relations in the disposition of their estates by will, and the motives of partiality, affection, or resentment by which they naturally may be influenced are not subject to examination and review by the courts." *Barricklow v. Stewart*, 163 Ind. 438, 72 N. E. 128; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681. If one has the capacity indicated to make a will, then he may make it as "eccentric, injudicious, and unjust as caprice, frivolity, or revenge can dictate." *Schneider v. Vosburgh* (Mich.) 106 N. W. 1130; *In re Spencer's Estate*, 96 Cal. 448, 31 Pac. 454; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

Still "mind is represented by feeling, thought, and volition, and any departure in these from their normal relations" tends to show mental disorder. 3 *Witthaus & Becker's Med. Jur.* 182. Therefore, when the mental capacity of a testator to make a will with reference to a particular individual is questioned, it is always proper to show the state of his feelings and thoughts, as manifested by his words and acts towards such individual, and, indeed, generally, in so far as these tend to prove mental capacity, or the lack of it, in making the will, and whether the testator at the time was dominated by delusions concerning the individual that caused him to make it. Hence it is that, "In order to determine the capacity of the testator's mind and its true action at the time the will is made, a wider range of inquiry is permissible into facts and circumstances, whether before or after the time of making the will, the better to enable the jury to determine the probable state of the mind, and the extent and force of the restraint, at the time the will was execut-

ed. The contents of the will, the manner in which it was written and executed, the nature and extent of the testator's estate, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claim of particular individuals, the situation of the testator himself, and the circumstances under which the will was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of the testator's capacity to make the will." *Tobin et al. v. Jenkins et al.*, 29 Ark. 151, 157-160, quoting *Jarman on Wills*, 79.

The test of testamentary capacity is necessarily the same, whether the insanity be attributable to dementia or insane delusion—paranoia. While appellee's plea against the will was broad enough to cover dementia, or general insanity, the evidence tends to show, and appellee only contends for, paranoia or delusional insanity. So we will next consider "delusion," and as synonymous with "insanity." It is for the court to define delusions, announce the rules for their ascertainment, and declare their effects. It is for the jury to find whether a delusion exists in any given case. 1 *Clevenger, Med. Jur. of Insan.* pp. 308, 309, § 23; *Proctor v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473. "Paranoia" is a term used by medical experts, alienists, and authors on medical jurisprudence to designate the form of insanity characterized by systematized delusions. A systematized delusion is one based on a false premise, pursued by a logical process of reasoning to an insane conclusion. 1 *Wharton & Stille's Med. Jur.* § 1020 et seq. There is one central delusion, around which other aberrations of the mind converge. The term "paranoia" takes the place of the word "monomania" or "partial insanity," and includes all that was formerly meant by that word, but is considered a more accurate term to describe the peculiar form of delusional insanity we are now considering. 1 *Wharton & Stille's Med. Jur.* § 1022; 1 *Clevenger, Med. Jur. of Insanity*, 860. Mr. Clevenger, in his excellent work on *Medical Jurisprudence of Insanity*, says: "The theory of medical science that there is no such thing as partial insanity, and that a man is either sane or insane, is not true in law, and that to establish unsoundness of mind it is not necessary that it should be general. It is sufficient if proved to exist on one or more subjects, though in all other respects the individual may conduct himself with the utmost propriety. Within this rule partial insanity or monomania invalidates a will, which is its direct offspring, or where the will was in any way the effect of or the result of such insanity, though the testator's general capacity was unimpeached." 1 *Clevenger*, p. 293, § 15. Our own court, in *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058, said: "The law now recognizes the fact, well

established by the investigation and observation of medical experts, that there may be a derangement of mind as to a particular subject and yet capacity to comprehend and intelligently act on other subjects. The fact that the grantor was a monomaniac and possessed of insane delusions on some subjects, not connected with the conveyance of the matters out of which it grew, is not sufficient to invalidate his deed. To have that effect, the insane delusion must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew." See, also, *Bolling v. State*, 54 Ark. 601, 16 S. W. 658; *Green v. State*, 64 Ark. 534, 43 S. W. 973.

It is unquestionably true that one may be possessed of a delusion concerning one subject, and yet be of sound mind on all other subjects, according to the weight of modern authority; and this should be so declared as a proposition of law. *Gardner on Wills*, 120, note. See *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Taylor v. Trich*, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679; *Dew v. Clark*, 3 Add. Ecc. 79; *Buswell on Insanity*, p. 19, c. 1, § 15; *Id.* p. 270, c. 9, note; *Id.* pp. 380, 381, c. 11, §§ 273, 274, note 3. The mere existence of a delusion, however as we have said, "is not sufficient to invalidate a will. Its connection with the will must be made manifest and shown to have influenced its provisions." If, notwithstanding the delusion, the will was directly traceable to another cause, it should not be avoided. 1 *Wharton & Stille*, § 84; *Heminway's Estate*, 195 Pa. 291, 45 Atl. 726, 78 Am. St. Rep. 815; *McGovran's Will*, 185 Pa. 203, 39 Atl. 816; *Dale v. Dale*, 36 N. J. Eq. 281; *Hollinger v. Syms*, 37 N. J. Eq. 233; *Reichert v. Reichert*, 144 Mich. 295, 107 N. W. 1057; *Bonordi's Will*, 24 N. Y. Supp. 188; *Trumbull v. Gibbons*, 22 N. J. Law, 117, 138; *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S. W. 394; *Bain v. Cline*, 24 Or. 175, 33 Pac. 542; *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 306; *In re Clapham's Estate*, 73 Neb. 492, 103 N. W. 61; 1 *Clevenger*, 297; *Libby Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161.

This delusion, which operates to defeat a will made under its influence, may be defined as follows: Where one conceives something extravagant and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such a one is possessed of an insane delusion. *Dew v. Clark*, 3 Add. Ecc. 79; 1 *Wharton & Stille*, 80; *Smith v. Smith*, 48 N. J. Eq. 570, 25 Atl. 11; *Am. Seaman's Soc. v. Hopper*, 33 N. Y. 624; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 626, 4 L. R. A. 738; *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 306; *Robinson*

v. Adams, 62 Me. 369, 18 Am. Rep. 473; *Benoist v. Murrin*, 58 Mo. 307; *Stanton v. Wethewax*, 16 Barb. (N. Y.) 259; 1 *Redfield on Wills*, c. 3, § 11, subd. 20, 21; *Matter of Will of White*, 121 N. Y. 406, 24 N. E. 935; *Page on Wills*, § 104; *Merrill v. Rolston*, 5 Redf. Sur. (N. Y.) 252; 4 *Words & Phrases*, 3644, verbo "Insane Delusions." The above is substantially the definition of Sir John Nichol in 1826 in the great case of *Dew v. Clark*, supra, and it is one that has been approved and followed by a majority of cases and text-writers ever since. A delusion cannot be predicated upon any purely esoteric and abstract subject, for the reason that beliefs concerning such subjects are speculative, and could not be proved false. *Gass' Heirs v. Gass' Ex'rs*, 3 *Humph. (Tenn.)* 278; 1 *Redfield on Wills*, c. 3, § 11, subd. 21. See, also, *In the Matter of Bonard's Will*, 16 *Abb. Prac. N. S. (N. Y.)* 128; 1 *Clevenger*, 303 et seq.; 1 *Thompson v. Quinby*, 2 *Bradf. Sur. (N. Y.)* 449; *Thompson v. Thompson*, 21 *Barb.* 107; *Smith's Will*, 52 *Wis.* 543, 8 N. W. 616, 9 N. W. 665, 38 *Am. Rep.* 756; *Anderson's Law Dict.* 337; *Owen v. Crumbaugh*, 228 *Ill.* 380, 81 N. E. 1044; *Whipple v. Eddy*, 161 *Ill.* 114, 122, 43 N. E. 789.

But filial love and gratitude do not belong to a class of theoretical or metaphysical subjects not susceptible of proof. Indeed, there is scarcely anything in our civilization more concrete and real than these emotions, growing out of the natural ties of blood and incident to the family relation. Their presence or absence is manifested, and may be proved, in manifold ways. If a parent believe that his daughter does not love him, or love him as well as she does some others, or is ungrateful to him, the falsity of such belief may be easily shown. The conduct and declarations of the daughter herself, showing her mental status toward him and others, are original evidence. *Wigmore on Evidence*, §§ 1730, 1715, 349, 190. "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, as made at the time in question, are original evidence. If they are the natural language of the affections, whether of body or mind, they furnish satisfactory evidence, and often the only proofs, of its existence." *Greenleaf on Evidence*, § 102. See *Beller v. Jones*, 22 *Ark.* 93; *Jacob v. Whitcomb*, 10 *Cush. (Mass.)* 255. It may also be shown that such erroneous belief is adhered to against all evidence and argument to the contrary. Such belief would therefore be a delusion.

But if the belief be that his daughter does not love him as much as he wishes, or as much as his daughter ought, or that his daughter is not as grateful as he wishes, or as grateful as she should be, then it is not a belief of the total want of affection and gratitude, but only as to the degree thereof. Such a belief necessarily is in the domain

of speculation and theory, where no proof can discover its error; for no evidence can measure the quantum of love and gratitude that a father may wish his child to have towards him, nor the quantum of love and gratitude that a child should have towards its parent. The unexpressed wishes of a parent as to the degree of love and gratitude that he desired his child to have for him, as well as the quantum of love and gratitude that a child should have for the parent, are so purely psychical, ethical, that they are not susceptible of proof. A belief of that kind cannot be shown to be erroneous; nor can it be shown that such a belief would not be changed by evidence and argument. There is no criterion by which to demonstrate the error and unchangeability of such belief, and the whole subject-matter is in the wide realm of speculation, and cannot therefore be a delusion. *Anderson's Law Dict.* "Delusion"; *Buswell on Insanity*.

Evidence is the means by which facts are proved. All evidence must be addressed to the sane mind. That which no sane mind would believe at all does not rise to the dignity of evidence; and a belief in something that no sane man could believe is evidence of insanity. 1 *Wharton & Stille*, § 83. Evidence, in a legal sense, is external. It is brought into the mind through the senses, by the mental faculty of perception, and appropriated by the faculty of reason. Therefore any evidence will produce some sort of impression or belief in the mind, correct or incorrect. It is a solecism to speak of a belief that is based on any evidence as an insane belief or delusion. A belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason; and where this is the case, no matter how imperfect the reasoning process may be, or how erroneous the conclusion reached, it is not an insane delusion. *Anderson's Law Dict.* "Delusion" note; *Owen v. Crumbaugh*, 228 Ill. 330, 81 N. E. 1044; *In re Scott's Estate*, 128 Cal. 57, 60 Pac. 527. The distinction between an erroneous belief or mistake, based on evidence, and a delusion, is clearly drawn in *Smith v. Smith*, 48 N. J. Eq. 570, 25 Atl. 12, as follows: "A delusion is the mind's spontaneous conception and acceptance of that as a fact which has no real existence except in the imagination, and its persistent adherence to it against all evidence. Mistake, whether of fact or law, moves from some external influence, which is weighed by reason. Delusion arises from morbid internal impulse, and has no basis in reason." See, also, the following: *In re McGovran's Estate*, 185 Pa. 203, 39 Atl. 816; *Doble v. Armstrong*, 160 N. Y. 584, 55 N. E. 305; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; *Potter v. Jones*, 20 Or. 239, 25 Pac. 709, 12 L. R. A. 161; *Steinpuehler v. Wempner* (Ind. Sup.) 81 N. E. 482; *Fullick v. Allison*, 3 Haggard, 527 (by Sir John

Nichol); *Schouler on Wills*, §§ 162, 163; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Mullins et al. v. Cottrell*, 41 Miss. 324; *Young v. Mallory*, 110 Ga. 10, 35 S. E. 278; *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535; *Amer. Seamen's Friend Soc. v. Hopper*, 33 N. Y. 624; 1 *Underhill on Wills*, 127. In 1 *Redfield on Wills*, p. *80, c. 3, note, it is said: "A belief based on evidence, however slight, is not a delusion, which rests upon no evidence but mere surmise."

Capacity is presumed. The burden of proof is on the one who attacks a will on the ground of insanity; and if the testator's general capacity is conceded the proof is more difficult, and in such cases the proof must be of the clearest and most satisfactory kind. *Mullins v. Cottrell*, 41 Miss. 291; *Smith v. Smith*, 48 N. J. Eq. 570, 25 Atl. 11; 1 *Wharton & Stille*, —; *In re McGovran's Will*, 185 Pa. 203, 39 Atl. 816; *Fullick v. Allison*, 3 Hagg. 527; *Dew v. Clark*, 3 Add. Ecc. 79.

The instructions should be confined to the issue, should be based on the evidence, and should be considered as a whole. *Armistead v. Brooks*, 18 Ark. 521, 527; *Morton v. Scull*, 23 Ark. 289; *Railway Co. v. Trotter*, 37 Ark. 593; *Railway Co. v. Rosenberry*, 45 Ark. 256; *Railway Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; 2 *Crawford's Dig.* 1826f. The court should give instructions appropriate to any theory of the cause sustained by competent evidence. "It is therefore error for the trial judge to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law is in a general way covered by the charge given, unless the court can see that no prejudice resulted from such refusal." *Railway Co. v. Crabtree*, 69 Ark. 137. Each party has the right to have the theory of the case he contends for, and which he has adduced evidence to support, submitted to the jury upon proper instructions, unless the court in its general charge has declared the law so that the respective contentions of the parties may be presented in argument to the jury, without unfairness or prejudice to either. *Railway Co. v. Weldy*, 80 Ark. 454, 97 S. W. 452; *Hamilton Brown Shoe Co. v. Choc-taw Merc. Co.*, 80 Ark. 440, 97 S. W. 284; *Ry. Co. v. Hitt*, 76 Ark. 233, 88 S. W. 908, 990; *Luckinbill v. State*, 52 Ark. 45, 11 S. W. 963; *Smith v. State*, 50 Ark. 545, 8 S. W. 941.

II. Now, testing the instructions of the trial court by the principles above announced, our conclusions are as follows:

(1) The court properly outlined the issues and correctly defined testamentary capacity in the first instruction asked by appellants and modified and given by the court.

(2) The court erred in striking the second paragraph from appellant's request No. 2. The second paragraph, to wit, "A belief which is founded on any evidence as a basis is not a delusion," was a concise and correct

proposition of law. It was an indispensable test for determining whether a belief of the class under consideration was a delusion, because such a belief is of something in its nature not impossible. It was peculiarly appropriate here, because of the testimony of medical experts on behalf of the appellee defining a delusion as "a belief, an idea, held by a person against such ordinary average information or experience as would to the ordinary average individual prove sufficient to cause him to give up the idea." This testimony did not meet the legal requirements of a delusion, yet it was well calculated to cause the jury to conclude that a belief was a delusion if it was held against any evidence that would convince "the ordinary average individual" to the contrary; whereas the law is that the most extraordinary, eccentric, and absurd beliefs are not delusions, if based on any evidence and held against all evidence. *Anderson's Law Dict. "Delusion."* In this state of the record, a specific declaration like that contained in the second paragraph was essential to guide the jury to the right conclusion. True, almost the converse of the proposition is stated in the first part of the first paragraph defining delusion; but the idea is not so tersely and clearly conveyed, and the appellants were entitled to have the proposition presented to the jury as they asked it, in order to prevent the jury from being misled.

Paragraphs 3 and 4 were not improper, although, had the court given the second paragraph, it would not have been error to strike these; for the fourth was in part a repetition of the idea contained in the second, and the third was a repetition of what had already been given in the first instruction.

(3) The modification by the court of proponents' third instruction, and the giving of the second and third instructions for contestant, authorized the jury to find against the will if they found that the testator could not comprehend the deserts and relations of his daughter. The court was specifically requested to limit the inquiry as to mental incapacity, and the consequent failure to comprehend deserts, to that brought about by the delusion. But the court refused the request. Had not the attention of the court been specifically directed to the vice of these instructions, we should say that, taking the instructions as a whole, the proper construction to be put upon these would be that the mental incapacity referred to was that only brought about by the insane delusion mentioned in the other instructions. But the refusal of the court to confine these requests to the specific issue, when its attention was called to it, indicates that the court was willing that they should be given the broadest sweep of which they were susceptible. In that view, they were inconsistent with other instructions, and very misleading and prejudicial; for there was a great deal of testimony tending to show at least moral per-

version or "medical insanity," if not delusion, and in the absence of consistent and clear instructions throughout, confining the inquiry to the issue of delusion, the jury might have concluded that they were authorized to find against the will because of what they considered the great moral perversity of Dr. Taylor towards his daughter, which might, in their opinion, have rendered him incapable of comprehending her deserts. Moreover, the modification of appellants' third request by the paragraph added gave the whole instruction a bad form, for the modification was not germane to the paragraph modified. It presented an independent proposition of law, and should have been asked and given, with the limitation indicated, as a separate proposition. The court erred, therefore, in modifying the third request of appellants by adding the second paragraph, and also in giving the second and fourth at appellee's request without the limitation indicated. See, in addition to cases already cited on this point *supra*, *Benoist v. Martin*, 58 Mo. 307; *Lucas v. Vartons*, 24 Ga. 640, 71 Am. Dec. 147; *Williams' Ex'r v. Williams*, 90 Ky. 28, 13 S. W. 252; *In re Kendricks' Estate*, 130 Cal. 360, 62 Pac. 609; *Hardenburg v. Hardenburg*, 133 Iowa, 1, 109 N. W. 1015.

(4) The court did not err in modifying appellants' fifth request. The idea contained in the part stricken out had been sufficiently covered in the first and fourth instructions given at the instance of appellants.

(5) The first instruction given at the instance of appellee was erroneous. It was not in conformity with the law we have announced as to delusion. It was not enough that the belief should be false and without foundation of fact to rest upon, but it must also be adhered to against all evidence and argument. The element of this persistency of the belief is entirely absent. Moreover, the court must never declare as a matter of law that a delusion exists upon any given state of facts. In this peculiar class of cases it is never a question of law for the court to determine whether a delusion exists in any case. That is for the jury. See cases noted on this point.

(6) We have already considered the defects in instructions 2 and 4 given on motion of appellee.

(7) Instruction No. 8, given on appellee's motion, was the law.

(8) Of the remaining requests of appellants the court did not err in refusing those numbered, respectively, 8, 10, 11, 13, 14, 15, 16, 18, 19, and 22. Such of these as were correct were sufficiently covered by those given and which should have been given.

(9) The court should have given the seventh. The seventeenth which was of the same purport, but argumentative in form, was properly refused.

(10) As the court had given appellee's re-

quest No. 2, it should also have given appellants' request No. 21.

(11) Requests of appellants numbered 9, 12, and 20 were all substantially to the same effect, and were designed to present appellants' theory that the marriage of appellee was the cause of the discrimination against her in the will of her father. If Dr. Taylor was the final victim of a delusion that his daughter did not love him (which first began in a mere apprehension that she might not, as early as 1878, and which progressed until it developed into a positive and persistent conviction), it is certain that it did not dominate him prior to her marriage to the extent of causing him to deny her any of the comforts or luxuries of life that could contribute to her physical or mental well-being. Prior to that time he seemed extremely solicitous of her welfare. He was generous and indulgent. He gave her excellent educational advantages and extensive travel in this country and in Europe. He administered without stint to her every want and denied her no pleasure, except that of showing her fondness and devotion to her friends and those whom she loved. At this he complained, and in some instances he protested in such an unnatural way as to warrant the conclusion that all his devotion to his daughter was tinged with supreme selfishness, and that there was a great and unnatural jealousy on his part towards his daughter because of her affections for others. But, notwithstanding all this, there was no diminution of his love and devotion to her, and no curtailment of the benefits and kindnesses extended toward her, until she married against his will. He told her before that if she married McClintock it would separate them forever, and begged her on his knees not to do so, and further told her that if she did marry McClintock she could never expect a dollar of his estate. Contemporaneously with the marriage a marked change came over Dr. Taylor, which was ever thereafter manifested in his conduct towards her. He apparently lost all affection for her. He ceased to show any except a nominal interest in and solicitude for her, himself attributing the fact of her marriage as the deciding point "from which their paths forever would be divergent." He ceased thereafter to write to her regularly at short intervals, as had been his custom. He upbraided her in the letters he did write for her marriage, saying that he could never on that account enter her home, and that it had prevented them forever from living together. He refused to let her first-born be called for him, giving as his reason that he could not consent for his name to be coupled with one who had done him so great a wrong. He referred to the great wrong she had done him by her marriage, saying that he "believed that God would in some way punish her for her disobedience and ungratefulness." He would not let the matter be discussed with him by his most intimate friends, who sought

to reconcile him to the condition; and at last, toward the close of his life, it is shown that he would turn pale, become angry, compress his lips, and leave the home of his most intimate friend when her name was mentioned. Finally, after weeks of consideration and consultation with his attorney, going over the whole matter of his estate and how he wished it distributed in his will, he calmly and deliberately had the clause written which practically disinherited her.

From a consideration of the testimony which tends to establish the above facts, in connection with all the other evidence, appellants contend that Dr. Taylor was of sound mind when he made his will and discriminated against his daughter therein solely on account of her marriage; and it is from this viewpoint especially they predicate the theory that, no matter if Dr. Taylor was possessed of a delusion concerning his daughter's affections for him at the time he made the will, such delusion did not dominate him in the provision concerning her, but that this was caused through resentment on account of her marriage. It was upon this contention and theory that the requests under consideration were made, and we are unable to see how there could be a fair trial of the cause with that theory omitted from the charge of the court. This was such a distinctive contention and feature of the case, as developed by the proof, we are of the opinion that the appellants were entitled to have it sent to the jury under one of the above specific requests for instructions, according to the authorities heretofore cited.

III. We will next consider the rulings of the court in the admission and exclusion of testimony, taking up the alleged errors by the number and in the order presented in the briefs, and for brevity only discussing those that we consider reversible.

(1) The court refused to permit Miss Jordan to answer the following question: "Don't you know it to be a fact that in that matter [meaning the suit of the Jordan heirs against Dr. Taylor] very great bitterness of feeling grew up on account of the difference between Col. Johnson and Dr. Taylor, in which your feelings entered?" The question was competent, but the error in not allowing the answer was not prejudicial, because the information sought had already been substantially elicited on cross-examination.

(2) The testimony of appellee was competent. Our statute provides that "in civil actions no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried: provided, in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify by the opposite party." Section 3093, Kirby's Dig. This statute has no application in

a case involving a contest over the probate of a will. It was intended to protect the estates of deceased persons from the attacks of persons who had, or claimed to have had, business transactions with the deceased prior to his death, and who are seeking to establish claims against his estate. This is clearly shown by the language, which declares that it is in actions where judgments may be rendered for or against the executors, administrators, etc. In other words, where a party seeks to obtain a judgment against the representatives of the estate of the deceased, and thus to impair or reduce the estate, the statute applies; but it cannot apply to controversies between devisees among themselves over a will, or between devisees or legatees and the heirs, as to the distribution of the estate by will or otherwise, for in such case the corpus of the estate is in no manner affected. There can in such cases be no judgment rendered for or against the administrator or executor as such by which the estate is impaired or reduced. In *re Miller's Estate*, 88 Pac. 338, and the many authorities cited therein; also other cases cited in appellee's brief.

(3) The court erred in admitting the testimony of the husband of contestant to prove the copy of the letter of contestant to her father, dated May 7, 1895, and in admitting the copy in evidence. Section 3095 of Kirby's Digest provides that "either husband or wife shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent." The copying of the letter by the husband of appellee, at her request, was not "business transacted by the one for the other in the capacity of agent." The term "any business transacted" refers to business transactions with third parties, not with each other. The copying of the letter was not a business transaction in which he could act as her agent; she being present. The design of the statute was to enable the husband or wife, who had transacted business with some third party through the other as agent, to prove such business by the agent who transacted it; the principal not having personal knowledge thereof. The testimony was clearly incompetent. *Pingree v. Johnson*, 69 Vt. 225, 39 Atl. 202; *Hazer v. Strelch*, 92 Wis. 505, 66 N. W. 720; *First Nat. Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686, 688. See, also, *Railway Co. v. Ford*, 71 Ark. 192, 71 S. W. 947.

(4 and 5) Error, but not prejudicial.

(6 to 8) It was proper to permit testimony showing the character and reputation of Mr. McClintock.

(9) In will contests, where the unsoundness of mind alleged is dementia, the inequalities of the will, the nature and extent of the estate, and the sources of its acquisition, are proper to be considered in determining the testamentary capacity. Where delusion is alleged as the ground of incapacity, this principle can have no application, further than to show

that the testator, if the delusion be established, was dominated by it at the time the will was executed. For this purpose the testimony is competent, just as it is competent, in cases of dementia, to show lack of testamentary capacity.

(10) The testimony of Col. Johnson, which tended to show what property of appellee's mother passed into the hands of Dr. Taylor, and its value, was proper. The court, however, should be careful to limit it to that, and not permit the testimony along this line to bring in collateral matters that are calculated to prejudice the rights of appellants. Such was the effect of some of the testimony of Col. Johnson, contained in subdivision No. 10, which the court should have excluded.

(11) No error in the ruling, for the reason that a part of the testimony of Col. Johnson was competent. The motion was general, to exclude all.

(12) The court permitted the testimony of experts to assume an argumentative form on the moral phases of Dr. Taylor's conduct towards his daughter and her rights. This was highly improper and prejudicial.

(13 and 14) No error in the rulings.

(15) Error. Too remote. Collateral matter was introduced; but it was not prejudicial.

(16 to 19) Rulings were correct.

(20) The court erred in permitting counsel for contestants to ask Mrs. Taylor this question: "Did you send his daughter, Mrs. McClintock, any notice of his illness?" She answered, over the objections of appellants, that she did not, and was then examined further as to her reasons for not doing so. This was wholly impertinent matter. It was not responsive to anything that was brought out on the examination in chief, and was not proper as original evidence for any purpose. If the reason why appellee was not present at her father's bedside in his last illness was on account of her not receiving notice of such illness, this testimony did not tend to prove it, and at least was not the best evidence of that fact. Appellee was a witness, and she was the only one who could testify that she did not receive notice of her father's last illness; for that was knowledge necessarily peculiar to her, and her testimony only could be admissible evidence of that fact. It is never permissible to ask a question that is itself incompetent as preliminary to one that is competent. It was competent to prove, under certain conditions, that Dr. Taylor made no request that his daughter be notified of his last illness; but it was a question to be asked direct, if at all, and without unnecessary and incompetent preliminaries. It was not competent for the purpose of showing personal animosity of Mrs. Taylor towards appellee. It did not tend to show that. It was not competent to show Mrs. Taylor's hostile attitude in the contest, for that was patent from the proceedings. Indeed, it was wholly incompetent for any purpose whatever, and it seems to us it had no other tendency than to arouse

undue sympathy on the one hand, and prejudice on the other.

(21) This was harmless error.

(22 and 23) The rulings were correct.

(23½) This was not prejudicial error.

(24 and 25) The ruling was error. On cross-examination Mrs. Taylor was asked with reference to a conversation between herself and appellee on a train between Memphis and Louisville. The question asked her was as follows: "I will ask you, Mrs. Taylor, if, when she came into the train to see you, she asked you if her father had left any word for her, and if you didn't respond, 'No, he had spent his life trying to forget you,' and that you had tried to make his life as happy as you could?" Her reply was, "I positively said nothing of the kind." Appellee was called in rebuttal, and over the objections of appellants the following occurred: "Q. Mrs. McClintock, did you have the conversation referred to, at the time I mentioned, with Mrs. Taylor, on the train between Memphis and Louisville? A. I did. Q. Did you, in that conversation, ask her if your father left any message for you or any remembrance? State what you asked her. A. I asked her if my father left any word for me of love or forgiveness; that it meant more to me than anything. Q. Please state what reply was made to that question. A. And as I remember it, and it is very distinct in my mind, she said that he spent his life in trying to forget me. Q. (by a juror). Said what? A. That he spent his life in trying to forget me, and that she tried to make his life as happy as she could."

Conceding, as appellee contends, if Dr. Taylor had stated to Mrs. Taylor that "he had spent his life trying to forget" appellee, that it would have been proper for appellee to have shown that fact, and conceding, further, if Dr. Taylor did not so state, that it was proper to show that Mrs. Taylor told appellee that he did so state, for the purpose of impeaching Mrs. Taylor's testimony, still the above testimony fell far short of proving, or even tending to prove, such a state of facts as that. The questions asked above did not call for anything Dr. Taylor said to Mrs. Taylor concerning Mrs. McClintock. Mrs. Taylor was not asked what Dr. Taylor stated to her and she repeated to Mrs. McClintock, and Mrs. McClintock was not asked what Mrs. Taylor told her Dr. Taylor had said. The conversation, if it occurred in the manner indicated by the question asked Mrs. Taylor, was about one year subsequent to the making of the will, and was about a matter wholly immaterial and irrelevant to the issue of whether or not Dr. Taylor, when he made his will, was possessed of a delusion which influenced him to disinherit appellee. So the above testimony falls under the ban of the general rule that, "when a witness is cross-examined on a matter collateral to the issue, he cannot be subsequently contradicted by the party asking the question." *McArthur v. State*, 59 Ark. 435, 27

S. W. 628; *Pinnkett v. State*, 72 Ark. 412-82 S. W. 845; *Jones v. Malvern Lbr. Co.*, 58 Ark. 125, 23 S. W. 679; *Butler v. State*, 34 Ark. 485. The evidence did not tend to show any hostile feeling on the part of Mrs. Taylor towards appellee, and was evidently not introduced for that purpose, but for the purpose of impeachment.

(26) The deposition of one Epes Randolph was taken on interrogatories and cross-interrogatories before a notary public in Arizona. Randolph was present at the scene between Dr. Taylor and the appellee at the Galt House in Louisville, Ky. He testified, among other things, that he heard appellee on that occasion tell her father that she no longer loved him or respected his wishes, but hated him and intended to marry McClintock. These statements, if true, were exceedingly important; for, if true, they tended to prove that, if Dr. Taylor believed his daughter did not love him, his belief was true, and therefore could not be a delusion. Appellee denied that she made any such statements, and the sharp conflict in the evidence at this point rendered the credibility of the witness Randolph a matter of significance to the cause of proponents. In order to lessen or destroy the credibleness of this testimony, appellee called in rebuttal one Winn, who was a lawyer, and a brother-in-law of Mrs. Taylor, and who testified, over the objection of appellants, substantially that he was present when the deposition of Randolph was taken, and that there was no one present representing the contestant; that he went out to Arizona for the purpose of interviewing Randolph with reference to the case and taking his deposition if he found that he would make a witness; that he had the agreement to take the deposition and the interrogatories and cross-interrogatories sent to him, and read them over with Mr. Randolph. He did not ask him any questions, and none were asked him, except the reading of the interrogatories that were sent out. The agreement, caption, and certificate attached to the deposition of Randolph were by agreement read to the jury. The appellants moved the court to instruct the jury that witness Winn had a right, under the law, to be present at the taking of the deposition of Epes Randolph; but the court refused, and the appellants duly saved their exceptions.

It was error to attempt the impeachment of this witness Randolph by this method. The law prescribes how a witness may be impeached. Section 3138 of Kirby's Digest. The method adopted here is not found in the law, and it would be very unfair to the witness, who is absent, and to the party relying on the testimony of such a witness, to permit it to be called in question in a manner not prescribed nor contemplated by the statute. Section 3181, Kirby's Digest, provides that, "where a deposition is taken upon interrogatories, neither party nor his agent nor attorney shall be present at the examina-

tion of the witness unless both parties are present or represented by an agent or attorney, or unless the opposite party, or his agent or attorney, has been seasonably notified of the time and place of taking the depositions, or the party attending has been notified by the opposite party to attend." The deposition was taken, it appears, by agreement, and it is not pretended by appellee that the above statute was not fully complied with. If not complied with, his remedy was to quash the deposition for failure to do so, but not to attack it by the sudden and improvised methods adopted here in the midst of the trial. The court, having erred in admitting the testimony of Winn in the first instance, only accentuated it by refusing to attempt even to mollify its prejudicial effect by telling the jury that Winn had a right to be present when the deposition was taken.

IV. We have now considered all the assignments of error urged here for reversal except those presented and argued under the head, "The court should have given a peremptory instruction sustaining the will," or "that the verdict is not sustained by the evidence." Under this head the appellants insist that "contestant's hypothetical case omits facts that were essential and contains statements that were not facts." The hypothetical question of appellee was defective in two important particulars:

(1) It states with sufficient accuracy of detail the facts which the evidence tended to show about Dr. Taylor's taking his daughter to Little Rock to live after the death of his wife; that in compliance with her dying request that appellee and Miss Jordan should not be separated, and that the latter should rear appellee, Dr. Taylor arranged to have appellee and Miss Jordan live with their uncle, Mr. Richard Johnson, in Little Rock. It states correctly the circumstances and conditions of her home life with these relatives from the time she was taken there in 1878 till she was taken away in 1882, showing the conduct of Dr. Taylor towards her on the occasion of his visits to her and her conduct towards him, and showing that Miss Jordan had treated appellee as a mother would treat her child during all this time, and that appellee loved her as a mother, etc. After all this is shown, the question states that: "In 1882 Dr. Taylor took the daughter away from Miss Jordan and the family with which she was stopping, without indicating to them his intention of putting her in the permanent custody of others, and placed her in the care of his brother and sister-in-law, Mr. and Mrs. Gip Taylor, at Winchester, Ky., saying to the latter that he did not like the influences surrounding her at Little Rock and that he did not think Miss Jordan a proper person to raise her, assigning as his reason that he was afraid his daughter's affections would be weaned from him." The question omits the following facts, which are undisputed, and which were proved by the witnesses for ap-

pellee: That a suit had been brought by the Jordan heirs, Miss Jordan, herself, her brother, and sister (Mrs. Gibson), against Dr. Taylor for their alleged interest in their mother's estate, charging that Dr. Taylor had taken title to property belonging to their mother in his own name; that the suit aroused the most bitter feeling on the part of the brother and sister of Miss Jordan, and the family with whom she and appellee were living, against Dr. Taylor; and that Col. Ben Johnson, who attended to the lawsuit for them, did not speak to Dr. Taylor up to the time of his death. True, Miss Jordan testified that this business difference did not affect her feelings towards Dr. Taylor. She testified that she had always disliked Dr. Taylor since he had married her mother, and that the lawsuit had nothing to do with her feelings; that the suit was attended to by Col. Ben Johnson, and she had nothing to do with it. She testified that she always treated Dr. Taylor respectfully, because he had married her mother, and that he had treated her respectfully and kindly until he took his daughter away from her. The experts gave their opinion upon the assumption that every material statement in the hypothetical case was true, and that no material statements had been omitted. As one of them (Dr. Green) expressed it, he gave his opinion upon the assumption "that that is a correct statement from beginning to end." This witness, in explaining his reason for declaring Dr. Taylor insane, said: "It seemed as though he took his child from one person to another, not that the moral influences were not good, not that they did not instruct his child in the way she should go and bring her up a useful woman, but he was afraid they would turn her from him and teach her not to love him." Dr. Green further said, if Dr. Taylor "knew that the first lady to whose care that child was committed disliked him very much, and that in her daily life she was constantly thrown in the most intimate relations with people who disliked him, some of whom did not speak to him, and never did speak to him up to the time of his death," that the "change of the daughter from the custody of that lady to some one else would not seem an unnatural one," and that if such were the facts they should have been stated to him. Now, it seems to us that the above omitted undisputed facts had an essential bearing on the issue involved. They certainly tended to give a reasonable and natural explanation of why Dr. Taylor should have taken his child from Miss Jordan. They tended to show the reason for his saying "that he did not like the influences surrounding her at Little Rock," and that "he was afraid his daughter's affections would be weaned from him." Without the above facts being stated, the above reasons that he gave for his conduct would not furnish an excuse or explanation for it; and, unexplained, it was a most potent factor in the chain of evidence relied upon by appellee to establish the delusion.

We are of the opinion that a correct consideration of the hypothetical question by the experts and a just determination of the issues involved demanded that the above facts should be embraced in the hypothetical case.

(2) The hypothetical question states that he compelled Miss Didlake and his daughter to accompany him from place to place over Europe, and through England and Scotland, when his daughter was in a very precarious condition of health and should have had quiet and rest. We find no evidence whatever in the record tending to establish the above statement. Yet, if the statement was true, it tended to show most unnatural and unreasonable conduct on the part of Dr. Taylor, and was a cogent circumstance, doubtless, in the minds of the experts, when they were forming their opinion of his insanity from a review of all his conduct as set forth in the hypothetical case. We find no other defects in the hypothetical question that we regard as material.

Hypothetical questions must fairly reflect the evidence, and unless they do the resultant opinion evidence is not responsive to the real facts, and can have no probative force. *Quinn v. Higgins*, 24 N. W. 482. The hypothetical case must embrace undisputed facts that are essential to the issue. In taking the opinion of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence, or any part thereof, and it is not necessary that the facts stated, as established by the evidence, should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts. When a party seeks to take an opinion upon the whole or any selected part of the evidence, it is the duty of the court to so control the form of the hypothetical question that there may be no abuse of his right to take the opinion of the experts. The right may be abused by allowing the opinion to be given in such a way as to mislead the jury, by concealing the real significance of the evidence, or by unduly emphasizing certain favorable or unfavorable data. On the above propositions see 1 Gr. Ev. pp. 561, 562, § 441; *Ince v. State*, 77 Ark. 426, 93 S. W. 65; *St. L., I. M. & S. Ry. Co. v. Hook*, 83 Ark. 589, 104 S. W. 217.

The opinion evidence must be discredited, because it is based upon a hypothetical case which omitted undisputed facts shown by the evidence and included other facts not proved. We are of the opinion that, unless the evidence of the experts is taken into consideration, the other evidence is hardly sufficient to support the verdict. It is impossible to divine what the opinion of the experts would have been, had the hypothetical case reflected the essential and material facts established by the evidence.

The case has not been properly and fully developed, and therefore, for the errors indicated, the judgment is reversed, and the cause is remanded for new trial.

MCCULLOCH and HART, JJ., dissent.

HILL, C. J., and BATTLE, J. (concurring). We concur in the judgment of reversal, and all of the opinion upon the points therein declared to be reversible error, and also concur in all the points discussed wherein the rulings were held not to be error, except two:

First, in holding the evidence admissible as to the estate which Dr. Taylor received from his wife, the mother of the contestant. This evidence would be proper, as shown by the authorities, in cases where the attack is on the general capacity of the testator to make a will, but is wholly inapplicable to cases where his general capacity is admitted, where it is admitted he was a man of fine business attainments, and where it is charged that he was only afflicted by a delusion in one particular. Therefore it was wholly irrelevant to the issue thus made to prove the value of the estate which he may have received from the mother of the contestant, and the tendency of such testimony would only be to arouse sympathy in behalf of the daughter, whom the jury would think had not been fairly treated by her father, when the question is not one of fair treatment of the daughter, but one merely of the capacity of the testator to make a will uninfluenced by an alleged delusion.

The other point in which we cannot concur is in holding the eighth instruction to be correct. This instruction, given at the instance of the contestant, tells the jury as a matter of law that a person may be entirely sound mentally on all subjects or as to all individuals save one, and as to that particular subject or individual his mind may be so diseased as to render it impossible to say that he is of sound mind and is capable of reasoning and exercising a sound judgment in regard to the delusion.

This division of insanity into partial and total originated, judicially, with Sir Matthew Hale, when Lord Chief Justice of England in the reign of Charles II. This great jurist did much for the laws of England, yet was not sufficiently beyond his generation to enforce the law against witchcraft (he was the last English judge before whom a person was convicted and sentenced to death for witchcraft). Still his division of sanity is followed by many courts and many alienists. It finds support in the testimony of eminent alienists in this case, and is opposed by equally eminent alienists, who declare that partial insanity, or monomania, is an impossibility. They say that monomania is an antiquated term, which was used by the English writers and to some extent by the French writers, who thought that a per-

son could be insane on one idea, and that the term and theory has been abandoned within the last 40 years, and that the modern thought is that, when a person is insane on one point, the individual is insane.

One side compares the brain to a barrel of apples, each part separate, and one might be diseased and rot of itself without the other separate particles becoming affected, and so with the part affected by paranoia; while the other side says that the comparison of the brain to a barrel of apples is unfortunate, because the cells in the brain and all parts of the brain are connected together—that between apples there is only contact, but between all parts of the brain there is organic connection, some independent and yet all interdependent.

In view of this disagreement between learned doctors, it is not the province of the court to side with either. It is not a legal question; but the question of insanity is a question of fact, and the learned doctors may explain it in their own way and according to their own theories to the satisfaction or dissatisfaction of the jury, but still the question remains with the jury to decide whether the particular person was sane or insane. When scientists are agreed upon these questions, it may be well for the courts to state the scientific conclusion; but when the scientists are at large upon it, it is not the province of the court to accept either theory, but to leave it, as all other questions of fact, to be determined in the particular instance. In the cases in this and other courts, cited in Justice WOOD'S discussion of this subject, the scientific and legal definitions were accepted without question; but now the evidence here shows, or tends to show, that the scientific world or an important part

of it has departed from those theories, and the courts should not blindly follow precedents based on other data. A recent treatise on Medical Jurisprudence thus discusses this subject:

"What is meant by partial insanity? Few legal writers seem to care to analyze what is meant, or can be meant, by a partial insanity. If the words are taken strictly, they must include almost all the insane; for there are few, if any, insane persons who have not some use of their minds. Only the most advanced demented or the most furious maniacs can be placed in a class of patients who have no glimmer of reason, no use of their senses, no power of memory, no play of emotion, however slight; and even of these extreme cases such absolute negation of normal mentality can hardly be affirmed. On the other hand, it is not more reasonable to say that a paranoiac or a melancholiac is only partially insane than to say that a patient with typhoid fever is only partially ill, because, perchance, his heart or his kidneys may be sound, or to say that a patient with cirrhosis of the liver is only partially sick, because his brain or his knee joints are not affected by the disease." 1 Wharton & Stille's Med. Jur. § 473.

For these reasons we think the court erred in the eighth instruction, and should merely have given, on this subject, this part of it: "The jury are instructed, in considering the question as to the mental soundness of C. M. Taylor and his capacity to make a will at the date of the paper offered for probate, they should take into consideration all the facts and circumstances adduced at this hearing bearing upon his relation to his daughter and his alleged delusion in regard to the state of her affections for him."

SYKES v. SPEER et al.

(Court of Civil Appeals of Texas. June 4, 1908. Rehearing Denied June 25, 1908.)

1. DIVORCE—JUDGMENT—VALIDITY—PARTIAL INVALIDITY.

Where a judgment in an action for divorce awards a wife a divorce and damages for personal injuries inflicted by the husband, the invalidity of that portion of the judgment which awards damages does not affect the validity of the portion awarding the divorce.

2. HUSBAND AND WIFE—TORTS BY HUSBAND AGAINST WIFE—LIABILITY.

A wife cannot sue her husband for torts committed by him against her person or reputation while the marriage relation existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 753.]

3. EXECUTION—SALES—VALIDITY—COLLATERAL ATTACK.

A judgment in an action by a wife for divorce and for personal injuries inflicted by the husband on her awarded her a divorce and costs and damages for the injuries. An execution for the damages and costs was issued, and premises of the husband were sold thereunder. *Held*, that though the judgment for damages was invalid, the execution containing the item of costs which was valid, was sufficient as against a collateral attack, and a sale under the execution was not subject to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 736.]

4. SAME.

The failure of an execution to state correctly the amount of the judgment and the costs is an irregularity which may justify the setting aside of the sale in a direct action for that purpose, but does not render the sale void so as to permit a collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 737, 738.]

5. HOMESTEAD—RIGHTS OF SURVIVING SPOUSE—OTHER MEMBERS OF FAMILY.

Where the husband or wife dies, the survivor retains the status as head of the family and as such is entitled to the homestead exemption then existing, regardless of whether or not there are other constituents of the family remaining with the survivor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 245, 311.]

6. SAME—DIVORCE.

Where a marriage is dissolved by divorce, the homestead rights of the parties depend on the presence of other constituents of the family and their subsequent relations to those constituents, and where there are no children and no other constituents of a family remaining after the separation, neither husband nor wife are entitled to continue the homestead exemption existing at the time of the divorce, for after a marriage has been dissolved the parties become in law unmarried persons, and are entitled to homestead rights only in cases where they become the head of a family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 310.]

7. DIVORCE—JUDGMENT—AWARDING CUSTODY OF CHILDREN.

A judgment of divorce awarding to the wife the custody of the children is a mere judicial determination that she, as between herself and husband, shall have the preference legal right to the custody, and to that extent it deprives the husband of his natural right to share equally with her in such custody, and this right conferred on the wife is a personal one, which she may waive in favor of the husband.

8. HOMESTEAD—PERSONS ENTITLED—HEAD OF "FAMILY."

The duty of a husband toward his children, notwithstanding a divorce awarding to the wife the custody of the children, constitutes the husband and his children, when living together, a family, entitled to a homestead exemption, and, until the children are actually taken from the husband, he, with them, constitute a family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 22-24.]

For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

9. SAME—ABANDONMENT.

When a homestead character once attaches to property it continues to be the homestead until the owner voluntarily changes its character by disposing of the property or by leaving with the intention of not returning and occupying it as a home.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 307-311.]

10. SAME.

The abandonment of a homestead must be voluntary and not under compulsion and an abandonment is accomplished not merely by going away without any intention of returning at a particular time in the future, but by going away with the definite intention never to return, the intent of the parties in leaving their homestead being the controlling fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 307-319.]

11. SAME.

Whether a homestead has been abandoned is a question of fact ascertainable from the circumstances surrounding the particular transaction, and where no other homestead has been acquired, it must be clear that there has been a total abandonment with an intention not to return and claim the homestead, before an abandonment will be found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 353.]

12. SAME.

A judgment of divorce awarded the custody of the children to the wife, adjudged that the homestead of the parties was community property, that each was entitled to an undivided one-half interest therein, and that the wife should have the exclusive possession of the entire tract during the minority of the children, and gave the wife judgment for damages for personal injuries inflicted by the husband, and for costs. The husband's undivided interest was levied on under an execution for the damages and costs, and the wife purchased the premises and obtained a writ of possession under which the husband was removed from the premises. The children continued in the custody of the husband, who after having been removed from the premises, went on another place in another county, but did not acquire any other home beyond what a mere tenancy might confer. *Held*, that the husband did not lose his homestead rights in his undivided interest, the right awarded to the wife being a possessory right during the minority of the children personal to her, and not vesting in her an estate transferable to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 310.]

13. SAME—EXEMPTIONS.

A judgment of divorce awarding the wife costs of the suit cannot be satisfied out of the homestead of the husband while he retains custody of the children, though the judgment awarded such custody to the wife.

14. SAME.

A forced sale of a homestead except for that which the Constitution makes it liable is void, and a grantee of the purchaser at such

sale acquires no better title than the purchaser did.

15. PRINCIPAL AND AGENT—NOTICE TO AGENT—EFFECT AS TO PRINCIPAL.

A purchaser procuring land through an agent who has knowledge of the facts, is not a bona fide purchaser without notice, for the knowledge of the agent is notice to the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 670-679.]

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by H. E. Speer and another against J. D. Sykes. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Hart & Hart for appellant. Barnwell & Eberhart, for appellees.

HODGES, J. This is a suit instituted by the appellees, Speer and Goodnight, in the district court of Upshur county, to recover of the appellant, Sykes, a tract of 160 acres of land. The appellees alleged that the land formerly belonged to J. D. Sykes and his wife, Sallie Sykes; that on the 3d day of April, 1903, Sallie Sykes sued her husband, J. D. Sykes, for a divorce, for damages for personal injuries alleged to have been inflicted by Sykes upon her, for the partition of their community property, and the custody of their five children; that on the 13th day of January, 1904, a judgment was rendered in favor of Sallie Sykes in all respects as prayed for; granting her the divorce, awarding her a personal judgment against Sykes for \$500 for the personal injuries, giving her the exclusive custody of the children, adjudging that the homestead (consisting of the 160 acres of land here sued for) was the community property of Sykes and his wife, and that each was entitled to an undivided one-half interest, but awarding to Mrs. Sykes the exclusive possession of the entire tract during the minority of the children. It is further alleged that that judgment still remains in full force and effect, and upon it was issued an execution for the sum of \$500 and costs, amounting to \$40.95, on the 29th day of February, 1904; that this execution was placed in the hands of the sheriff of Upshur county, and by him a levy was made upon the undivided interest of J. D. Sykes in the 160 acres of land; that the land was advertised and sold under the execution on the 5th day of April, 1904, and was purchased by Mrs. Sykes for the sum of \$300, and a deed was made to her by the sheriff. It was also alleged that on the 5th day of April a writ of possession was issued in favor of Sallie Sykes, on the 27th of February, 1904, delivered to the sheriff of Upshur county, and executed by him on March 5, 1904, by causing Sykes to move from the premises and placing Sallie Sykes in possession; that in October, 1904, Sallie Sykes sold and conveyed the 160 acres of land to the appellees herein by a warranty deed, receiving therefor \$1,000. Plaintiffs alleged that unless restrained Sykes would forcibly enter

on the land and cut and remove the timber therefrom, that he was threatening and preparing to do the acts complained of, and that he would convert the property to his own use and benefit. They further alleged that he was now on the property, and was cutting and removing the timber and otherwise damaging the property, and refused to leave when directed to do so by any officer of the court. They prayed for a writ of injunction against Sykes restraining him from in any way interfering with their possession of the property, from cutting and removing timber, and from committing any acts of trespass or damage upon the land, and that they be quieted in the title and possession of the property. To this petition was attached a copy of the judgment and decree which had theretofore been rendered in the divorce suit between Sykes and his wife.

Sykes answered, disclaiming any interest in half of the land described in the plaintiff's petition, and alleged that he was the owner of the other half. He pleaded not guilty, and especially that he was the father of five minor children, who were living with him at the time, and that they had been living with him since the 1st day of January, 1903; that he had supported all of said children during all of that time since the 1st day of January, 1903, up to the present time, and was still maintaining and supporting them and intended to continue doing so as long as they were minors; that the land described in the plaintiff's petition was his homestead on the 1st day of January, 1903, and long prior thereto, and that it had been his homestead all the time since and is still such; that he had been living upon the land during all of said time, with his children, maintaining and supporting them by the produce raised upon the land; that he owned no other land and had never owned any land since the 1st day of January, 1903, except that involved in this suit. He further answered attacking the validity of the judgment recovered against him for the sum of \$500 for personal injuries. He prayed for judgment for half of the land in controversy, and that the same be partitioned and divided between him and the defendants. The case was tried before the court without a jury, and a judgment rendered awarding a recovery in favor of the appellees, plaintiffs in the court below, for the entire 160 acres of land. Findings of fact and conclusions of law were filed by the trial judge, but for reasons stated were not filed till after the adjournment of the term of court at which the case was tried. While the date of the filing shows that it was made on the last day of the term, yet it affirmatively appears from the certificates of the judge that this was the result of a filing back, and is not the true date. For this reason the findings of the trial judge cannot be considered on this appeal, and we shall consider the facts contained in the record, as if no such findings had been made.

The facts are practically uncontradicted, and show that J. D. Sykes and Sallie Sykes were husband and wife, as alleged in the petition of the plaintiffs herein; that such a suit was filed by Mrs. Sykes against her husband for divorce during the latter part of 1903; that at the first term thereafter Sykes appeared, and at his instance the case was continued; that at the next succeeding term she recovered a judgment against him in all things substantially as she had prayed for. She was granted a divorce, given the exclusive custody of the children during their minority, was given a judgment for the sum of \$500 for personal injuries inflicted by Sykes upon her while they were husband and wife, and all costs of suit were adjudged against Sykes. The judgment also decreed that the tract of land here involved was the community property of Sykes and his wife, and that each was entitled to an undivided one-half interest therein, but directed that Mrs. Sykes should have the possession of the entire tract during the minority of the children. The testimony further shows that this was the only tract of land which Sykes owned subsequent to the 1st day of January, 1903; that at the time of the institution of the divorce suit he and his wife and family were residing upon the tract as their homestead, and that after the divorce proceedings were instituted Sykes continued to reside thereon with his children until he was dispossessed by the sheriff on the 5th day of March, 1904, by virtue of a writ of possession issued upon the judgment of divorce; that after being so dispossessed he moved onto another farm belonging to another person, about three miles distant, and remained there until about the 1st of December following, at which time he returned to his old home with his children and was residing there at the time this suit was instituted. It is also shown beyond any controversy that notwithstanding Mrs. Sykes had been awarded the custody of the children by the decree of divorce, she had never made any demand on Sykes for the children, nor made any effort to acquire their actual custody from him, and had never contributed anything toward their support. In fact, the record justifies the conclusion that she had taken practically no interest in the children after the decree of divorce had been granted; that during all the time from the separation between Sykes and his wife the children remained with their father, apparently from choice, and that he supported, cared for, and maintained them during that time.

On the 7th day of March, 1904, the second day after Sykes had been dispossessed of the premises by the sheriff under the writ of possession, the sheriff levied a writ of execution upon the property, issued by virtue of the judgment rendered against Sykes, for \$500 for damages in favor of his wife and \$40.95 costs of court in the divorce proceedings. Under this execution the property was sold on the 5th day of April following, and

was purchased by Mrs. Sykes, her bid being \$300. She paid the costs of suit; the remainder was credited upon the judgment in her favor against Sykes; and she received a deed to the entire premises from the sheriff. In October following, while Sykes was still absent from the 160-acre tract, Mrs. Sykes conveyed the property to the appellees herein, they having purchased from her for the sum of \$1,000, which the testimony shows was paid partly in cash and the remainder in a note which she subsequently negotiated and received the money for. Speer and Goodnight did not know at the time of their purchase of the divorce proceedings between Sykes and his wife, and knew none of the enumerated facts antedating their purchase, but the purchase was negotiated by Dr. Holland, who was at the time the father-in-law of the appellee Speer. Dr. Holland was fully cognizant of all the facts concerning the controversy between Sykes and his wife, their separation and divorce, and their status afterwards. The record fails to show whether Mrs. Sykes ever in fact actually resided on the 160 acres after the possession had been awarded to her—in fact, we infer that she did not, but that she had a tenant upon the premises, or a portion of it.

The first two assignments of error attack the validity of the judgment for personal injuries rendered in favor of Mrs. Sykes against her husband in the divorce suit, and charge that the execution issued by virtue of that judgment was void and that no valid sale resulted. It will be observed that this judgment for \$500 for personal injuries was rendered in the divorce suit and was only a portion of the judgment in that case. If that portion be held to be erroneous, it still does not affect the validity of the decree of divorce and that portion of the judgment disposing of the other issues involved. We are inclined to think that the portion of the judgment awarding Mrs. Sykes personal recovery against her husband for injuries inflicted upon her during their marital relation was not voidable merely, but absolutely void. The judgment itself shows upon its face that it was an award for injuries inflicted by the husband upon the wife and during the time such relation existed. If this suit had been brought for a recovery for that alone, unmixed with any other matter of which the court could take judicial cognizance, we would have no hesitancy in holding that the entire proceedings were a nullity. That a wife cannot sue her husband for torts committed by him against her person or her reputation while that relationship existed is not an open question in this state. *Nickerson v. Nickerson*, 65 Tex. 281. The reason for this holding is that there is no liability, not merely that the wife is incapable of maintaining an action against her husband; for even if she should be divorced on the next day after the injuries were inflicted, and even if the result

of the injuries should be perpetuated long after the time of their infliction and after her rights as a feme sole had been fully restored, still she would not be allowed a recovery for such injuries. The adjudications which sustain this view place their holdings upon public policy which refuses to permit any liability for such conduct on the part of the husband committed under such conditions. While the law may and does provide for a criminal prosecution for such violence toward the wife, still there can be no civil liability. It would seem to the writer that if a husband can be held responsible criminally for an unjustifiable assault upon one whom the law has placed under his care and protection, and who has for his sake surrendered so many of her civil rights and given up the legal status which she otherwise might sustain, certainly the same considerations of policy would permit her to recover compensation for damages which his brutality may have inflicted upon her, when sought in a proceeding after the dissolution of the marriage relation. But the holdings of the courts which we are compelled to follow have adjudged otherwise, and our duty is plain. However invalid the recovery may have been in favor of Mrs. Sykes for the \$500 of damages, still the execution, containing as it did the item of \$40.95 costs which had been adjudged against Sykes, and based upon a judgment otherwise valid, was sufficient to make the execution proof against an attack collaterally made on account of an irregularity. While the law requires executions to state correctly the amount of the judgment and the costs, still, if from any cause this is not done, the failure is an irregularity which may justify the sale being set aside when sought in a direct action for that purpose, but would not render the sale void. We therefore think the sale made under the execution was good as against the mode of attack made in this suit. *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770, and note; *Freeman on Void Judicial Sales*, § 3.

The next assignments of error raise the homestead right and assail the judgment of the court as being contrary to the law and the facts upon which that issue is predicated. As before stated, Sykes pleaded that he was the head of a family consisting of himself and his five children, and that after the decree of divorce was granted the land sued for continued to be his homestead. It is not disputed that Sykes owned no other land and that up to the time of the divorce, and on the date of his dispossession, he continued to reside on the land with his children as he had done before. It was not until he was forcibly ejected from the premises on the 5th day of March, 1904, that he ceased to occupy and use it. There are two questions which present themselves, and upon their determination this issue must depend. They are these: First. After the decree of divorce

awarding the custody of the five minor children to Mrs. Sykes, did Sykes, in continuing to keep those children with him under the circumstances, become the head of a family? Second. If it did constitute him the head of a family, then was he deprived of his homestead rights in the portion of the land which had been awarded to him by the decree of the court awarding the right of possession to his divorced wife during the minority of their children? Unless both of these questions can be answered favorably to Sykes, then he is not entitled to recover.

It has been uniformly held in this state that when the husband or the wife dies the survivor retains the status as head of the family, and as such is entitled to the homestead exemption then existing, regardless of whether or not there are other constituents of the family remaining with such survivor. In other words, when the marriage is dissolved by death the survivor alone, unattended by others necessary to constitute a family, is entitled to continue to hold the homestead exemption. *Zwerneman v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485. But a distinction has been made between cases where the dissolution of marriage is brought about by the death of one of the parties, and where it results from a decree of divorce. *Bahn v. Starcke*, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40. In the latter instance the homestead rights of each of the separated parties depend upon the presence of other constituents of a family, and their subsequent relations to those constituents. If there are no children and no other constituents of the family remaining after the separation, neither the husband nor the wife is entitled to continue the homestead exemption existing at the time of the annulment of their marriage. After the marriage has been dissolved both of them become in law unmarried persons, and are entitled to homestead rights only in cases where they become the head of a family independent of the other. The testimony is undisputed that after the divorce Sykes still retained the custody of his five children. They were constantly under his care and protection, and were exclusively supported by him continuously from the date of the separation between him and his wife until the time this case was tried. It is also undisputed that his wife, though given the right of custody, made no effort to procure the actual custody of the children, and that she contributed nothing to their support. It seems that she asserted no claim to them, and made no demand upon Sykes for them. She appears to have permitted them to remain with their father—from what motive the record does not inform us. When the decree of the court awarded her the custody of the children it was merely a judicial determination that she, as between herself and Sykes, should have the preference legal right to the exclusive custody, and to that extent alone deprived Sykes of his natural

right to share equally with her in the custody and support of the children. The right thus conferred upon Mrs. Sykes was a personal one, and one which she might waive in favor of her divorced husband should she see fit to do so. Whatever may be said of the legal responsibility of Sykes for the support and maintenance of his children after the divorce and the award of their custody to the mother, still there remained such a moral right and duty to assist in their support and maintenance, as would constitute Sykes and his children, when living together, a family entitled to a homestead exemption. *Stone v. McClellan*, 36 Tex. Civ. App. 364, 81 S. W. 751. Should his wife die, or refuse to care for the children, then his duty would arise and his full parental rights might be asserted. Only the equality of his right with hers to the custody of the children was affected by the decree of the court. Otherwise his rights, duties, and responsibilities which his relations as parent imposed upon him were as complete as ever. Until the children were actually taken from Sykes, and not merely the legal right to the custody, he with them constituted a family that might claim a homestead exemption. *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82; *Zapp v. Strohmeyer*, 75 Tex. 638, 13 S. W. 9.

If Sykes was the head of a family at the time he resided upon this tract of land with his children, then it cannot be disputed that it was his homestead at the time he was forcibly ejected from it by the sheriff. The question then arises: Did this ejection, under the circumstances, and the placing of the divorced wife in possession, with the right of occupancy and use during the minority of the children, operate to destroy the homestead rights of Sykes and his children? When a homestead character once attaches to property it will continue to be the homestead till the owner voluntarily changes its character by disposing of the property, or of leaving with the intention of not returning and occupying it as a home. *Baum v. Williams*, 16 Tex. Civ. App. 407, 41 S. W. 840; *Gunn v. Wynne* (Tex. Civ. App.) 43 S. W. 292; *Fyffe v. Beers*, 18 Iowa, 11, 85 Am. Dec. 581. The abandonment must be voluntary and not under compulsion. *Flynn v. Hancock*, 35 Tex. Civ. App. 395, 80 S. W. 245. Abandonment is accomplished, not merely by going away without any intention of returning at a particular time in the future, but by going away with the definite intention never to return. *Foreman v. Meroney*, 62 Tex. 726; *Holland v. Zilliox* (Tex. Civ. App.) 83 S. W. 37; *Thomas v. Williams*, 50 Tex. 271. In every case abandonment is to be regarded as a question of fact, to be ascertained from all the circumstances surrounding the particular transaction. The intent of the parties in leaving the homestead is the controlling fact. *Cline v. Upton*, 58 Tex. 319. When no other homestead has been acquired "it must be undeniably clear and be-

yond, almost the shadow, at least of reasonable grounds of dispute, that there has been a total abandonment with an intention not to return and claim the exemption," before an abandonment will be found. *Goubenant v. Cockrell*, 20 Tex. 97; *Cantine v. Dennis* (Tex. Civ. App.) 37 S. W. 136. The first case cited, in which the language quoted was used, has been cited with approval in numerous cases since. It is not claimed in this case that Sykes voluntarily left his home, because the evidence shows that he was put off of the place. Neither can it be contended that he had no intention of returning when his wife's right of occupancy had terminated, either by the lapse of the time for which it was given her or by any other fact, because the evidence shows that within a short time after she had sold the place, evidencing a purpose to no longer use it as a home, he did return and resume its use as a home for himself and family. It is true that after having been compelled to leave his home he went upon another place in another county, but he did not acquire any other home beyond what a mere tenancy might confer. Under these facts we do not think Sykes lost his homestead rights in his interest in the 160 acres of land. While his former wife had been given the right of possession and use during the minority of the children, yet she seems not to have desired to continue the exercise of that right. While the decree of the court did not so specify, it was evidently the purpose in setting aside the homestead to her for that period to provide a means by which she could better support and maintain the children during their minority. This was a possessory right, one merely to the use and occupancy of the premises during that time, and was personal to her. It did not vest in her an estate in the land which she could transfer to another, but a use which she alone could exercise. *York v. Hutcheson* (Tex. Civ. App.) 83 S. W. 896.

The debt claimed by Mrs. Sykes was entitled to no more preference as to being satisfied out of this tract of land than was that of any other creditor. When the execution was levied on the land it was a homestead for that family of which either she or her divorced husband was the head. As such it was not subject to seizure for the debt of her husband, no matter by whom held. *Holland v. Zilliox*, supra; *Biffle v. Pullan*, 114 Mo. 50, 21 S. W. 450. It seems to us that to sustain the right of the divorced wife in this instance to levy upon and sell the premises which the court, in the exercise of its beneficent powers, had set aside to her as a home where she could maintain and support her minor children, would be to put it within her power to take advantage of those merciful provisions of the law, and defeat not only the very purpose for which the right was given her, but to permanently deprive her divorced husband of his rights

which the court had suspended for her sake. Such a holding would result in a hardship which could be justified upon no principle of law or equity. When Mrs. Sykes sold the premises she evinced an unmistakable intention of abandoning the rights which the court had conferred upon her, and her former husband then had the legal right to resume his occupancy restricted only by his rights as a tenant in common with those who had purchased Mrs. Sykes' undivided one-half interest. This much she had the right to sell, and no more. The land being a homestead exemption at the time the writ of execution was levied on it, the sale thereunder conveyed no title. The question of innocent purchaser is not here involved. The purchasers from Mrs. Sykes acquired no better title than she did. It matters not how ignorant the purchasers from her were concerning the state of the title, or of the facts which constituted the land as a homestead; that afforded them no protection. A forced sale of a homestead, except for that which the Constitution makes it liable, is void by reason of the fact that it is not subject to such forced sale. But even if it should be held that a purchaser, ignorant of the transaction affecting the title and possession of Mrs. Sykes, might be protected on that account when he paid a valuable consideration, still that protection cannot be claimed in this instance. The testimony shows that the purchase from Mrs. Sykes by which the appellees procured the conveyance was made through the agency of Dr. Holland, and that the latter was familiar with all the attendant facts. His knowledge was sufficient to constitute notice to his principals.

We think the court erred in rendering a judgment in favor of the appellees for the entire tract of land. They are unquestionably entitled to one-half of it; and inasmuch as the appellant has conceded that right and asked for a partition of the land, the case should be reversed and remanded in order that this may be done. But for that we would here render judgment for the appellant for an undivided one-half of the land, and finally dispose of the case so far as this court is concerned. For the errors discussed, the cause is reversed and remanded.

BERRY BROS. v. FAIRBANKS, MORSE & CO.

(Court of Civil Appeals of Texas. July 2, 1908.)

1. EVIDENCE — PAROL EVIDENCE — INDEFINITE CONTRACT.

Where the terms of a written contract are indefinite and vague, proof of the surrounding circumstances is admissible to explain the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2066-2101.]

2. SALES — CONTRACTS — PERFORMANCE — QUESTIONS OF LAW AND FACT.

Whether a seller in a contract for the sale of an engine, to be shipped as soon as possible, complied with the contract, is a mixed

question of fact and law, and the court should interpret the meaning of the contract, and the jury should apply the evidence in the determination of whether or not the undertaking was performed within the meaning of the contract.

3. SAME.

Where a written contract for the sale of an engine called for delivery "as soon as possible," parol evidence that the seller's agent was advised by the buyer of the importance to the buyer of the greatest expedition in shipping the engine by reason of the harvesting season designated date was admissible to enable the court to construe the quoted clause, and to enable the jury to determine whether the undertaking was performed within the meaning of the contract.

4. SAME.

That a contract for the sale of one engine to be shipped as soon as possible was modified by substituting two engines for the one originally contracted for did not change the requirement that the same should be shipped as soon as possible.

5. TRIAL — ADMISSIONS — EFFECT.

An admission by defendant, entered under district and county court rule 31 (67 S. W. xxiii), relieves plaintiff of the obligation of proving his case, and allows him to recover to the extent of his claim made in his pleadings, and defendant cannot object to failure to offer evidence on any material allegation.

6. JUDGMENT — RES JUDICATA.

A cause of action on a written contract, though executory, and a cause of action for damages for the breach of the contract, are distinct, and a judgment in an action on the contract will not bar a subsequent action for damages for the breach thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1242, 1243.]

7. SAME.

A judgment in an action on a contract will bar a future action based on a rescission of the contract, or a failure of consideration thereof, and such facts must be pleaded in the action on the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1242, 1243.]

8. TRIAL — ADMISSIONS IN STIPULATION — EFFECT.

Where, in an action by a seller on a contract of sale, the petition alleged that the goods were shipped as soon as possible in compliance with the contract, and that the services of the seller's agent in putting the machinery into successful operation were waived by the buyer, and the buyer demanded in a cross-action damages for the failure of the seller to deliver the machinery as soon as possible, and then filed an admission reciting that the seller had a good cause of action, except so far as it might be defeated by the fact of the answer constituting a good defense, defendant was entitled to recover damages on proof of the failure of the seller to ship machinery within the time contracted for.

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by Fairbanks, Morse & Co. against Berry Bros. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. S. Patrick, W. F. Moore, and Burdett & Connor, for appellant. Moore, Park & Birmingham, for appellee.

LEVY, J. The appellees' cause of action was founded on a written contract alleged to have been entered into between appellants

and appellees, by the terms of which the appellees sold to appellants two eight horsepower portable gasoline engines, to be shipped as soon as it was possible to ship same, for a consideration to be paid when the said engines were put into successful operation by appellees' erector. It was alleged that the said engines were shipped and consigned to appellants as soon as it was possible to ship same, and were received by the appellants; and there were further alleged facts which appellees claimed showed that the services of appellees' erector were waived by appellants. Appellants answered by a general demurrer and general denial, and in a cross-action for damages alleged to have been sustained by a failure on the part of the appellees to ship and deliver the engines "as soon as possible" as provided for in the contract. The following was filed by the appellants: "Now comes the defendant, and, before announcing ready for trial, in open court admits that the plaintiff has a good cause of action, as set out in his petition, except so far as it may be defeated, in whole or in part, by the fact of defendant's answer constituting a good defense, which may be established on the trial of this cause, and demand the opening and closing of the case." The case was tried to a jury, and under a peremptory instruction the jury returned a verdict in favor of the appellees. From the judgment entered in accordance with the verdict, the appellants have brought the case on appeal, and seek to have the same revised for the errors assigned.

The appellants by their first and second assignments of error complain of the ruling of the court in excluding the evidence of Berry and Rives. The main objection urged is that such evidence has the effect to alter and vary the terms of a written contract by previous negotiations or contemporaneous parol agreement. Looking to the evidence offered and excluded by the court, it is, in substance, that appellees' agent was advised by the appellants at the time of the contract and during the negotiations for the purchase of the 10 horse power engine of the importance to the appellants of the greatest expedition in shipping the engines, by reason of the harvesting season of hay being ready on June 10th, and the vast amount of hay to be harvested, and that the engine was bought for use in the beginning and flush of the season. The written contract here involved neither fixes nor refers to no more certain and definite time within which the engine should be shipped to Brookston than the provision "as soon as possible." Because the words possess so much flexibility they cannot have an arbitrary definition, and consequently are vague and general. They look forward to certain happenings and expedition of the parties. It is the duty of the court, however, to interpret the obligation of this clause of the contract. To accomplish the mutual meaning attached by the parties to the contract to the words used, and to make the clause reasonable and not to

place either party at the mercy of the other, the words "as soon as possible" must be construed and applied in the light of the proof of the surrounding circumstances. It is a recognized rule that, when the terms of a contract are indefinite and vague, proof of the surrounding circumstances is admissible to explain. 1 Greenleaf, § 288. The cross-action of appellants is for damages for alleged failure to ship the engine "as soon as possible." In the ordinary course of things, upon a trial before a jury, the inquiry of whether the engines were shipped "as soon as possible" would be a mixed question of fact and law. It devolved upon the court to interpret the meaning of the parties to the contract, and to instruct the jury in the proper formulated instruction. It was the province of the jury to apply the evidence offered in the case in the determination of whether or not the undertaking was performed within the meaning and obligation of the contract. The case of Robinson v. Brooks (C. C.) 40 Fed. 525, was a case to recover back the purchase price of a threshing machine for failure to ship "at once, or as soon as possible." In this case the court quoted from, and followed the meaning given to the words in, the case of Palmer v. Insurance Co., 44 Wis. 208, where the term, "as soon as possible," as employed in a policy of insurance, was ruled to mean "within a reasonable time, with an undertaking to do it in the shortest practicable time." The case of Insurance Co. v. Lawrence, 35 U. S. 507, 9 L. Ed. 512, was a suit on an insurance policy wherein there was a provision that the assured should produce an account of the loss under certificate of a magistrate "as soon as possible." It was ruled by the court that the parties meant "that the certificate must be produced within a reasonable time after the loss." The case of Williams v. Rittenhouse & Embree Co., 198 Ill. 602, 64 N. E. 995, was a suit to enforce a mechanic's lien, and involved a contract for the erection of buildings, and provided that the contractor should have the brick walls ready for the roof in 30 days from the date, and the balance of the work "as soon as practicable thereafter." There the court, after reviewing decided cases, used the following expression: "The word 'practicable' and the word 'possible' may, and sometimes do, have the same meaning. If here regarded as synonymous, neither could be construed to require more than the exercise of reasonable diligence, in view of all the circumstances which might attend upon the execution of the work. It may be, and often is, possible to do that which is impracticable." We are of the opinion that the court erred in excluding the evidence. It was admissible and necessary in order to enable the court to properly construe the clause involved and to formulate the proper instruction to the jury in respect to the meaning the parties attached to the words, and as well to enable the jury to determine, along with all the facts, whether or not the undertaking was

performed within the meaning and obligation of the contract. That two engines were subsequently substituted for the one engine previously contracted for would not be a tenable objection to the evidence. 1 Greenleaf, § 303. The later contract covers the same character and terms of performance, and merged in that respect the former one. The dealings of the parties were with reference to an engine being shipped "as soon as possible," and the parties thereto had within contemplation the performance of the contract within such time. That two engines, instead of one, were to be shipped, might enlarge the time of performance, and such evidence could properly be considered by the jury in determining the performance of the terms of the contract.

It is contended by appellees that by the admission filed by the appellants they were precluded from offering proof in support of their claim, and that, in consequence, no other judgment than that rendered could have been entered by the court. The effect given to the written admission by the court doubtless prompted the peremptory instruction to the jury. Appellees' cause of action was founded on a written contract, and a judgment was sought on the written contract. Appellants entered a general denial, and filed a cross-action for damages for breach of the contract. Appellants' admission was entered under authority of rule 31 of practice for the district and county courts (67 S. W. xxiii), and was of binding effect that appellees had a good cause of action, as set out in their petition, except so far as it may be defeated, in whole or in part, by the facts of appellants' answer constituting a good defense. The contemplation of the rule is that the admission relieves the appellees of proving the case, and to allow them to recover to the extent of the claim made in their pleadings. *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663. The admission reaches to the entire cause of action pleaded, and appellants cannot question failure to offer evidence on any material allegation. *Taylor v. Reynolds* (Tex. Civ. App.) 105 S. W. 65. But in this case we do not think the scope and effect of this admission could properly be construed to be a waiver by appellants of their cause of action, and the admission applied in denial to appellants to prove and recover on their cross-action for damages for breach of the contract. A cause of action on a written contract, though executory, and a cause of action for damages for the breach of the contract, are legally severable and distinct, and are not so drawn together that the one cause of action necessarily involves and includes the other. A cause of action for damages is not adjudicated by a judgment in a suit on a contract of sale. *Dilley v. Ratcliff*, 29 Tex. Civ. App. 545, 60 S. W. 237. Consequently a judgment on the contract would not be a bar to an independent and subsequent suit for damages

for breach of the contract. There is a distinction to be drawn between a cross-action for damages for breach of the contract sued on and answer pleading rescission or failure of consideration of the contract. In the latter plea there is involved the legal contention that the contract sued on is incapable of enforcement, and such defenses must be pleaded in the suit on the contract, or a judgment on the contract would be a bar to any future action. Because such defenses are necessarily drawn into and involved in the plaintiffs' cause of action, an admission might properly, in a given case, be ruled to waive and preclude such defenses. But in a cross-action for damages it does not involve the legal contention that the contract is incapable of enforcement between the parties. Such plea affirms the contract in all things as made, and seeks damages for its nonperformance or failure to perform according to its terms. An admission under the rule would have the effect to admit and affirm the contract as sued on. Judgment would be entered on the contract for appellees, and, if judgment be recovered on cross-action in damages, then such recovery would be entered over and against or as a set-off against appellees. A recovery on the action would not be legally inconsistent with a recovery by appellees on their contract. They have a recovery under the admission for their entire claim, and a recovery on the cross-action would not be in a legal sense in defeat of the contract or recovery on the cause of action pleaded.

The petition alleged that appellants waived that portion of the contract which bound appellees to put the engines in successful operation by an erector furnished by appellees. The legal effect that would properly be given to the waiver, and the admission of the waiver would be the waiver of the right to insist upon the erection of the engines under the terms of the contract, but the admission could not properly be construed to be a waiver of any damages arising from a breach of the contract, so far as the failure to ship the engines within the time for erection. 3 Page on Contracts, § 1509. Because this admission did not preclude the defense, it was error to not permit the issues of the cross-action to be decided by the jury. *Smith v. Trader's Bank*, 74 Tex. 541, 12 S. W. 221. In the absence of pleadings that it was in contemplation of the parties that the engines contracted to be sold were to be manufactured, and that the delay in the shipment, if any, was caused by their having to be manufactured, the evidence complained of in the third assignment would not properly be admissible. But on another trial this objection may not exist.

It was error to give a peremptory instruction in this case, and the assignment of error in this respect should be sustained.

The case was ordered reversed and remanded for another trial.

WALKER et al. v. TEXAS & N. O. R. CO.

(Court of Civil Appeals of Texas. June 19, 1908.)

1. APPEAL AND ERROR—PRESUMPTIONS—DIRECTION OF VERDICT—REVIEW.

Unless error is properly assigned on the direction of a verdict for defendant, the appellate court will presume that the evidence authorized such direction under some one or more of the issues.

2. TRIAL—DIRECTION OF VERDICT.

A trial court is not authorized to direct a verdict for defendant, unless the evidence is of such a character that, as a matter of law, no other verdict can be rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381-384.]

3. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—STATEMENT.

Where, in an action for the death of plaintiff's husband, defendant pleaded negligence of a fellow servant, contributory negligence, assumed risk, and that deceased at the time of the accident was in the employ of an independent contractor, a statement, in support of assignments that the court erred in directing a verdict for defendant, merely alleging that the alleged independent contractor was not such in fact, and making no reference to the other defenses, was insufficient to justify a review of the ruling on appeal.

4. SAME—STATEMENT.

A statement, in support of an assignment that the court erred in directing a verdict for defendant, reciting that, the testimony being conflicting as to every material point, and strongly in support of plaintiff's cause of action on each question presented by the pleadings, it was error for the court to so invade the province of the jury, while correct as a proposition, was insufficient as a statement, required by rule 31 (67 S. W. xvi) to consist of a brief statement, in substance, of such proceedings or part thereof, contained in the record as will be necessary and sufficient to explain and support the proposition.

5. SAME—HARMLESS ERROR.

The overruling of plaintiff's first special exception to defendant's second amended answer, setting up special exceptions to the petition, and to the hearing of such special exceptions, because not filed in due order of pleadings, was without prejudice, where defendant's special exceptions referred to were all overruled.

6. PLEADING—EXCEPTIONS—SEPARATE PARAGRAPHS.

An exception to a paragraph of defendant's answer, based on an alleged independent contract, because it did not show the nature of the contract, was without merit, where the succeeding paragraphs of the answer contained a sufficiently full statement of the terms of the contract.

7. MASTER AND SERVANT—DEATH OF SERVANT—FELLOW SERVANTS.

Where decedent was employed by M. pursuant to a contract with defendant railroad company for the construction of trestles, roadway buildings, cattle guards, fences, water tanks, etc., along defendant's line, and was unloading timbers from cars at the time he received the injury from which he died, he was not engaged in operating the cars, locomotives, or trains of a railroad within Rev. St. 1895, art. 4560f, authorizing a recovery for injuries to persons so engaged, though inflicted by the negligence of fellow servants; and hence the railroad company would not be liable for decedent's death if caused by the negligence of a fellow servant, as defined by articles 4560g and 4560h.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 363-366.]

8. APPEAL AND ERROR—RECORD—BILLS OF EXCEPTIONS—REVIEW.

A ruling excluding testimony is not reviewable, where the bill of exceptions taken fails to state the grounds of objections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2297.]

9. EVIDENCE—CONCLUSION OF WITNESS.

A question asking a witness, in effect, whether deceased was guilty of negligence was objectionable, as calling for a conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2248-2254.]

10. SAME—BEST EVIDENCE.

Whether deceased, at the time he sustained the injuries resulting in his death, was employed by defendant or an independent contractor could not be shown by the understanding of the men employed under the written contract between the alleged contractor and defendant.

11. SAME—WRITTEN CONTRACT—PROOF.

A written contract cannot be admitted as evidence against one not a party thereto without proof of its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1559-1580.]

12. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—NECESSITY OF SPECIFIC ASSIGNMENT.

Where a motion for a new trial was based on several grounds, an assignment that the court erred in overruling plaintiff's motion for a new trial for the reason assigned therein was too general to be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3037, 3038.]

13. MASTER AND SERVANT—DEATH OF SERVANT—INDEPENDENT CONTRACTOR.

Where a railroad company contracted with M. to construct all trestles, roadway buildings, cattle guards, fences, water tanks, pump houses, etc., along the railroad line then in process of construction, the railroad to furnish material for the work, to be delivered at the site of stations, either on cars or by wagons, M. was an independent contractor, though the work was required to be done under the direction of defendant's engineer, who was also required to approve of or reject the work or material, and whose decision was to be final between M. and the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 5.]

Appeal from District Court, Nacogdoches County; Tom C. Davis, Judge.

Action by C. T. Walker and others against the Texas & New Orleans Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Ingraham, Middlebrook & Hodges, for appellants. Baker, Botts, Parker & Garwood and Blount & Garrison, for appellee.

REESE, J. This is a suit by C. T. Walker, widow of T. L. Walker, suing for herself and their minor children, to recover of the Texas & New Orleans Railroad Company damages in the sum of \$25,000, for the death of the said T. L. Walker, which is alleged to have been caused by the negligence of defendant. The court instructed the jury to return a verdict for defendant, and from the resulting judgment for defendant, their motion for a new trial having been overruled, plaintiffs appeal.

Unless there is a proper assignment of error which we can consider, and under which

we can declare that this charge was error, we must conclude that the evidence authorized the charge under some one or more of the issues. In such case we would have to hold that, under the pleadings and evidence, no other verdict could have been properly rendered, and that therefore the judgment should not be reversed for errors committed upon the trial. The trial court was not authorized to instruct the jury to return a verdict for the defendant, unless the evidence was of such a character that, as matter of law, no other verdict could be rendered. Until the contrary is shown, we must assume that the state of the evidence authorized the court to instruct a verdict for defendant, and in such case the judgment will not be reversed for errors in procedure.

In addition to the general denial, defendant set up the defenses: That the death of Walker was caused by the negligence of a fellow servant, contributory negligence, assumed risk, and that deceased was, at the time of the accident, in the service of one Maurice, and engaged in the performance of his duties in such employment; that Maurice was engaged in the prosecution of certain work for defendant as an independent contractor, and that the persons engaged with him in the work in which deceased received his injury, and whose negligence is alleged to have caused his death, were likewise employees of Maurice under said independent contract, and that defendant was in no way liable for the acts of said Maurice or his employees. If upon either of these issues the evidence was such as to authorize the charge of the court, the judgment should not be reversed. It is therefore essential that appellants, in order to have this judgment reversed, should show by proper assignment, or assignments of error, that the charge cannot be sustained upon any of the issues presented. Lacking this other errors are mere harmless abstractions.

The fourteenth assignment of error, and the statement thereunder, are as follows:

"The court erred in his charge to the jury in the following words, viz.: 'Gentlemen of the jury, you are charged, in this case, to return a verdict for the defendant'—because such charge was unauthorized by the evidence, because it was the province of the jury, and not the court, to determine the question of liability of the defendant, because there was no legal evidence in the case to authorize it, because each and every material allegation in plaintiffs' petition was most strongly proven by the evidence. Because the court erred, taking all the evidence in the case together, it is not such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. And this fourteenth assignment of error is submitted as a proposition.

"Statement. The contract, on close inspection, shows that defendant was not only interested in the result of the work, but the

very manner of it, and the material used in the construction of the work, and was done and to be done under the direction of Mr. Lamb, the defendant engineer. Also it shows said engineer shall inspect, examine, and pass upon, approve, accept, or reject the work or material, whose decision will be final upon all matters between Maurice and defendant, thereby showing that defendant and Maurice were equally interested, and were, so to speak, partners. And also the testimony showing that the defendant was the owner of the work controlling it, and had the supervision of it, thereby establishing the relation of master and servant between Maurice and defendant company." If the assignment can be properly presented as a proposition, the statement under it is obviously insufficient. No reference is made to the evidence upon any issue, except that presented by the plea that Maurice is an independent contractor. From all that appears or is suggested the evidence upon each of the other issues may have required the charge that was given. In order to sustain the assignment, we would be compelled, with no assistance from the brief, to go through the entire record, to be able to understand the state of the evidence upon the other issues. An assignment so presented cannot be considered.

The sixteenth assignment of error and accompanying statement are as follows:

"The court erred in its charge to the jury in the following words: 'Gentlemen of the jury, you are charged in this case to return a verdict for the defendant'—because, taking all the evidence in the case together, it is not of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. And the sixteenth assignment of error is here submitted as a proposition under the sixteenth assignment of error of appellants.

"Statement. The testimony being conflicting as to every material point, and strongly in support of plaintiff's cause of action upon every question presented by the pleadings, it was error for the court to so invade the province of the jury." The statement is correct as a proposition, but as a statement it is entirely insufficient. It cannot, by any latitude of construction, be considered "a brief statement, in substance, of such proceedings," or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition," as is required by rule 31 (67 S. W. xvi).

These are the only assignments of error which assail the charge of the court. Appellee makes vigorous objection to their consideration, which must be sustained. In the view we take, there being no assignment of error to the peremptory charge, so presented as to require consideration, other errors would not require a reversal if properly presented. *Heirs of Webb v. Kirby Lumber Co.* (Tex. Civ. App.) 107 S. W. 581, 20 Tex. Ct.

Rep. 543. Other assignments will, however, be disposed of.

The first assignment of error assails the ruling of the court in overruling plaintiffs' first special exception to defendant's second amended original answer, setting up certain special exceptions to the petition, and in hearing the said special exceptions, because not filed in due order of pleadings. It is a sufficient answer to the assignment that the special exceptions of defendant referred to were all overruled.

The second assignment of error is that the court erred in overruling the plaintiffs' exceptions to the defendant's first special plea, in its second amended original answer, because the plea referred to does not show the nature of the contract between defendant and Maurice. The statement under the assignment, which is submitted as a proposition, is that the special plea of the defendant No. 1 does not show, in any manner, the contract between Maurice and defendant. Permitting any criticism of the statement as insufficient, the paragraph of defendant's answer, following the one at which the exception is leveled, contains a sufficiently full statement of the terms of the contract. The assignment is without merit.

The third assignment is addressed to the alleged error of the court in overruling plaintiffs' special exception to the defendant's second special plea in its second amended answer. The assignment presents no error, and is overruled.

The sixth assignment complains that the court erred in overruling plaintiffs' special exception to the fifth special plea of defendant, in its second amended original answer to plaintiffs' amended petition, because if the deceased was killed by a fellow servant's negligence, it would be no defense to the action whether Maurice was or not an independent contractor. The allegations of the answer, sustained by the evidence, were that Maurice was engaged in the work of building "all trestles, roadway buildings, cattle guards, fences, water tanks, pump houses, etc., along defendant's line of railroad then in process of construction, that defendant was to furnish material for the work, to be delivered at site of station, either on cars or by wagons, and that at the time of the accident deceased Walker, with his co-employees was engaged in unloading, from a car of defendant, some heavy timbers furnished for the work." They were not "engaged in the work of operating the cars, locomotives, or trains" of defendant, as provided in article 4560f, Rev. St. 1895. The statute referred to has no application, and defendant would not be liable if the death of Walker was caused by the negligence of a fellow servant, as defined in articles 4560g, 4560h, Rev. St. 1895. The assignment cannot be sustained. *G. C. & S. F. R. R. Co. v. Johnson* (Tex. Civ. App.) 103 S. W. 448, on rehearing. Error refused.

The seventh, eighth, ninth, and tenth as-

signments of error complain of the ruling of the court in sustaining defendant's objections to certain testimony. The bills of exception taken by appellants fail to state the objection made to the testimony, and the grounds upon which it was excluded. For this reason we cannot revise the action of the trial court, and cannot hold that any error was committed by the rulings indicated. *Endick v. Endick*, 61 Tex. 560; *Arambula v. Sullivan*, 80 Tex. 618, 16 S. W. 436. The questions asked the witnesses, referred to in the seventh, eighth, and ninth assignments, were clearly leading. In addition that referred to in the ninth assignment was objectionable as calling for the conclusion of the witness. In substance and effect the witness was asked whether the deceased was guilty of negligence. The testimony sought to be elicited, referred to in the tenth assignment, was irrelevant and immaterial. It was intended, we suppose, to bear upon the issue as to whether or not Maurice was engaged in the prosecution of work as an independent contractor. This could not be shown by the understanding of the men in the face of the written contract between Maurice and the defendant. None of the statements from the record accompanying these assignments are sufficient. The assignments are overruled.

There was no error in overruling the objection to the testimony referred to in the eleventh assignment. The statement accompanying the assignment is as follows: "The witness was only giving his opinion, and was not testifying from his own knowledge, but hearsay." The testimony is not objectionable on either ground. There is no merit in the assignment.

The twelfth assignment complains of the ruling of the court in admitting in evidence, over plaintiffs' objection, the written contract between F. W. Maurice and defendant. One of the objections to this evidence was that the execution of the contract was not proven. The terms of the contract are not set out in the assignment, nor in the accompanying statement. So far as the brief of appellants is concerned, we are left entirely to conjecture as to the nature of this contract, or its bearing upon the issues presented. The bill of exceptions is a part of the statement of facts, from which it appears that the instrument is a contract between the Texas & New Orleans Railroad Company and F. W. Maurice. The objections to its introduction are (1) that it was not the original contract; (2) that there was no proof of its execution; (3) that it was immaterial and wholly irrelevant; and (4) that it did not bind plaintiff. The proposition and statement under the assignment are confined to the objection that the execution of the contract was not proven. The statement is as follows: "There was no proof of the execution of the contract, and its introduction upon this ground was objected to by appellants, and the objection overruled by the court, and

the same admitted by the court." The objection that the execution of the contract was not proven must be sustained. It is admitted by appellee in its brief that there is in the record no evidence of its execution which was necessary to entitle it to be admitted as evidence as against one not a party to the contract. *Betterton v. Echols*, 85 Tex. 212, 20 S. W. 63; *Peterson v. Martinez & Bros.*, 34 Tex. Civ. App. 212, 78 S. W. 406, 8 Tex. Ct. Rep. 915. This, however, will not require a reversal of the judgment in the view we take of the absence of any proper assignment assailing the charge of the court directing a verdict for defendant.

The fifteenth assignment is as follows: "The court erred in overruling plaintiffs' motion for a new trial for the reasons assigned therein." There are many grounds urged in the motion. The assignment is too general, and cannot be considered. *Mayer, Kahn & Freiberg v. Duke*, 72 Tex. 449, 10 S. W. 565; *Bumpass v. Morrison*, 70 Tex. 758, 8 S. W. 506; *O'Neill v. Willis Point Bank*, 67 Tex. 40, 2 S. W. 754.

The thirteenth assignment of error complains of the admission of testimony over appellants' objection. The bill of exceptions does not show what were the grounds of objection urged to the testimony. The assignment is otherwise without merit.

The seventeenth assignment is overruled. The objection stated to the admission of the contract, if tenable at all, would go to its legal effect, and not to its admissibility.

We have examined the contract introduced in evidence between F. W. Maurice and the Texas & New Orleans Railroad Company. Under its terms Maurice was an independent contractor in the matter of the work to be done by him, and not an employé, agent, or servant of the railroad company. *Smith v. Humphreyville* (Tex. Civ. App.) 104 S. W. 495, 19 Tex. Ct. Rep. 636. Writ of error refused. If the deceased, Walker, was employed by Maurice, and was engaged, at the time he was killed, in the work then being done by Maurice under the contract aforesaid, and his death was caused by the negligence of Maurice, or other employé of Maurice, engaged in this work along with Walker, the defendant would not be liable.

For the reasons indicated in this opinion, the judgment is affirmed.

Affirmed.

RHODES et al. v. MARET et al.

(Court of Civil Appeals of Texas. June 13, 1908. Rehearing Denied July 4, 1908.)

1. CHARITIES—CONVEYANCE—SUFFICIENCY—TRUSTEE—JOINT USE OF BUILDING—EFFECT OF AGREEMENT.

A lodge and citizens of a community desiring to erect a building, citizens signed a subscription list whereby they contributed money to build a "lodge and schoolhouse, the upper story to be used for lodge purposes and the lower room for school purposes," the building being

erected upon the lodge's land, under the direction of a joint committee, which received the building and for several years supervised the schools, etc., after which, at the committee's request, the lodge controlled the entire building, the lower room continuing to be used for school purposes. *Held*, that there was a contract between the lodge and the subscribing citizens creating a right in the nature of a use ingrafted upon the building, entitling the community to use the lower story so long as the building exists for the purposes contemplated by the agreement; the committee appointed by the community constituting such body in law as was capable of receiving the right conferred upon the community.

2. FRAUDS, STATUTE OF—DEEDS—SUFFICIENCY OF WRITING—PRESUMPTIONS.

Though it does not appear that a lodge signed a subscription list constituting a contract between the lodge and a community for the erection of a building on the lodge's land to be used jointly for lodge and school purposes, the list having been signed by members of the lodge, 40 years having passed, and the lodge having formally recognized and acted upon the instrument, it will be presumed, if necessary, either that the lodge signed the instrument, or that the members who signed did so with proper authority from the lodge, within Rev. St. 1895, art. 624, requiring conveyances to be declared in writing, subscribed, and delivered by the grantor or his agent.

3. TRUSTS—ADVERSE POSSESSION BY TRUSTEE.

That for many years a lodge controlled the lower story of a building erected on land owned by the lodge, by citizens of the community under an agreement that the upper story should be used for lodge purposes and the lower for school purposes did not bar the community's right to so use the lower story; there being no considerable period when such right was denied, and the lodge being in effect trustee for the community as to the lower story.

4. SCHOOLS AND SCHOOL DISTRICTS—TRUSTEES—CONTROL OF PROPERTY.

Under Rev. St. 1895, art. 3992, giving school district trustees control of the district schoolhouses, grounds, and property, the trustees of a school district, when organized, succeeded to the trusteeship of a lodge respecting the lower story of a building erected on the lodge's land by citizens of the community under an agreement that the lower story should be used for school purposes, entitling them to control that story for public free school purposes.

Appeal from District Court, Hood County; W. J. Oxford, Judge.

Trespass to try title by H. G. Rhodes and others against Fred Maret and others. From the judgment, plaintiffs appeal. Affirmed.

See 101 S. W. 278.

Estes & Douglass, for appellants. John J. Hiner and W. L. Dean, for appellees.

CONNER, C. J. Appellants W. J. Goodlet, H. G. Rhodes, and J. A. Wood are the three principal officers of Acton Masonic Lodge No. 285, and in behalf of and for the benefit of said lodge instituted this suit in trespass to try title to recover possession of five acres of land out of the John McCoy survey, in Hood county, together with the improvements thereon. In addition to the ordinary allegations in trespass to try title, the appellants pleaded affirmatively the statute of three, five, and ten years' limitations. The appellees J. R. Randle, V. M. Mayfield, and C. F. Brister are the trustees of Acton School Dis-

trict No. 27, and appellees Mary Stephenson and Audie Duckworth are the school teachers in said school district, and were alleged to be in possession of the property in controversy. The school district is one of the public free school districts of the state, and is operated under the free school laws of the state. There is a two-story stone building located on said five acres of land, that on the 13th day of November, 1905, was locked and in the actual possession of appellants. On said date appellees broke open the house, and have since retained the possession and use of the lower story for the purpose of a free school. Appellees pleaded not guilty, and specially that on the 5th day of December, 1866, Acton Masonic Lodge, through its officers and agents, entered into an agreement with the citizens of Acton community to the effect that, if said community would assist said lodge to erect said stone building, said lodge and community should be the joint owners of the building; that the lodge should use and occupy the upper story for its purposes, and the said community the lower story for school and church purposes; that said contract, or a memorandum thereof, was in writing and duly signed by the parties thereto, and placed in the archives of said lodge; that said Acton community appointed a committee to act with a committee appointed by the lodge to secure the construction of the building; that the community subscribed and paid in furtherance thereof the sum of \$750, being more than one-half the cost thereof; that the building was erected and by the builders delivered to the building committee, composed of Masons and parties representing the Acton community, since which time the building has been used and occupied by the community and the lodge as originally contemplated. Appellees prayed for a judgment establishing the right of the community to the lower story of the building; but, in event this could not be done, then they prayed for judgment against the appellants for the said \$750 contributed by the community as aforesaid. The trial resulted in a verdict and judgment, so far as necessary to here notice, giving to appellees the title and right of possession to the lower story of the stone building mentioned, burdened with a right of ingress and egress therefrom in appellants to the upper story, which, together with the title and possession of the five acres of land, was awarded to appellants.

By assignments of error to the action of the court in overruling exceptions to appellees' said special answer, and in admitting certain evidence tending to establish the agreement therein set up, and in other ways, appellants present substantially, as we view it, but two controlling questions, which are: First, Did Acton Lodge, in 1866, enter into any such contract as enables appellees, as representatives of the Acton community, to maintain the right to the possession and use of the lower story of the stone building men-

tioned; and, if so, has such right been barred under the statute of limitations by adverse possession of appellants, as pleaded by them? While the case presented is anomalous, and appellees have cited no authority in support of the judgment, we have finally concluded that we should uphold it. Generally speaking, the evidence supports the special plea of appellees. It appears that in December, 1866, Acton Lodge and the citizens of the Acton community were desirous of erecting the building, and that what we will term a subscription list was circulated, and that the citizens subscribed thereto between \$500 and \$800—at least one-half the cost of the structure. The list thus refers to the common purpose: "We, whose names are signed, agree to pay the amounts opposite our names for the purpose of building a Masonic lodge and schoolhouse in the town of Acton; the upper story of said house to be used for lodge purposes, and the lower room of said house to be used for school purposes." This paper was lost at the time of the trial, but the above quotation contains its substance, so far as witnesses could remember; it further appearing that it was signed by at least some of the citizens who were Masons and some who were not. It does not appear, however, whether Acton Lodge, as such, signed it, or whether the members thereof signed by its direction or authority. However, the list was filed and remained among the archives of the lodge for many years, and is referred to by some of the oldest members and officers of the lodge, who testified, as the "conveyance" from the lodge of the lower story to the Acton community. It further appears from written minutes and orders of the lodge and of public meetings of the citizens of Acton community that after the subscription a joint committee, composed of members of the lodge and of persons appointed by the citizens, was formed, with duty and power to provide for the erection of the desired building, and that the building in controversy was the result. Upon completion the building was delivered to said joint committee, which, as indicated by some of the evidence, continued for several years to act for the community in the employment of teachers, in visiting and supervising the schools, etc.; it being noted in this connection as an illustration of the time that one of the first contracts was with Dr. Doyle, who was employed to teach a three months' term and received "\$40 per month, one-third in specie and the rest in produce." The building was completed and received by the joint or union committee April 20, 1867, from which time, under its supervision and control, as stated, the lower room was used as a schoolroom and place of public worship until on January 15, 1870, at which time the union committee presented a "memorial" to the lodge, which was granted, asking the lodge to take charge of the building. From January 15, 1870, the lodge, through appropriate committees, seems to

have had general control of the entire building until shortly before the institution of this suit; the lower story, however, being devoted during all the time to the use of schools and public worship. The evidence suggests that the management and control was thus exercised. At first the lodge employed teachers and acted in the capacity somewhat of a trustee for schools until the establishment of the public free school system of the state, after which the public free school term was supplemented at times by subscription payment of the teacher for a longer period. Later the regular school trustees of the district managed and controlled the schools, provided for repairs, etc.; the control of the lodge existing only during times when there was no school.

It is undisputed that the fee-simple title to the five acres of land in controversy was vested in the lodge prior to all times herein mentioned, and we have felt considerable hesitancy in disposing of the matter. We have finally concluded, however, that the subscription list embodied a contract, covenant, or agreement between Acton Lodge and the subscribing citizens of the community sufficient to create a right in the nature of a charity or use, as classified in the common law and equity authorities, which was imposed or ingrafted upon the building in controversy, conferring the right to the use of the lower story of the building in controversy so long as it shall continue to exist for the purposes contemplated by the agreement. Such a use, charity, or right is not unknown to our law. In *Hopkins v. Upshur*, 20 Tex. 96, 70 Am. Dec. 375, where the question of the liability of a subscriber for the erection of a church was involved, our Supreme Court, in disposing of one of the contentions, says: "Another objection to this suit is taken, which strikes at its foundation; that is, that a court of equity has no power in this state to uphold and enforce such a trust for a charity. It is contended that this jurisdiction was given to the court in England by statute, and, there being no such statute here, the power is wanting. See case, cited by appellee, of *Green et al. v. Allen et al.*, 5 Humph. (Tenn.) 170. We think the contrary is settled by the weight of authority, and that a court of equity has such power by virtue of its general jurisdiction, independent of a statute. This is fully shown in a case, decided by the Supreme Court of the United States, of *Vidal et al. v. Citizens of Philadelphia et al.*, 2 How. 127, 11 L. Ed. 205. See, also, *Story, Eq. Jur.* § 1191, and *Dickson et al. v. Montgomery et al.*, 1 Swan (Tenn.) 348." In the case of *Ingils v. Trustees of Sailors' Snug Harbor*, 3 Pet. (U. S.) 99, 7 L. Ed. 617, a devise for the benefit of an unincorporated class of persons was upheld as a charitable devise, use, or trust. See, also, authorities cited in note to this case.

It may be objected that the Acton commu-

nity designates no natural or artificial person or body known to our law, and that hence it was incapable of receiving the right we have in contemplation; but, as seen from the authority last cited, this is not an insuperable objection. We think that the committee appointed by the community that acted in conjunction with the committee appointed by the lodge, and which by the community had been given power and authority in the nature of that of a trustee, constituted such body in law as was capable of receiving. We have seen that this committee not only acted in the prosecution of the work, but at its termination actually received the building, and the right and authority of the committee thereafter to use, manage, and control the lower story was repeatedly recognized by Acton Lodge. If these trustees were capable of receiving, as we think they were, it would seem undoubtedly true that the contract under consideration was sufficient in its terms to create, as before stated, a use or trust. See, also, on this question, *Bell County v. Alexander*, 22 Tex. 351, 73 Am. Dec. 268.

Appellants insist, however, in effect, that the building became a fixture upon the land, and that the subscription list or writing relied upon by appellees is violative of our statute on the subject and insufficient to operate as a conveyance. *Rev. St. 1895, art. 624*, which was in force at the time in question, provides that "no estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing." While, as we have seen, there was no affirmative proof that Acton Lodge signed the paper in question, it does appear that it was signed by members of the lodge, and we think that after the lapse of more than 40 years, and after it has been made to affirmatively appear that the lodge formally recognized and acted upon the instrument, we should presume, if necessary, either that the lodge signed the instrument, or that those members thereof who were shown to have signed it did so with the proper authority of the lodge. So that, even if the right adjudged to appellees is such as could only have been conferred by a "conveyance," we think we should overrule this contention. Besides, it is undisputed that the contract, as we construe it, was in writing, and it has been repeatedly held in this state that an express trust in writing may be ingrafted upon land, and some of the authorities, at least, treat the right under consideration as one in the nature of a trust.

It is also insisted by appellants that the right of the Acton community, if any ever existed, was barred by limitation before the institution of this suit. While, as herein-

before stated, Acton Lodge, for a long period after the surrender of the function by the union committee, did assume control and management of the lower story of the building, we yet think such possession, management, and control was in the nature of that of a trustee for the Acton community. The holding was not adverse, in the sense that the right of the Acton community was barred. It cannot be pretended, from the evidence, that there has been any considerable period when the right of the Acton community to the use of the lower story of the building in controversy as a public school-room has been denied. It may, however, be suggested that no sufficient legal reason exists for a termination of the lodge's trusteeship in this particular, and that therefore the judgment in favor of appellees as the trustees of the Acton school district is without right and unauthorized. It is undisputed, however, that the Acton community is now organized under the public free school laws of this state as a regular school district, and that appellees are the regularly qualified and acting school trustees of the district. Such being the case, by the express terms of the statute, appellees Randle, Mayfield and Brister, as trustees of the district, have been given the control. See Rev. St. 1895, art. 3902, which provides that "all schoolhouses erected, grounds purchased or leased for a school district, and all other property belonging thereto, shall be under the control of the district trustees of such district." The right of the Acton community to the use of the lower story of the building being established, as we have concluded was done, we think it follows that appellees, as trustees of the district, succeeded to the trusteeship, as it were, of the lodge, and that they should now be permitted, with the qualification mentioned in the judgment, to use, occupy, and control the lower story of the building in question for public free school purposes.

The judgment below will accordingly be in all things affirmed.

GATE CITY ROLLER RINK CO. v. McGUIRE.

(Court of Civil Appeals of Texas. June 4, 1908.)

1. MASTER AND SERVANT—COMPENSATION—EMPLOYEE'S RIGHT TO.

Findings that a contract, under which skating rinks were consolidated, and plaintiff was employed as manager, provided that plaintiff should receive \$1,000 whether the consolidated rink ran 1 month or 12; that plaintiff had been without employment, and had been unable to secure a position for 6 weeks within the year following the consolidation; that the consolidated company employed plaintiff for one year for \$1,000, to be paid in monthly installments; that the employment and salary were intended to cover management of the rink, and of a summer theater if the rink should close; that the contract contemplated the continual existence of the rink, which was destroyed by fire; that since such destruction plaintiff refused other employment; that it had not been impossible to

reconstruct the rink on the old site; that the contract was made for a year because plaintiff feared the rink might be closed during the summer, making the chances of other employment unfavorable—were sufficiently clear to authorize judgment for plaintiff for accrued monthly installments.

2. SAME—EVIDENCE—ADMISSIBILITY.

In an action for salary for managing a skating rink, it was not error to exclude a writing, claimed by defendant to embody the terms of the contract, where it was not signed by plaintiff, and where defendant's witnesses testified fully concerning its contents; their testimony not being disputed.

3. WITNESSES—EXAMINATION—LEADING QUESTIONS.

In an action for salary for managing a skating rink, interrogatories, to one of plaintiff's associates in a rink consolidated with defendant's, as to whether witness, at a certain date, met with certain persons to perfect a consolidation, and whether he had, at such time, any intimation as to how much stock they would be allowed in a consolidation, and whether it was not understood that, unless plaintiff was made manager, the consolidation could not be affected, and as to whether plaintiff had not made certain statements, before and at the conference, as to whether certain matters were not first discussed at such conference, were objectionable as leading.

4. EVIDENCE—CONCLUSIONS OF WITNESS.

Interrogatories to witness as to whether, when the witness became a stockholder in a consolidated company, he did not understand that the company was to have paid plaintiff in the action a year's salary whether he worked for that time or not, and whether he considered the agreement so to pay plaintiff binding on the stockholders, was objectionable, as asking for the conclusions and opinion of the witness.

5. WITNESSES—LEADING QUESTIONS.

Answers to leading questions are objectionable as far as responsive to the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-851.]

6. SAME—IRRESPONSIVE ANSWERS.

Answers to interrogatories, not responsive to the same, and containing volunteered and immaterial statements, are objectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 861-863.]

7. SAME—EXAMINATION—LEADING QUESTIONS.

In an action for salary for managing a skating rink, formed by consolidation of two rinks, an interrogatory, "If you have said" that plaintiff was to receive stock and \$1,000 for managing the consolidated rink, whether he managed it for a month or a year, state what amount the consolidated company has paid him, and is it not true that such was the final contract, and if it was not, what was the final contract? was objectionable as leading and suggestive.

8. SAME—IRRESPONSIVE ANSWERS.

Where, by an interrogatory to witness, he was asked whether plaintiff was not to receive a certain salary for managing a skating rink whether it ran a month or a year, and whether such was not the final contract, and if it was not, what was the final contract, an answer that it seemed that plaintiff thought the contract was, in some respects, indefinite, and that they had under it a right to fire him out at any time on notice, or close down the rink and leave him without a job, and that it seemed that an agreement was reached before the different parties began to sign the contract, and that they finally agreed to plaintiff's suggestion, whatever it was, was objectionable as not responsive.

9. MASTER AND SERVANT—ACTION FOR WAGES—EVIDENCE.

In an action for salary for managing a skating rink, organized by a consolidation of a

rink owned by defendant and one owned by plaintiff and his associates, plaintiff could show the facts concerning the history of transactions leading up to the consolidation and his employment, not only to show the intent of the parties, but to show whether or not the contract was as testified to by him.

Appeal from Bowie County Court; Sam H. Smelser, Judge.

Action by J. W. McGuire against the Gate City Roller Rink Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Defendant's objections to the first set of questions, set out in the opinion under defendant's third and fourth assignments of error, were that the questions were leading, and called for irrelevant and immaterial testimony, and for self-serving declarations by plaintiff, and for conclusions, opinions, and beliefs on the witness' part. The objections to the answers were that, in so far as they were responsive to the interrogatories, they were objectionable, for the same reason that the interrogatories were objectionable, and further that they were not responsive, and contained volunteered and immaterial statements, understanding, and opinions, both on plaintiff's and the witness' part. Defendant's objection to the interrogatory set forth in the opinion, under defendant's third and fourth assignments of error, as the "fourth question," was that it was leading and suggestive, and the answer was objected to as not being responsive and as containing irrelevant matter.

Glass, Estes & King, for appellant. R. P. Dorough, for appellee.

HODGES, J. J. W. McGuire, the appellee, sued the appellant in March, 1907, to recover the sum of \$583.30 claimed as the balance due on his salary for services rendered in managing a skating rink in the city of Texarkana. The facts show that the appellee and two others were the owners of what was called the "Texarkana Skating Rink"; that their capital stock was valued at \$2,000, of which McGuire owned one-half, and his two associates each owned one-fourth; that some time prior to the 1st day of October, 1906, the appellee and his associates were approached by the owners of the appellant company for the purpose of negotiating an agreement to consolidate the Texarkana Skating Rink with the Gate City Roller Rink Company, a new corporation, which had been formed for the purpose of building and operating another skating rink in the city of Texarkana. There was a meeting, held in the office of one of the stockholders of the appellant company, for the purpose of discussing and agreeing upon terms of consolidation. The testimony shows that McGuire and his associates were offered stock in the new company to the amount of \$1,000, and the further terms that McGuire should be employed to manage the new rink for one year, at a salary of \$1,200. This offer was rejected, because McGuire and his as-

sociates did not think they were offered a sufficient amount of stock. Subsequently the negotiations were resumed, and the offer to consolidate, upon allowing McGuire and his associates stock to the amount of \$1,500, with the employment of McGuire for one year at a salary of \$1,000, was agreed to. Another meeting was held, at which this agreement was reached, and there the terms were discussed regarding McGuire's employment. There is no conflict in the testimony in regard to the consolidation, but only as to the terms upon which McGuire was employed. McGuire contends that his employment for one year was a part of the consideration which induced him to enter into the contract of consolidation, that without his consent the consolidation could not have been perfected, and that, unless he had been guaranteed employment for one year, or the compensation of \$1,000 whether he was used one year or not, he would not have agreed to the consolidation. He testified that, at the last meeting, when the terms were agreed upon, he expressly stated, and that it was generally acquiesced in, that he would accept employment at a salary of \$1,000 a year, with the understanding that his salary was to be paid in full, whether the rink ran 12 months or less. He admits that he agreed, in case the rink should be closed down during the summer months, to manage a summer theater for the company at the place where the rink was located. The appellant offered testimony to the effect that McGuire agreed to accept employment at a salary of \$1,000 a year, that the company reserved the right to discharge him by giving 30 days' notice, and that it also reserved the right to furnish him other employment in case the rink should be discontinued. The testimony further shows that the rink began operations under McGuire's management some time about the 1st of October, 1906, and continued until in March of 1907, when it was totally destroyed by fire. There was an insurance of about \$6,000 upon the building and material, but no attempt has ever been made to rebuild the rink or to resume its operations at any other place. It was further testified to, and admitted by McGuire, that he had been offered employment by the officers of the appellant company, without stating what that employment was, and that he had refused it. There was also testimony tending to show that the rink could not be rebuilt at the same place where it once stood, by reason of the fire limits of the city being extended so as to include that lot. The testimony fails to disclose whether or not the failure to rebuild and renew the operations of the skating rink were from inability on the part of the company, or for other reason. The case was tried before a jury, and, after the conclusion of the testimony, was submitted upon special issues, the following questions being propounded at the request of the plaintiff: "Q. Did the contract entered into by and between the plaintiff and defendant provide that plain-

tiff was to receive \$1,000, and that he should receive the same whether the rink ran 1 month or 12? Answer yes or no. A. Yes. Second. How long has the plaintiff been without a position, or unable to secure a position, since the 2d day of March, 1907? A. Six weeks." On behalf of the defendant the court submitted the following questions: "First. Did the plaintiff make a contract with the defendant, by the terms of which he engaged his personal services to the defendant for a period of one year at a salary of \$1,000? Answer. Yes, sir. Second. If you answer the above question yes, then was said salary to be paid in monthly installments of \$83½ per month? Answer. Yes. Third. In said contract was it contemplated and understood that the plaintiff would, during the summer months, in the event the rink should be closed during the summer, manage a summer theater in the rink building, and was the annual salary of \$1,000 to cover his services as manager of said theater? In other words, did the employment for one year and salary therefor cover, or was it intended to cover, the management of the rink, and also, if the rink was closed, the management of a summer theater? Answer. Yes. Fourth. Did said contract, at the time it was executed, contemplate, as a consideration of its performance, the continued existence of the rink which was subsequently destroyed by fire? Answer. Yes. Fifth. Since the destruction by fire of the rink has the plaintiff refused other employment? Answer. Yes. Sixth. Has it been possible to reconstruct the rink at the place it was located before it was destroyed by fire? Answer. No. Seventh. Was the contract between the plaintiff and the defendant made for a period of one year because the plaintiff feared the rink might be closed during the summer months, and that, during such time, his salary might be discontinued, and the chance for other employment at such a season be unfavorable? Answer. Yes." Upon these findings both the appellant and the appellee moved the court to enter judgment in favor of the defendant and plaintiff, respectively. The appellee asked for judgment for the amount sued for, with interest at the legal rate, and, in the event the court should hold payment should be made monthly, then for judgment accordingly. The appellant moved the court to render judgment upon the findings in favor of the defendant, and in the event the court should hold that, on account of the findings, the plaintiff had been without employment, or was unable to secure employment, for a period of 6 weeks after the 2d day of March, judgment ought not to be rendered, without qualification, in favor of the defendant, then that judgment be rendered for an amount equivalent to what the plaintiff's wages under the contract would have been for said length of time, or until the date of the trial. The court sustained the plaintiff's motion, and entered judgment in his favor for the sum sued for, together with

interest, and overruled the motion of the appellant.

The refusal of the court to enter judgment in accordance with appellant's motion is made the basis of the first group of assignments of error. These assignments are all directed toward the same ruling and are merely the statement of different reasons why the court is said to have erred in the ruling complained of, and for that reason they will be treated as one assignment. While the answers given by the jury to the several questions propounded do not leave the legal deductions to be drawn therefrom entirely free from doubt, still we think they were sufficiently plain to authorize a judgment in favor of the plaintiff. But the jury, having found that the payments were to be made in monthly installments, and the evidence showing that all of the installments had not then matured, the particular judgment was, in some respects, erroneous. That error, however, is such as might be cured by a reformation of the judgment, without the necessity of a reversal. Upon another trial the conditions will be such that it is not likely to recur. It is evident from the pleadings and the arguments of the parties that this case was prosecuted upon one theory and defended upon another. The plaintiff seems to have rested his right of recovery upon the contention that he had made a contract to perform a given service, not to render services for a definite period of time, and was to receive therefor a fixed compensation of \$1,000; that this compensation was not alone for the services he was to render, but was a part of the consideration of the agreement for the consolidation of the two rinks. He assumed that, when suit was filed, the conditions existed which justified the conclusion that his services, under the contract, had been completed, and he was entitled to receive the full contract price which had previously been agreed upon. The appellant defended upon the assumption that the contract was one for the performance of personal services for a definite period of time, and that the right of the appellee to recover was to be determined by the rule for fixing the measure of damages for broken contracts of employment. The jury evidently adopted the appellee's construction of the contract. As the case is to be reversed upon other grounds, we take occasion to suggest that upon another trial, if the case should again be submitted on special issues, the questions be so framed as to make the meaning of the jury clear concerning the legal effect of the answers to be given.

We do not think the court erred in refusing to permit the appellant to introduce in evidence the written instrument claimed by it as embodying the terms of the contract agreed upon between the parties at their last meeting. This contract had not been signed by McGuire, and he contended it was not the contract under which he was employed. He

testified that it had been presented to him, and that he objected to some of the provisions because it gave the right to discharge him before the expiration of his term of 12 months, and that this was a provision which he especially desired to guard against. Whether or not the written instrument contained the terms of the agreement, though not signed by the appellee, was therefore a disputed question, and if admissible at all, it could only be for the purpose of showing what its contents were, in the event there was any dispute as to that matter. The witnesses for the appellant who knew the terms of the written contract, were permitted, without objection, to testify fully concerning its contents and provisions, and there was no issue raised as to the correctness of their testimony in that regard—in fact, they appear rather to have been corroborated by the appellee himself. In his situation the introduction of the written instrument could have served no useful purpose; there being no issue as to what it contained.

The third and fourth assignments of error complain of the action of the court in refusing to sustain the appellant's objections to the following interrogatories and the answers thereto: "Did you, on or about October 1, 1906, in company with J. W. McGuire, meet George Conway, Geo. West, Louis Hellbron, and Will Steel to perfect a consolidation of the Texarkana Skating Rink with the Gate City Roller Rink Company? Before that meeting had either of you any intimation as to the amount of stock you three (McGuire, Rain, and Ector) would be allowed in case you should make this consolidation? Was it not understood that, unless McGuire was made manager of the Gate City Roller Rink Company, the consolidation could not be effected? Before you three went into this conference did or did not McGuire state to you that he was expecting trickery from these men, and that he would not go into this consolidation unless they agreed to make him manager for the period of one year, and pay him a full year's salary, whether he worked a full year, or the rink ran a full year? When you met in this conference was or was not the first question discussed relative to what McGuire's salary should be and for what length of time? Did or did not McGuire state to those present that he would not go into this consolidation unless he was made manager of the Gate City Roller Rink for one year, and he must draw his full year's salary whether the rink ran a full year, or whether he worked a full year? Was or was not this agreed to, and you then discussed the amount of stock you, McGuire, Rain, and Ector were to receive in the Gate City Roller Rink Company? Did not the consolidation subsequently take place between the Texarkana Rink and the Gate City Roller Rink? When this consolidation was made, did you become a stockholder in the Gate City Roller Rink Company? Did you go into the consol-

idation with the belief or understanding that the company would be compelled to pay McGuire this full year's salary, whether he worked a full year, or the rink ran a full year? After the consolidation of the two rinks, did you consider and believe, as a stockholder, the agreement to pay McGuire a full year's salary to be, in effect, and binding on the stockholders of the Gate City Roller Rink Company?" Answer. "I did meet those persons for that purpose about said date. We had no intimation before said meeting of what we should get for our stock. I mean the first meeting. It was understood that, unless McGuire was made manager of the Gate City Roller Rink, the stockholders of the Texarkana Skating Rink would not sell. The first question discussed at this meeting was relative to McGuire's salary, and for the length of time. Mr. McGuire stated in this meeting positively that he would not enter into the agreement unless he was made manager of the Gate City Roller Rink, and paid a year's salary whether the rink ran or not. This was agreed to. We then discussed the amount of stock we were to receive in the Gate City Roller Rink Company. The consolidation of the two rinks subsequently took place. I did become a stockholder in the Gate City Roller Rink Company after this consolidation was made. I went into the consolidation with the understanding that J. W. McGuire was to receive one year's salary whether the rink ran or not. As a stockholder of the Gate City Roller Rink Company, I did believe the said contract to be binding on the stockholders, whether the rink ran or not." Fourth question. "If you have said that said McGuire was to receive \$1,500 in stock and \$1,000, to be paid to him as manager of said Gate City Roller Rink Company, whether the rink ran one month or one year, or whether he acted as manager one month or one year, then state what amount has been paid to him by said Gate City Roller Rink Company. If you have not stated such to be the case, is it not true that such was the final contract entered into by and between the plaintiff and the defendant? If you say no, then what was the contract? Do you swear that the final contract was not as set forth in the first sentence of this interrogatory?" Answer. "I do not know what has been paid McGuire as his salary. At the meeting at which this consolidation was made, and the contract with McGuire was made, I remember that the consolidation was first brought up, and agreed to by parties on both sides, without any objection. Then the question of McGuire's contract was discussed, the two contracts being each in writing, and was then considered. It was handed to Mr. McGuire to see if he objected to same. The contract handed McGuire, I think, is the one attached to Conway's deposition, and marked, 'Exhibit A.' It seems that McGuire thought that the contract was, in some respects, indefinite and ambiguous, and possibly he thought that

they had a right to fire him out at any time upon the notice given, or close down the rink and leave him without a job, and he raised the point there as to the time of employment, stating that he wanted the employment for one year, and it seemed that an agreement was reached as to that point between McGuire and the officers of the Gate City Roller Rink Company before the different parties began to sign the contract. They finally agreed to McGuire's suggestion whatever it was—I don't remember just what. Some contracts were signed by—I don't know whether both parties signed all the contracts or not. I thought both contracts were being signed, but I found out that they were not. I thought the contract with McGuire was signed with the explanation made by McGuire, assented to by the officers of the Gate City Roller Rink Company. I have stated the contract as near as I remember it." We think these questions and answers were subject to the objections urged. The facts which the answers tended to establish formed one of the vital issues in the case, and, if improperly admitted, were calculated to prejudice the interests of the appellant.

The second, fifth, and sixth assignments of error are directed against the allegations and proof of the facts concerning the history of the transactions prior to and leading up to the making of the contract of consolidation of the two rinks and the employment of the appellee. There was no error in the ruling of the court upon those questions. We think it was proper for the jury to have the benefit of all the facts connected with and leading up to the final consummation of the agreement, in order to ascertain the real intent of the parties. This intention was to be gathered from the surrounding circumstances. Not only were those facts legitimate for the purpose of arriving at the intent of the parties, but might be looked to as circumstances tending to show whether or not the contract was as testified to by McGuire. 2 Page on Contracts, § 1123; 3 Ency. of Evidence, 517; 1 Thompson on Trials, §§ 1105-1108.

For the errors pointed out the judgment is reversed, and the cause remanded.

BOWLES v. DRIVER.

(Court of Civil Appeals of Texas. March 7, 1908.)

1. CUSTOMS AND USAGES—EVIDENCE—ADMISSIBILITY.

Custom is admissible in proof, not to establish a contract, but to add an incident not expressly embraced in it, and in reference to which the parties presumptively contracted, since, where there is nothing in a contract to exclude the inference, the parties are presumed to contract in reference to the custom prevailing in the particular business to which it relates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 45.]

2. LANDLORD AND TENANT—TERMINATION OF LEASE—RIGHT OF TENANT.

Where the term of a lease is definitely fixed by contract, the tenant who sows his crop at

a time when he knows he cannot reap cannot, after the expiration of the term, enter on the premises and harvest the crop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 498, 499.]

3. SAME.

Where a lease for a year fixed the termination of the lease on January 1st, and fixed the proportion of rent to be paid, but did not set out the details of the lease, and the parties knew that a crop planted by the tenant would mature within the life of the lease and in time to be substantially gathered, it would be assumed that they contracted with reference to the custom that, if circumstances prevented the tenant from fully gathering the crop before January 1st, he would be authorized to finish up the work as soon after that time as suitable diligence would enable him to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 498, 499.]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action between William A. Bowles and H. L. Driver. From a judgment for the latter, the former appeals. Affirmed.

Harry Tom King and B. K. Isaacs, for appellant. E. M. Overshiner, for appellee.

STEPHENS, J. The court did not err, we think, in receiving proof of a custom in Taylor county, Tex., permitting tenants to gather the remnant of the cotton crop after January 1st, and did not err in rendering judgment on the finding that such a custom existed, and that the tenant in this instance, after exercising reasonable diligence to gather said cotton crop, had been unable to do so prior to January 1st. We do not understand such a custom to be at variance with a rental contract for a year, which, as in this instance, merely fixed the termination of the lease on January 1st, and fixed the proportion or amount of rent to be paid. Evidently the contract did not purport to set out all the terms and details of the lease, and, as said in *Moore v. Kennedy*, 81 Tex. 144, 16 S. W. 740, "custom is admissible in proof, not for the purpose of establishing a contract, but to add an incident not expressly embraced in it, and in reference to which the parties are presumed to have contracted." Or, as said in *Dwyer v. City of Brenham*, 70 Tex. 30, 7 S. W. 598, "the law seems to be that, when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. This view is adopted by eminent text-writers, and seems not to be disputed by any decision to which we have been referred." For a well-considered case, in which the authorities are reviewed and the rule above announced is well sustained both by argument and authority, see *Foster v. Robinson*, 6 Ohio St. 90. This rule was followed by this court in the unreported case of *Moutry v. Carter*,

from the county court of Cooke county, decided January 20, 1908.

Numerous cases have been cited by appellant in opposition to this rule, which have been carefully examined, and only one out of the whole list, in our opinion, sustains his contention, and that is the Virginia case cited in the brief and presented to the court in oral argument; but even that case is not entirely analogous here, since it seems to be treated as coming within the well-recognized principle that, where the term of the lease is definitely fixed by contract, the tenant who sows his crop at a time when he knows he cannot reap has no one to blame for his folly but himself. In the Virginia case the tenant knew when he planted the crop that he could not possibly reap the harvest within the period fixed by his lease, since it could not grow to maturity during that time; whereas in the case before us both parties knew that the crop would mature within the life of the lease and in time to be gathered, if not entirely, at least substantially so, and they must have therefore contracted with reference to the custom that, if circumstances prevented the tenant from fully gathering the crop before January 1st, he would be authorized—not to extend the lease, or even to fully occupy the premises—but only to finish up his year's work as soon after the 1st of January as suitable diligence would enable him to do.

SIMON et al. v. MIDDLETON et al.†
(Court of Civil Appeals of Texas. June 10, 1908. On Rehearing, June 29, 1908.)

1. WILLS—VALIDITY—"UNDUE INFLUENCE."

The "undue influence" which invalidates a will is an influence which destroys the free agency of testator, and places him in a position where he is dominated by another, and acts directly on his mind at the very time when he executes the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 375-381.]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

2. SAME—PROOF OF UNDUE INFLUENCE.

Fraud or undue influence connected with the making of a will may be proved by circumstances, each one of which must point towards the end sought, and all of them taken together must in a reasonably satisfactory manner establish the fraud or undue influence, and a wide range is permitted in the investigation.

3. SAME—ACTION TO ANNUL—EVIDENCE.

In a will contest, on the question of undue influence, evidence of the execution of prior wills concerning which no undue influence is shown, which disposed of the property substantially as in the last will, is admissible to prove the absence of undue influence, while a sudden and complete change in the disposition of property would demand explanation unless the change is made in favor of heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 407.]

4. SAME—UNNATURAL OR UNREASONABLE DISTRIBUTION.

The fact that some of testator's children are disinherited and others favored, and the

distribution appears unnatural or unreasonable, raises no presumption of undue influence, but that fact may, when taken with others, show undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 398.]

5. SAME—FINANCIAL CONDITION OF LEGATEES.

The financial condition of legatees may be shown as bearing on the question whether a will was the product of a mind not unduly influenced by beneficiaries.

6. SAME—SLANDEROUS CHARGES AGAINST POSSIBLE BENEFICIARY.

If a beneficiary, to influence testator's mind, fabricates false and slanderous charges against one who would ordinarily have been a recipient of favors under a will, and his slanders have induced the making of a will cutting off the slandered person from benefits, evidence of the slander would be important as bearing on the question of fraud and undue influence.

7. SAME.

Unreasonable prejudice or erroneous convictions as to the unworthiness of one who has a natural claim on testator's bounty, to form a basis for a refusal to probate a will because of fraud or undue influence, must have been nursed or fostered by a beneficiary, and the will, procured wholly by his lying or false representations, made with intent to secure its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 385.]

8. SAME—EVIDENCE.

Evidence held not to show that a will was executed as a result of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 421-437.]

9. SAME—BURDEN OF PROOF.

In a contest of the probate of a will, as executed under undue influence, the burden of proof is upon contestants not only to establish undue influence, but to show that it was operating on testator at the time he made the will, and amounted to such moral coercion as resulted in a disposition of his property which he did not wish to make.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 388-402.]

10. SAME—EVIDENCE—LETTER OF TESTATOR TO DISINHERITED CHILD.

Proof of declarations of a testator is inadmissible to establish undue influence, where there is no proof of a lack of mental capacity to make the will, and hence evidence of the reasons testator had for withdrawing an allowance to a disinherited daughter, contained in a letter written to her two years after the execution of the will, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 415-420.]

11. SAME.

The reasons given for withdrawing the allowance were not evidence of undue influence in the execution of the will two years before the letter was written.

12. SAME.

On a contest of probate of a will as executed under undue influence, testimony of a witness that he had never seen any immorality on the part of one of testator's disinherited children was immaterial.

13. SAME.

On a contest of probate of a will as executed under undue influence, evidence as to the financial condition of a disinherited daughter of testator 14 or 15 years before the will was made was immaterial and calculated to prejudice the jury.

14. SAME.

For like reasons, evidence of altercations between a disinherited daughter and a son who

† Application for writ of error dismissed by Supreme Court for want of jurisdiction.

was a beneficiary three years before the execution of the will was improperly admitted.

15. **SAME.**

For like reasons, evidence that a son of a disinherited daughter had taken notes to testator from the daughter, in which she sought to obtain money, and of the suggestion of testator that she should wash and iron, was improperly admitted.

16. **SAME.**

Evidence that a disinherited son heard two of his brothers, who were beneficiaries, say, after testator's funeral, that there were three wills, and that the children disinherited by the last will knew nothing about it, and "we will give them \$5 and let them go to hell," was improperly admitted, since their knowledge of the existence of other wills was not relevant to the issue of undue influence to procure the execution of the will sought to be probated.

17. **SAME.**

Evidence that some time during the year the will was made, whether before or after not appearing, testator had told a road superintendent, under whom testator's disinherited son was working in a road gang, to turn the son loose, and testator would pay the fine, while perhaps admissible to show a more kindly disposition towards the son, was entitled to little probative force.

18. **SAME.**

Evidence that a disinherited son of testator had been excluded from the table with the family and compelled to eat in the kitchen, and that his brothers objected to his eating with them, was not evidence of undue influence by the other members of the family, where it appeared that he was excluded on account of his vile habits and vicious life, and because he was afflicted with a loathsome disease.

19. **SAME—REVOCATION.**

Two years after making a will disinheriting certain children, testator made a memorandum in a small book, containing a list of his property, followed by the statement: "This is all left after paying all due by the store to Mrs. Julia R. Simon, as per second will (meaning the will made two years before), and not to have any claim against L. M. Simon or Sam Rubenstein what is on the books and notes you may find and if you find that Cain (a son disinherited under the will) has reformed you may give him a small amount." *Held*, that, as there was no express revocation of the will, and no inconsistent provisions in the memorandum amounting to an implied revocation, the memorandum should not be held to work a revocation of the will.

20. **SAME—CODICIL.**

The memorandum, which was intended to supplement the will with a list of property, and to amend it by giving the two persons named what they owed the estate, and by allowing the disinherited son a small amount if he should reform, amounted to a codicil of the will, and should be probated with it.

On Motion for Rehearing and Further Conclusions of Law.

21. **WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT—STATUTORY PROVISIONS.**

The exception to the general rule that no person shall be incompetent to testify because he is a party to a suit or proceeding or interested in the issue tried, which denies the right of an heir or legal representative of a decedent to testify as to any transaction or statement by decedent in an action by or against the heirs or legal representatives arising out of any transaction with decedent unless called by the opposite party to testify thereto, ingrafted thereon by the express provisions of Rev. St. 1899, art. 2302, will not be extended by judicial construction.

22. **SAME.**

A will contest between legatees and disinherited children of the testator is not an action "by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent," within Rev. St. 1895, art. 2302, providing that in such actions neither party shall be allowed to testify against the others as to any transaction with or statement by decedent, unless called to testify thereto by the opposite party, and hence testimony of one of the disinherited children as to a conversation between her and her father, shortly after the will was executed, in which her father accused her of intimacy with a man, and upon her denial and inquiry as to the source of his information stated that one of the legatees had told him, and that he did not want to have anything to do with it, and that he then cried, was admissible.

Appeal from District Court, Washington County; Ed. R. Sinks, Judge.

Application by J. R. Simon and others for the probate of the will of Alexander Simon. From a judgment of the county court admitting the will to probate, contestants Mollie Middleton and others appealed to the district court, where probate was refused, and proponents appeal. Reversed and remanded.

W. W. Searcy and Hutcheson, Campbell & Hutcheson, for appellants. Mathis, Buchanan & Rasberry and Louis Phillips, for appellees.

FLY, J. This suit grows out of the contest of the will of Alexander Simon, deceased, of date October 4, 1904, which was, at the instance of appellants, probated in the county court; but probate of which was, on appeal by appellees to the district court, refused. In the will all the property, except bequests of \$5 each to Mollie Middleton, Leah Martin, and Cain Simon, appellees herein, was bequeathed to Julia R. Simon, wife of the testator, with full power of disposal; what remained at her death being bequeathed to Louis Simon, James H. Simon, Alexander Simon, Jr., Rosa Rubenstein, and Hannah Folz, children of the testator and Julia R. Simon, and appellants herein. Appellees, who are also children of the testator and Julia R. Simon, contested the will on the grounds that the testator was of unsound mind when he made the will, that the signature to the will was a forgery, that the will was not attested by two witnesses in the presence of the testator, and that it was procured through fraud and undue influence on the part of appellants. The cause was submitted to the jury on the issue of fraud and undue influence alone, and a verdict was returned for appellees and against the probate of the will.

The "undue influence" which will invalidate a will consists of substituting the will of the person exercising it for that of the testator. It is an influence which destroys the free agency of this testator, and places him in a position where he is dominated by another, which acted directly on his mind at the very time when he executed the will. As

said by this court in *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S. W. 394: "Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation are permissible, and cannot be held to be undue influence, unless they subverted and overthrew the will of the testator and caused him to do a thing that he did not desire to do."

Fraud or undue influence can be proved by circumstances. In fact, it is usually the case that it cannot be directly proved, but must be shown by circumstances. Each one of the circumstances, however, must point towards the end sought, and all of them, taken together, must in a reasonably satisfactory and convincing manner establish such fraud and undue influence. The facts and circumstances must necessarily and logically lead to the inference that fraud or coercion was employed, and that the will does not represent the real desire and intention of the testator. In the investigation of fraud or undue influence there must be a wide range permitted. As said by Underhill, in his *Law of Wills* (section 182): "The nature of the relations and dealings between the testator and the beneficiaries, the extent of the property of the testator, his social and commercial standing, his family connections, the claims of particular persons upon his bounty, the situation of the beneficiaries, social and pecuniary, the situation and the mental condition of the testator, the nature and contents of the will itself, and all the circumstances under which it was executed, may be considered as facts from which fraud and undue influence may be inferred, or by which they may be disproved."

The execution of wills prior to the one being contested, concerning which no undue influence is shown, disposing of the property substantially as in the last will, is relevant and material in showing the absence of undue influence, while a sudden and complete change of the disposition of property would demand explanation, unless the change is made in favor of heirs. The fact that some of the children are disinherited and others favored, and the distribution appears unnatural or unreasonable, raises no presumption of undue influence; but such fact may, when taken with other facts, show undue influence. The financial condition of the legatees may be shown as circumstances bearing upon the question as to whether the will was the product of a mind not unduly influenced by beneficiaries.

If a beneficiary, for the purpose of influencing the mind of the testator, fabricates false and slanderous charges against one who ordinarily would have been a recipient of favors under a will, and such slanders have induced the making of a will by which such person is cut off from any benefits, such slander would constitute important evidence bearing upon the question of fraud and undue influence; but the mere fact of the existence

of unreasonable prejudice, or erroneous convictions as to the unworthiness of the contestants, is no evidence of coercion or fraud. Dislike towards one who has a natural claim upon the bounty of the testator, to form a basis for a refusal to probate a will, must have been fanned into life or nursed and fostered by a beneficiary in order to form the basis for fraud or undue influence. A will must be procured wholly by lying or false representations, made by a beneficiary with the intention of procuring the execution of a will, in order to invalidate it for such fraud.

The evidence in this case falls to establish "undue influence," as above defined. It is true that it was shown that Alexander Simon, Sr., entertained animosity and prejudice against Mrs. Middleton, Mrs. Martin, and Cain Simon for many years, and, while it may have ebbed and flowed at times during the years, it was the product and outcome of what the testator considered the outrageous conduct of his daughters and the profligate life of his son. Some grounds were shown for the existence of the anger of the testator towards the disinherited children; but, if it had been utterly unfounded, it would not invalidate the will, unless it was engendered by the appellants and used by them to utterly destroy the volition of the testator as to the disposition of his property. *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Barry v. Graclette* (Tex. Civ. App.) 71 S. W. 309. It was his property, accumulated by thrift and enterprise during a long life, and he had the absolute right to dispose of it as he saw fit. No doubt, the daughters were poor and needed a portion of the property, and, looking at it from a moral standpoint, it may be that he should not have disregarded the ties of blood and nature; but he had the right legally to give his property to a stranger, or for charitable purposes, if he was capable mentally of making a will and made it in response to his own desire and volition.

There is nothing to indicate that the fraud of appellants, or either of them, induced the making of the will. The testator knew of the marriage of Mrs. Middleton to a gambler, not of her religious faith, over the protest and in utter disregard of the wishes of her parents. He knew that she did not speak to them even while living with her two children in his house. He knew of the conduct of Mrs. Martin, knew that she did not speak to her parents, and did not treat them with any consideration. He knew of the disreputable conduct of his son Cain, and had the right to cut him off on account of his profligacy. If at times in the long years the testator seemed to relent towards his undutiful children, his detestation of their conduct was voluntarily expressed through his wills for years before his death, and he was consistent in his desire to prevent his property

from going into the hands of those children. He was a man of strong will and purpose, and acted upon his own convictions and prejudices; but they were his, formed in his own mind, and acted upon through his own strong determination. They were not shown to have been builded upon the fraud and deception of any of the proponents of the will. Cain was the only witness who testified as to one of the proponents telling his father about the conduct of Mrs. Middleton, and he was impeached.

Not only was the burden on appellees to establish undue influence, but it devolved upon them to show that it was operating upon the mind of the testator at the time that he executed the will of 1904, and that the execution of the will was the outcome of an influence amounting to moral coercion, which destroyed his volition and caused him to make a disposition of his property which he did not wish to make. Not one single influence was shown to be operating upon the mind of the testator in this case at the time that he executed the will sought to be probated, except one arising from the convictions of a strong and determined mind. He simply placed in crystalized form the determination lasting through years and founded on facts within his own knowledge and under his own observation. It doubtless is true that he ought to have exercised charity and forbearance towards his erring and undutiful offspring, and it may be that he has acted in a cruel and unnatural manner towards them; but he cannot be called to answer for these things before the tribunal of the district court or of this court. He had the right of disposition of his property after his death, and, when he had made such disposition in the exercise of his intelligent volition, his action cannot be set aside on grounds of morality and the duties he owed to his own offspring.

The contents of the letter written by the testator to Mrs. Middleton, two years after the execution of the will, should not have been permitted in evidence. The reasons that the testator gave for cutting off an allowance that he had been making to Mrs. Middleton did not tend in any manner to show undue influence in the execution of a will two years before the letter was written. Upon what information and evidence he based the charges against his daughter's character which influenced him in cutting off the allowance does not appear, and the letter had no probative force in showing undue influence in the execution of the will. It is an example that fully sustains the justice of the rule which prohibits proof of declarations of a testator to establish undue influence, when there is no proof of a lack of mental capacity to make the will. *Kennedy v. Upshaw*, 64 Tex. 411; *Wetz v. Schnelder* (Tex. Civ. App.) 96 S. W. 60. This extends to what Lusk swore that he said to the testator about the contents of the letter, and his reply thereto.

The evidence did not tend to prove the issue of undue influence, or any other in the case. It could have had no effect except to inflame the jury and prejudice them against appellants. Neither should the witness have been allowed to testify that he had never seen any immorality on the part of Mrs. Middleton. The evidence was utterly impertinent to the issues in the case.

The testimony of Ad. Von Kalekstein as to a conversation he had with Alex Simon, Jr., with reference to Cain, about 1904, did not tend to prove any issue in the case, and was clearly irrelevant and improper. It was inflammatory and calculated to engender prejudice against appellants.

The evidence of Fricke as to the financial condition of Mrs. Martin, in San Antonio in 1889 or 1890, was clearly illegal and improper. It could have had no tendency except to inflame the jury against appellants. It had no connection with any issue in the case. What may have been her financial condition 14 or 15 years before the will was made was clearly impertinent. It was, on motion to strike it out, held that appellees should not go into details, but the court did not withdraw it from the jury.

The evidence as to the altercations, in 1901, between Mrs. Middleton and Alex Simon, Jr., and as to a conversation about that time between him and his mother, was inadmissible. The issue was that undue influence had been used to procure the execution of a will in 1904, by Alexander Simon, Sr., and none of that testimony had a tendency to establish that issue. There was no issue as to the ill will existing between appellants and appellees. Every one admitted that, and proof of the harrowing disputes between them could have no other tendency than to raise prejudice in the minds of the jury.

We fail to see the relevancy of evidence in regard to Adrian Middleton taking notes to the testator for his mother in which she sought to obtain money, and the suggestion of the testator that she should wash and iron. It may have tended to show brutality on the part of the old man, but it did not show any undue influence. We see no place in the trial for this character of evidence. It should have been excluded, not only because of its inflammatory character, but because of its irrelevancy. *Kellogg v. McCabe*, 92 Tex. 199, 47 S. W. 520.

Evidence of what Cain Simon heard Alex and Jim Simon say to each other after the funeral of the testator about the existence of three wills, and that they would "give them \$5," and that "they don't know anything about it; we will give them \$5 and let them go to hell"—was palpably inadmissible for any lawful purpose. Knowledge of the existence of three wills on the part of appellants, after the death of their father, had no relevancy as to the issue of undue influence to procure the execution of the will sought to be probated. Mere knowledge that

a testator had made a certain will has been held not evidence of undue influence. *Chadwick v. Haley*, 81 Tex. 617, 17 S. W. 233.

The evidence of Burney Parker, to the effect that some time in 1904 he was road superintendent and had Cain Simon in the road gang, and that his father, Alex Simon, Sr., told him to turn Cain loose, and he would pay the fine, would, perhaps, have been admissible as slightly tending to show a more kindly disposition on the part of the father towards his son; but it did not appear whether it was before or after the execution of the will, and could have had little probative force.

In view of another trial, it may be said that the statements made by counsel to the jury complained of in the eighteenth and nineteenth assignments of error were improper.

Any testimony tending to show that the proponents had an undue influence over the actions of the testator in other matters would be admissible in connection with any facts tending to show that the influence was exerted in connection with the execution of the last will; but the mere existence of great influence on the part of proponents over the testator would not invalidate the will of 1904, unless it appeared that the influence was exerted to procure the execution of the will. There is nothing to indicate that fact, and consequently all evidence of ill will upon the part of the proponents towards the contestants would be of no force or effect whatever.

If it be true that Cain Simon was excluded from the table with the family, and that he ate in the kitchen, and that his brothers objected to his eating at the table with them, that would not show that undue influence was exerted. He seems to have been excluded on account of his vile habits and vicious life, and not on account of any influence exerted by proponents over the testator. We fail to see the pertinency of the testimony under the circumstances developed by the evidence. All such testimony would open up inquiries as to why certain things were done by the proponents, and lead to such crimination and recrimination that they ought not to be countenanced in a court of justice. That is verified in this case by the fact that evidence that Cain was excluded from the table was answered by evidence that the personal uncleanness of Cain Simon, together with the fact that he was afflicted with a loathsome disease, caused his exclusion from the family table. Nothing should have been admitted except evidence which tended in some way to show that the will offered for probate was executed through undue influence exerted upon Alex Simon, Sr., by proponents. Of course, the successful or unsuccessful termination of Mrs. Middleton's business in San Antonio, the character of Mrs. Martin, whether or not she had received assistance from her brothers, mother,

or sisters, whether or not James H. Simon played cards with Frank Middleton, what Lusk said to James H. Simon about helping Mrs. Middleton, and his reply, whether or not Alex Simon, Jr., was willing "to take down the screen" that hid his private life, did not tend to prove any issue in the case, and should have been excluded.

In a memorandum made in a small book on July 1, 1906, is a list of the property owned by Alex Simon, Sr., and after the list the statement: "This is all left after paying all due by the store to Mrs. Julia R. Simon, as per second will, and not to have any claim against L. M. Simon or Sam Rubenstein what is on the books and notes you may find and if you find that Cain has reformed you may give him a small amount." It is signed by the testator. Appellees claim that the memorandum constituted a revocation of the will of 1904, but we do not think the contention is maintainable. There is not a single word in the memorandum indicating any desire upon the part of the testator to destroy the will sought to be probated. There are no provisions in the memorandum inconsistent with the will of 1904. There being no express revocation of that will, nor any inconsistent provisions in the memorandum amounting to an implied revocation, it must be held that there was no intention to revoke it. *Dougherty v. Holschelder* (Tex. Civ. App.) 88 S. W. 1113. In that case the subject of the revocation of wills by implication is fully discussed.

The memorandum is obscure; but by a reference to the different wills, we think, it is evident that the testator was referring to the will of 1904, which he designated as the "second will." He could not have referred to the joint will of himself and wife, because that was the first will referred to in the testimony. In the will made in 1883, the whole of the property was left to Julia R. Simon during her life, remainder to the appellants, and Leah Simon, now Martin, and Cain Simon, and it is evident that it is not the will referred to as "second will," because in that will Cain Simon was provided for, and the provision in the memorandum as to allowing him a small amount if he reformed cannot be reconciled with the terms of that will. In the will made in 1899, provision was made for paying Cain Simon \$10 a month, and in case "he makes a man of himself he shall receive a full share of the estate." In that will everything was left to Mrs. Simon except trivial sums. In the will of July 7, 1900, the sum of \$2,000 was bequeathed to Cain Simon, and there could be no reason for permitting a small sum to be paid to him if the memorandum referred to that will. In a memorandum made July 15, 1902, the testator seems to have gone back to the will of 1883, because he states that he had made a will and had left his wife a life estate in the property, but he makes a mistake as to what he had given Cain Simon. We

think it clear that the memorandum of 1906 did not have in view that memorandum. In the memorandum of 1902, there was no provision as to the disposition of the bulk of the estate; there being nothing but a recitation of what was provided in a former will and a provision as to the disposal of the estate after the death of Mrs. Simon. In all the wills, there was a provision for Cain Simon, except the last, in which he was given the nominal sum of \$5. It is reasonable to conclude that the last memorandum was intended to supplement the will of 1904, by giving a list of the property of the estate, and to amend it by giving L. M. Simon and Sam Rubenstein what they owed the estate, and to grant authority to Mrs. Simon to allow Cain a small sum in case of his reformation. It has the character of a codicil to the will of 1904, and we think should be probated with it.

There was no such attack on the reputation of the witness Zekind as would justify a resort to character witnesses to sustain his evidence. He had resided in the county for many years and had been absent only about three years. He was not a stranger in Washington county, but was well known.

The remaining assignments of error are disposed of by what appears hereinbefore in connection with other assignments.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing and Further Conclusions.

Nothing is presented by the motion for rehearing that forms a ground for a change in our original opinion, and we adhere thereto.

An opinion is sought on the question of the admissibility of Mollie Middleton's testimony as to a conversation between her and her father, whose will she is seeking to destroy, shortly after the will was executed, in which conversation she would have stated, had she been permitted, that her father had accused her of intimacy with Jim Osborne, and she had denied it and asked him why he made the accusation, and he stated that he had been told so by Alex Simon, Jr., and that he did not want to have anything to do with it, and then cried. Article 2302, Rev. St. 1895, under whose provisions the court held the testimony inadmissible, is as follows: "In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the

opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." The article is an exception to the original statute, and the exclusion of the evidence of Mrs. Middleton must be justified, if at all, by the terms of the latter part thereof. Can it be said that this suit is one "arising out of any transaction with such decedent"? Of course, the suit must be one that arises out of a transaction that the parties had with the decedent, and not a transaction with some one else. In the case of *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255, it is said, in a case similar to this: "The making of a will is a transaction, but it is not a transaction of the testator with the devisees or legatees. The only participants in it are the testator and those whom he may call upon to witness that it is his last will and testament. The devisees may have nothing to do with it, and may in fact be ignorant of its existence, until after the death of the testator." The general rule in Texas is that "no person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding, or interested in the issue tried," and, as said in the case cited, it is broad enough to permit any one, no matter what his position towards a suit may be, to testify to any matter that would be permissible were he not so situated, and it is only by an exception, which has been ingrafted on the liberal and catholic rule quoted, that an heir or legal representative of a decedent is denied the right to testify under certain circumstances. The rule in Texas is that the terms of the exception will not be extended by judicial construction. *Tyson v. Britton*, 6 Tex. 222; *Roberts v. Yarboro*, 41 Tex. 449; *Markham v. Carothers*, 47 Tex. 21; *Collins v. Warren*, 63 Tex. 311; *Moore v. Willis*, 69 Tex. 109, 5 S. W. 675; *Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255. That as strong reasons exist for excluding the statements of a testator to a disinherited child as to those made to any class of persons cannot be denied; but the Legislature has not seen proper to include them within the exception, and we cannot do so. This is not an action "by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." This is a transaction by the decedent, but not one that any of the parties to this action had with him. It is simply a contest between legatees as to a deed performed by the decedent without their co-operation. The evidence should have been admitted.

**UNITED STATES & MEXICAN TRUST
CO. et al. v. DELAWARE WESTERN
CONSTRUCTION CO.†**

(Court of Civil Appeals of Texas. June 11, 1908.)

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where the report of the master formed no part of the evidence on which the court based its judgment, the court on appeal will not consider assignments of error attacking the judgment because of the refusal to sustain exceptions to the report.

2. RAILROADS — ISSUANCE OF STOCKS AND BONDS—STATUTORY REGULATION.

The stock and bond law, Sayles' Ann. Civ. St. 1897, art. 4584f of which authorizes an application to the Railroad Commission for the issuance by a domestic railroad company of stocks and bonds, etc., having been enacted to prevent the overcapitalization of railroad corporations, and thereby avert the creation of more than a legitimate basis for the fixing of rates of transportation, and to protect the purchasers of railroad stocks and bonds against inflated issues, and the Commission being the special tribunal erected for the purpose of controlling such issues, to the end that it may perform its work, it has the right and is charged with the duty of valuing the property of each railroad and all the work done on one in process of construction.

3. CONTRACTS — CONSTRUCTION OF RAILROAD WORK—RIGHTS OF CONTRACTOR—"SHOULD."

Where a contract for construction work for a railroad stipulated that the railroad would pay a specified sum for the work, with the option of paying the same in its bonds and stocks authorized by the Railroad Commission, and, in case the Commission "should not authorize an amount of bonds and stocks" equal to such sum, the contractor would accept in full satisfaction such an amount as the Commission authorized, etc., the contractor could demand no more stocks and bonds than the Commission authorized, provided the Commission was justified in refusing to authorize a further issue, and the amount authorized must then be received by the contractor in full satisfaction, the word "should" in the quoted phrase evidently meaning such an amount as the Commission elected to authorize.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6499-6500; vol. 3, p. 7800.]

4. RAILROADS—STOCKS AND BONDS—ISSUANCE—DETERMINATION OF RAILROAD COMMISSION—CONCLUSIVENESS.

The final adjudication of the Railroad Commission acting under the stock and bond law, providing for an application to the Commission by a railroad for permission to issue stocks and bonds, etc., on the issue of fact presented on an application by a railroad under the stock and bond law for permission to issue stock and bonds, is conclusive on the court, and it cannot review the determination of the Commission fixing the amount of bonds and stocks the railroad may issue.

5. SAME—APPOINTMENT OF RECEIVER—GROUNDS.

A railroad company defaulted in the payment of interest on its bonds and other obligations. It was insolvent, and its earnings were wrongfully diverted. *Held*, that the holders of its bonds might foreclose the mortgage securing the bonds and have a receiver appointed to take charge of the property of the company.

6. SAME—EFFECT OF APPOINTMENT.

The appointment of a receiver of a railroad company does not dissolve the company, nor hinder the exercise of corporate functions

† Writ of error granted by Supreme Court.

except those which involve the control and management of the property over which the court assumes supervision through the receiver, and, unless otherwise restricted by statute, the company may encumber its property subject to the priority of the debts for the payment of which it is being administered.

7. SAME—POWERS OF RAILROAD COMMISSION—APPOINTMENT OF RECEIVER—EFFECT.

The mere appointment of a receiver of a railroad company does not oust the jurisdiction of the Railroad Commission to permit the company to issue additional bonds and stocks pursuant to the stock and bond law authorizing an application by a railroad company to the Commission for permission to issue stocks and bonds, etc.

8. SAME—CONTRACTS—CONSTRUCTION WORK—RIGHTS OF CONTRACTOR.

Where a contract for construction work for a railroad stipulated that the railroad would pay a specified sum for the work, with the option of paying the same in stocks and bonds authorized by the Railroad Commission, and, in case the Commission should not authorize an amount equal to such sum, the contractor would accept in payment the amount authorized, the Commission had the power to determine what issue less than the specified sum should be full compensation for the work, and nothing short of arbitrary action of the Commission would justify a resort to the courts for an equitable lien substituted for the contractual lien, and equity could not decree a lien in favor of the contractor on a state of facts which would not warrant the Commission to authorize an additional issue of bonds.

9. SAME.

A contract for construction work for a railroad required the contractor to perform certain work, and to pay all liabilities against the railroad except those created by issuance of bonds and incurred for operating the road, and bound the contractor, in case it used the credit of the railroad to carry out the contract, to discharge the debts so created, and stipulated that, if the railroad discharged any of the indebtedness incurred by doing any of the things contracted for, the sum paid should be deducted from the amount owing to the contractor. *Held*, that whatever liability might be incurred by the railroad in doing the things contracted to be done by the contractor was a debt of the contractor, and the creditors of the railroad might, in the settlement of the affairs of the railroad when it became insolvent, insist that the contractor before participating in the distribution of the assets should discharge its own obligations.

10. SAME.

A contract for construction work for a railroad required the contractor to perform the work and to discharge debts against the railroad except those created by the issuance of bonds and incurred for operating the road. The contractor owned all of the stock of the railroad and directed its management. It carried on the construction work through the agency of the railroad, and used the latter's credit and income for that purpose. *Held*, that the contractor was responsible for the cost of the work, and could not escape liability for such debts.

11. CORPORATIONS—SHAREHOLDERS—RELATION BETWEEN CORPORATION AND SHAREHOLDERS.

While the shareholders are in a sense separate from the corporation, equity will regard them, in many transactions, for practical purposes, as being the same.

12. RAILROADS—LIENS—PRIORITIES.

Where a contractor for construction work for a railroad was the owner of all of the stock of the railroad, and thereby owned all its property rights and franchises, the contractor could not burden the property of the railroad with in-

cumbrances, and then share with the bona fide purchasers of bonds issued by the railroad.

13. SAME—ENFORCEMENT.

A proceeding asking that a lien be decreed in favor of a contractor for construction work for a railroad against the property of the railroad is an appeal to the equitable powers of the court, and the court must take into consideration the situation and rights of the parties and do complete justice to all.

14. CORPORATIONS — INSOLVENCY — LIENS — PRIORITIES.

A shareholder of a corporation, by reason of whose dereliction assets of the corporation which is insolvent have been depleted, cannot in equity as a creditor share equally with other creditors of the corporation in the distribution of the assets until he has made amends for his own wrongs or discharged his own obligations to the corporation.

15. SAME—ASSETS—UNPAID STOCK SUBSCRIPTIONS.

The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims.

16. SAME.

A subscriber for stock in a corporation paid only 5 per cent. of the par value of the stock. The subscriber controlled the corporation, and after it had mortgaged its property to secure its bonds, the subscriber procured the cancellation of the certificate of stock and the issuance of a new certificate for full paid-up stock for the amount that had been paid on the stock subscribed. *Held*, that the cancellation of the certificate originally issued, and the issuance in lieu thereof of a new certificate was in fraud of the rights of the creditors of the corporation.

17. LIMITATION OF ACTIONS — NATURE AND FORM OF REMEDY — EQUITY — PRINCIPLES—APPLICATION.

One who would escape the rigors of the law by a resort to equity must not himself invoke the rules from which he flees.

18. SAME.

Where the failure of a contractor to perform its contract is urged against its prayer for equitable relief, the contractor is not entitled to rely on a plea of limitation, though an action at law for damages by reasons of such failure might be barred by limitations.

Appeal from District Court, Harrison County; Richard B. Levy, Judge.

Action by the United States & Mexican Trust Company to foreclose a mortgage executed by the Texas Southern Railroad Company, in which C. L. Taylor was appointed receiver, and in which the Delaware Western Construction Company intervened. From a judgment in favor of the intervenor, plaintiff and the receiver appeal. Reversed and rendered.

Cook & Gossett, T. S. Miller, A. H. McKnight, and T. P. Young, for appellant trust company. S. P. Jones, for appellant Taylor. Barnwell & Eberhart, for appellee.

HODGES, J. The Texas Southern Railway Company is a private railway corporation incorporated under and by virtue of the laws of Texas, and will be hereinafter referred to as the railway company. In January, 1901, it consisted of a line of railway extending from Marshall to Harleton, in Harrison county, a distance of about 16½ miles,

and also a line extending from Gilmer to Ashland, in Upshur county, of practically the same distance. It had at that time in contemplation the purchase of a line of railroad then owned by the Schlueter-Whiteman Lumber Company extending from Winnsboro in Wood county in an easterly and southeasterly direction towards Gilmer, and covering a distance of about 15 miles. On the 1st day of March, 1902, the railway company entered into a written contract with the Delaware Western Construction Company, the intervenor and appellee herein, which will hereinafter be called the construction company. This written contract recited the existence and ownership of the lines of railroad above mentioned, and the intention of the railway company to fill in the gap between Harleton and Ashland, and the contemplated purchase of the Schlueter-Whiteman Lumber Company's road, and the purpose to extend on east from Winnsboro in Wood county to the town of Gilmer; and further recited the fact that a previous verbal agreement had been entered into with the construction company for the purpose of building lines of railroad from Harleton to Ashland and from Gilmer to a connection with the Schlueter-Whiteman road; and further, that it was necessary to practically rebuild the old line of road, and to expend a large amount of money in retieing, bridging, and in reinforcing the embankments along the line of road from Marshall to Harleton and from Gilmer to Ashland, and that it was further agreed that the construction company was to pay for the Schlueter-Whiteman railroad and to pay off the lien of the Commercial Lumber Company then on a portion of the road of the Texas Southern Railway Company; and was to furnish all material and labor for the building of the new road, to connect the different parts of the road into one continuous line of railroad from Marshall to East Winnsboro, and was to make all of the improvements named, to build station houses, side tracks, telegraph lines, water stations, fences, and all such other improvements as might be necessary to put the road in good condition and ready to operate from Marshall to East Winnsboro, and was to be paid therefor the sum of \$1,600,000, with the option on the part of the railway company to pay therefor in its bonds and stock at par to be authorized by the Railroad Commission of Texas; and in case the Railroad Commission should not authorize the amount of bonds and stock equal to the said sum of \$1,600,000, then the construction company on its part agreed to accept in full payment and satisfaction of said contract such an amount of bonds and stock as the Railroad Commission would authorize. After reciting the fact that the aforesaid agreement was only verbal, but that the same had up to that time been finally carried out, and all the terms and conditions complied with to the extent of the work then done on

the part of the construction company, the agreement continued as follows:

"Therefore, it is hereby agreed by and between the Texas Southern Railway Company, party of the first part, and the Delaware Western Construction Company, party of the second part, that the parties hereto here and now ratify, confirm and approve the said verbal agreement heretofore made; and it is further agreed that the party of the second part will furnish rails of not less than fifty-two (52) pounds to the yard, to take the place of the rails from Marshall to Harleton and from Ashland to Gilmer; and that it will build, finish and construct all of the balance of said railroad and equip the same with rails not less than fifty-two (52) pounds weight to the yard, and will build all fences, cattle guards, road crossings, depot stations, side tracks, telegraph line, water stations and all other buildings in accordance with the plans and specifications now on file in the office of the party of the first part. It is further agreed that the party of the second part will reduce all grades upon said line between Winnsboro and Marshall to a maximum not to exceed one and one-fourth ($1\frac{1}{4}$) per cent. The party of the second part will pay and discharge all liens against said railway, and will pay and discharge all its indebtedness, except for operation expenses, contracted or owing on March 1, 1902, it being understood and agreed that two hundred and twenty-five thousand dollars (\$225,000) of the bonds to be authorized by the Railroad Commission of Texas are to be delivered to the Missouri, Kansas & Texas Railway Company of Texas, in accordance with the terms of a contract of October 2, 1901, between the party of the first part and the Missouri, Kansas & Texas Railway Company of Texas. It being the intention of the parties hereto that when the party of the second part shall have fully done and performed all of the things that it is to do under this contract, and all liabilities of every kind and description against said railway company, as herein provided, shall have been paid except such stock and bonds as may be authorized, or allowed by the Railroad Commission of Texas, that it shall be deemed to have fully complied with its contract. In consideration, of the agreement to do and perform the matters above set forth, it is hereby agreed that the party of the first part will pay to the party of the second part the sum of one million, six hundred thousand dollars (\$1,600,000) with the option of the first party to pay said sum in its bonds and stock at par; said bonds and stock to be duly authorized by the Railroad Commission of Texas, and in case said Railroad Commission should not authorize an amount of bonds and stock equal to said sum of one million, six hundred thousand dollars (\$1,600,000) on said railway from Marshall to East Winnsboro, then, and in that case, the party of the second part hereby agrees to accept in full payment and

satisfaction of this contract such an amount of bonds and stock as said Railroad Commission of Texas shall authorize on said line of railroad between Marshall and East Winnsboro. It is further understood and agreed that, in case it shall be necessary at any time to use the name of the railway company to procure funds to carry out this contract, that the railway company will sign any and all notes or acceptances that may be necessary for that purpose, but the party of the second part is to pay and discharge the same. It being further agreed and understood that if the railway company shall pay or discharge any of the indebtedness incurred by the doing and performing of any of the matters herein contracted for, that said sums so paid shall be deducted from the amount owing to said party, and in case first party elects to pay second party with its bonds and stock as herein authorized, then it shall retain an amount of bonds or stock equal to the amount so paid dollar for dollar."

These are all the material portions of the contract necessary to be set out as applicable to the facts of this case.

Early in the operations under this written contract the railway company elected to pay the construction company in its stock and bonds which it should be authorized to issue by the Railroad Commission of Texas. The total capital stock of the railway company at that time which had been subscribed amounted to \$300,000, divided into 3,000 shares of \$100 each. On or before the 21st day of February, 1902, certificates of stock had been issued for the entire 3,000 shares, of which 2,850 shares were issued in the name of the construction company; certificates for 142 shares were issued to L. E. Walker, all of which he held for the construction company except 1 share for himself, which he held as a director; the remaining 8 shares were held by each of the 8 other directors. The construction company had subscribed for 2,991 shares, and voted all of them at the various meetings of the stockholders of the railway company. It continued to own and hold all of the stock of the railway company except the 9 shares held by the directors, and had owned and controlled the railway company till the railway company was placed in the hands of a receiver, as hereinafter shown. The 9 shares held by other parties in reality belonged to the construction company, and were transferable at its dictation.

L. E. Walker was, during all the time preceding the appointment of a receiver, the president and general manager of the railway company, and also the president and general manager of the construction company. Prior to October, 1903, the railway company had executed a mortgage deed of trust to the appellant trust company as trustee to secure the bond issues thereafter authorized by the Railroad Commission of Texas. In October, 1903, after the execution of this mortgage, L. E.

Walker, the general manager of the railway company and also of the construction company, received information from a member of the Railroad Commission of Texas to the effect that with the certificates of stock outstanding for the entire capital stock of the railway company no additional bonds would be authorized by the Railroad Commission. At that time only \$5 per share had been paid on the stock of the railway company subscribed for. On the 24th day of October, after the receipt of this information, at a special meeting of the stockholders of the railway company, at the request of the construction company, a resolution was adopted providing that stock certificate No. 11 for 2,316 shares held by the construction company, and on which a total of \$11,500 had been paid, be canceled, and that the president and secretary of the railway company be directed to issue to the construction company a full paid-up certificate of stock in lieu thereof for \$11,500. This was done in good faith for the purpose of procuring the approval by the Railroad Commission of the issuance of additional bonds. There was no other consideration for this action in cancelling the old certificates and issuing the new. Prior to this, on the 1st day of July, 1902, the railway company had executed to the appellant, the United States & Mexican Trust Company (which will hereinafter be called the trust company), as a trustee, a mortgage deed of trust upon its railroad property and appurtenances then owned and to be thereafter acquired. The railroad was then being operated as a continuous line from Marshall to Winnsboro, a distance of about 75 miles, the gap theretofore existing having been completed. This mortgage also conveyed the rolling stock, equipment, and all appurtenances, including the depot, terminal grounds, and buildings, and was to secure a total possible issue of \$5,000,000 of bonds to be issued under the authority of the Railroad Commission. This mortgage was recorded in the various counties through which the railroad extended in November following.

On the 2d day of October, 1902, upon an application by the railway company, the Railroad Commission of Texas fixed the bondable value of the railroad at \$576,676.42, from which it deducted the amount of paid-up stock then outstanding, \$79,980, leaving a net bondable value of \$496,696.42. At that time there were outstanding some liens against the railroad property, amounting in the aggregate to \$285,000. The Commission authorized the issuance and registration of bonds to the amount of \$212,000, and other bonds equal to the amount of the liens then outstanding when releases of those liens were filed with the Commission. Releases of some portions of those liens were afterwards filed with the Commission, and bonds were issued and registered accordingly for those amounts. As the value of the railroad property was added to additional bonds were authorized

by the Commission. On the 31st day of December, 1903, the railway company filed an application for leave to issue other additional bonds. On the 22d day of January, 1904, an amended application requesting that the Commission have its engineer value the work and improvements of the railway, and asking leave to issue and register 492 additional bonds, was filed. On the 6th day of February, 1904, the railway company added a supplemental application asking that the equipment and rolling stock of the company be included in the valuation, and made a showing to the effect that there was at that time, besides other liens before mentioned, liens to the amount of \$33,818 upon the equipment and rolling stock; that the liens and bonds then outstanding against the equipment amounted to \$50,460; that the total value of the equipment and rolling stock was \$92,935.50; and asked for additional bonds on the equipment of \$8,657.50. On these applications the engineer of the Railroad Commission made his estimates and valuations, and reported to the Commission that the entire property of the railway company at that time, including the equipment, was valued by him at \$922,678.07; and also pointed out in his report the number of bonds theretofore issued and registered as being \$614,000. The bonds withheld by the Commission to cover liens outstanding amounted to \$50,000, and stock certificates \$79,980, making a total of \$743,980. These left a balance available for bond issue on the 21st day of January, 1904, of \$178,698.07.

On the 8th day of February, 1904, the railway company filed a protest against the valuations which the engineer of the Commission placed upon the property, claiming that it was too low upon certain items; and set out in detail what it alleged to be the true value of those items. Those complained of as being too low were the following:

	Valued by the Engineer at	In the Pro- test at
The depot grounds at Marshall	\$22,285 00	\$50,000 00
The right of way through the city of Marshall.....	12,139 00	16,892 00
The work of excavation and building embankments on the two miles of extension in the city of Marshall and the depot grounds	7,428 90	10,445 56
Sand ballast on 71.298 miles of track valued by the engineer at \$250 per mile, in the protest at \$500 per mile, aggregate	17,822 00	35,644 00

The protest also presented the following items which it claimed were not taken into account by the engineer in his valuation, but omitted from his report:

25 miles of 35-pound relay rails at the value of	\$50,455 00
Tools of various kinds, furniture, stationary material, and supplies acquired since the valuation of October 2, 1902, of the value of	14,103 51

These last items, added to the difference between the valuation placed upon the property by the engineer of the Commission and

that contained in the protest, amounted to the aggregate sum of \$115,865.76. This the railway company claimed should be added to the bondable value as fixed by the engineer in his report to the Commission. It was also claimed that there should be allowed the additional sum of 6 per cent. interest and 6 per cent. for legal and engineering expenses on the items in which the differences occurred between the valuations of the engineer of the Commission and that mentioned in the protest. These items upon which interest is claimed should have been computed amount to \$51,306.63. To this protest as filed was attached a copy of the report of the Commission's engineer, and the report of the engineer selected by the railway company for the purpose of making the estimates and valuations mentioned.

On the 10th day of February, 1904, the Railroad Commission took up for consideration the application of the railway company and its protest above mentioned, and made an order substantially as follows: It recited the facts set forth in the application of the railway company as the basis for the issuance of additional bonds on the filing of its map and profile of its spur to the city of Marshall, and the report of the Commission's engineer fixing the valuation at \$922,678.07 (including the spur into Marshall, but exclusive of any additions to the rolling stock since the former report of the engineer); and then proceeds:

"And it appearing to this Commission that the said railway company now owns rolling stock to the total value of \$92,935.50, against which this Commission has heretofore authorized bonds registered to the amount of \$50,460; that there are yet outstanding equipment liens against said rolling stock to the amount of \$33,818.00, leaving an amount to the value of \$8,657.50, against which no bonds have been registered or upon which there are no liens outstanding. And it further appearing to this Commission that on January 3, 1904, the said railway company procured a release to the amount of \$6,000.00 from the lien held by the Commercial Lumber Company of Gilmer, Texas, which lien was for the total amount of \$30,000, bonds for which have been withheld from registration by the Commission pending the release of said lien or portion thereof, as appears in its order of October 2, 1902. And it further appearing to this Commission that it has heretofore authorized registered in the office of the Secretary of State of the state of Texas bonds of the issuance authorized in its order of September 25, 1902, to the amount of \$614,000.00, * * * and it further appearing that certificates of capital stock have been issued by said company to the amount of \$79,900.00. And it further appearing that the said railway company has canceled and has submitted to this Commission for further cancellation, its 'Construction Notes' Nos. 1 to 103, both inclusive, and Nos. 134

to 500, both inclusive, or a total issue of 500 notes of the denomination of \$1,000 each, and its 'First Lien Betterment Notes' Nos. 1 to 50, both inclusive, of a total issue of 50 notes of the denomination of \$1,000 each, leaving still outstanding 30 of said 'Construction Notes' Nos. 104 to 133, both inclusive, of the denomination of \$1,000 each, held by one W. A. Chatterton, of Marshall, Texas, to secure an indebtedness of \$15,000.00. And it further appearing to this Commission from the above that the said railway company is now entitled to register in the office of the Secretary of State of the state of Texas additional bonds to an amount of \$193,000.00, less the said indebtedness of \$15,000.00 now outstanding, which is secured by the said thirty construction notes Nos. 104 to 133, both inclusive. And it further appearing to this Commission that 178 of the said bonds have been submitted by said company to this Commission for its approval, and that they have been duly signed by its president, L. E. Walker, and attested by its secretary, John Copeland, under its corporate seal. It is therefore ordered, adjudged and decreed by the Railroad Commission of Texas that 178 of the bonds of the Texas Southern Railway Company of the issuance authorized by this Commission to be issued in its order of September 25, 1902, be, and the same are hereby in all things approved;" etc. "And it is further ordered that upon the filing with this Commission by the said railway company of the release of the said equipment liens mentioned above, aggregating \$33,818.00, or any portion of same, this Commission will approve and authorize the registration of additional bonds of the issue and tenor above described, to the amount of such release."

It was also ordered that the protest above referred to be passed without prejudice. The 178 bonds authorized by this order made a total bonded indebtedness of \$792,000 outstanding and registered at the time the suit hereinafter mentioned for a foreclosure of the mortgage deed of trust was commenced. To this indebtedness must be added the \$15,000 of bonds reserved by the Commission for W. A. Chatterton, a lienholder, making a total of \$807,000 of bonded indebtedness issued and authorized. There were also vendors' liens still outstanding in the sum of \$40,000, and equipment liens of approximately \$40,000 additional, making a grand total of the indebtedness for which liens were issued on the property of the railway company of \$887,000. This sum when added to the capital stock amounted to \$966,980, or \$44,301 more than the valuation placed upon the property of the railway company by the Railroad Commission's engineer. The railway company having defaulted in the payment of the interest on its bonds, on the 11th day of January, 1904, the appellant trust company, as trustee for the bondholders, commenced in the district court of Harrison county a suit for the foreclosure of the mort-

gage deed of trust theretofore executed, to secure the bonds issued by the railway company under the orders of the Railroad Commission. In this suit there were a large number of interventions filed by different parties claiming liens and debts against the property of the railway company, among which was this intervention filed by the construction company, the appellee herein. On the 22d day of September, 1904, a final decree of foreclosure was rendered in the district court of Harrison county, adjudging and establishing a bonded indebtedness outstanding against the railway company of \$807,000. When the original suit was filed S. P. Jones was appointed receiver, but later resigned and was succeeded by C. L. Taylor, who is the present receiver and represents the railway company in this suit. This intervention on the part of the construction company was filed on the 14th day of October, 1904. It was referred to the Master in Chancery in accordance with the general order of reference in the cause.

Intervener alleges in its petition of intervention that it is a corporation organized under the laws of the state of Delaware, having its principal office and place of business at Kansas City, Mo.; and at the times thereafter mentioned was doing business in the state of Texas in constructing, building, and maintaining a line of railway for the Texas Southern Railway Company, and also repairing said railway; that the intervener was incorporated and created for the purpose of constructing, building, operating, maintaining, and repairing railways, and at the times thereafter mentioned was so engaged at such work. It further alleges that it owned the Texas Southern Railway Company and equipment for its entire length; and sets out the contract, written and verbal, hereinbefore mentioned with the railway company, whereby it agreed to construct the different gaps in the line of railway, and to do the other work and discharge the other obligations mentioned in said contract; and also sets out the terms of the contract with reference to its compensation. It then alleges that in accordance with the agreement the road was built and turned over to the railway company about the 1st of July, 1902, since which time, it says, the railway company has been running and operating the road; that after the railroad was so turned over the intervener continued to do certain construction and repair work, and that settlements were made upon the valuations and estimates of the chief engineer of the railway company. It further alleges that it was agreed that such estimates should be received and accepted as correct. It also alleges that on June 18, 1904, a settlement was had, and that on that day N. P. Turner, as chief engineer of the railway company, at the request of the intervener and the railway company, made up a statement of the amount yet alleged to be due to the intervener by the railway company,

and that according to such settlement and estimates the railway company was indebted to the intervener in the sum of \$181,480.37, as per itemized statement attached to its petition; that the railway company had failed and refused to pay; that no bonds or stocks had ever been issued or delivered to the intervener by reason of said work and the indebtedness there mentioned. It is also alleged that under the valuation made by the Railroad Commission the railway company would be entitled to issue bonds to the amount of said indebtedness so set out, and that said bonds under the contract would belong to the intervener, but that the railway company being in the hands of a receiver, no further bonds would be permitted to be issued; that by reason of these facts the intervener was entitled to a lien. It asks for judgment for the amount alleged, and that it be classified as a statutory lien prior to the appellant's deed of trust; but prays that if the court should determine that it should not be so classed, then that it be made a claim equal with the bonds.

The exhibit of items referred to in the petition consists of three separately classified claims denominated "Abstracts A, B, and C," respectively, and is as follows:

Abstract A, consisting of intervener's claim of valuations of various things on and about the main line from the city limits of Marshall to Winnsboro over and above the valuation fixed on the same by the Railroad Commission by and in its order of February 10, 1904, in issuing bonds	\$ 95,822 39
Abstract B, valuations claimed by intervener on Marshall extension (that is, about two miles of the road from the city limits of Marshall extending into the city) over and above the valuation placed on the same February 10, 1904, by the Railroad Commission in issuing bonds	54,537 45
Abstract C, valuations claimed by intervener of the things claimed to be done since the valuations made on February 10, 1904, by the Railroad Commission..	31,621 53

Total claim, made up of these three items	\$181,482 37
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The appellant, in addition to its specific answer to this plea of intervener's, filed in due time an answer denying the intervener's petition, and alleging a lien superior to all the claims of the intervener.

On November 27, 1905, the appellant trust company filed an amended answer in substance as follows: After special exceptions and a general denial, it avers that the intervener received all of the stocks and bonds authorized and issued under the direction of the Railroad Commission according to its contract; that the railway company had exercised its option to pay in bonds. It further alleges that the intervener had subscribed to 2,316 shares of stock of \$100 each of the railway company, and alleges the payment of only 5 per cent. of the value of the stock, the subsequent cancellation of the original shares, and the issuance in lieu thereof of

certificates for full paid-up stock to the amount only of the 5 per cent. that had theretofore been paid upon the total number of shares subscribed for by the intervener. It charges that the cancellation of this stock was null and void, was collusive and fraudulent in law; that if there was anything due the intervener on account of the matters set up in its petition the same was in partial payment of said stock and subscription, and should in equity and good conscience be so considered. It also alleged that under the terms of the contract set out in the intervener's petition it was bound to do the things mentioned therein, but had failed to perform its part of the contract; that the railway company was damaged because of the failure of the intervener to perform its part of the contract; that by reason of such failure it had become twice as expensive to operate the road for the years 1903 and 1904 as it would have been if the construction company had completed the road according to its contract. It further alleged that the intervener had been paid in full in the stocks and bonds all that had ever been due from the railway company; that by reason of the railway company having to do the things which the intervener had contracted to do the debts it had incurred were far in excess of the amounts claimed by the intervener. It was further alleged that the railway company itself had done all the things that the intervener in its petition claims to have done, and that the intervener had long since abandoned the contract. It also averred that the intervener is the real owner of the railway company, and as such held all of its stock except a nominal amount, and is really seeking to enforce a claim set up in its petition herein against what it owns itself, and that it had caused the bonds secured by the mortgage deed of trust to the plaintiff trustee to be issued, sold, and negotiated as first lien mortgage bonds, and was therefore estopped from claiming a lien upon the property mortgaged by the said deed of trust to secure said bonds; that it had been agreed between the intervener and the trust company that the mortgage bonds were and should be a first lien on the property of the railway company, and intervener was not entitled to any prior lien; that the consideration of such agreement was the undertaking of the appellant trust company to dispose of the bonds, and to act as trustee in registering the same; that the intervener represented to the trustee, appellant herein, that it had no prior lien, and made the same statements to purchasers of such bonds before they purchased; and that neither the trustee nor the bondholders had any notice of any such claims as those now set up and relied on by the intervener; that the bondholders had paid full value for some of the bonds, and on the others had loaned 50 per cent. of the face value thereof; and that all of the parties acting on the assumption and representation that the bonds were

a first lien, which representations were held out by the construction company as an inducement to the appellant trustee and the purchasers. The answer further states that the itemized statement or account and the settlement pleaded by the intervener construction company, was fraudulent and void, and contrary to public policy, and without any consideration; that it was made by L. E. Walker, then the president of both the railway company and the intervener, and N. P. Turner, under the direction and influence of Walker; that in truth and fact the intervener was largely indebted to the railway company at the time the receiver was appointed, and owed the railway company \$14,376.49 on account of the dealings between said companies, and other sums, and that the railway company was hopelessly insolvent at the time of said attempted settlement; that Walker and Turner each acted for both companies. The answer further sets up 13 different items of indebtedness against the intervener in behalf of the railway company, which it claims were not included within the settlement which the intervener alleges was made. Those items are as follows:

(1) The unpaid stock subscription.....	\$220,020 00
(2) The amount due on the account on the defendant's books.....	14,376 49
(3) Damage for failing to complete the road as per contract.....	180,000 00
(4) Capital stock not credited to the railway company in the account on books	79,990 00
(5) The amount due the United States & Mexican Trust Company.....	19,128 51
(6) The amount partly due and partly paid by old rails of the railway company to the Western Supply & Manufacturing Company	25,000 00
(7) The amount partly due and partly paid secured on the "Lodwick Spur"	18,740 20
(8) The equipment liens (being liens on rolling stock) unpaid.....	35,000 00
(9) Statutory liens for material other than the above.....	27,500 00
(10) The vendor's liens on part of the railroad at time of appointment of the receiver due to Commercial Lumber Company and Schluter-Whiteman Lumber Company.....	40,000 00
(11) The statutory liens for material allowed in Class "C".....	27,000 00
(12) "B" claims allowed as liens.....	87,000 00
(13) "E" claims allowed.....	57,000 00

It is further alleged that the pretended settlement prepared by Turner under the direction of L. E. Walker was for the purpose of enabling the construction company to borrow about \$175,000 on the same as a mechanic's lien, if the plaintiff, appellant herein, would waive its mortgage lien; that this had been refused by the appellant and by the bondholders; that the railway company was insolvent at the time, and that the plaintiff refused its consent, and the matter was dropped; that no lien whatsoever exists in favor of the intervener. The answer further denies generally the allegations and the pleading of the Western Supply & Manufacturing Company and other interveners. It concludes with a prayer for judgment, that the inter-

vener take nothing by its suit, and that the appellant's title be forever quieted. The answer also specifically denies the items of the account as stated, and is verified by the affidavit of one of the appellant's attorneys. The receiver also filed an answer denying the intervenor's claim, and alleging payment in stocks and bonds. The Western Supply & Manufacturing Company filed a subintervention, claiming an indebtedness against the construction company, and asking that it be subrogated to the rights which that company might have against the railway company. It is unnecessary, in view of the disposition we make of the case, to give a detailed statement of this intervenor's pleading.

The testimony shows that the construction company really owned the railway company; that it either directly or indirectly held all of the shares of stock except about nine which had been distributed among different individuals for the purpose of enabling them to serve as directors for the railway company, and that most of those directors served from a spirit of accommodation, and the stock which they held would be transferred to suit the convenience of the construction company in changing directors. Nearly all of the active officers in charge of the business of both companies were practically the same, some of them serving in the same capacity for each at the same time. The claims for labor and the cost of operating the railroad during the year 1903 and that portion of 1904 preceding the appointment of a receiver, were largely unpaid; and after his appointment the receiver spent about \$100,000 in carrying on the work which the construction company had contracted to do but failed to carry out. The failure of the construction company to perform this work according to its contract was due to a lack of means available for that purpose, and it is now financially unable to continue under the terms of the contract with the railway company and discharge its obligations thereby incurred. The failure of the railway company to pay its operating expenses was due to the fact that the money it earned was used in building the road and in construction work which the construction company had obligated itself to do. It appears from the testimony of L. E. Walker, who was president of both companies and acted as a general manager for both at the same time, that according to the books of the railway company at the time the receiver was appointed, on the 11th day of July, 1904, the construction company owed the railway company for work which had been done by it for the construction company the sum of \$14,376.44. This sum is admitted in the pleadings of the appellee to be correct.

After August, 1903, the construction company ceased to keep any books or to carry the names of any employees upon its pay roll; and all the work in the way of construction, or repairing the railway, as pro-

vided for under the terms of the contract between the construction company and the railway company, was carried on in the name of the railway company; and all of the employees engaged in the service were upon the pay roll of the railway company, and those who were paid were paid in the money of the railway company. The actual cost of the work was charged to the construction company on the books of the railway company. The earnings of the railroad were put into the operation and construction and were used, as one of the witnesses testified, to pay the most pressing bills. The outstanding labor pay checks that have been put into class B of the court's classification of claims against the railway company, and the outstanding material bills put in class C, were left unpaid because the railway company used its earnings for construction. The following arbitrary charges were made against the construction company in favor of the railway company for the years 1903 and 1904:

For the year ending June, 1903, approximately	\$ 50,000 00
For the year ending June, 1904, approximately	38,000 00
Total	\$ 88,000 00

These arbitrary charges were made against the construction company on account of the increased expense of operation by reason of the uncompleted condition of the road. The railway company had put into the construction from the earnings an amount equal to the outstanding pay checks, using the credit of the railway company for the purpose of raising money. Disregarding the arbitrary charges against the construction company on account of the increased expense of operation, the receipts of the railway company were about equal to the cost of its operation. Walker, the president, testified that the charges made against the construction company were correct, and that by taking them into consideration the railway company made money in its operation. The total current liability of the railway company on the 30th day of June, 1904, was approximately \$216,000. Assuming the arbitrary charges against the construction company to be correct, the total current liability of the railway company arose by allowing its credit to be used in doing the construction work which the construction company had contracted to do. The construction company is not now financially able to take care of its obligations to carry out its contract with the railway company. It owns practically no property, and has no assets beyond securities which it has already pledged for advances. The construction company closed its account with the Marshall National Bank in May, 1903, and after that no laborers were carried on its pay roll. In none of the annual statements of the railway company reported to the Railroad Commission as required

by law, were contained any part of the claim made the basis of this intervention. The reports were made and sworn to by L. E. Walker, the president of the railway company. The reason which he assigns for this omission is that the entry in the books of the railway company was not made till some time in September following the last report to the Railroad Commission. In a decree rendered on the 22d day of September, 1904, foreclosing the mortgage lien of the bondholders, the court adopted the following scheme for classifying the claims against the railway company: Class A being demands against the receiver incurred by him as such; Class B, operative labor demands liens prior to all except class A; Class C, other statutory mechanics and material liens prior to all except classes A and B; Class D, the bonds secured by the mortgage to plaintiff, trustee; Class E, demands against the railway company unsecured or subsequent in lien to the mortgage.

At the time of the master's report (December 5, 1905) these had been by the original and various supplemental decrees in this case allowed and classified demands and liens in aggregate amounts as follows, viz.:

In Class B.....	\$ 87,000 00
In Class C (including Schlueter-Whiteman vendor's lien balance of \$14,000)....	27,532 91
(These have been taken up and paid, but as to the corpus of the mortgaged property are simply replaced by receiver's certificates of at least equal lien.)	
Class E	57,052 28
In liens special on equipment prior to the bond mortgage deed of trust.....	35,000 00
And there was then outstanding unclassified (and other than the Western Supply & Manufacturing Company demand) a total of demands against the railway company of.....	50,000 00
(These at the time of the trial in the district court had been classified approximately \$10,000 into classes B and C and \$40,000 into class E.)	
At the same time (December 5, 1905) there was unpaid the personal demand of the United States & Mexican Trust Company from the railway company on account of rails, as to which there is no question as to the personal liability, but disputed as to lien, the principal sum of	19,126 61
And vendor's lien upon the railroad to the Commercial Lumber Company.....	28,000 00
And a mortgage upon the Lodwick spur (appurtenant to and part of the Texas Southern Railroad) to secure a note of the construction company in the principal sum of \$18,740.20, less a payment of approximately \$4,100 balance.....	14,640 20
There was also outstanding the balance of the Western Supply & Manufacturing Company demand on account of rails since put in judgment prior in lien to the bonds balance of principal.....	17,018 00
And there had been paid on the original of this demand by old rails taken from the railroad	8,000 00
At the time of the appointment of the receiver as shown by the books of the railway company showed a balance due it from the construction company for other than the above items of.....	14,376 49

All these items of indebtedness arose either on account of construction (including acquisition) done by the railway company for the construction company or because of failure of the construction company to complete its contract within a reasonable time.

The court found the bondable value of the road to be \$965,153.57. It also found that the construction company was chargeable with the following matters:

Paid-up stock	\$ 79,980 00
Balance of account due the railway company for construction work.....	14,376 49
Bonds outstanding	807,000 00
Vendor's liens against the railroad unpaid	40,000 00
Total	\$941,356 49

The court then found a balance in favor of the construction company of \$23,797.80, for which it rendered judgment in favor of the appellee and directed that it should have a lien in Class D on a parity with the bonds, but that the proceeds thereof should be impounded and held for the satisfaction of a claim of \$11,138.71, part of a judgment in favor of the Western Supply & Manufacturing Company, which had a subintervention in this same suit. Each party objected and excepted to the action of the court in overruling their respective exceptions to the master's report, and severally excepted to the rulings and judgment of the court; and the plaintiff and receiver severally and specially objected and excepted to the judgment of the court allowing intervenor judgment for any sum, or any lien therefor.

The items composing the claim for which this intervention is made by the construction company may be grouped into three classes, which are denominated "Abstracts A, B, and C," respectively. Abstract A is composed of items for construction work completed on the main line before February 1, 1904, for which it is claimed that no bonds were issued by reason of undervaluation by the Railroad Commission, and amounts to \$95,323.39. Abstract B is composed of those for construction work on the Marshall extension, not fully completed at the time the engineer of the Railroad Commission made his report in January, 1904, amounting to \$54,537.45, also claimed to be undervalued. Abstract C consists of items and improvements completed since the 1st day of February, 1904, on the entire line of the railroad, and not included in the estimate made by the engineer of the Commission in his report of January, 1904, and amounts to the sum of \$31,621.53. These several items make the aggregate sum of \$181,482.37 sued for in this intervention.

The testimony shows that the items included in Abstracts A and B, except an insignificant amount, were considered by the engineer of the Railroad Commission in making up his report of the valuation of the railroad property of January 18, 1904, upon which the Commission acted in making its last order authorizing the issuance of 178 additional bonds.

The construction company is here suing for those items upon the theory that the Railroad Commission should have allowed additional bonds in such amounts covering those two items, or groups of items, over and above what it did allow in its order of February 10, 1904, and before. The item of \$31,621.53, details of which are stated in Abstract C, are claims for things done after the order of the Commission above referred to was made, and the construction company is asking for judgment for that sum upon the theory that the Commission would have ordered bonds to be issued therefor upon an application made for that purpose by the railway company except for the appointment of the receiver.

Of the items included in Abstract C constituting a part of the sum of \$31,621.53, the grading of the four spur track was done by private parties for whose benefit the spurs were put in; the railroad tracks mentioned and charged for were constructed of old rails which came out of the main line of the railroad, and which had been replaced by other rails. All of the actual work and other material mentioned in Abstract C were done and furnished by the railway company, the construction company having abandoned the construction work before that time.

Not later than the 1st of September, or the latter part of August, 1903, the construction company ceased to keep any books, or any employes upon its pay roll, and in effect abandoned the construction work which it had contracted to perform for the railway company. The construction work done thereafter was performed by the employes carried on the pay roll of the railway company. There was after that time no employe or representative of the construction company in Texas, except L. E. Walker, who was the president and general manager of the railway company, and other employes of the latter company. The income from the operation of the railway was used to pay for construction work and material which the construction company had contracted to perform and furnish. By reason of that fact a large floating debt was created against the railway company, most of which was secured by statutory liens upon the property. There were charges made upon the books of the railway company for material purchased and work performed by the railway company in the construction work, and at the time of the appointment of the receiver this charge amounted to the sum of \$14,376.49. This, however, did not include other debts incurred by the railway company for construction work and material prior to the time the receiver was appointed. At the time the last application was made to the Railroad Commission for authority to issue and register bonds there were liens outstanding against the railway company's equipment, in addition to other liens before mentioned, amounting to the sum of \$35,000. This lien was never discharged by the construction com-

pany, although the Commission authorized an additional issue of bonds to the amount of \$15,000 upon the filing of a release therefrom.

The first 10 assignments of error complain of the refusal of the trial court to sustain exceptions to certain specified portions of the report of the master. It appears that this intervention was referred to the master under the terms of the general order made by the court at the time of the master's appointment. In this hearing testimony was taken and findings made by the master, upon which he made and filed certain conclusions of fact and referred the questions of law to the court. While the judgment rendered would indicate that the report of the master was before the court at the time of the trial and was being considered, yet it also appears that the findings and conclusions of the trial judge were based upon the evidence offered before the court, without regard to the report of the master. This is evidenced by the fact that the statement of facts is made out by the trial judge, certifying that it is a true and correct statement of all the facts adduced upon the trial before him, and in this statement the report and findings of the master do not appear. The report of the master, which is copied in the transcript, seems to have formed no part of the evidence upon which the court based its judgment, and for that reason we have not thought it necessary to consider those assignments which attack the judgment for refusing to sustain the exceptions mentioned. The testimony upon all the material points involved in this appeal appears to be practically uncontradicted, leaving only the legal conclusions therefrom to be reviewed.

The remaining assignments of error complain of the judgment rendered as being unsupported by the evidence, the different assignments being merely the statement of different reasons for the complaints. The right of the intervener to the judgment awarded it in this case depends in a great measure upon what construction is to be given the contract entered into between the construction company and the railway company, as well as upon the considerations of other facts that may affect its equitable right to assume the attitude of a creditor, and, as such, insist upon sharing in the distribution of the assets of an insolvent corporation of which it was practically the sole owner, and toward which it still owed a duty under the terms of the contract. The theory upon which this judgment was recovered, and upon which it must be sustained if affirmed, is that under the terms of the contract the construction company is entitled to the difference between the par value of the bonds that had been issued under the orders of the Commission and the actual value of the railroad; that the legal effect of the contract was to bind the railway company to issue and deliver to the

construction company, not only all of the stocks of the railway company, but bonds to the full value of the road, and that having failed to issue bonds to the full amount of that value the intervener has the right to recover in this suit the difference between the bonds so issued and delivered and the actual value of the road. The contract provides: "In consideration, of the agreement to do and perform the matters above set forth, it is hereby agreed that the party of the first part will pay to the party of the second part the sum of one million, six hundred thousand dollars (\$1,600,000) with the option of the first party to pay said sum in its bonds and stock at par; said bonds and stock to be duly authorized by the Railroad Commission of Texas, and in case said Railroad Commission should not authorize an amount of bonds and stock equal to said sum of one million, six hundred thousand dollars (\$1,600,000) on said railway from Marshall to East Winnsboro, then, and in that case, the party of the second part hereby agrees to accept in full payment and satisfaction of this contract, such an amount of bonds and stock as said Railroad Commission of Texas shall authorize on said line of railroad between Marshall and East Winnsboro."

If according to the terms of this contract the appellee has received all of the compensation to which it is entitled for the construction work performed by it, then it is clear that it is not entitled to a judgment in this proceeding. For unless it can show itself to be a creditor of the railway company it has no right to share with those who are creditors in the distribution of the assets. Whether or not it is a creditor with or without a lien depends, then, upon whether it has received all the compensation agreed upon in the contract for the construction work it contracted to be performed. Article 4534f, Sayles' Ann. Civ. St. 1897, provides: "Should any company or corporation authorized to construct, own or operate a railroad in this state desire to issue bonds or other indebtedness, to be secured by lien or other mortgage on its franchises and property, in advance of the completion of the said railroad, it shall make application to and first procure the consent of the Railroad Commission thereto. In said application it shall exhibit to the Commission its contract with the construction company, if it have any; the profile of its completed road or part of road, the evidence of its right of way, depot grounds, terminal facilities; the extent and value of work done or in process of completion; the amount of property received; the amount of stock subscribed and the amount paid in; and all other necessary facts showing the value of the franchises and property proposed as security for said contemplated debts."

The act of which the foregoing article is

a part is what is known as the stock and bond law, and was enacted for the purpose, among other things, of preventing the overcapitalization of railway corporations organized under the laws of this state, and thus averting the creation of more than a legitimate and fair basis for the fixing of rates of transportation by such companies, and also to protect the purchasers of railroad stock and bonds against inflated issues. The Railroad Commission is the special tribunal erected for the purpose of controlling such issues of bonds and stocks, and to the end that it may perform its work effectually and fairly it is given the right, and charged with the duty, of valuing the property of each railroad in the state, and all the work done upon one in process of construction. At the time the contract in this case was entered into this law was in effect, and the parties must have contracted with reference to its provisions. Therefore when it was agreed that if bonds to the amount of \$1,600,000 should not be authorized by the Railroad Commission the compensation should be such as it would authorize, it must have been intended to so limit the bond issue to such as the Commission should, in the proper exercise of its powers and duties, permit to be issued. If for any reason the Commission might justifiably refuse to authorize the issuance of more than it did, then the intervener would have no right to demand more. The facts show that in this case there were three applications made for the authority to issue bonds. One was made on the 2d day of October, 1902, another on the ——— day of ———, 1903, and the third and last on the 31st day of December, 1903. The total bond issue authorized amounted to the sum of \$792,000. There were also at all times various outstanding liens against the property of the railway company; and the Commission ordered a reservation to cover those liens, and directed that when releases were filed bonds for corresponding amounts might be issued and registered. These liens amounted to \$88,000 when the last issue was made.

The claim presented by the intervener in this suit, and for which it asks judgment and a lien upon an equality with that of the holders of the bonds, as before stated, may be divided into three groups. It is thus subdivided in the exhibit attached to the petition of intervention, and those groups are denominated Abstracts A, B, and C. The aggregate amount of the three is \$181,482.37. Of this sum \$95,323.39 compose Abstract A, and \$54,537.45 make up Abstract B—total of the two, \$149,860.84; the remainder, \$31,621.53, constitutes Abstract C. We make these separate references for reasons which will hereafter appear.

The evidence conclusively shows that the items composing Abstracts A and B, and the valuations placed upon them by the intervener, were before the Railroad Commission

at the time the last issue of bonds was authorized, and were considered by the Commission before the promulgation of its order. The amounts claimed in these two abstracts are the difference between the valuations of the Commission's engineer, adopted and used in the making of the order for the additional bond issue, and the estimates of value made by the intervener upon the same improvements. The contention of the intervener is that the Commission's valuation was too low, and as evidence of that fact the intervener has produced the report of an engineer of its own selection, making estimates of the valuations of the same property and improvements.

It thus appears that at the time the Commission made its last order authorizing the bond issue by the railway company, it had before it, not only the estimates contained in the report of its own engineer, but the estimates made at the instance of the railway company, and also its protest against the estimate of the Commission's engineer. The question as to whether or not the valuation of the Commission's engineer was too low was directly presented, and must have been passed upon in the determination made by the Commission. It is true that the protest was passed without prejudice, but just what the legal effect of such an interpolation made by the Commission in its order would have, we are not called upon to say. The Commission made an adjudication upon the issues of fact presented, and certainly we would not be justified in treating this otherwise than as final, unless it was made to appear that the Commission itself did not so intend it. If it be considered as a final determination of how many additional bonds it would permit to be issued and registered under that valuation, then its judgment is conclusive upon that subject, and no court has the right to review it. Hence, for that reason, if for no other, the intervener is not entitled to any claim for an additional bond issue based upon those estimates of value, and is, therefore, not entitled to be treated as a creditor to that extent in this proceeding. We may therefore consider Abstracts A and B as eliminated from any further consideration upon those grounds. There will then remain the items included in Abstract C, consisting of improvements and additions made to the value of the property after the last bond issue was authorized and before the appointment of the receiver, and which, it is alleged, were not included in the estimates before the Commission when its final order was made. These amount to the sum of \$31,621.53, and are asked for upon the theory that the Commission would have authorized an equivalent bond issue had application been made therefor before the railway company was placed in the hands of the receiver. No application was made for an issue of bonds on account of these accretions to the prop-

erty, and we are left, even according to this theory, with the delicate task of deciding what the Commission would and should have done had such an application been presented; what estimate it would have placed upon the accretions made, and what deductions it would have made on account of the liens then outstanding against the property of the railroad. The assumption upon which this portion of the intervener's claim is urged is, we think, opposed to the proper construction of the contract under which the construction work was undertaken. This contract provided that the intervener should be limited to such an amount of stock and bonds as the Railroad Commission should authorize. By the term "should," as used in that connection, it was evidently meant such an amount as the Commission elected to authorize. If the Railroad Commission, for any reason sufficient in law to justify it in so doing, should refuse to make an order for an additional bond issue, then the amount issued should be received, according to the plain terms of the contract, in full satisfaction. If the passing of the property of the railway company into the hands of a receiver was a sufficient legal reason why more bonds should not be authorized, then we see no escape from the conclusion that the intervener had received from the railway company all the bonds it was entitled to under the contract. It is not contended that the railway company had refused to make an application for a further issue of bonds. The facts show that the intervener was the owner of all of the stock of the railway company and dominated and controlled its policy. Neither is it charged that the application for a receiver was wrongfully made, or that the conditions which actually existed rendered the appointment of a receiver unnecessary. On the contrary, it is shown that the railway company had defaulted in the payment of the interest on its bonds, and in the payment of many of its other obligations; that the construction company, if engaged in any way in carrying on the construction work, was doing it through the medium of the railway company, and was burdening that company with debts and liens incurred solely for that purpose; that both companies were insolvent, and that the earnings of the road were being diverted to the payment of the expenses of construction. Under those conditions the bondholders had the right to seek a foreclosure of their mortgage lien and to have a receiver appointed to take charge of the property. The appointment of a receiver does not dissolve the corporation, nor hinder the exercise of corporate functions except those which involve the control and management of the property over which the court assumes to exercise supervision through the receiver. *Mosby v. Burrow*, 52 Tex. 403. Unless otherwise restricted by statute the corporation, or the owner of the

property which has been placed in the hands of a receiver, may still incur it subject to the priority of the debts for the payment of which it is being administered. Such incumbrances would attach to the surplus, if any, remaining after the payment of those prior obligations. The mere appointment of the receiver in this instance did not oust the jurisdiction of the Railroad Commission to grant an additional bond issue, but the conditions which called for the appointment of the receiver, the insolvency of the corporation, furnished a legal objection to permitting the property to be burdened with additional liens. To hold that a court can fix a lien which the Railroad Commission would be justified in refusing would be to substitute one tribunal for another. If the Commission could not grant permission to the railway company to create the liens, upon what principle can the action of a court in creating an equitable lien be justified? The right of intervener to additional bonds must be derived from its contract. The contract fixed the Commission as the arbiter that should determine what issue, less than \$1,600,000, should be full compensation for the construction work to be performed by the intervener. *Augusta Trust Co. v. Fed. Trust Co.* (C. C.) 140 Fed. 930. Nothing short of an arbitrary or an illegal refusal on the part of the Commission would justify a resort to the courts in seeking to have an equitable lien substituted for the contractual lien which the parties contemplated that the Commission should authorize. A court of equity would not be justified in decreeing a lien in favor of the intervener upon a state of facts which would not warrant the Commission in authorizing an additional issue of bonds for the amount claimed. We have concluded that the judgment in favor of the intervener is not supported by the facts, and will have to be reversed.

But we do not rest the disposition we make of this case upon the principles alone so far discussed. There are other reasons equally as cogent for holding that the intervener is not entitled to the relief here sought. The intervener contracted to perform the construction work, and agreed to pay off and discharge all liabilities and debts against the railway company, except those created by the issuance of the bonds and incurred for operating the road. This was the consideration upon which rested the obligation of the railway company to deliver to the construction company its stock and bonds. Not later than the 1st of September, as shown by the testimony, the construction company ceased to perform the construction work under the terms of its contract, but the same was continued by the railway company. The credit of the latter company was used for procuring material and labor for that purpose, and its earnings from the operation of the road were used in that way. By reason of this a large

floating debt was created against the railway company, most of which was secured by statutory liens, or was susceptible of being so secured. In the contract with the railway company the intervener had bound itself that in case it used the credit of the railway company in procuring funds to carry out the contract it would pay off and discharge the debts so created. It was further stipulated that if the railway company should discharge any of the indebtedness incurred "by doing any of the matters therein contracted for," the sum so paid should be deducted from the amount owing to the construction company; and in case the railway company elected to pay in stock and bonds, then it should retain an amount of bonds or stock equal to the amount so paid, dollar for dollar. This left it clear that whatever liability might be incurred by the railway company in doing any of the "matters or things" contracted to be done by the construction company, should be deemed the debt of the construction company and not that of the railway company. These provisions of the contract inured to the benefit of the creditors of the railway company, and gave them the right, in the final settlement of the affairs of that company, to insist that the construction company, before being permitted to participate in the distribution of the assets of the railway company, especially when the latter is insolvent, should first discharge its own obligations. *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; 25 Amer. & Eng. Ency. of Law, 551; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274.

It is shown by the evidence that at the time the receiver was appointed there was a floating debt and liens against the railway company amounting to more than the entire claim sought to be recovered by this intervention. The court below found that the bondable value of the railroad property was \$965,153.57. This exceeds the value as fixed by the Railroad Commission by \$42,475.50—\$10,553.97 more than the aggregate of the value of all the accretions alleged to have been made after the valuation fixed by the Commission, as shown in Abstract C of the pleadings of the intervener. While not accepting the valuation adopted by the court as being the true bondable value of the railroad property, yet we shall treat that as being correct in considering the facts we here discuss. The court further found that the road should be chargeable with the following liabilities:

Capital stock	\$ 79,980 00
Mortgage bonds actually issued, including a reservation in favor of Chatterton for \$15,000	807,000 00
Balance due from the construction company, as shown on the books of the railway company	14,378 49
Vendors' liens unpaid.....	40,000 00
Total	\$941,356 49

This sum deducted from the bondable value of the property as found by the court gave the sum of \$23,797.08, for which judgment was rendered in favor of the intervener. If, in arriving at that sum, the court fixed the bondable value of the road too high, or failed to deduct all of the items of liability which should be taken into consideration in arriving at the net bondable value remaining, then it follows that this judgment is wrong to the extent of the error made in either way.

The uncontroverted evidence shows that at the time the receiver was appointed an equipment lien against the railroad property was outstanding, amounting to the sum of about \$35,000; that this lien was in existence at the time the Railroad Commission passed upon the last application for the issuance of bonds, and was regarded by it as a lien which would have to be discharged, or that sum would be deducted in estimating the amount of bonds that should be authorized. We think the court should have taken this item also into consideration in determining the liabilities which would affect the amount of bonds that might be issued. Had this been done it would have more than extinguished the difference which was made the basis of the judgment in favor of the intervener. Not only should this item have been taken into consideration in making that estimate, but also other items of indebtedness against the railway company amounting to approximately \$200,000. These were debts against the railway company for which the intervener was directly, or indirectly, responsible. The intervener was the owner of all the stock of the railway company, and directed its management and policy. It had either abandoned the construction work which it had contracted to perform before that for which it claims compensation was done, or was carrying it on through the agency of the railway company, using the latter's credit and income for that purpose. If its right to this further compensation was not lost by abandonment, then it cannot escape liability for the debts with which it loaded the railway company in carrying forward the construction work which the construction company had contracted to do. It should not be permitted to reap the benefits of the work done, without being responsible for the cost of accomplishing it.

But there is still another reason which we think is sufficient to deny a recovery of the intervener in this case. While the shareholders are, in a sense, separate and distinct from the corporation, in many transactions equity will regard them, for practical purposes, as being the same. *Aransas Pass Harbor Co. v. Manning*, 94 Tex. 563, 63 S. W. 627. The construction company, as the owner of the railway company, did indirectly whatever was done by the latter. When the construction company received all of the stock of the railway company this

carried with it the real ownership of all the property rights and franchises of the railway company, and as long as it continued to own and hold that stock it continued its complete ownership of the corporate property. The railway corporation was but a creature in the hands of the construction company, and the stipulations for the issuance of bonds was merely a method of enabling the construction company to borrow money upon the railway property. It is doubtful if a bond in the hands of the construction company, under the facts of this case, could be regarded as a debt in the sense that would authorize that company, as the holder, to share equally with those who had purchased other bonds for a valuable consideration from the construction company. When the stock of the railway company was delivered there was a completed transfer of the evidences of ownership of all its property. The issuance of the bonds added nothing to the value of the railway property, formed no additional compensation, and a failure to issue bonds would not have withheld from the construction company any property right. The bonds when issued were mere promises to pay money, and depleted the value of the stock in proportion to the number issued and sold. To permit the construction company through its domination to burden the property of the railway company with incumbrances, a part of which it may hold, and then share to that extent with the bona fide purchasers of bonds, would be to give that company the right to incumber its own property with liens in its own favor.

This is not an action to foreclose an existing lien, but an equitable proceeding asking that a lien be decreed in favor of the intervener, where under the terms of the contract one could not be asserted in law. It is an appeal to the equitable powers of the court. Under such conditions the court should take into consideration the situation and rights of the parties and do complete justice to all, as near as may be. The principles of equity forbid that a shareholder by whose dereliction the assets of an insolvent corporation had been depleted could, as a creditor, share equally with other creditors in the distribution of those assets till he had made amends for his own wrongs, or discharged his own obligations to that corporation. The construction company still owes the debts which it caused to be incurred by the railway company in doing the construction work. Many of those debts are superior, as to the right of priority of payment, to the bonds, while others are upon a parity with them. In this manner the construction company has diminished the security of the bondholders, and is now seeking to deplete it still more by being admitted to an equal right to share in that security for the payment of this claim. It would be in-

equitable and unjust to permit this to be done without requiring the construction company to first satisfy its debts due the railway company, or of having its claim offset with its own obligations.

Again, it is shown that the construction company subscribed for 2,316 shares of stock in the railway company, on which it paid only 5 per cent. of the par value, the remainder never having been paid, and which is still due, unless the cancellation at the instance of the construction company may be regarded as valid. This was attempted after the mortgage was executed and after most of the bonds were issued. It is well settled that the unpaid subscriptions of stock form a part of the assets of the corporation to which the bondholders and mortgagees may look for satisfaction of their claims. *National Bank v. Texas Investment Co.*, 74 Tex. 436, 12 S. W. 102.

In the opinion of the writer the cancellation of the certificate originally issued to the construction company, when only 5 per cent. had been paid, and the issuance in lieu thereof of a certificate for full paid-up stock for the amount that had been paid on the stock subscribed, was in fraud of the rights of the creditors of the railway company. It was done by the vote of the construction company, and for the sole purpose of enabling it to burden the property of its creature, the railway company, with a bond issue, which could not otherwise be done. To the answer setting up those facts the construction company has replied with a plea of limitation. 'No principle is better settled than that he who would escape the rigors

of the law, by a resort to equity, must not himself invoke the rules from which he flees. Where the failure of the intervener to perform its contractual obligations is urged against its prayer for equitable relief, a plea of limitation is no defense, even though an action at law for such damages by reason of such failure might be barred. *S. A. & A. P. Ry. v. Gurley*, 92 Tex. 229, 47 S. W. 513.

The intervener pleads and relies upon a settlement which is alleged to have been made between the construction company and the railway company, by which it was found that the latter owed the former the sum sued for. We do not think the facts support this contention. The purported settlement consists of the itemized statement set forth in the exhibit attached to the petition of intervention, prepared by Turner, the engineer of the railway company, and also acting in the same capacity for the construction company, at the instance of Walker, the president and general manager of both companies. There is no evidence of any settlement between the two companies. The trial court based its judgment upon other considerations and seemed to ignore any such a contention. We think the evidence will abundantly justify us in finding as a fact that there had been no settlement between the construction company and the railway company.

We deem it unnecessary to refer in detail to all the assignments of error filed by the trust company and the receiver.

For the errors discussed, the judgment of the district court is reversed, and judgment here rendered in favor of the appellants.

BROWN v. GLOBE PRINTING CO.

(Supreme Court of Missouri, Division No. 2.
June 16, 1908. Rehearing Denied
July 14, 1908.)

1. LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS—NATURE OF PROCEEDINGS.

A proceeding before the Governor of a state for the extradition of a fugitive from the justice of another state, on the demand of the Governor of the latter state, is of a quasi judicial character, and of such importance to the public that a full or abridged report thereof, if fair and impartial, is privileged, though private rights may, by reason of the report, be violated.

2. SAME.

The rule that, to justify as privileged a publication of proceedings, the proceedings must have been directly judicial, or in a court of justice, is extended to executive and legislative proceedings and investigations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 128.]

3. SAME.

All the proceedings with respect to an indictment after its return into court and in connection therewith, including proceedings for the extradition of accused, constitute one privileged occasion, and a full or abridged report thereof, if fair and impartial, is privileged, so far as the matters connected therewith are not mere hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

4. SAME.

Whether an abridged report of proceedings constituting a privileged occasion has the same effect on the character of one referred to as a full report would have is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 362.]

5. SAME—"PRIVILEGED COMMUNICATION."

The rule that a fair account of the whole proceedings in a court or before a public magistrate, sitting publicly, is a privileged communication, whether the proceedings are on a trial or on a preliminary and ex parte hearing, implies that there must be a hearing of some kind, and, in order that the ex parte nature of the proceedings may not destroy the privilege, there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 127, 128.

For other definitions, see Words and Phrases, vol. 6, pp. 5592-5598.]

6. SAME.

The rule that a publication of judicial or quasi judicial proceedings in cases of civil character may be privileged, on the ground of public interest, must apply to criminal cases, for the public have as much interest in a criminal as in a civil proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

7. SAME.

A publication is not shorn of its privileged character because it is abridged, provided it remains fair and impartial.

8. SAME.

Full or abridged reports of a legal proceeding continued from day to day, if as fair and impartial as the circumstances will permit, are privileged; but all comment on the case must be deferred until the proceedings terminate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

9. SAME.

The headlines of a newspaper publication of the report of judicial or quasi judicial pro-

ceedings are not a part of the proceedings, but are the voluntary statements of the publisher.

10. SAME.

The headlines of a newspaper publication of a report of extradition proceedings before the Governor of a state: "Ziegler's [alleged fugitive's] Lawyer calls Brown [prosecuting attorney] Liar. Accuses Him of Perjury. Declares if Misourian Visits New York He Will be Arrested. Insists Cole County Prosecutor Made Affidavit He Knew Was False"—are not privileged, and are libelous, even though the matter could be deemed otherwise privileged, since the publication was equivalent to a comment unnecessary to a fair report of the proceedings and likely to raise inferences detrimental to the prosecuting attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

11. SAME.

While words reflecting on the character of an individual, spoken or written in due course of a judicial or quasi judicial proceeding, if pertinent to the issue, are privileged, the privilege does not allow the publication of the defamatory words in a newspaper, though the publication is made in good faith and as a matter of news.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

12. SAME.

A publication of only such parts of the brief of counsel appearing in behalf of an alleged fugitive in proceedings for his extradition as reflected on the character and integrity of the prosecuting attorney instituting the criminal prosecution, and imputing to him crime, is not privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

13. SAME—ACTIONS—VERDICT—EFFECT.

Where the question whether a publication was a libel and was properly the subject of an action for damages was submitted to the jury, and they were told that on this question they were the judges of the law as well as the facts, a verdict awarding compensatory and punitive damages was a finding that the article was a libel and not privileged.

14. APPEAL AND ERROR — INVITING ERROR — RIGHT TO COMPLAIN.

A party cannot predicate error on the action of the court in giving an instruction asked by himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3602-3604.]

15. SAME.

Where the court gave an instruction requested by a party and refused another requested instruction, the party could not predicate error either on the refusal of the one or the giving of the other instruction, on the ground that, if the instruction refused was properly refused because it misstated the law, the instruction given, containing a similar statement of the law, was improperly given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3602-3604.]

16. LIBEL AND SLANDER—ACTIONS—QUESTION FOR COURT—PRIVILEGED OCCASION.

It is for the court to determine whether the occasion on which an alleged defamatory statement was made was such as to render the statement privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 362.]

17. TRIAL—INSTRUCTIONS—REQUESTS.

It is proper to refuse an instruction in effect covered by the instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

18. LIBEL AND SLANDER—PRIVILEGED COMMUNICATION.

One is not at liberty, after the termination of a legal proceeding and the rendition of the decision therein, to publish excerpts from briefs of counsel which reflect on the character of another, and a publication of such excerpts 22 days after the filing of the brief, and 2 days after the rendition of the decision, is not privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

19. SAME—MALICE—EVIDENCE.

While a condensed report of proceedings constituting a privileged occasion, if prepared faithfully and truly, is privileged, the suppression of parts of the testimony in the proceedings, which would qualify the defamatory matter contained in the report, is evidence of malice, which destroys the privilege.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

20. SAME.

The jury, in determining whether one sued for libel was actuated by actual malice or ill-will toward the person defamed when it published the libel, may take into consideration the character of the publication itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 363.]

21. SAME.

Where, on a trial for libel for publishing an article relating to extradition proceedings before a Governor, malice, though not disclosed by direct evidence, was inferable from the publication itself, and from the facts that part of the testimony on the hearing which would have qualified the defamatory matter complained of was omitted, and that only such part of a brief of counsel was published as related to the charge of perjury made against plaintiff, the refusal to submit affirmatively the defense of privilege was not erroneous because of want of evidence on which to predicate it.

22. TRIAL—INSTRUCTIONS—REQUESTS.

Where an instruction given by the court is not misleading, a party desiring a more pointed instruction must request it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 628-641.]

23. SAME.

The court is not required to give instructions of its own motion in a civil case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 627.]

24. SAME.

An instruction failing to give any statement of facts from the evidence on which a verdict for defendant could be found was not erroneous, where no such facts were disclosed by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

25. APPEAL AND ERROR—ERROR IN FAVOR OF PARTY COMPLAINING.

A party cannot complain of an error operating in his own favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

26. TRIAL—INSTRUCTIONS.

It is not necessary that an instruction should refer to another, or that the issues involved should be presented to the jury in one instruction, and where the instructions taken as a whole, fairly present the issues and are not calculated to mislead the jury, they are sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

27. LIBEL AND SLANDER—RIGHT TO RECOVERY.

A publication of an article, which is libelous per se, and which is not privileged, gives to the person defamed the right to a verdict.

28. SAME—DAMAGES.

The jury are the sole judges of the damages to be awarded for the publication of a libelous article, and their finding will not be disturbed unless the verdict is so excessive as to clearly indicate that it was the result of bias and prejudice.

29. SAME.

In an action for newspaper libel based on an article charging an attorney with committing perjury while acting as prosecuting attorney of a county, a verdict of \$2,000 actual damages and \$10,000 punitive damages is not excessive, where malice is inferable from the publication itself, and from the fact that matter which would have explained the defamatory words was omitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 353.]

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by Frank M. Brown against the Globe Printing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ashley C. Clover and W. S. Pope, for appellant. Edwin Silver and J. L. Smith, for respondent.

BURGESS, J. This is an action for damages for libel. Plaintiff recovered judgment for \$2,000 actual damages and \$10,000 punitive damages against the defendant, from which judgment, after ineffectual motions for a new trial and in arrest, defendant appealed.

The petition sets forth, in substance: That plaintiff is a citizen of this state and an attorney at law, engaged in the practice of his profession at Jefferson City, Cole county, Mo.; that defendant is a business corporation of this state, with a capital stock of \$500,000, and at the times mentioned in the petition was engaged in printing, publishing, and selling a daily and other editions of a newspaper named and styled the "St. Louis Globe-Democrat"; that the defendant corporation is the sole owner of said newspaper, and printed the same in the city of St. Louis, Mo., where it has its principal office, and published, circulated, and sold the same not only in St. Louis, but in different counties of this state, including Cole county, and also in the states of Illinois, Texas, Arkansas, Kansas, Iowa, the Indian Territory, and elsewhere; that the circulation of said newspaper exceeded 100,000 copies; that on February 2, 1904, and prior thereto, there was pending at the city of Albany, N. Y., before the Governor of New York, a certain extradition proceeding wherein the Governor of Missouri sought to obtain the extradition from the state of New York of one William Ziegler, charged by indictment in the circuit court of said Cole county, Mo., with the crime of bribery, alleged in said indictment to have been committed by said Ziegler in said Cole county, Mo.; that defendant, on February 3, 1904, in the daily edition of its said newspaper, having reference to the aforesaid extradition proceeding, wrongfully, wickedly, and with malice printed and pub-

lished, concerning plaintiff, in manner and form as follows, the following false, libelous, and defamatory words and matters, to wit:

"Ziegler's Lawyer Calls Brown Liar.

"Accuses Him of Perjury.

"Declares if Missourian Visits New York He Will Be Arrested.

"Insists Cole County Prosecutor Made Affidavit He Knew Was False.

"Special Dispatch to the Globe-Democrat—New York, February 2. Gov. Odell's decision, made public yesterday, denying the request of Gov. Dockery of Missouri to surrender William Ziegler of New York to the Missouri authorities for extradition, has for the present at least brought to a definite and unsuccessful and the attempts to get the New York capitalist into the state of Missouri to stand trial on the charge of perjury. The decision leaves Ziegler in the somewhat awkward position of being unable to leave this state without the liability of arrest and a possible repetition of the proceedings before the Governor of another state, and the certainty of being arrested and tried if he should visit Missouri. It is probable that Mr. Ziegler will take all possible steps to have the Missouri indictment quashed. In fighting the application for extradition, Mr. Ziegler employed the most eminent available counsel, including Edward Lauterbach, Nicoll, Anable & Lindsay and Bowers & Sands. The thoroughness with which these lawyers went into the merits of the case is sure to make it, with the Governor's decision, a leading case in all matters affecting extradition. The brief of John M. Bowers, which was followed very closely by Attorney General Cuneen in the opinion upon which the Governor based his decision, is an interesting one.

"Charges Brown with Perjury.

"It is noteworthy, in connection with the case, that the danger of arrest which Mr. Ziegler undergoes by visiting Missouri is offset by an equal danger which Prosecuting Attorney Brown of Cole county is under if he at any time visits this state. In his brief, Mr. Bowers openly charges Brown with deliberate and criminal perjury, and Mr. Bowers does not hesitate to say that, upon his advent into this state, Brown will be instantly arrested, and his indictment for perjury sought for. In his brief, Mr. Bowers says, among other things:

"What is your excellency asked to do? You are asked to consign Mr. Ziegler to the prosecuting attorney of the county of Cole, in the state of Missouri, for trial on an indictment founded on the evidence of his enemies. This prosecuting attorney of the county of Cole made an affidavit upon which was put in motion the machinery of the Constitution under which Mr. Ziegler's extradition was sought. It was false as to every

allegation as to Ziegler's flight. Mr. Ziegler sent a respectful message to the Governor of the state of Missouri, asking that his prosecuting attorney of the county of Cole be produced before your excellency, to repeat the oath he had made by which the machinery of the law as to extradition had been set in motion. He declined to come, and at page 76 of the stenographer's minutes of the proceedings, before your excellency, it was openly conceded that he had no knowledge of the matters he swore in this regard.

"Makes Open Charges.

"What does this mean? We openly charged before your excellency upon the hearing that an official of a state had committed perjury pure and simple upon which he instituted a procedure of this nature, committed a crime of the highest grade."

"The one fact which the state of Missouri concedes it had to prove to deprive a citizen of the state of New York of his freedom and transport him to the state of Missouri was that he had been present in that state at a certain time. Mr. Brown, the prosecuting attorney who is to try him, made an affidavit of that fact. Mr. Brown knew it was untrue when he made it. Even if he swore to facts as true of which he had no knowledge, it was perjury."

The petition then avers that at the times referred to in said publication plaintiff was the duly qualified and acting prosecuting attorney of Cole county, Mo., and that the terms "Brown," "Mr. Brown," "Cole County Prosecutor," "Prosecuting Attorney Brown of Cole County," etc., as used in said publication, all have reference to and mean the plaintiff. The petition further states: That the defendant published, sold, and circulated the edition of its newspaper containing said false and defamatory matter concerning plaintiff in Cole county, Mo., and elsewhere in the state of Missouri, as also in the states of Arkansas, Texas, Illinois, Iowa, Kansas, the Indian Territory, and elsewhere; that the defendant, in the manner and by the means aforesaid, did falsely, maliciously, and wickedly publish, circulate, and give currency to the charge, among other things, that plaintiff had committed the atrocious and abominable crime of perjury; and that plaintiff, by said wrongful acts and conduct of the defendant, has been greatly injured and damaged in his good name and reputation, and his feelings and estate, as an attorney at law, and in his business pursuits. Plaintiff, in his petition, prays judgment for actual damages in the sum of \$20,000, and for punitive damages in the sum of \$20,000.

The answer to the petition denied every allegation thereof, except such as were specifically admitted, and sets up, in substance, the following defenses: That the article complained of in plaintiff's petition was a fair, correct, and truthful report of both the oral

and printed argument of the attorneys of said Ziegler, made in the course of the hearing before the Governor of New York. That the application for the extradition of Ziegler, with all proceedings in connection therewith, was ancillary to and a part of the criminal prosecution of said Ziegler, begun by the filing of the indictment against him in the circuit court of Cole county, Mo., and therefore concerned the administration of justice in Missouri. That the defendant, as a publisher of a public journal, made the publication complained of for the purpose of giving public information in regard to the administration of justice, and as a matter of news, and without malice. That said publication was privileged in law. That the affidavit of plaintiff upon which is based the charge of perjury in the publication complained of was made by plaintiff upon information and in the course of his official duty, and not upon his personal knowledge, and as a fact, and plaintiff could not be guilty of perjury in making same, and this was so understood by all who saw and read the publication. That the article complained of is a true report of a charge and accusation against plaintiff herein, made by one John M. Bowers, an attorney for said William Ziegler, in the course of said extradition proceedings, and the article clearly and explicitly states that the charge and accusation was made by the said Bowers, and it was published by defendant without approval, indorsement, injurious comment, or malice, and as a matter of news. By way of mitigation of damages, the answer pleaded that the said charge and accusation against plaintiff was made by said John M. Bowers, an attorney for said Ziegler in said extradition proceeding on the hearing of the same, that the article complained of so states, and that it was published by defendant without approval, indorsement, injurious comment, or malice, and as a matter of news. That the news and information as to said extradition proceedings was largely sought for and chronicled in the daily press of the country, and that defendant published many articles in regard to said extradition proceedings, and that the article complained of was first published on February 2, 1904, in *The Brooklyn Eagle*, a reputable journal, published in the city of New York, and was sent to defendants, in the due course of its business, as the publisher of a newspaper, by its New York correspondent, and that it was published by defendant in good faith, without either malice or negligence, and without any purpose to injure or damage the plaintiff. That on the same day the article complained of was published by defendant, other reputable newspapers, acting independently of each other, published of and concerning the plaintiff statements similar to those published by the defendant.

Plaintiff, in his reply to said answer, denied that the article in question was a fair, correct, and truthful report of the oral and

printed argument of the attorneys of said Ziegler made in the course of said hearing, and denied that the said publication was privileged; denied that the matters set forth in said publication were obtained during the progress of the hearing of said extradition proceeding before the Governor of New York, but that said publication was copied by defendant's reporter or correspondent from a newspaper published in the state of New York, and was, so far as it related to plaintiff, an unfair and arbitrary selection from the brief of the counsel of William Ziegler referred to in defendant's answer of that part of said brief which maliciously, wickedly, and falsely assailed and reflected on plaintiff's personal honor and official and personal integrity; denied that said publication was made in manner and form or under such circumstances as to make it privileged in law; admitted that said affidavit was made by plaintiff on information received from others and in the course of his official duty, but denied that plaintiff could not be guilty of perjury or of knowingly making a false affidavit in so making said affidavit; denied that this was so understood by all who saw and read the publication; denied that said article complained of was a true report of a charge and accusation made by said John M. Bowers, an attorney for said Ziegler, and averred that, if such were the fact, it would not constitute any defense for the defendant in this action; denied that the article complained of explicitly states that the charge and accusation was made by said Bowers against plaintiff, and that it was published without approval, indorsement, injurious comment, or malice; also, denied that said article was published by defendant without malice or under mitigating circumstances.

In support of his case, plaintiff testified at the trial: That he had lived 24 years in Jefferson City, Mo.; that he was a practicing attorney on February 3, 1904, and prior to that time, and on said date he was temporary prosecuting attorney of Cole county, Mo.; that he was appointed as said officer on November 14, 1903, and the appointment continued until February 15, 1904; that he was married and had a family of five children, ranging in ages from 22 to 4 years; that he was a subscriber to the *Globe-Democrat*, which published said article, and, so far as he knew, no retraction or of apology for the publication complained of had been made by the paper; and that said publication had caused him mental pain and humiliation. On cross-examination, the plaintiff stated: That he did not know whether the publication of the article in question had affected his standing as a citizen or lawyer in the community, and did not know that it had injured him in his business or social relations; that he had not personal knowledge of any injury done him, socially or professionally, outside of Cole county by said publication. He further stated that he knew of no ill feeling on the part of

the Globe-Democrat or its officers against him, that since the publication of the said article he had been appoluted by the curators of the State University to look after the collateral inheritance tax, that the application for the extradition of Ziegler was made on November 16, 1903, and that plaintiff made the affidavit upon the information communicated to him by Attorney General Crow, who had been before the grand jury, and who went over the facts with plaintiff. Thomas Hollingshead, business manager of the defendant, testified, on behalf of plaintiff: That the defendant company publishes the Globe-Democrat, and had been doing so since the year 1876. That the daily circulation of the paper in February, 1904, was from 75,000 to 100,000, possibly 125,000 copies. Witness said that the defendant has subscribers in Cole county, Mo., and that the paper circulates in all the western and southwestern states. That the paper is published in St. Louis, and, in the opinion of witness, there were subscribers to the paper in every county in Missouri. That the capitalization of defendant company was a half million of dollars. That it owns an eight-story brick building in St. Louis worth from \$300,000 to \$400,000, and that the value of defendant's newspaper property was probably two and a half million dollars. The witness further testifies that the article complained of was published by defendant in an effort to publish all the news occurring over the country, especially in Missouri, and as a matter of public interest. He did not know that prior to the publication of said article that any attempt was made to interview plaintiff to ascertain the correctness of the articles, nor did he know that any offer of retraction or apology had been made since it was published. Three witnesses testified for plaintiff that his general reputation and social standing in the community, about the 3d of February, 1904, was good, and said witnesses further testified to the effect that, so far as they knew, plaintiff's reputation and social standing was as good at the time of the trial as before the article complained of was published.

Defendant read in evidence the stenographer's report of the extradition hearing before Gov. Odell, of New York, which report included the arguments of counsel, remarks of Gov. Odell, some letters, telegrams, and affidavits produced at said hearing, and the testimony of several witnesses thereat, all of which tended to show that Ziegler was in the city of New York, and not in Missouri, on March 19, 1901, to which date Gov. Odell restricted the proof on said hearing. The evidence introduced by the state of Missouri on said hearing was also read in evidence on the trial of the present case, which evidence went to show that said Ziegler was in Missouri on March 19, 1901. Defendant also read in evidence the deposition of John M. Bowers, one of the counsel for Ziegler in the extradition hearing before Gov. Odell,

and who stated that said hearing was on December 7, 1903, and that the brief filed with Gov. Odell was prepared by him. The witness stated that he had read the record of the proceedings in said matter, that the same was correct, and that the statements therein purported to have been made by him were in fact so made by him. He further testified that the quotation from the brief set forth in the article complained of constituted but a small part of the same, and was only a portion of the argument on one point. On cross-examination, he stated that the brief was sent to Gov. Odell on January 11, 1904, and doubtless reached him on January 12, 1904, and that Gov. Odell's decision on the extradition proceeding was made on February 1, 1904. Defendant read in evidence the printed brief of witness Bowers in said extradition proceeding, which brief consisted of about 43 pages of printed matter, subdivided into two points or headings. The deposition of Harry E. Whiting, the New York correspondent of the St. Louis Globe-Democrat, was also read in evidence by defendant. This witness testified: That he sent to the defendant the articles complained of in this action; that on the evening of February 2, 1904, he discovered the article in the Brooklyn Eagle; that he clipped the story word for word from the Eagle and sent it by telegraph to the Globe-Democrat; that he did so because it was a matter of local interest; and that he did not know Mr. Brown, Mr. Ziegler, or Mr. Bowers, and he was still in the employment of the Globe-Democrat. On cross-examination, he testified: That the article as published contained all he wired; that he did not furnish the "heads" to said article; that he had not seen a copy of Mr. Bowers' brief when he sent the article to the defendant; that he was not present at the hearing before Gov. Odell on December 7, 1903, and had not seen a copy of the testimony taken at that hearing; and that, prior to the article complained of, he had not sent to defendant any article or story referring to the prejury charge against plaintiff. Defendant also read in evidence various articles bearing on the Ziegler extradition matter, published in the Globe-Democrat at different times between November 14, 1903, and February 1, 1904. These publications consisted of correspondence dated at Jefferson City, Albany, and New York City, and relate to different matters connected with the Ziegler extradition proceeding from the time Ziegler was indicted in the circuit court of Cole county, Mo., until the final decision of Gov. Odell, at Albany, on February 1, 1904, refusing to honor the requisition for Ziegler made by the Governor of Missouri. One of these articles, dated November 14, 1903, purporting to be a special dispatch from Jefferson City, Mo., contained the following paragraph with reference to plaintiff: "Frank Brown, who was temporarily appointed Stone's successor, it is being

told on the streets to-night, has himself antagonized Judge Hazell, and the latter is already bitterly criticised for the selection of Mr. Brown, who is not looked upon as being regular in his Democracy; he having gone over to the 'gold bugs.' Because of this fact, he lost his place as official reporter of the state Supreme Court. The silver wing of the party will carry this into the contest against Judge Hazell, who is a candidate for re-election." Defendant then read in evidence a certified copy of the requisition papers, that is to say, the requisition made by Gov. Dockery for the arrest and delivery of Ziegler to the Missouri authorities; also, the application of plaintiff, as prosecuting attorney of Cole county, Mo., to Gov. Dockery for the issuance of the requisition on the Governor of New York, with accompanying documents, including the indictment found against Ziegler for bribery by the Cole county grand jurors. Over the objection of plaintiff, defendant read in evidence a publication of similar nature to the article complained of in this action, and bearing same date, published in the St. Louis Republic, and which latter article is the subject of a similar suit pending in this court.

Plaintiff, in rebuttal, read in evidence the article printed in the Brooklyn Eagle of February 2, 1904, being the publication referred to by witness Whiting as the one from which he copied the article sued on. Said Brooklyn Eagle article, in addition to the matter extracted therefrom by defendant's correspondent and published in defendant's newspaper on February 3, 1904, contained the following: "There are many references in the brief to Evelyn B. Baldwin and the part he took in urging the Ziegler indictment. One of these references is worded as follows: 'The state of Missouri produces the affidavit of Evelyn B. Baldwin. Baldwin's threats to injure Ziegler were sufficiently proven by Mr. Ziegler's answer and the accompanying affidavits filed with your excellency, none of which have been questioned or contradicted. Baldwin swears that in March, 1901, Ziegler told him that he had to go to Missouri before the Missouri Legislature adjourned; that Ziegler was going out to crush the alum baking powder people; that about the middle of March, 1901, he went to the Forty-Second street railway station in New York City with Mr. Ziegler, who told affiant that he was going that night to Missouri; that at that station Ziegler introduced affiant to Kelly; that Ziegler and Kelly came away on the train; that afterward, when Ziegler had returned to New York, affiant was present when Ziegler and Kelly talked about the trip of Ziegler and Kelly to Missouri, and about the defeat of the legislation in Missouri which Ziegler was interested in defeating; and that affiant waited for Ziegler to return from Missouri to New York until March 21 or 22, and up to that time he did not know of his return. The next time he saw Ziegler after Ziegler went

to St. Louis in the middle of March was on the 28th of March, 1901, when Ziegler returned to New York from St. Louis, and that Ziegler told him he had accomplished what he went to Missouri for. Now this affidavit of Baldwin's is sworn to in Missouri. He was one of the witnesses called upon whose evidence the indictment against Mr. Ziegler was found. Mr. Ziegler denies in detail all Baldwin's assertions. That they are false is proven by the evidence in the case showing Mr. Ziegler was in New York at these periods."

The evidence shows that said statement by Ziegler, alluded to in the Brooklyn Eagle article and in Mr. Bower's brief, denying the assertions of said Baldwin, was not made under oath. The alleged libelous publication upon which this action is based was identified and read in evidence by both plaintiff and defendant. The main question presented for consideration upon this appeal is whether, under the evidence disclosed by the record, the publication complained of was privileged and of a privileged occasion.

Defendant contends that not only was the hearing before Gov. Odell a privileged occasion, but that, in addition, the application for the extradition of William Ziegler, with all the proceedings in connection therewith, judicial and quasi judicial, inter partes and ex parte, formed a privileged occasion, and that a fair report thereof, in the absence of actual malice, was privileged. It must be conceded that the proceedings in question were of a quasi judicial character, and if the report published by the defendant was a full, fair, and impartial report, it was privileged. In *Boogher v. Knapp*, 97 Mo. 122, 11 S. W. 45, it is said: "The doctrine of the authorities is that the report must in effect be a fair and impartial report of what took place with reference to its effect upon plaintiff's character. Whether it is such a report is a question for the jury. The report is fair and impartial, so far as the plaintiff is concerned, if a verbatim report of the proceedings would have the same effect on his character as the report made. The only interest plaintiff has in the accuracy of the report is that it shall be so far accurate as not to be more injurious to him than a verbatim report would be." *Barber v. St. Louis Dispatch*, 3 Mo. App. 377; *Hawkins v. Globe Printing Co.*, 10 Mo. App. 174. The English rule would seem to have been that in order to justify the publication of proceedings of the character under discussion, and render the publication privileged, the proceedings must have been directly judicial, or had in a court of justice; but it is held, in *Barrows v. Bell*, 7 Gray (Mass.) 301, 66 Am. Dec. 479, that the English rule is too broad. The court, speaking through Chief Justice Shaw, said: "But whatever may be the rule as adopted and practiced on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth both for the proceedings

before all public bodies and for the publication of those proceedings for the necessary information of the people." The rule is now extended to executive and legislative proceedings and investigations. 25 Cyc. 410. "While it has been held that the publication of matter defamatory of an individual is not privileged merely because the libel is contained in a fair report in a newspaper or pamphlet of what occurred at a meeting held for a public purpose, yet it seems to be the prevailing rule that proceedings, if of public interest, need not be those of a judicial or legislative body to render a fair report thereof privileged." 18 Am. and Eng. Ency. of Law (2d Ed.) 1046; *Allbut v. General Council*, etc., 23 Q. B. D. 400. *Arnold v. Star Savings Co.*, 76 Mo. App. 159, was a suit for an alleged libel published by the defendant in its newspaper, called the "Star Sayings." The court, in the course of its opinion, said: "The letter and postal from the Evansville chief of police were not a statement of facts developed on a judicial investigation, nor the statement of a fact resulting from a judicial investigation, nor were they matters about which the public had a right to be informed, nor was it information useful to the public, and was not therefore privileged."

It would seem from these and other authorities which might be referred to that the occasion was of such importance to the public that a full and fair report of the proceedings was justified, even though private rights might by reason of such report be violated, and that, after the return of the indictment against Ziegler into court, all the proceedings with respect thereto and in connection therewith, including the proceedings for his extradition, constituted one privileged occasion, and that full or abridged reports of the same were privileged, provided they were fair and impartial so far as plaintiff was concerned, and the abridged reports, if any, had the same effect upon his character as a full and verbatim report of the proceedings would have had, which latter was a question for the jury. The rule is otherwise, however, with respect to the publication of partial proceedings, upon which no judicial action has been had. Thus it was held that the contents of a petition for divorce (*Barber v. St. Louis Dispatch*, supra), of a petition for disbarment (*Cowley v. Pulsifer*, 137 Mass. 392, 150 Am. Rep. 318), of a bill in chancery (*Publishing Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005), of a petition in a bastardy charge (*Park v. Detroit Pub. Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 509, 16 Am. St. Rep. 544), could not be published before judicial action had been taken thereon. The general rule is stated in *Barber v. St. Louis Dispatch Co.*, supra, to be as follows: "Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and

ex parte hearing; but the very terms of the rule imply that there must be a hearing of some kind. In order that the ex parte nature of the proceeding may not destroy the privilege—to prevent such result—there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action. This will be apparent if we regard the reason of the rule. Perhaps the earliest, certainly one of the best, expressions of the reason of the rule, is that contained in the opinion of Lawrence, J., in *Rex v. Wright*, 8 Term Rep. 298, and often since quoted with approval. It is there stated, in substance: That though the publication of proceedings in courts of justice may severely reflect on individuals, yet such publications, if they contain true accounts, are not libels nor the subjects of action, because it is of great importance that the proceedings of courts of justice shall be known; that the general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the person whose conduct may be the subject of the proceedings. But the proceedings there alluded to were proceedings in open court, as is shown not only by the judge's language, but by the case to which he makes direct reference, and upon which his remarks hinge (the case of *Curry v. Walter*, 1 Esp. 456), where the publication was of a speech made in open court, in printing which in *The Times* the supposed libel consisted. So where it is said 'it is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges' (per Lord Campbell, in *Davison v. Duncan*, 7 El. & Bl. 231), or, 'we ought to make as wide as possible the right of the public to know what takes place in any court of justice' (per Chief Baron Pollack, in *Ryalls v. Leader*, Law Rep. 1 Ex. 299), it is apparent that judicial proceedings in open court are spoken of. Indeed, the English cases on which the appellant most confidently relies are all cases of proceedings in open court, or before a public magistrate sitting as a court. *Curry v. Walter* has been noticed above. In *Lewis v. Levy*, El. B. & E. 537, the plea was that the proceedings took place 'before a public court of justice, to wit, a justice of the peace then sitting and holding a public court,' that 'the proceedings were had in the said public court.' 'Upon the hearing of the said charge,' etc., Lord Campbell, in denying the position that the privilege must be confined to the proceedings of superior courts, said: 'But on such a question the dignity of the court cannot be regarded, and we must look only to the nature of the alleged judicial proceeding which is reported.' The decision proceeds distinctly upon the ground of a hearing, an investigation, a judicial inquiry and action. Lord Campbell further remarked: 'But although a magistrate, upon any preliminary inquiry respecting an indictable offense, may,

If he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that, while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that the course is calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), we think the court in which he sits is to be considered a public court of justice.' In other cases it is stated that the publication is a mere extension of the area of publicity; that, while the courtroom can contain but few persons, the public press indefinitely extends the field of notoriety. An examination of the latter cases (*Pinero v. Goodlake*, 15 L. T. [N. S.] 676; *Wason v. Walter*, Law Rep. 4 Q. B. 93, where Lord Cockburn's decision is based upon the analogy between public proceedings in courts of justice and public debates in the Houses of Parliament, and the advantage to the people that it should be known what passes within their walls; *Hunter v. Sharpe*, 4 F. & F. 983) will show that a hearing and an inquiry in public are essential to bring the publication within the rule as to privileged communications. It may be safely asserted that if a London newspaper were to publish the one-sided statements of a bill filed in the Divorce Court, merely upon the filing, and previous to its coming before that court for judicial action the Court of Queen's Bench would not, upon the authority of *Curry v. Walker*, or *Lewis v. Levy*, or *Wason v. Walter*, decide that such a publication was privileged. Those cases are authority to the contrary, not only upon their facts, but by reason of the limitations which are expressly laid down in them. He who seeks to stretch a wholesome rule beyond its legitimate application attacks the rule itself, and the able judges who decided those cases were too good logicians to impair the force of their own arguments by extending an exceptional rule to cases where the reason that creates the exception does not exist. So, too, in the case of *Ackerman v. Jones*, 37 N. Y. Super. Ct. 43, the publication expressly described a public appearance and statement of a criminal charge before a magistrate, and it appears that the affidavit was presented to the magistrate, was considered and acted upon by him, and that process issued upon it. The court, in its opinion, said: "The affidavit in question became a part of the regular judicial proceedings in a criminal suit by the people on the complaint of Buri Leigh."

As the publication of judicial or quasi judicial proceedings in a case of a civil character may be privileged on the ground of public interest, we can see no reason why the same rule should not apply in criminal cases, for the public have as much interest in a criminal as in a civil proceeding, if not more, and it is upon the principle that nothing is foreign to

the public to which it is a party that the criminal action of the state of Missouri against William Ziegler, after the indictment was made public, as well also as the extradition papers and the steps taken to secure their issue, were privileged. We do not, however, intend to be understood as holding that telegrams which passed between parties in the state of New York and the state of Missouri with respect to the indictment of Ziegler and his extradition were part of the proceedings, or were admissible in evidence, but only such facts as were connected with the procurement of the indictment and the proceedings following the same. Matters that were mere hearsay were not admissible.

In this connection, it may be said that a publication is not shorn of its privileged character, if such it ever possessed, because abridged and condensed, if it remain fair and impartial. *Boogher v. Knapp*, supra; *Newell on Slander & Libel*, § 161; 18 Am. & Eng. Ency. of Law, 1045; *Folkard's Starie on Slander & Libel*, § 227; *Cowley v. Pulsifer*, supra. So, full or abridged reports of a legal proceeding continued from day to day, if as fair and impartial as publications under the circumstances will permit, are privileged. In *Lewis v. Levy*, 96 E. B. & E. (English Common Law Reports) 535, it is held that if judicial proceedings continue more than one day, and their publication is not expressly forbidden by the court, a report published in a newspaper every morning of the proceedings of the next preceding day is privileged, if fair and accurate, but that all comment on the case must be deferred until the proceedings terminate. To the same effect are *Risk Alley Bey v. Whitehurst*, 18 L. T. N. 615; *Newell on Slander & Libel* (2d Ed.) p. 554.

It has been held that the headlines to the publication "are only privileged if they are a fair index of a truthful report." *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401; *Lawyers' Co-op. Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120; *Hart v. Sun Print. & Pub. Ass'n*, 70 Hun, 358, 29 N. Y. Supp. 434. The headlines were no part of the proceeding before Gov. Odell for the extradition of Ziegler, but were voluntary statements of the publisher of the libel. The headlines were as follows: "Ziegler's Lawyer Calls Brown Liar. Accuses Him of Perjury. Declares if Missourian Visits New York He Will Be Arrested. Insists Cole County Prosecutor Made Affidavit He Knew Was False." Such headlines were not privileged matter at common law, and were libelous remarks or comments, even if the matter could be deemed otherwise privileged. An inspection of them would seem to be sufficient to demonstrate this fact. "Their publication in this manner was certainly the equivalent to a remark or comment unnecessary to a fair and truthful report of judicial proceedings, and likely to raise inferences highly detrimental to the character and standing of the one concerning whom they were printed and

published." *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 806, 49 L. Ed. 128.

It is also insisted by plaintiff that the defense of privilege is not available to defendant, for the reason that the quotations from the brief of Mr. Bowers and his associates, filed in the Ziegler extradition proceeding before the Governor of New York, are not privileged matter. In *Saunders v. Mills*, 6 Bingham, 60, it is said that "a statement in a newspaper of the circumstances of a cause tried in a court of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a court of justice as a newspaper is privileged to publish." In *Rex v. Creevey*, 1 Maule & Selwyn, 273, the defendant, a member of the House of Commons, had made a speech in Parliament in which he used language of a slanderous character concerning another person, and which he afterwards caused to be published in a newspaper. It was ruled that his privilege as a member of Parliament authorized him to make the speech, but did not authorize him to publish a report of the speech in a newspaper. It was further held in that case that counsel have a right, whilst the cause is going on, to endeavor to produce an effect by making such observations on the credit and character of parties and their witnesses, but that neither the person making them nor any other person who hears them has the right afterwards to publish such observations, that when the occasion ceased the right would also cease, and that it would be no justification to plead that such a publication was a transcript of the speech. So in *Commonwealth v. Godshalk*, 13 Phila. (Pa.) 575, it is held that the speech of counsel in a judicial proceeding does not afford matter for a privileged publication, and that if it contain scandalous and defamatory matter a prosecution for libel may be maintained, citing *Commonwealth v. Culver*, 2 P. L. J. 362; *Saunders v. Mills*, supra; *Filnt v. Pike*, 10 E. C. L. R. 668; *Lake v. King*, 1 *Saunders*, 120; *Rex v. Creevey*, supra; *Rex v. Lord Aberdeen*, 1 Esp. 226. Cooley says: "It does not follow, because counsel may freely speak in court as he believes or is instructed, that therefore he may publish his speech through the press." Cooley on Const. Lim. (6th Ed.) 549. It is true that in *Wason v. Walter*, 4 Law Rep. (Q. B.) 37, it is held that a faithful report in a public newspaper of a debate in either house of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question, but that the publication is privileged on the same principle that an accurate report of a proceeding in a court of justice is privileged; that is, that the advantage of publicity to the community at large outweighs any private injury resulting from the publication. But even in that case it is said: "Our judgment will in no

way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the case of *Rex v. Lord Abington*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273."

While words reflecting on the character of an individual, spoken or written in due course of a judicial or quasi judicial proceeding, if pertinent to the subject of the inquiry or relevant to the issue, or in a legislative assembly, by a member thereof, in the discharge of his official duties, are privileged, this privilege does not go to the extent of allowing the publication of the slanderous words in a newspaper, even though the publication is made in good faith and as a matter of news. The authorities draw a broad distinction between the right of a person, on a privileged occasion, to utter words reflecting upon the character of another, and the right to publish through the newspaper press any false and defamatory matter contained in such person's speech or address. As said in *Hotchkiss v. Oliphant*, 2 Hill (N. Y.) 510: "The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and, when called on by the aggrieved party, the publisher should be held strictly to proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but, if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community." *State ex Inf. Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. In *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401, it is said: "Liberty of speech and of the press is guaranteed by the supreme law of the land and will be zealously guarded, preserved, and enforced by the courts. The provisions of the federal and state Constitutions * * * were designed to secure rights of the people and of the press for the public good, and they do not license the utterance of false, slanderous, or libelous matter. Individuals are free to talk and the press is at liberty to publish, and neither may be restrained by injunction; but they are answerable for the abuse of this privilege in an action for slander or libel under the common law, except where by that law or by statute, enacted in the interest of pub-

lic policy, the publication is privileged and deemed for the general good, even though it works a private injury."

In the case at bar, the defendant did not publish the entire brief of Mr. Bowers and his associates, but only such portions thereof as seemed to reflect upon the character and integrity of the plaintiff and to impute to him crime or moral turpitude. This was not privileged. 18 Am. & Eng. Ency. of Law (2d Ed.) 1045. Judge Cooley, in his work on Constitutional Limitations, states the law thus: "It seems to be settled that a fair and impartial account of judicial proceedings which have not been ex parte but in the hearing of both parties is, generally speaking, a justifiable publication; but it is said that, if a party is allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. A plea that the supposed libel was in substance a true account and report of a trial has been held bad, and the statement of the circumstances of a trial as from counsel in the case has been held not privileged. The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceeding." Cooley's Cons. Lim. (7th Ed.) 637. Upon the same subject, Newell on Libel & Slander, § 163, says: "The publisher must add nothing of his own. He must not state his opinion of the conduct of the parties or impute motives therefor. He must not insinuate that a particular witness committed perjury. That is not a report of what occurred. It is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground, that they are a fair and bona fide conclusion on a matter of public interest, and are therefore not libelous, but such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Judge Campbell said: 'If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separated.'" The question of whether the publication was a libel, and was or was not properly the subject of this action for damages, was submitted to the jury by an instruction asked by defendant, by which instruction the jury were told that upon this question they were the sole judges of the law as well as the facts. By their verdict the jury in effect found that the article was a libel. If libelous, it follows that the publication was not privileged.

Defendant insists that the court, by its refusal to give defendant's instruction No. 4, upon the question of privileged publication, committed error. Upon this question the

defendant submitted to the court three instructions, one of which was given, and the others refused. The refused instructions are as follows: "(3) The court instructs the jury that the publication of fair and impartial reports of judicial and quasi judicial proceedings and of hearings before public magistrates are what are known in the law as privileged publications, and the publishers thereof are not liable therefor, though they contain libelous matter, unless they were actuated by malicious motives in publishing same and in this connection the jury are instructed as follows: If they believe and find that an indictment was returned into the Cole county circuit court, charging one Ziegler with the offense and crime of bribery, and that thereupon, upon affidavit by plaintiff herein, the Governor of Missouri made requisition upon the Governor of New York for the extradition of said Ziegler because he was a fugitive from justice from the state of Missouri, and that various preliminary steps were had and taken in Jefferson City, Mo., and the city of Albany, N. Y., in connection with said extradition, and that thereafter a hearing was had in the city of Albany before the Governor of New York, at which evidence was heard and argument made as to whether said Ziegler was a fugitive, and the jury further believe and find that defendant published from time to time accounts of said proceedings and hearing and argument, and that the article complained of formed part of said accounts, and if the jury further believe that the accounts of said proceedings, taken as a whole and together, form and were a fair and impartial report of said extradition proceedings, then they will find for the defendant." (4) The court instructs the jury that a report of a judicial proceeding, to be fair and impartial, and therefore privileged, need not be a full and verbatim report of said proceedings, but that a condensed or abridged report of such proceedings is privileged, if it is fair and impartial in its character, and therefore if the jury believe that defendant published only abridged reports of the proceedings in connection with the extradition of William Ziegler, and in doing so published in the article complained of only a part of the argument and brief made and filed by John M. Bowers in said extradition proceedings, yet if the jury further believe and find that the abridged reports of said proceedings so made by defendant, including the part of said argument and brief so made and filed, are fair and impartial reports of said proceedings in their relation to and effect upon plaintiff's character, then the jury will find for defendant, unless they further find that defendant made such abridged reports from malicious motives and with a desire to injure plaintiff." Instruction No. 2, given, is as follows: "The court instructs the jury that the failure of the defendant to publish all of the argument of

John M. Bowers in the article complained of, or all the proceedings in connection with the extradition of William Ziegler, does not make defendant's account of same unfair and partial so far as plaintiff is concerned, if the jury find that the publication of the full argument and a full account of the proceedings would have had the same effect on plaintiff's character as the publication of part thereof."

Defendant contends that, if instructions 3 and 4 were refused because they extended the privileged occasion to all the proceedings in relation to the extradition of William Ziegler, then instruction No. 2 should also have been refused, as being open to the same objection. A party cannot, however, predicate error of the action of the court in giving an instruction asked by himself. It matters not that it be erroneous and open to the same objections as other refused instructions. In this connection, it may be said that it was for the court to determine whether the occasion on which the alleged defamatory statements were made was such as to render the communication privileged. *Newell on Slander & Libel*, p. 392; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583. Said instruction No. 4 was properly refused; the matter therein contained having in effect been covered by instruction No. 2. And said instruction No. 3 was properly refused for several reasons, and particularly for the reason that, with reference to the extradition hearing before Gov. Odell, it would avail the defendant nothing, although the jury might find "that defendant published from time to time accounts of said proceedings and hearing and argument, and that the article complained of formed part of said accounts," because, under the rule laid down by the authorities, it was necessary that the jury find that defendant published its report of the proceedings during the progress thereof, or the morning after the proceedings of the previous day. The defendant was not at liberty to publish excerpts from Mr. Bowers' brief, reflecting on plaintiff's character, after the proceedings had terminated and the decision was rendered. The record shows that the brief of Mr. Bowers was received by Gov. Odell on January 12, 1904, and the proceedings were closed and the decision rendered on February 1, 1904, while the libelous matter complained of did not appear in defendant's newspaper until February 3, 1904, 22 days after the brief was submitted and 2 days after the decision was made. For this reason, if no other, the publication was not privileged.

The court, of its own motion, gave the following instruction: "The court instructs the jurors that while the publication of an abridged or condensed report of a public trial or judicial proceeding, if prepared impartially, truthfully, and fairly, will be deemed privileged, and protect the publisher against an action therefor, yet the addition

by the publisher of any unfavorable insinuations or comments of his own as to the person assailed, or the omission or suppression of parts of the proceedings which would tend to qualify or explain the defamatory matter and place it in a more favorable light for the person defamed, is evidence of malice and destroys the privilege, and therefore, unless the jurors believe and find from the evidence that the report published by defendant of the proceedings of the William Ziegler extradition matter before the Governor of New York was a fair, truthful, and impartial report or abridged report of said proceedings, as above explained (so far as it related to the plaintiff herein and the accusations there made against his character), the jury will disregard the defense of privilege made by the defendant and find against it on said defense. And the jurors are further instructed that, even though said defense of privilege, as above indicated, is sustained by the evidence, yet it is not available to the defendant, if the jury find and believe, taking into consideration the character of the publication and all other facts and matters in evidence, that the defendant was actuated by actual malice or ill will towards the plaintiff when it made said publication." Defendant complains of the phraseology of this instruction and challenges the declarations of law contained therein. Instruction No. 7, given by the court at plaintiff's request, told the jury that the charge of perjury was libelous per se, and, if false, is presumed to have been made with malice, and that under the pleadings in this case the charge is false; and defendant contends that, as the presumption of malice from a false, defamatory publication is rebutted or overcome when the defamatory words are spoken or printed on a privileged occasion, it was error to say, in said instruction given by the court of its own motion, that "the addition by the publisher of any unfavorable insinuations or comments of his own as to the person assailed, or the omission or suppression of parts of the proceedings which would tend to qualify or explain the defamatory matter and place it in a more favorable light for the person defamed, is evidence of malice and destroys the privilege."

We cannot see wherein this declaration of law is erroneous: "A condensed report might be published, if prepared faithfully and truthfully, but the suppression of parts of the testimony which would tend to qualify the defamatory matter contained in the report would be evidence of malice, and would destroy the privilege." *Newell on Slander & Libel*, p. 554; *Salisbury v. Union & Advertiser Co.*, 45 Hun, 120. In the case at bar, as in the case last cited, there was no direct evidence of malice on the part of the defendant, but malice was inferable from the publication itself and from the fact that part of the testimony in the extradition hearing which would have tended to qualify or ex-

plain the defamatory matter published was suppressed or omitted, and that only such part of Mr. Bowers' brief was published as relates to the charge of perjury and making a false affidavit. Had other parts of said brief been published, or had the article which appeared in the Brooklyn Eagle, from which was extracted the publication complained of, been published in full, it would have appeared that there was substantial evidence to support the affidavit of plaintiff that Ziegler was in Missouri on or about March 19, 1901. The latter part of the Brooklyn Eagle article contained matter purporting to be taken from Mr. Bowers' brief, with reference to Evelyn Baldwin's affidavit, to the effect: That about the middle of March, 1901, he (Baldwin) went to the Forty-Second Street Railway Station in New York City with Ziegler; that the latter told Baldwin he was going that night to Missouri to crush the alum baking powder people; that Ziegler introduced Kelly to Baldwin; that afterwards, when Ziegler returned to New York, he and Kelly, in the presence of Baldwin, spoke of their trip to Missouri, and of their success in defeating the legislation in which Ziegler was interested.

Defendant also objects to the statement in said instruction "that, even though said defense of privilege is sustained by the evidence, yet it is not available to the defendant if the jury find and believe, taking into consideration the character of the publication and all other facts and matters in evidence, that the defendant was actuated by actual malice or ill will towards the plaintiff when it made said publication." What the defendant particularly objects to in said instruction is the phrase "character of the publication." We think that the jury, in determining the question whether the defendant was actuated by actual malice or ill will towards the plaintiff when it made said publication, had the right to take into consideration the character of the publication itself, which contained remarks and comment detrimental to plaintiff outside of and in addition to the extracts from Mr. Bowers' brief. "In such case the presumption of malice would the more easily arise." *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005, and cases therein cited. While the verbiage of the instruction might be open to slight criticism, we are unable to see how it could have prejudiced the rights of the defendant.

Defendant's next contention is that under the rulings of the court the sole defense in this case "for the jury" was that of privilege, and that, as there was evidence tending to substantiate it, the defendant was entitled to have the same submitted affirmatively, as it requested. The refusal of the court to give the instructions asked by defendant upon this feature of the case was justified, we think, upon the ground of want of evidence to justify them—that is, evidence that the publication was privileged—and the fact

that the court could have framed the instruction given of its own motion in a manner which would have made it more direct and pointed with respect to the defense of privilege, so far as that defense was available in connection with the published report of the proceedings before Gov. Odell, cannot be assigned as error. The instruction given by the court is not misleading or erroneous, and, if defendant had desired more pointed instructions than this one, it was its duty to have asked them. The instructions asked by defendant in this regard were deficient, as stated, and the court is not required to make or give instructions of its own motion in a civil case. *Minter v. Bradstreet*, 174 Mo. 491, 73 S. W. 668. Nor was this instruction erroneous because the jury were not given any hypothesis or statement of facts from the evidence upon which they could find a verdict for the defendant, for no such facts were disclosed by the evidence.

It is further contended that the court erred in giving, at plaintiff's request, instructions which ignored defendant's plea of privilege, and especially in giving instructions numbered 7 and 11 which, it is contended, assumed to state the whole case; but these instructions, when considered in connection with all other instructions given, presented the case very fairly to the jury, and, if any error was committed, it was in defendant's favor, of which it has no right to complain. "It is not necessary that an instruction should refer to another, or that the issues involved be presented to the jury in one instruction; but if the instructions, taken as a whole, present the issues fairly, and are not calculated to mislead the jury, they are all the law requires." *Minter v. Bradstreet*, 174 Mo. 444, 73 S. W. 668. From what we have said, it follows that there is no merit in the contention that the failure of the court to give the instruction asked by defendant, at the close of all the evidence, directing a verdict for it, was error.

It is also claimed by defendant that the court should have sustained defendant's motion for a new trial upon the ground that the verdict was against the weight of the evidence, excessive, and the result of bias and prejudice on the part of the jury. As to the first proposition, it seems unnecessary to say more than what has already been said in this opinion to the effect that the publication is libelous per se, and not privileged, which entitled plaintiff to a verdict; the only question being the amount of damages allowed by the jury. Nor are we willing to say that the verdict was excessive or the result of passion or prejudice. *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253, was an action for libel, and Chief Justice Kent, speaking for the court on the question of damages said: "The last point is that the damages ought to have been nominal only, because the publication was made under a mistake of the fact. The quo animo with

which the libel was published was altogether a matter for the consideration of the jury, and the circumstances which might tend to aggravate or extenuate the damages, and lessen or increase the degree of malice which the law imputes to the publication of every unjustifiable libel, were, no doubt, urged to the jury upon the trial, as they might have since been presented to this court, upon the argument of the present motion. The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say that in the opinion of the court the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries." Cases of this character differ so much in the facts and circumstances connected therewith, and out of which they grow, that the amount of damages allowed by a jury in one case forms no guide or rule for the assessment of damages in another, so that, of necessity, the jury are the sole judges of that matter, and their finding will not be disturbed unless their verdict is so excessive as to clearly indicate that it is the result of bias and prejudice on their part, which we are unwilling to say is the case here.

The judgment is affirmed. All concur.

BROWN v. PUBLISHERS: GEORGE KNAPP & CO.

(Supreme Court of Missouri, Division No. 2.
June 16, 1908. Rehearing Denied
July 14, 1908.)

1. LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS—EXTRADITION PROCEEDINGS.

A proceeding before a Governor for the extradition of a fugitive is of a quasi judicial character, and a full and fair report thereof is privileged.

2. SAME—REPORT OF LEGAL PROCEEDINGS.

A newspaper article, published after the Governor of a sister state had rendered his decision in a proceeding for the extradition of a fugitive, which refers to the effect of the decision on the fugitive and states that the prosecuting attorney of Missouri instituting the criminal prosecution may, on his visiting the sister state, be prosecuted for perjury, and which sets forth extracts from the brief of counsel for the fugitive charging the prosecuting attorney with perjury in making a false affidavit, etc., shows on its face that it is not a report of the proceedings before the Governor of the sister state and is not privileged.

3. SAME.

A newspaper article, stating that the prosecuting attorney of a county in Missouri instituting a criminal prosecution had been charged with perjury and with the making of a false af-

fidavit, that the attorney for accused in proceedings before the Governor of a sister state for the extradition of the accused charged the prosecuting attorney with perjury, in that he had made an affidavit when he knew that it was untrue, by swearing to facts as true of which he had no knowledge, and that the counsel for accused claimed that the charge of perjury was based on a section of the "Penal Code," etc., charges the commission of perjury by the prosecuting attorney and contains no statement of attending circumstances showing that the charge is unfounded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 54-60.]

4. SAME—WORDS ACTIONABLE PER SE.

A publication charging one with perjury is actionable per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 54-60.]

5. SAME—PRIVILEGED COMMUNICATIONS—REPORTS OF LEGAL PROCEEDINGS.

A fair and impartial account of judicial proceedings is, generally speaking, a privileged publication; but, if a party is allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he draws from the evidence, and he must not state his opinion of the conduct of the parties or impute motives therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

6. SAME.

The headlines at the beginning and in the body of a newspaper article relating to proceedings before the Governor of a sister state for the extradition of a fugitive, which, in referring to the prosecuting attorney instituting the criminal prosecution, state: "Attack on Attorney Brown. Baking Powder Magnate's (fugitive) Lawyer, in his Brief, Openly Charges Missouri Prosecutor with Perjury," etc., are not privileged, but are unauthorized comments and are libelous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

7. SAME.

Though a counsel may lawfully speak in court what he believes to be true, he cannot publish his speech in the press, and, though words reflecting on the character of an individual spoken or written in due course of a judicial proceeding are privileged, their publication in good faith and as a matter of news is not privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 127.]

8. SAME—SUFFICIENCY OF CHARGE.

Words charging one with the commission of a crime as heinous as perjury are actionable though they do not set forth the particulars of the case in language necessary to make a good indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 54-60.]

9. SAME.

Words making a general charge of perjury are actionable in themselves without any colloquium.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 187-197.]

10. SAME—INSTRUCTIONS.

In an action for libel based on a newspaper article charging plaintiff with perjury in making an affidavit without explaining that plaintiff was not technically guilty of perjury, an instruction that it is no offense to make an affidavit, though affiant had no knowledge of the facts, and though the statement in the affidavit was not in accord with the facts, and to constitute perjury the affidavit must be willfully, corruptly, and falsely made, is properly refused.

11. SAME.

Where, in an action for libel based on a newspaper publication charging plaintiff with perjury, defendant admitted making the publication, but denied malice or ill will, and sought to justify on the ground of privileged communication, and the publication was not privileged, the refusal to direct a verdict for defendant was proper, the falsity of the charge and the existence of malice being presumed.

12. SAME—JUSTIFICATION.

Where, on a trial for libel based on a newspaper article stating that plaintiff had committed perjury and had made an affidavit he knew to be false, defendant admitted the publication as alleged and denied malice and pleaded privilege, a justification to the extent that the publication was true as to the charge that plaintiff had made an affidavit of facts of which he had no knowledge tendered a false issue.

13. SAME.

Where, on a trial for libel based on a newspaper article charging plaintiff with perjury and with having made an affidavit he knew to be false, defendant admitted the publication, denied malice, and pleaded privilege, and the court submitted the two defamatory charges to the jury, an instruction that all matters defamatory of plaintiff in the publication complained of would be deemed false by the jury in making its verdict was not erroneous, though defendant sought to justify by claiming that plaintiff had made an affidavit of facts of which he was ignorant.

14. TRIAL—INSTRUCTIONS.

On a trial for libel based on a publication not privileged, an instruction ignoring the defense of privilege is not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

15. LIBEL AND SLANDER—INSTRUCTIONS.

In an action for libel based on a newspaper article charging plaintiff with perjury and with having made an affidavit he knew to be false, an instruction that if defendant published the article in good faith, believing the same to be a proper item of news and a part of the report of occurrences in extradition proceedings, without malice toward plaintiff, and not negligently or in wanton disregard of plaintiff's rights, plaintiff was not entitled to recover any exemplary damages, was not erroneous; the charges of perjury and knowingly making a false affidavit, being actionable per se and implying malice.

16. SAME—DAMAGES—"ACTION FOR LIBEL."

An action for libel is an action to recover damages for injuries to a man's reputation and good name, and it is not necessary, in order to recover general damages for words which are actionable per se, that plaintiff should have suffered any actual or constructive pecuniary loss; but plaintiff is entitled to recover as general damages for the injury to his feelings which the libel has caused and the mental anguish and suffering which he has endured as a consequence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 348.]

17. SAME—QUESTION FOR JURY.

The question of damages in a case of libel and slander is peculiarly within the province of the jury, and, unless the damages are so unconscionable as to impress the court with their injustice, and thereby induce the court to believe that the jury were actuated by prejudice or corruption, it will not interfere with the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 364.]

18. SAME—EXCESSIVE DAMAGES.

In an action for libel based on a publication in a newspaper charging plaintiff, an attorney at law, with having committed perjury in instituting a criminal prosecution while acting as prosecuting attorney of a county, a verdict of

\$5,000 actual damages and \$5,000 punitive damages was not excessive, in view of the large circulation of the newspaper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 350, 351, 353.]

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by Frank M. Brown against Publishers: George Knapp & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Lehmann & Lehmann and W. S. Pope, for appellant. Edwin Silver and J. L. Smith, for respondent.

GANTT, J. The plaintiff brought this action against the defendant, a corporation organized under the laws of this state with a capital stock of \$500,000, and the owner and publisher in the city of St. Louis of a daily newspaper known as the "St. Louis Republic." It was alleged that the daily edition of this paper exceeds 100,000 per day. Petition states:

That on February 2, 1904, and prior thereto, there was pending at the city of Albany, N. Y., before the Governor of the state of New York, a certain proceeding wherein the Governor of the state of Missouri sought to secure the extradition from the state of New York of one William Ziegler, charged by an indictment theretofore returned into the circuit court of Cole county with the crime and offense of bribery alleged in said indictment to have been committed in said Cole county, state of Missouri. That on February 3, 1904, the defendant, in said newspaper and in its daily edition thereof of February 3, 1904, having reference to the aforesaid extradition proceeding, did wrongfully, wickedly, and with malice print and publish concerning plaintiff herein the following false, libelous, and defamatory words and matter in manner and form as follows, to wit:

"Ziegler Dares Not Leave New York.

"If He Goes to Connecticut Home New Extradition Proceedings may be Instituted.

"Attack on Attorney Brown.

"Baking Powder Magnate's Lawyer, in His Brief, Openly Charges Missouri Prosecutor with Perjury.

"Republic Special.—New York, Feb. 2. William Ziegler's escape from extradition to Missouri, through the grace of Governor Odell, has left him in a decidedly awkward position. Mr. Ziegler will run a risk, should he leave the jurisdiction of New York State, of being arrested, should the Missouri authorities continue their efforts to bring him within the jurisdiction of Missouri. Mr. Ziegler has a country home in Connecticut and his attorneys are inclined to the belief that Attorney General Crow will be prepared to requisition the Governor of the New England state for Mr. Ziegler's return, should he take up his residence there even temporarily,

which he frequently does. Mr. Ziegler's discomfiture, however, is not the only result of the decision handed down by Governor Odell yesterday. The attorneys for the baking powder manufacturer are said to be lying in wait for Acting Prosecuting Attorney Brown of Cole county, should he at any time visit New York. In his brief, Mr. John M. Bowers, one of Mr. Ziegler's attorneys, openly charges Attorney Brown with deliberate and criminal perjury, and Mr. Bowers does not hesitate to say that, upon his advent into the state, Brown will be instantly arrested and his indictment for perjury sought for.

"Charge of Perjury.

"The language used by Mr. Bowers in his brief is clear. He says:

"This prosecuting attorney of the county of Cole made an affidavit upon which was put in motion the machinery of the Constitution under which Mr. Ziegler's extradition was sought. It was false as to every allegation as to Mr. Ziegler's flight. Mr. Ziegler sent a respectful message to the Governor of the state of Missouri, asking that this prosecuting attorney of the county of Cole be produced before your excellency to repeat the oath he had made by which the machinery of the law as to extradition had been set in motion. He declined to come and on page seventy-six of the stenographer's minutes of the proceedings before your excellency, it was openly conceded that he had no knowledge of the matters he swore to in this regard. What does this mean? We openly charged before your excellency, upon the hearing, that an official of the state who had committed perjury pure and simple upon which he instituted a procedure of this nature committed a crime of the highest grade.

"Knew It Was Untrue.

"The one fact which the state of Missouri concedes it had to prove to deprive a citizen of the state of New York of his freedom and transport him to Missouri was that he had been present in that state at a certain time. Mr. Brown, the prosecuting attorney who is to try him, made an affidavit of that fact. Mr. Brown knew it was untrue when he made it. Even if he swore to facts as true of which he had no knowledge, it was perjury."

"Mr. Bowers' claim that Attorney Brown committed perjury is based on section 101 of the New York Penal Code, which says: 'An unqualified statement of that which one does not know to be true, is equivalent to a statement of that which he knows to be false.'

"Further Proceedings.

"There has been talk to-day to the effect that a civil action might be taken against prosecuting attorney Brown, but it is highly improbable that any such proceedings will be begun."

That the terms "Brown," "Attorney Brown," "Missouri Prosecutor," "Acting Prosecuting Attorney Brown of Cole County," "Prosecuting Attorney of the County of Cole," "An Official of the State," "Mr. Brown, the Prosecuting Attorney," and "Prosecuting Attorney Brown," as used and contained in said libelous and defamatory publication all have reference to and mean plaintiff. That at the times referred to in the said defamatory publication, the plaintiff was the duly appointed and acting prosecuting attorney of the county of Cole, state aforesaid. That defendant published, sold, and circulated said edition of its newspaper, to wit, the St. Louis Republic, containing said false, libelous, and defamatory matter concerning plaintiff in Cole county, Mo., whereby the cause of action has accrued against defendant, and on plaintiff's behalf in said Cole county, and within the jurisdiction of this court, and published and sold and circulated said edition of its newspaper elsewhere in the state of Missouri and in the states of Arkansas, Texas, Illinois, Iowa, Kansas, Indian Territory, and elsewhere. That defendant in the manner and by the means aforesaid did falsely, maliciously, and wickedly publish, circulate, and give currency to the charge that plaintiff had committed, among other offenses, the atrocious and abominable crime of perjury. That plaintiff by the aforesaid wrongful acts of the defendant corporation has been greatly damaged in his good name and reputation, and in his feelings and estate, and in his aforesaid relation of attorney at law in the courts of this state, in his official character as prosecuting attorney of Cole county aforesaid, and otherwise in his business pursuits and vocation. Wherefore plaintiff prays judgment against defendant for actual or compensatory damages in the sum of \$20,000 and for punitive and exemplary damages in the sum of \$20,000 and for costs.

The defendant, answering, admitted its existence as a corporation, its ownership of the St. Louis Republic, and that it made the publication complained of, and denied everything else in the petition, and then set up the following special defense: "That at the time of the said publication there had been pending and had just closed a proceeding before Hon. B. B. Odell, then Governor of the state of New York, for the extradition of William Ziegler, who had theretofore been indicted by the grand jury of Cole county, Mo., for the crime of bribery, and for whose extradition the Honorable A. M. Dockery, then Governor of Missouri, had issued his requisition. That a hearing had been had before the said Governor of New York, to determine whether or not the said Ziegler should be extradited to the state of Missouri for trial. That on said hearing it was claimed by said Ziegler that he was not a fugitive from the justice of the state of Missouri, and that he was not in the state of Missouri at the time when it was al-

leged that the said crime of bribery was committed by him. That the Governor of New York, upon consideration of the matter, found, as contended by and on behalf of the said Ziegler, and refused to issue a warrant for his extradition. That the crime charged against the said Ziegler was bribery of state officials of Missouri in order to influence the legislation of said state, and the indictment of the said Ziegler and the proceedings for his extradition were matters of great public interest and importance, and, throughout the pendency of the same, the defendant made a true and faithful report of the occurrences therein without malice and as a matter of public interest and importance. That in the article complained of, the defendant published what was said by one John M. Bowers, who was of counsel for said Ziegler in said proceeding, in his brief and argument before the Governor of New York, for the purpose of advising its readers of the position taken in behalf of said Ziegler in said extradition proceedings. That the plaintiff was, at the time the extradition of said Ziegler was applied for, the prosecuting attorney of Cole county, Mo., and did, on the 3d day of December, 1903, make an affidavit to the Governor of Missouri, which was used and designated to be used as the basis of extradition proceedings against the said Ziegler, in which the said plaintiff swore that the said Ziegler was charged with the crime of bribery committed in the county of Cole, and state of Missouri, on or about the — day of March, 1901, and further swore that at the time of committing said crime William Ziegler was personally present in said county and state, and that on or about the — day of March, 1901, the said William Ziegler fled from the state of Missouri, and further swore upon belief that the said Ziegler was at the time of making the said affidavit in the city of New York. That the allegations of said plaintiff in said affidavit, to the presence of the said Ziegler in Cole county, Mo., at the time of the commission of the alleged offense in March, 1901, and as to the flight of said Ziegler from the state of Missouri at that time, were made, not upon belief, but in form unqualifiedly. That upon the hearing before the Governor of New York, the state of Missouri was held to show that said Ziegler was in this state on or about the 19th day of March, 1901, as being about the date of the commission of the offense of bribery. That said Ziegler offered evidence to show that he was not in Missouri at the time, and it was conceded by the attorneys representing the state of Missouri that the plaintiff at the time of the making of the said affidavit had no personal knowledge of the whereabouts of the said Ziegler in the month of March, 1901, and, in fact, the said plaintiff had no such knowledge. That the Penal Code of the state of New York (section 101) is as set forth in said publication. That upon the facts herein-

before stated, the said Bowers argued in his brief, as quoted in the said publication, that the statement of plaintiff in his affidavit, as to the presence of said Ziegler in Missouri in March, 1901, because made without qualification and without knowledge of the fact, was tantamount to perjury. That this defendant, without malice or ill will of any kind, published this argument of the said Bowers with the facts upon which it was predicated, as it had published other occurrences and proceedings in the case, as a matter of legitimate public interest or importance, without in any manner approving or justifying the same, and its publication was a fair and true report of the said argument, and of the facts on which it was predicated, and, with its other publications of reports of occurrences in said extradition proceeding from time to time as the same happened, it made a fair and truthful report of said extradition proceeding from beginning to end, as it lawfully might do."

The replication was a general denial of the new matter in the answer. The cause came on for trial on the 31st day of May, 1905, and resulted in a verdict and judgment for the plaintiff of \$5,000 for actual damages and \$5,000 punitive damages. In due time the defendant filed its motions for a new trial and in arrest of judgment, which were heard and overruled, and the defendant has appealed to this court. On the part of the plaintiff, the evidence tended to show that the circulation of the St. Louis Republic was substantially as stated in the petition, and that the paper had a large circulation in the Mississippi Valley and had subscribers in nearly all the counties of Missouri, including Cole county and Jefferson City. It is also shown that the capitalization of the defendant company was \$500,000, and the president of the company testified: That he would not sell his interest in the defendant company at par nor for two or three times that amount; that the witness had no knowledge of any ill will on the part of the management of the defendant newspaper towards the plaintiff; that he had never had any controversy with the plaintiff, bore him no ill will, and his only feeling was one of sympathy with the officers of this state in their efforts for the extradition of Ziegler; that the editor of the Republic was J. A. Graham, the night and news editor was Homer A. Bassford, the city editor was Mr. McAuliffe, and the business manager was W. B. Carr. He further stated that the publication was a telegram sent by the New York City Bureau of the Republic, by its correspondent in that city, J. B. Regan. The plaintiff testified in his own behalf that he had lived in Jefferson City for 24 years, and during that time had been engaged there in the practice of law. He was appointed prosecuting attorney of Cole county November 14, 1903, and continued as such until the 15th day of the following February. The publication gave him mental pain and suffering. It

was a matter of great annoyance to him, because it brought him into criticism; the people spoke adversely of him. He is a married man with five children. On cross-examination, he stated: He never knew William Ziegler. Believed he was now dead. That he made the affidavit in the extradition papers to secure the extradition from New York to Missouri. That he did not know personally where Ziegler was in the month of March, 1901, nor where he had ever been at any time of his life. Witness did not hear until some time after March 30, 1903, of the telegram to Gov. Dockery asking him to cause witness to attend the hearing of the extradition proceedings in New York. That witness made the affidavit for the requisition of William Ziegler at the request of Attorney General Crow, who conducted the investigation before the grand jury that returned the indictment against Ziegler at the request of Attorney General Crow, and on the information furnished by the latter. Witness felt secure in the request and confidence of his home community and did not believe people would take it seriously. The publication was a matter of great annoyance more than anything else. With this prima facie showing, the plaintiff rested. The defendant at this point offered a demurrer to the evidence, which was overruled. Thereupon the defendant introduced evidence to the following effect: Joseph Graham, managing editor of the St. Louis Republic, testified that the publication complained of, and others relating to the Ziegler extradition proceedings, were made as a matter of public interest and concern to the state of Missouri, and that there was no ill will against Mr. Brown, but, on the contrary, the Republic people were entirely favorable to him. On cross-examination, he stated that no attempt was made to verify the statements in the publication complained of by the correspondent at Jefferson City, and there naturally would not be, as the publication was made with reference to proceedings in New York. Messrs. Bassford, McAuliffe, and Carr, editors and managers of the Republic, all testified that they knew of no malice or ill will towards Mr. Brown on the part of anybody connected with the Republic. John P. Regan, the New York correspondent of the Republic, testified that, from time to time while the Ziegler extradition proceedings were pending in New York, he sent reports of them to the Republic as matters of public interest to the people of Missouri. He did not intend to and did not charge Mr. Brown with perjury, and sent what Mr. Bowers had said of Mr. Brown as something the people of Missouri would be interested in. His sympathies in the matter were with the Missouri attorneys. He got the Bowers brief through the New York Herald. On cross-examination, he said he got the information upon which his reports of the Ziegler extradition was based from various sources; principally, the

New York Herald and the Brooklyn Eagle. The publication which is the basis of this action was taken from the Brooklyn Eagle.

The deposition of John M. Bowers taken in New York was read in evidence. He testified: That he was one of the counsel for Ziegler in the extradition proceedings before Gov. Odell of New York. That he was present at the hearing before the Governor of New York on December 7, 1903. He identified the telegram of November 30, 1903, sent by Ziegler to Gov. Dockery, requesting the presence of Brown at the extradition hearing, and said he prepared it and had it sent. He prepared the brief filed for Ziegler with Gov. Odell. He wrote the matters in the brief referring to Mr. Brown. That the statements in the brief as to Mr. Brown were made without malice towards him and as a mere matter of business. The one question of fact, which the Governor upon whom the demand is made for extradition has the right to try, is as to the presence of the accused in the demanding state at the time of the commission of the offense. The only evidence of any dignity produced at this hearing on behalf of the state was an affidavit of Mr. Brown. On that the Governor of Missouri issued his warrant, and on that warrant, in ordinary cases, the defendant would have been surrendered. That affidavit set the extradition machinery in motion. It became necessary therefore to meet it. So he caused Ziegler to send a telegram to Gov. Dockery requesting Mr. Brown's presence, but Mr. Brown did not come to New York. The Missouri authorities claimed that these affidavits were matters of form; whereas, Ziegler's counsel insisted that they were of the gravest importance. In fact, that it would be difficult to find words to describe the gravity of such a crime as making a false affidavit to set extradition in motion, and in the majority of cases would accomplish the purpose. These statements were repeatedly made by him as to the gravity of the offense, and it was charged that the affidavit was false, that Mr. Brown never knew Mr. Ziegler, had never seen him in his life. On cross-examination, he stated: That the brief prepared by himself and approved by the other counsel for Ziegler was sent to the Governor of New York January 11, 1904; that the Governor's decision was made on February 1, 1904; that the question at issue before Gov. Odell was whether Ziegler was in Missouri on March 19, 1901; that the quotations from the brief of witness in the article sued on constituted only a portion of the argument on a single point; that witness had not to his knowledge any conversation with the correspondents of the Republic and Globe-Democrat prior to the publication complained of. Outside of the brief in his argument before Gov. Odell, he stated that an officer of the state of Missouri had committed perjury pure and simple by instituting this proceeding, and he intimated

that, if Mr. Brown had appeared before the Governor as a witness and repeated his statement under oath, they might have instituted criminal proceedings in New York.

The date of the alleged crime of Mr. Ziegler was finally fixed by stipulation as the 19th day of March, 1901. The date was blank in the extradition proceedings and may have covered the months of January, February, and March. The one controverted fact was the presence of Mr. Ziegler in the state of Missouri on the 19th day of March, 1901. Counsel for the defendant offered the brief of Mr. Bowers in full, and the report of the proceedings before Gov. Odell was identified as correct and was offered in evidence and is set out in full in the transcript. This report shows that the hearing before the Governor began December 7, 1903, and was had at Albany. E. C. Crow, Attorney General, and Judge Thomas P. Harvey appeared for Missouri, and John M. Bowers, Delancy Nicoll, Edward Lauterbach, William J. Underwood, John D. Lindsey, and James W. Gerard appeared for Ziegler. Mr. Bowers opened the matter before the Governor by request that the Missouri representatives fix the dates when they claim Ziegler was in Missouri. The Governor held this to be essential. Attorney General Crow contended that the extradition papers made out a prima facie case, and the burden was on Ziegler to show that he was not in Missouri, and that the state was not held to any precise date, and that constructive presence would be sufficient. There was much discussion of these questions. Mr. Bowers, in the course of the discussion, said: "Mr. Crow knows that if the defendant is taken into that state they can try him for any act they like, and do anything they wish to him, and that he has not the protection ordinarily attached to extradition treaties. Therefore, sir, if the affidavit filed, which sets that proceeding in motion, be a piece of perjury, it is the most wanton crime that it is possible for an official to commit." After much heated controversy before the Governor, the 19th of March was fixed upon, under the ruling of the Governor, as the date of the offense, and the Governor ruled that the Ziegler counsel should introduce their evidence as to whether Ziegler was or was not in the state of Missouri on the 19th of March, 1901. The state of Missouri then introduced affidavits that one Daniel Kelly was an agent of Ziegler, and he was in Missouri at the time named, and, acting for Ziegler, committed the bribery charged in the indictment against Ziegler; that Ziegler's name was on the Southern Hotel register in St. Louis, but in Kelly's handwriting, on the date of March 19, 1901. The state also offered the affidavit of Evelyn Baldwin to the effect that Ziegler had said to him shortly before the 19th of March that he was going to Missouri, and shortly afterwards said he had just come from there. At the conclusion of the hearing, the Governor

granted the state two weeks in which to file a brief in support of its contention, and Ziegler a week thereafter filed his brief. The brief filed by Ziegler is the one identified by Mr. Bowers in his deposition and the one referred to in the article upon which this suit is based. It was admitted by the plaintiff that section 101 of the Penal Code of New York is in the words stated in the answer and in the publication complained of. The defendant also offered in evidence further publications made by the Republic concerning the Ziegler extradition beginning with November 15, 1903, when the indictment against Ziegler was returned, and ending with the publication complained of on February 3, 1904. Gov. Odell made his decision refusing the extradition of Ziegler on February 1, 1904. Under the date of December 8, 1903, two dispatches from Albany of the preceding day gave an account of the hearing before the Governor. In rebuttal the plaintiff, over the objection of the defendant, gave in evidence an article from the Brooklyn Eagle containing the same extracts from the Ziegler proceedings which are contained in the defendant's publication. With this the plaintiff closed the case. The instructions in the case will be discussed in connection with the assignments of error on the part of the defendant.

1. It is insisted on behalf of the defendant that the publication sued upon is not libelous because it is, and appears upon its face to be, part of the report of a legal proceeding, in which the epithets complained of as libelous were applied by counsel to the plaintiff under circumstances, as disclosed by the publication itself, which show them to be mere invective and unwarranted by the facts upon which they were predicated. It has already been ruled, in the companion case of *Brown v. Globe Printing Company* (handed down on this day) 112 S. W. 462, and growing out of practically the same publication, that the proceedings before Gov. Odell for the extradition of Ziegler upon the demand of the Governor of Missouri to answer to an indictment for bribery, were of a quasi judicial character, and if the report published by the defendant was a full, fair, and impartial report, it was privileged. As the authorities were exhaustively considered in that case, both English and American, we deem it unnecessary to again review them, and content ourselves with the conclusions therein reached.

A fair reading of the alleged libelous publication will show that it did not purport to be a report at all of the proceedings before the Governor of New York. The extradition had been refused, and this article began with a reference to the effect of the proceedings on Ziegler's future movements, his risk in going outside of the state of New York, and the probability of the authorities of Missouri taking further steps to bring him to Missouri. The article then proceeds to state that Ziegler's discomfiture is not the only result of the

Governor's refusal to extradite him, but the attorneys for Ziegler were said to be lying in wait for the plaintiff, should he at any time visit New York, and then, foreshadowing a prosecution of plaintiff, says: "In his brief Mr. John M. Bowers, one of Ziegler's attorneys, openly charged Attorney Brown with deliberate and criminal perjury, and Mr. Bowers does not hesitate to say that upon his (Brown's) advent into this state (New York) Brown will be instantly arrested and his indictment for perjury sought for." Certainly this makes no reference to the occurrences at the trial, but refers wholly to events transpiring after the extradition had been denied and to threats of Bowers of a prosecution for "deliberate and criminal perjury." Then follows the extract from the brief of Bowers, in which he says: "He (Brown) desired to come, and on page seventy-six of the stenographer's minutes of the proceedings before your excellency it was openly conceded that he had no knowledge of the matters he swore to in this regard. What does this mean? We openly charged before your excellency upon the hearing that an official of a state who had committed perjury pure and simple, upon which he instituted a procedure of this nature, committed a crime of the highest grade." Then the publication is interspersed in heavy type, with these words by the publisher: "Knew It Was Untrue. The one fact which the state of Missouri concedes it had to prove to deprive a citizen of the state of New York of his freedom and transport him to Missouri was that he had been present in the state at a certain time. Mr. Brown, the prosecuting attorney who is to try him, made an affidavit of that fact. Mr. Brown knew it was untrue when he made it. Even if he swore to facts as true of which he had no knowledge, it was perjury." Then, without quoting further from the brief, the sender of this dispatch says: "Mr. Bower's claim that attorney Brown committed perjury is based on section 101 of the Penal Code, which says: 'An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.'"

Evidently Bowers did not use this language in the heat of passion in an oral argument, but committed it to writing deliberately on January 11, 1904, over a month after the hearing on the 7th of December, 1903. Obviously, he considered it matter of serious weight. Now what fact is stated that robs this charge of perjury of its infamous character? Does the reference to section 101 of the New York Penal Code have any such tendency? We think not. It rather accentuates his position. What would the ordinary reader gather from the whole article? Obviously, that plaintiff was charged with deliberate and criminal perjury in swearing to facts he knew to be untrue, and, if he swore to facts of which he had no knowledge, he was equally guilty, and then a section of a Penal Code is reproduced to sustain that charge. Not a

word is said that if this was the whole of plaintiff's offending, as the said affidavit was made in Missouri, it did not constitute perjury, and that the Penal Code referred to was that of New York, which would not govern. View this article in any light, the whole burden of it is that Mr. Bowers had deliberately charged plaintiff with pure and simple perjury in order to get Ziegler extradited from New York to Missouri, and we look in vain for a statement of facts which would show that such a charge was baseless, or which would have restrained the generality of the charge. The question is: What was the apprehension of those who read this charge? In *Eckart v. Wilson*, 10 Serg. & R. (Pa.) 44, the slanderous words were, "You have killed Bob Waters—you have poisoned him, and I can prove it," and it was sought to show as a defense that Waters was still alive, but it was rejected. Afterwards, in *Deford v. Miller*, 3 Pen. & W. 103, perjury was assigned on a publication stating that plaintiff had filed his affidavit in the court, which had become a public record, to which there stood opposed the oaths of two respectable men, and saying: "In law it would be called perjury." The defense was that the alleged oath was made before the prothonotary in vacation in a matter not determinable before him, and it was insisted it could not be perjury because the oath was extra judicial, but Chief Justice Gibson, referring to *Eckart v. Wilson*, said: "In that case the plaintiff had been charged with the murder of a living man; in this, he has been charged with perjury in an extra judicial oath. In the one, the commission of the crime charged was rendered impossible by matter of fact, and in the other it is made so by matter of law, and, if there is any further difference between them, I am unable to perceive it." He then held the publication libelous, citing *Charnel's Case*, Cro. Eliz. 279, in which, to an action for saying, "My turkeys are stolen, and Charnel hath stolen them," it was objected that, as the speaker of the words was a feme covert and without capacity to be the owner of the things said to have been stolen, it was impossible in law that the charge be true; but the court refused to sustain the objection, "because, as it was said, she had charged him with stealing; and if one which hath no horse saith, 'I. S. hath stolen my horse,' this is as great discredit as if he had one, for every one knoweth not whether he had a horse or not."

In like manner, they who read the publication in the case before us may not have known whether the oath in which perjury is alleged to have been committed constituted perjury in law, or not; nor could they be expected to incur the trouble and expense of an inquiry into the fact, granting them competent to determine it on a view of the record. "Words which impute a crime are actionable, not more because they expose the party charged to the danger of being convicted than of being prosecuted which,

even to the innocent, is a grievance; and in every instance where the meaning of what would otherwise have been an unambiguous accusation has been controlled by circumstances which showed it to be groundless, and thus rendered it harmless, the controlling circumstances were so mingled with the accusation by the accuser himself as to make the poison carry its antidote along with it." This view of the law was expressly adopted by this court in *Persely v. Bacon*, 20 Mo. 330, loc. cit. 337. Applying these principles to the publication in this case, we look in vain for a statement of circumstances by Bowers or defendant that would show to the apprehension of any ordinary reader that the charge of perjury was groundless because of such attendant circumstances disclosed by Bowers, or the defendant in reproducing and publishing such charge. There is not a word or line which shows the charge of perjury to be palpably unfounded on the face of it. There is not even to the trained legal mind a mitigating fact stated, save and except the statement volunteered by the defendant's correspondent who sent the dispatch that Bowers based his claim of perjury on section 101 of the New York Penal Code, which enacted that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false." What Penal Code is not disclosed. When this section of the Code is read in connection with the statement preceding it, "that it was conceded that plaintiff had no knowledge of the matter he swore to in his affidavit," it emphasized the charge. The publication on its face does not even show that plaintiff made the affidavit in Missouri, save by the barest legal inference that no one but a lawyer would appreciate. Concede that such an affidavit is and was in fact not perjury in Missouri, where it was made and where alone a criminal prosecution on it could be started, no such fact is stated in the publication, and it cannot be maintained that anything less than such a statement would show the charge of perjury to be groundless. It has long been ruled, as shown by the cases already noted, that it would not suffice to show that as a matter of fact plaintiff had not committed perjury under the laws of Missouri, or matter debors the libel itself. The charge of perjury is actionable per se, and there is no statement of attending circumstances in this publication which show, or tend to show, said charge was unfounded, and accordingly it must be held that this assignment of defendant is not well taken.

2. Having reached the conclusion that the publication was libelous per se, and that there was no such accompanying statement of circumstances as showed the plaintiff could have been guilty of perjury, it is due counsel for defendant to examine the authorities upon which it relies to sustain its

contention that the publication contained an antidote for the poison. In *Trimble v. Foster*, 87 Mo. 49, 56 Am. Rep. 440, the slander was: "He is a thief. He is a d— thief." The answer was an admission of the speaking of the words, but denied that they were spoken falsely and maliciously for the purpose of slandering plaintiff, but because he believed that plaintiff had been guilty of stealing his property. For a more specific answer, he states he purchased of plaintiff a farm, and plaintiff delivered him possession thereof and prior to speaking the words: "The plaintiff unlawfully and without the knowledge or consent of defendant entered upon said land, and by force took and carried away and converted to his own use fixtures belonging to said land and the property of defendant and then in defendant's possession, to wit, one sidewalk running from the dwelling house to an outhouse, also a brick mound built up in the front yard for flowers, two large grain bins or cribs located in and part of the barn, also a lot of manure and other things belonging to defendant by reason of the purchase aforesaid and of great value." Of this answer, this court held it was not a plea of justification, but only immitigation. Said the court: "If words spoken amount, of themselves, to a charge of larceny, yet if accompanied with a specification of acts upon which the charge is based, which show no such crime was committed, the party of whom the words were spoken has no cause of action. As if the words relate to the taking of property not a subject of larceny they will not be actionable. But if some of the property alleged to have been stolen was the subject of larceny, the action may be maintained. As if A. should say of B. that he stole an acre of land and a horse, the property of A." Because the answer did not specifically state that the "other things" were fixtures—that is to say, were so attached to the land that as between vendor and vendee they were a part of the land, and therefore not the subject of larceny—this court reversed the circuit court for holding the same a complete defense. That case supports our conclusion in this, that there is no statement of facts which show that perjury could not have been committed.

Hall v. Adkins, 59 Mo. 144, was an action for slander. The plaintiff was a lessee of certain land from defendant. By the terms of the lease the plaintiff and his co-lessee were to raise a crop of corn on the land and were to pay defendant \$475 in money on or before January 1, 1873, or before that time if the crops were sooner sold; "the crop to be security for the payment of said sum and to be gathered and penned on the premises on or before December 1, 1872." The defamatory words were: "He is stealing my corn. Aaron Hall stole my corn and is swindling me, and the neighbors are helping him to do it." The defendant admitted

speaking the words charged, denied they were maliciously spoken, and pleaded in justification the truth of the words spoken, and, in mitigation of damages, the facts and circumstances relied upon to constitute said stealing and a reference by him to such facts and circumstances at the time of speaking the words. Reply denied the facts relied upon to constitute the larceny and averred no explanation was made by defendant at the time they were spoken, and no reference made to such facts and circumstances. The testimony tended to show that plaintiff and defendant had an interview in which plaintiff proposed to provide other security for the rent, so that he might dispose of the corn, but failed to reach an agreement; that plaintiff told several parties he and defendant had had a "fuss," and he intended to take corn. Before any of the rent was paid, plaintiff did take part of the corn in the night without the consent and against the will of defendant and used it to feed plaintiff's hogs. There was a conflict as to whether defendant, at the time of speaking the actionable words, communicated to every person to whom and in whose presence he uttered the words the circumstances attending the taking of the corn by plaintiff. There was a verdict and judgment for plaintiff, and defendant appealed. It was ruled, first, that, plaintiff being the owner of and in possession of the corn, there was no larceny in his selling or feeding the corn; that, as defendant had a lien on the crop, it was a wrongful act, but not larceny. The court instructed that the verdict, at all events, must be for plaintiff, regardless of the other facts pleaded in mitigation and justification. But this court held that while the words were actionable in themselves, yet if the defendant honestly believed that the facts and circumstances attending the taking of the corn constituted larceny, and, so believing and without malice, uttered the words charged only to those to whom he communicated the facts in his opinion constituting the crime charged and upon which he based the same, thus sending an antidote along with the poison, and showing a mistaken view of the law, rather than a malicious purpose, the plaintiff could not recover. In that case, if the evidence for the defendant was believed, he had told all the facts upon which he based his charge of larceny. The evidence disclosed plaintiff had wrongfully disposed in the nighttime of corn on which defendant had a lien, and this court held that, while it was not larceny, yet if defendant honestly believed it to be such, and to every person to whom he made the charge he detailed the facts, then plaintiff could not recover.

If the publication had been a full and fair report of the proceedings before the Governor of New York (which it is not) with the explanation of Attorney General Crow and Judge Harvey that the affidavit of plaintiff

Missouri, where it was made, there might be merit in the contention that the antidote went with the poison, but the facts of *Hall v. Adkins* differ so radically from those in this case that it constitutes no authority for the publication in this record. Defendant's proposition of law is well enough, and we need not go beyond our own decisions for it, but the facts of this case do not make that law applicable here. The charge of Bowers was that plaintiff had committed perjury pure and simple, and defendant, reproducing the charge, says that: "Bowers in his brief openly charges Attorney Brown with deliberate and criminal perjury." And the antidote now relied on is that Bowers' claim that it was perjury is based on section 101 of the New York Penal Code, which says: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false." Instead of a statement of facts and circumstances which would have demonstrated it was not perjury and could not be, a citation of a section of a Penal Code is cited which tended to show Bowers' contention was well grounded in law. In other words, it emphasizes the charge of perjury.

3. But it is insisted it was a privileged report of a legal proceeding, fairly and impartially made, without malice, and therefore not actionable. As already said, the publication upon which this action is based is not and does not purport to be a fair and accurate report of the proceedings before the Governor of New York for the extradition of Ziegler. It is a reproduction of a part only of Mr. Bowers' brief, filed over a month after that hearing had ended, with comments by the defendant and sensational headlines of its own. It is not even a report of all of Mr. Bowers' brief, but of an extract only, which reflects upon plaintiff's character and integrity. Judge Cooley, in his *Constitutional Limitations* (7th Ed.) 637, states the rule adopted by most courts on this question: "It seems to be settled that a fair and impartial account of judicial proceedings which have not been *ex parte* but in the hearing of both parties is, generally speaking, a justifiable publication. But it is said that, if a party is allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. A plea that a supposed libel was in substance a true account or report of a trial has been held bad, and the statement of the circumstances of a trial as from counsel in the case has been held not privileged. The report must also be strictly confined to the actual proceedings in court and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly and properly the legal proceedings." Upon the same point, Newell, on *Libel and Slander* (section 163), states the rule in this way: "The publisher must add

nothing of his own. He must not state his opinion of the conduct of the parties or impute motives therefor. He must not insinuate that a particular witness committed perjury. That is not a report of what occurred. It is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground, that they are a fair and bona fide conclusion on a matter of public interest, and are therefore not libelous; but such observations, to which quite different considerations apply, should not be mixed up with the history of the case." Lord Campbell said: "If any comments are made, they should not be made as a part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separated." In the companion case to this, of *Brown v. Globe Printing Company* (112 S. W. 462), argued and submitted along with this cause on practically this same publication, the opinion in which is handed down to-day, it was said: "It has been held that the headliness to the publication 'are only privileged if they are a fair index of a truthful report.' *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401; *Lawyer's Co-op. Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 63 N. Y. Supp. 1120; *Hart v. Sun Printing & Pub. Co.*, 79 Hun (N. Y.) 358, 29 N. Y. Supp. 434. The headlines were no part of the proceeding before Gov. Odell for the extradition of Ziegler, but were voluntary statements of the publisher of the libel." The headlines were as follows: "Ziegler's Lawyer Calls Brown Liar. Accuses Him of Perjury, Declares if Missourian Visits New York He Will be Arrested. Insists Cole County Prosecutor Made Affidavit He Knew Was False." Such headlines were not privileged matter at common law and were libelous remarks or comments if the matter could be deemed otherwise privileged. An inspection of them would seem to be sufficient to demonstrate this fact. "Their publication in this manner was certainly equivalent to a remark or comment unnecessary to a fair and truthful report of judicial proceedings and likely to raise inferences highly detrimental to the character and standing of the one about whom they were published and printed. *Dorr v. United States*, 195 U. S. 133, 24 Sup. Ct. 808, 49 L. Ed. 128." In this case the headlines, so far as they affect plaintiff, were: "Attack on Attorney Brown. Baking Powder Magnate's Lawyer in His Brief Openly Charges Missouri Prosecutor with Perjury."

If the headlines in *Brown v. Globe Printing Company* were not privileged, and we hold they were not, by the same token these headlines are likewise not privileged, and they fall within the condemnation which the law visits upon such unauthorized comment under the claim that they were but a fair report of judicial proceedings. *Hayes v. Press Co.*, Limited 127 Pa. 612, 18 Atl. 331, 5 L. R. A. 643,

14 Am. St. Rep. 874. In addition to these headlines, the publication contains in its body, in large capitals, the words, "Charge of Perjury," and "Knew It was Untrue," and these sensational headings thus interspersed in the article were equally beyond the privilege of the defendant as a publisher. But there is another equally potent reason why the publication in question was not one of privilege. In *Brown v. Globe Printing Co.*, the authorities, both English and American, are collated to the effect that it does not follow, because counsel may willfully speak in court as he believes or is instructed, that therefore he may publish his speech through the press. *Saunders v. Mills*, 6 Bing. 60; *Rex v. Creevey*, 1 Maule Selwyn, 273; *Com. v. Godshalk*, 13 Phila. (Pa.) 575; *Com. v. Culver*, 2 Pa. Law J. 362; *Flint v. Pike*, 10 E. C. L. R. 668; *Rex v. Lord Aberdeen*, 1 Esp. 226; *Hotchkiss v. Oilphant*, 2 Hill (N. Y.) 510. In *Brown v. Pub. Co.*, Burgess, J., says: "While words reflecting on the character of an individual, spoken or written in due course of a judicial or quasi judicial proceeding, if pertinent to the subject of the inquiry or relevant to the issue, or in a legislative assembly, by a member thereof, in the discharge of his official duties, are privileged, this privilege does not go to the extent of allowing the publication of the slanderous words in a newspaper, even though the publication is made in good faith and as a matter of news. The authorities draw a broad distinction between the right of a person, on a privileged occasion, to utter words reflecting upon the character of another, and the right to publish through the newspaper press any false and defamatory matter contained in such person's speech or address. As said in *Hotchkiss v. Oilphant*, 2 Hill (N. Y.) 510: 'The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and, when called on by the aggrieved party, the publisher should be held strictly to proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he published, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community.'" In this case, had the defendant exercised ordinary care and prudence it could have readily ascertained that the charge of perjury made by Bowers against the plaintiff was in fact and in law not perjury under the laws of Missouri,

where alone, if at all, the offense had been committed, and yet it was sent broadcast throughout the Mississippi Valley, and especially in the state of Missouri, where the plaintiff lived and was well known. For the reasons given in *Brown v. Globe Printing Co.*, we therefore hold that this publication was not a privileged one.

4. It is insisted by the defendant that the court erred in refusing the tenth instruction requested by the defendant, which is in these words: "Under the laws of Missouri it is no offense simply to make an affidavit to the matter of fact, even though the person making it had no knowledge of the fact, and even though the statement of his affidavit was not in accord with the actual fact, and to constitute an offense under the laws of Missouri the affidavit must be willfully and corruptly and falsely made, and, if the article complained of does not charge according to its own import the plaintiff with willfully, corruptly, and falsely making the affidavit in question, then the article is not libelous, and your verdict should be for the defendant." The pith of this instruction seems to be that, unless the defendant charged the plaintiff with willfully, corruptly, and falsely making the affidavit in question, then the article is not libelous; that the words "deliberate and criminal perjury" and "perjury pure and simple" "in swearing to facts which plaintiff knew were untrue when he made the affidavit" were not a sufficient charge of perjury so as to be actionable. We are entirely unable to agree to this contention. Words charging another with a commission of a crime as heinous as perjury are actionable, although they do not set forth the particulars of the offense in language necessary to make a good indictment. In 18 Amer. & Eng. Ency. of Law, 989, it is said: "To render words actionable, it is not necessary that they should describe the offense with that precision which it is necessary to set forth in the indictment, and it is well settled that if the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed, or to the reader of the words, the impression that the plaintiff has committed a crime, the words are actionable." Words making a general charge of "perjury" are actionable in themselves, without any colloquium. 1 American Leading Cases, top page 108, and notes. Had defendant inserted the substance of this instruction in its article, and thereby explaining to the world and its readers that the plaintiff had not been guilty of perjury as charged in Mr. Bowers' brief, its attitude would have been much more favorable at this time; but certainly there was no error in refusing this instruction, as the charge in the publication was an unqualified one of perjury, which is actionable per se. The court properly told the jury that a publication charging the plaintiff with perjury was libelous, but it also told

the jury that they were the final and sole judges whether such publication was in fact libelous and defamatory.

5. It is insisted the court should have directed the jury to find for the defendant. It will be remembered that the defendant in its answer admits it made the publication complained of, but denied making the same with malice or ill will, and sought to justify upon the ground of privileged publication. The publication charged the plaintiff with the commission of a felony, to wit, perjury. We have already held that it was not privileged and was libelous per se. In *McIntyre v. Bransford*, 17 S. W. 359, the Court of Appeals of Kentucky said: "The falsity of defendant's words is presumed because the law will not presume misconduct in a person. If libelous per se, malice is also presumed. And if defendant pleads the truth, he must prove it, or, in the absence of any other defense, respond in damages, at least, to some extent. If, however, the truth be shown, he is not liable, although he may have been actuated by malice." In *Childers v. Mercury Co.*, 105 Cal. 289, 38 Pac. 904, 45 Am. St. Rep. 40, it was said: "The publication charged the plaintiff with the commission of a felony, which was false, not privileged, and libelous per se. Upon such a state of facts, the cause of action for actual damages is conclusively established, and the amount and measure of damages are the only questions left for litigation. In this publication malice in law is not only conclusively presumed, but such malice in fact is implied or presumed as to establish prima facie the right of plaintiff to exemplary damages. In other words, the existence of malice in fact is sufficiently shown by the publication to make the question an issue before the jury. That exemplary damages may be based alone upon a publication libelous per se, we have many authorities from many states." *Buckley v. Knapp*, 48 Mo. 152, in which last-mentioned case it was said: "When slanderous words are spoken, or a libelous article is published falsely, the law will affix malice to them. There is no necessity of proving express malice." *Hudson v. Garner*, 22 Mo. 423; *Goetz v. Amba*, 27 Mo. 28. Under these circumstances, we think it is obvious that there is no merit in the proposition that the court should have instructed the jury to find for the defendant, and we think that the assaults upon the third and fourth instruction given for the plaintiff are therefore groundless.

6. Error is also predicated upon the giving of the twelfth instruction, which was as follows: "The court instructs the jury that all matters defamatory of plaintiff in the publication complained of (as defendant has not in its answer relied on their truth as a defense) will be deemed by the jury in making its verdict as false and untrue as respects plaintiff." The contention is that this instruction is too broad. The defendant w-

mitted the publication in words and figures as set out in the petition, but denied the allegation that it was made maliciously, and then pleaded that it was privileged publication. It now says that it sought to justify to the extent that the publication was true as to the charge that plaintiff made an affidavit of facts of which he had no knowledge. We think this assignment tenders a false issue. The defendant assumes, as a basis of its contention, that the article charged no more than that plaintiff made an affidavit of facts of which he had no knowledge, and that in its answer it asserted the publication, so construed, was true; but, as we have seen, the article charged that the plaintiff had committed perjury, and made an affidavit he knew to be false, which is an entirely different proposition, and the court, in its fourth instruction, submitted these two defamatory charges to the jury, and this twelfth instruction, when considered along with all the other instructions, must be held to have referred to these two defamatory charges. The defendant makes no claim that it is justified of perjury, or that plaintiff made an affidavit that he knew to be false. While the court might have better named the two charges as constituting the libelous matter which was admitted by the answer without any attempt of justification thereof, we think the jury could not have been misled as to the issues presented for their determination. As to the other objection to this instruction, that it ignored the defense of privilege, we have already held that it was not a privileged publication, and it is not erroneous on that ground.

7. The second instruction given by the court of its own motion is also assailed. That instruction is in this form: "If the jury find from the evidence that the defendant published the article complained of in good faith believing the same to be a proper item of news and a part of the report of occurrences in the matter of the Ziegler extradition, and without malice or ill will towards the plaintiff, and not negligently, or in wanton disregard of plaintiff's rights, then the plaintiff is not entitled to recover any exemplary damages herein." In *Buckley v. Knapp*, 48 Mo. 162, it was held by this court that "in all actions of tort, whether for assault and battery or for trespassing, or libel or slander, where there are circumstances of oppression, malice, or negligence, exemplary damages are allowed not only to compensate the sufferer, but to punish the offender." The learned counsel for defendant says that "gross negligence may be the occasion of punitive damages, but mere negligence never is." In *Reed v. Western Union Telegraph Co.*, 135 Mo. 671, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, it was held that the distinction between negligence and gross negligence does not exist in this state. In *McPheeters v. Railroad*, 45 Mo. 22, this court

said: "There is no difference between negligence and gross negligence; the latter being nothing more than the former with the addition of a vituperative epithet." The authorities on this subject, both English and American, were fully considered in *Reed v. Telegraph Co.*, supra, to which reference is made. A reading of the instruction, we think, will itself answer this objection. It was given in behalf of the defendant and told the jury "that if the defendant published the article complained of in good faith believing it to be a proper item of news and a part of the report of occurrences in the matter of the Ziegler extradition, and without malice or ill will towards the plaintiff, and not negligently or in wanton disregard of plaintiff's rights, then there could be no exemplary damages." We think the defendant has no cause to complain of this instruction. The charges of perjury and knowingly making a false affidavit were actionable per se and implied malice; that is to say, intentional wrong-doing. In *Buckley v. Knapp*, 48 Mo., loc. cit. 161, it is said: "In most instances where an injury is committed against the person or property of another, the actual intention of the author of the mischief is immaterial. The law considers every one whose neglect, carelessness, and want of due regard for the rights of others occasions injury to them equally culpable and bound to make reparation to the extent of such injury as one who willfully does the mischief. It can make no difference to the party injured whether the injury was occasioned by the willful act or by negligence or a careless disregard of his rights, and such a consideration ought not to affect his remedies."

8. Defendant insists that the verdict is plainly the result of passion and prejudice, and is excessive. The allegation of the petition was that plaintiff, by the said wrongful acts and conduct of the defendant, has been greatly injured and damaged in his good name and reputation, and his feelings and estate, and in his relation as attorney at law, and otherwise in his business pursuits and vocation, and the court instructed the jury that if they found for the plaintiff they would allow as actual or compensatory damages such sum as would fairly and reasonably compensate him for all mental suffering and humiliation suffered by him by reason of the publication of the article aforesaid, and naturally and directly caused thereby, and for all injuries to his good name and reputation naturally and directly caused by said publication. The prayer of the petition may be considered as one for the general damages. The action for libel is one to recover damages for injury to man's reputation and good name. It is not necessary, in order to recover general damages for words which are actionable per se, that the plaintiff should have suffered any actual or constructive pe-

cunlary loss. In such action, the plaintiff is entitled to recover as general damages for the injury to his feelings which the libel of the defendant has caused and the mental anguish or suffering which he had endured as a consequence thereof. So many considerations enter into the awarding of damages by a jury in a libel case that the courts approach the question of the excessiveness of a verdict in such case with great reluctance. The question of damages for a tort especially in a case of libel or slander is peculiarly within the province of the jury, and unless the damages are so unconscionable as to impress the court with its injustice, and thereby to induce the court to believe that the jury were actuated by prejudice, partiality, or corruption, it rarely interferes with the verdict. In *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253, Chief Justice Kent said: "The quo animo with which the libel was published was altogether a matter for the consideration of the jury, and the circumstances which might tend to aggravate or extenuate the damages, and lessen or increase the degree of malice, which the law imputes to the publication of every unjustifiable libel, were, no doubt, urged to the jury upon the trial. * * * It is not enough to say that in the opinion of the court the damages are too high, and that we should have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages for the action for personal torts and injuries." The learned judge then considered the number of English cases in which the question of the excessiveness of the verdict had been considered. In our opinion this is a case in which the jury were clearly justified in giving both compensatory and punitive damages under well-settled principles of law, and, considering the character of the plaintiff and the large circulation of the defendant's paper and the degrading nature of the libel, we do not feel that we would be justified in setting aside the verdict on the ground of its being excessive.

After a careful consideration of all the assignments of error, we are of opinion that the judgment must be, and it is accordingly, affirmed.

FOX, P. J., and BURGESS, J., concur.

EVERETT v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Missouri, Division No. 1. July 3, 1908.)

1. RAILROADS—PEDESTRIAN ON TRACK—JURY QUESTION.

Whether a pedestrian killed on a railway track was a trespasser held a jury question.

2. SAME—CARE AS TO TRESPASSERS.

The doctrine that a railway company is only liable for injury to a person on its track caused by wanton negligence or willfulness applies only where the injured person was a tres-

passer and was injured at a place where the company's agents and servants in charge of the train had no notice or reason to apprehend that any person would be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239.]

3. SAME—PLEADING—ISSUES.

That the petition, in an action against a railway company for the death of a pedestrian, charges that the injury was willfully and wantonly caused by the company's servants in charge of the train, will not prevent recovery, if the evidence shows that the injury was negligent; the charge of willfulness being sustained by proof of negligence.

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Under the evidence, in an action against a railway company for the death of a pedestrian, held not error to overrule a demurrer to the evidence upon the ground of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1365-1381.]

5. SAME—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for the death of a pedestrian, held to warrant a finding that, notwithstanding decedent's negligence, the injury would not have happened if the company's servants in charge of the engine, after they discovered, or by exercising ordinary care could have discovered, the perilous position in which she had placed herself in time to have warned her of the approaching train, or in time to have stopped or slackened the speed thereof in time to have averted the injury, had so warned her or stopped the train.

6. SAME—INSTRUCTIONS.

In an action for the death of plaintiff's wife struck by a train while standing beside the track, instructions as to discovered peril and the duty of the persons in charge of the train held to properly state the law applicable to the facts.

7. NEGLIGENCE—"ORDINARY CARE" DEFINED.

"Ordinary care" is such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 6, 372.

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739-7740.]

8. EVIDENCE—FAILURE TO CALL WITNESS—EFFECT.

In a personal injury action, it was not error to prevent defendant from showing that a particular person had been subpoenaed as a witness for plaintiff, that he was present in the courtroom, and that he was not called as a witness; such facts not bearing upon any issue in the case.

Appeal from Circuit Court, Franklin County.

Action by James N. Everett against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This suit originated in the circuit court of Franklin county, wherein plaintiff seeks to recover the sum of \$5,000 damages from the defendant for the killing of his wife, Annie Everett, at Pacific, Mo., by the alleged negligence of its servants and employes in the operation of one of its freight trains.

The petition, in substance, charged: First. That the railroad track of defendant, for a distance of a half mile east of the corporate limits of Pacific, on May 24, 1904, and for a long time prior thereto, had been accustomed

to be used as a road and footpath to and from Pacific by pedestrians from that city and vicinity, and generally by the forbearance, knowledge, and tacit consent of defendant, and at the point thereon where the alleged injury occurred said track of defendant was level and straight east and west therefrom for a long distance. Second. That plaintiff's wife, Annie Everett, on May 24, 1904, at 8 o'clock p. m., was walking upon the said railroad track of defendant about 300 feet east of the corporate limits of Pacific, and while so walking thereon a certain west-bound freight train in charge of and operated by defendant on said track ran against and instantly killed plaintiff's said wife, and that her death was the direct result of the wanton disregard and of the careless and reckless manner in which the defendant's said train was run, in this: "That the defendant, its agents, servants, and employés, in charge of and operating said train, carelessly and negligently omitted to have placed in front of the engine drawing said train a headlight, lighted up at the time and place of the injury herein complained of occurred, and carelessly and negligently ran said train at an excessive rate of speed at the time and place the injury herein complained of occurred. That after the defendant, its agents, servants, and employés, in charge of and operating said train, seeing, or by the exercise of reasonable care and diligence, had they not been reckless in operating said train, could have seen, the dangerous position in which plaintiff's said deceased wife, Annie Everett, was situated, and seeing, or by the exercise of reasonable care and diligence, if said train had not been recklessly operated by defendants, its agents, servants, and employés in charge thereof, could have seen, the imminent peril in which plaintiff's said wife was placed, and that said deceased was unaware of the near and dangerous approach of said train, and that the defendant, its agents, servants, and employés negligently failed to sound the usual and ordinary signal in time to avert the injury herein complained of, and in fact did not at any time before the said injury to said Annie Everett either ring the bell, sound the whistle, or give any other signal by which his said wife might be warned of the near and dangerous approach of said train, and negligently failed and neglected to use the brakes or other appliances provided for stopping said train and at hand, and negligently failed to use the appliances provided and at hand for putting said train under control and stopping same before it struck and killed plaintiff's wife, but, on the contrary thereof, recklessly, negligently, willfully, and wantonly ran its said train against the plaintiff's said wife, so mutilating, wounding, and bruising her that from the effects thereof she did then and there immediately die, to the damage of the plaintiff in the sum of \$5,000, for which sum of \$5,000 the plaintiff prays judgment against the defendant

and for the costs of this suit." Defendant's answer contains: (1) A general denial, except the admission of defendant's corporate existence and the death of plaintiff's wife, Annie Everett, from injuries received on May 24, 1904; and (2) a plea of contributory negligence of plaintiff's said wife, and that she was a trespasser. Plaintiff's reply was a general denial of the new matter set up in the answer. The case was tried before said court with the intervention of a jury, and was left to the jury upon evidence given by both parties, and, under the instructions of the court, the jury returned a verdict finding the issues for plaintiff and assessing his damages at \$5,000, for which sum, in pursuance of the verdict, the court entered judgment for plaintiff. After unavailing motions for a new trial and in arrest of judgment, defendant appealed to this court.

Plaintiff's evidence tended to prove the following facts: That at the time of the injury and death of Annie Everett she was the wife of the plaintiff. That Pacific, the place where the injury occurred, is a town of about 1,200 inhabitants, through which pass two railroads; one being the Missouri Pacific, and the other is the road of defendant. Those two roads run parallel with each other from east to west and about 100 feet apart. Each have a depot at Pacific, and are opposite to each other. The depot and track of the latter is south of the former. The track and right of way of defendant was straight and level for a distance of one-half mile east of its depot, with no intervening obstruction of any kind. At a point about a half mile east of the depot, the track curves somewhat to the south, though the view is still clear. At the time of the accident defendant was constructing a pumphouse on its right of way at a point one-quarter of a mile east of its depot. Annie Everett was killed at or near that pumphouse. At that place defendant's track and the Meramec river run almost parallel with each other; the river being about 100 feet south of the track and about 200 feet east of the pumphouse. On the river there is a landing place for small boats, where they are tied up and have been used generally for years by the people of Pacific for fishing and pleasure purposes. At a point about 200 feet still further east of the pumphouse, there is located what is called the "tie chutes," which have been used for years for taking railroad ties from the river with a view of loading them upon the cars. Just north of the pumphouse and north of the Missouri Pacific tracks there are located some sand works, which have been operated for years in taking sand rock out of the river bluff, crushing and loading them on the cars, and about 500 feet east of those works are located other works of like nature, which have also been in operation for many years. Some 200 feet east of the pumphouse a public road crosses the tracks of the defendant and those of the Mis-

souri Pacific Company. This road then runs along the foot of the bluff and diverges from the railroad tracks in a northwesterly direction and enters the town of Pacific, a distance of about two city blocks north of the Missouri Pacific track. The tracks of defendant are not inclosed from its depot in Pacific to the point where the said public road crosses its track, a distance of about 1,500 feet, except on the south side thereof from the depot to the pumphouse an adjoining landowner has constructed a fence to inclose his land. On the outside wall of the depot building, at Pacific, there was painted a notice warning the public to keep off its right of way, tracks, etc.; but no such notice was posted between the depot and the point where the tracks cross the public highway before mentioned. That for years at least 10 men have been constantly engaged in the operation of the "tie chutes," and a like number in operating the sand works north of the Missouri Pacific track opposite the pumphouse, and as many more were engaged at the sand works which were located still further east. All of these men resided in Pacific and usually walked along the tracks of the defendant or those of the Missouri Pacific Company in passing to and from their work, and ever since the road of defendant was constructed (20 years) many people walked on its track in passing between Pacific and the boat landing on the Meramec river, which was the best and most convenient way for them to go. So great was this continued use of defendant's track that a well-defined footpath was established by said workmen and city people in walking along and upon it in passing back and forth between the city and said different points during those many years. That this path was well defined, and ran from the boat landing on the river to the south side of defendant's track, thence along the south side of the track for a distance of about 200 feet to the defendant's pumphouse, thence north, across its tracks, to the north side thereof, and thence west along the north side of the track of the Missouri Pacific.

On the afternoon of May 24, 1904, plaintiff and his wife and his niece, Vida Canari, together with the Reverend Mr. Wright and his wife, Zoezilla Wright, all residents of Pacific, formed a fishing party and walked on the track of defendant and in part along the footpath described from Pacific to the boat landing, where they entered a small boat and spent the afternoon fishing and rowing in the river. About 8 o'clock p. m. they returned to the boat landing, and while plaintiff and Rev. Wright were tying up the boat, the ladies started on for Pacific, walking along the footpath before mentioned—that is to say, up the river bank to the south side of defendant's track, thence along the south side thereof 200 feet to the pumphouse—and then stepped upon and started up the track towards Pacific; but, having just then heard a long whistle from the east, they walked back from the

track some little distance at or near the pumphouse, and waited until a train passed over defendant's track, and they stood there looking down the Missouri Pacific and defendant's track towards the east, and heard the rumbling of some train, when the Missouri Pacific bright electric headlight came around the curve, and then Mrs. Everett made some remark, which is not preserved in the record, and she and the ladies with her saw it was a Missouri Pacific train coming. They walked up to the south side of defendant's track and there stopped. Mrs. Everett stood about a foot behind of and to the left of Mrs. Wright, and Miss Canari stood still a little farther east. There they stood abreast for a few moments, in the gravel at the south end of the cross-ties of the track, facing north, and looked a second time down the Missouri Pacific and Frisco tracks east to make sure there was no train coming from the east on defendant's track before they stepped upon it, and none of them either saw or heard a train, and, being unconscious of the approach of any train on the track of defendant from the east, that very moment the second section of defendant's freight train, which was some 50 minutes late, came along from the east at the rate of 35 miles an hour, and the flag staff of the engine struck plaintiff's wife on the head and killed her almost instantly. Mrs. Wright and Miss Canari were the only eyewitnesses to this unfortunate occurrence. The plaintiff and Rev. Wright had not then left the boat at the landing and did not know anything about the accident. The trainmen in charge of the train did not see deceased nor either of the two ladies who were with her at the time she was killed; did not know of the injury till their train reached St. Clair, a station 18 miles west of Pacific, when and where a telegram informed them of the injury. That the train referred to on the Missouri Pacific track and defendant's train which struck plaintiff's wife were at that time running a race from Allenton, the next station east, to Pacific, a distance of five miles, and that the run was made in six minutes. The engineer and fireman who were in charge of the Missouri Pacific train testified that they were racing with and watching defendant's train, from Allenton to Pacific, and Mrs. Wright and Miss Canari and John Roby, all witnesses for plaintiff, testified that there was no headlight on defendant's engine, and that they did not hear the ringing of the bell, or the sounding of the whistle, nor see or hear any signal or warning of the approach of the train prior to the time the injury happened. The evidence also tended to show that at the time of the injury it was twilight, and that persons could be seen and distinguish objects at a distance of from 200 to 400 feet.

The engineer in charge of the defendant's train, a witness for defendant, on cross-examination testified, among other things: "Q. Then, Mr. Ramie, you have known and been

acquainted with defendant's road at Pacific for about 14 years? A. Yes, sir. Q. You are familiar with the surroundings there, the pumphouse, the tie chutes, sand works, etc? A. Yes, sir. Q. You know that people do work there? A. Yes, sir. Q. Have you seen people upon your track? A. Yes, sir. Q. Walking to Pacific and to the sand works? A. Yes, sir. Q. And the tie chutes? A. Yes, sir. Q. And to the Meramec river there? A. Yes, sir; I cannot say I know where they was going, but I have seen people on the track there. Q. And you knew that on the 24th day of May, 1904, as you came along? A. Yes, sir. Q. What look, if any, do you take along there? A. I look out everywhere on the road. That is my rule. Q. What difference, if any, do you make in this particular instance? A. It did not make any difference."

The defendant introduced substantially the following evidence:

George E. Fryman: "I reside at Springfield. Occupation, civil engineer. I know where the Missouri Pacific Railway and the St. Louis & San Francisco Railroad run at Pacific, Franklin county, Mo. This plat shows the location of those lines east of Pacific. The location of the Frisco pumphouse is shown upon the plat; also, the location of the Missouri Pacific pumphouse; also, the location of the joint depot at Pacific of the two railroad companies. It is 2,480 feet from the east line of that depot to the Frisco pumphouse. The arch culvert under the Frisco track at the point marked B is 190 feet from the Frisco pumphouse. The red line south of the Frisco track is the south right of way line of the St. Louis & San Francisco Railroad Company. Immediately north of the Frisco pumphouse the distance from the middle of the Frisco track north to the main track of the Missouri Pacific is 76 feet. For 500 feet east of the Frisco pumphouse the average distance between the tracks of those companies is 75 feet. The point of crossing of the wagon road over the railroads is shown in yellow, east of the Frisco pumphouse. The public highway is 165 feet north of the center line of the Frisco Railroad. The brown line south of the Frisco track shows the top of the river bank. From the top of that bank north to the center of the Frisco track at the culvert is 68 feet. These measurements were made October 28, 1904. The lines of the plat are absolutely correct for a period of a year and a half prior to the trial, except that the Frisco pumphouse has been built since the accident. East of the Frisco pumphouse the track is on quite a curve to the south. Do not know how long the wagon road has been there."

A. T. Brown: "I am railroad agent for the St. Louis & San Francisco Railroad Company at Pacific, and have been for two years and five months. When I went to Pacific, the wagon road from the public crossing east of the Frisco pumphouse to the town of Pacific

was in existence, but was 200 feet north of where it is located now—that is, north of the location shown on the plat; but the location of the public crossing has been the same since I have been at Pacific. At the time of the accident to Mrs. Everett and prior to that, for over two years—that is, since a month and a half after I came to Pacific—a sign has been kept on the outside walk of the waiting room of the Frisco depot at Pacific right in front of where the public congregate. This sign was as follows: 'Frisco System—St. Louis & San Francisco Railroad Company. Warning to the Public. All persons not having business with the company are hereby positively forbidden to enter, sit, stand or walk upon the railroad, side tracks, turntables, roadways, depot or platforms, or to go upon or ride upon any of the locomotives or cars of the St. Louis & San Francisco Railroad Company, whether same be in motion or not; and all persons are especially prohibited from walking on or crossing the tracks of this company except at the legally established crossings; and notice is hereby given that this company does not consent to such use of its tracks, and no agent or officer of this company is authorized to countenance or otherwise consent to such use of such tracks, or any other purpose or use of which is hereby prohibited; and all persons are hereby notified that they use same at their peril and exclusively at their risk of injury, as they are trespassers and the company does not undertake any care for their safety. The attention of parents whose children go about such places or upon any of the property of this company to play or ride on trains, or for any other purpose is especially called to this notice, and they are hereby requested to keep their children away therefrom. [Signed] B. L. Winchell, V. P. and Gen. Man.' I was in charge of the depot the evening of the accident and kept a record showing the number of trains that arrived and left that day. I have the record. The Frisco train in question was the second section of train No. 35, freight train, going west. There were 43 cars in the train. It arrived at the station at 8:22 p. m."

Henry Ramle: "I am a locomotive engineer for the St. Louis & San Francisco Railroad Company. I was raised at Pacific and lived there until the age of 23. Since then I have been working for the railroad company 16 years. I was running the Frisco freight train in question on May 24, 1904. I was on the second section of No. 35, from St. Louis to Newburg. I had been on that run about one year. That train had been on schedule ever since I had been working there, a good long time. I was about 40 minutes late that evening. My fireman was Lee Ryan. I came into Pacific with a very long train, 43 cars, and shut off steam east of the sand cut below Pacific, and had to use steam to pull the train up to the water tank. I came into town under full control, as I expected the

first section to be standing at the water tank taking water. My train was running about six or seven miles an hour when I passed the location of the Frisco pumphouse. It was running about the same rate when I passed the county road crossing, east of the Frisco pumphouse. I did not use any steam. The train was coming in slow. I did not have a race with the Missouri Pacific train. We had a headlight, and it was burning all the time. We lighted it before we left Chouteau avenue at St. Louis yards. It was a coal oil lamp. I never noticed the Missouri Pacific train until I got through the sand cut shortly before I struck the whistling post. I whistled for town and noticed a flash come alongside on the north side and glanced back and saw it was the Missouri Pacific train. I saw them when they passed me between the whistling post and the Missouri Pacific pumphouse. I just glanced at them. I had my head out of the window looking up the track. I was watching the track when I passed the pumphouse, paying attention to my duties, but could not help seeing the train as it passed. It did not take me from my work. I was watching, as was my duty. After the Missouri Pacific train got by me, the smoke of their engine partly, but not entirely, obstructed the view in front of me. I was on the right side of my engine. East of the Frisco pumphouse there is a curve in the track, curving south. The effect of that curve when looking south of my track or ahead was against me, going west, because I was in the cab and could not see the opposite side of the track. The length of my engine was in front of me. I could not see any one standing at that place there (where Mrs. Everett was struck). I doubt if I could have seen a person in that position in the daytime. I whistled for the town, and also for the country road crossing. I sounded two long and two short whistles for the road crossing near the whistling post. I gave one long blast of the whistle for the station east of that. It could have been heard distinctly at least from there to town. Nothing to prevent it. The bell on my engine was ringing east of that crossing. Could not say how long it continued to ring. I started ringing the bell after I sounded the whistle, up to the crossing anyway. I did not see or hear anybody east (west) of that crossing. I did not see Mrs. Everett or any one there along there anywhere. I could not. From the time I whistled for the crossing and for the town I was watching out ahead, standing up in the cab with my head out of the window and never turned my head either way." Cross-examination: "I did not know of Mrs. Everett being struck by my train until after I arrived at St. Clair, where I received a message to notify me to make an examination of my engine to see if there was any sign of anybody being struck. I saw that the headlight was lighted at Chouteau avenue. I did not do it myself. When I stopped at Pacific I walked

around the engine and saw it was burning there. I noticed it was burning before that. I saw reflections on both sides as we came through the sand cut. On account of being notified of this accident I made a memorandum of everything that occurred. The Missouri Pacific engine was ahead of me at the sand cut. It could not have been the reflection from the Missouri Pacific engine in the sand cut. It could not have come through and down. I saw my headlight burning after I stopped at the water tank, and know if it had gone out it could not have lighted itself again. It was not dark long, and it was daylight when it was lighted. When I passed Pacific it was not quite dark; not very dark. I reached Pacific at 8:22. I do not remember the time it took me to run from Allenton to Pacific. I guess about 15 minutes. The Missouri Pacific train did not start out of Allenton the same time as my train. The first I noticed their train that evening was when I was coming through the sand cut. They passed me before I got to the pumphouse. I must have been ahead of them out of Allenton. My run from Allenton to Pacific with 42 or 43 cars could not have been made in five or six minutes to save your life. Passenger trains can hardly make it in that time. I was on the north side of my engine going into Pacific. I could not have seen all the way to Pacific from the south side of my engine. I could not have seen all the way from the sand cut to the pumphouse on account of the trees. I did not notice the Missouri Pacific train running side by side with me for four or five miles. I have been acquainted with defendant's railroad at Pacific for about 14 years. Have seen people upon our track walking to Pacific and to the sand works and the chutes and Meramec river. When we passed through the sand cut and on to the pumphouse, my fireman was on the left side of the engine ringing the bell. I could not say what the fireman was doing all that time. The headlight we had was a coal oil light. That was our usual kind. We have the same to-day. Our headlight was not out when we passed the sand cut on to Pacific. It was burning. There were electric lights at Pacific. Do not remember whether they were burning when I got there. I did not give a whistle between the crossing and Missouri Pacific pumphouse. I started to ring the bell when I sounded the whistle, but do not know when it ceased ringing. I gave one long blast of the whistle for the town and two long and two short blasts for the crossing. I gave them at the post that is put there for the purpose, something like 200 feet from the crossing. As I approached the location of the Frisco pumphouse I was looking. I never took my head inside the cab from Allenton until I stopped at the tank at Pacific. I stopped at the east tank. Do not remember how long I remained at the station; took water, got orders and went on. I did not learn there that Mrs. Everett was

killed. I did not know that defendant's track was a passway used by the people going between Pacific and the river. I had seen people there the same as I do everywhere, not every day, but frequently." Redirect examination: "People walk along the track at other points, at all points on the road. Did not notice any difference in the people walking along the track between the pumphouse and the depot at Pacific from what I saw at other points. At St. Clair when I received the telegram notifying me of the accident I examined my engine to see if I could find any signs. I found nothing, with the exception that the flagstaff was gone, and the little bolt that holds the flagstaff up. The flagstaff was on the left side of the engine, that refers to the south rail of the track." Recross-examination: "The flagstaff was not ahead. It was on the end sill. The headlight was burning at St. Clair."

Lee Ryan: "I am a fireman for the St. Louis & San Francisco Railroad Company, and have been for about two years and two months. I was working as fireman for Mr. Ramie at the time of the accident referred to, May 24th. When we came into the sand cut east of Pacific, or before we started in, we shut off steam, and I got on my side, the left-hand side, the south side of the engine. At the whistling board we whistled for town, and a little farther we whistled four blasts for the crossing. He pulled the bell and tolled it. I was there continuously from the time we whistled for town and the crossing until I got ready to get back on the engine. Up to the time that we whistled I was sitting on the left side of the engine looking ahead, looking for trains. Do not think we went over seven miles an hour through the sand cut, do not think it was that fast. When we passed the Frisco pumphouse our train was going about the same speed, or possibly a little slowed. I did not see Mrs. Everett or the parties she was with. Our headlight was burning. It was not dark long enough to notice it until we got into the cut. It was burning all the time until we got to the water tank, at the sand cut, and when we got to Pacific, and had been ever since we left where I lighted it. I did not see the Missouri Pacific train until I got to the water tank. I only heard it as we passed by. After their train passed us the smoke from the Missouri Pacific engine drifted over us and darkened it some in front of us and obstructed the view. It came in front of the headlight." Cross-examination: "I have no recollection of how long it took to make the run from Allenton to Pacific. The Missouri Pacific train was a freight train. I was on the left-hand side of our engine from the time it passed the sand cut to the Frisco pumphouse. I was not looking from the rear end of our engine to the Missouri Pacific train. I had nothing to do with the whistle. I rang the bell before we reached the crossing east of the pumphouse. I rang it till we

got to the crossing, and I started over the tank to get ready for water. I still rang the bell after we passed the crossing. I rang the bell at the pumphouse and afterward. I started to say that it was between the place where the Frisco pumphouse is now and where we took water at the east water tank that I stopped ringing and went back over the tank to take water. It was about 150 feet from the depot where we took water, about three car lengths. The whistle was not sounded after we passed the crossing. I know positively that Mr. Ramie sounded the whistle. He gave one long blast for the town and two long and two short blasts for the crossing. He gave blasts for the crossing about 200 feet east of the crossing. I lighted the headlight myself that evening. The first place I noticed it was when we got to the sand cut. I could see reflections in there. Before we got there it was not dark enough to see it. We never stopped between Chouteau avenue and Pacific. We reached Pacific at 8:15, as near as I remember. We had an ordinary coal oil headlight. The smoke from the Missouri Pacific engine was in my face all the way from this side of the sand cut, after they passed our engine until they got near the tank. I did not see Mrs. Everett or anybody at the pumphouse at the end of the track. I was looking ahead all the time, taking a general view along the track. The headlight was burning when we got into Pacific. At the crossing and the pumphouse we were going a little slower than through the sand cut. We shut off steam at the sand cut. I think it was done down below Valley Park Hill. He worked the steam down at the park and shut it off about Valley Park Hill. I did not know that anything had happened until we got to St. Clair, which is 17 or 18 miles from Pacific. I had seen people go on that track between Pacific and the sand cut. Have seen people walking all along between there and Allenton. I did not notice people walking along the tracks between the sand works and Pacific any more than between Allenton and the sand works, or anywhere else on the road." Redirect examination: "I see people walking along railroad tracks every day at any place on the road, at all points."

James T. Kennedy: Direct examination: "I live at Pacific and have lived there 29 years. I am an engine watchman for the St. Louis & San Francisco Railroad Company at that place; have been so employed for nearly two years. I was there on May 24th of this year, 1904. I saw the Frisco engine on the second section of No. 35 stop for water that evening at the water tank east of the depot at Pacific. I observed the train before it got there. I noticed the headlight was burning as it was coming into town. I observed that before it stopped. With an unobstructed view I could have seen that engine on the track 200 feet if it had not been light. I was about 400 feet from the engine

when I saw the headlight upon it." Cross-examination: "When I first saw this train that evening I was at the crossing west of the depot. The train was still moving. I noticed the headlight; saw it moving. I was standing directly in front of the train about 400 feet away."

A. M. Brown: Direct examination: "I reside at Pacific, and know where the Frisco pumphouse is, the new one. I know the public road crossing east of that. There is a culvert near the pumphouse. I have lived at Pacific three years. My house faces the railroad, and I have a plain view of the pumphouse and crossing and of the track that runs by the pumphouse, and of both tracks almost to the sand cut, which is east of the public road crossing. My home is about a quarter of a mile from the pumphouse. I was at home on May 24th last. I saw both trains coming in that evening. Both engines were coming towards me. In my first observation they were about even, but the Missouri Pacific engine was a little ahead. I saw the headlight on both engines. They were both burning. When I saw it I thought one had an electric lamp, and that the Frisco engine had an old-fashioned oil lamp. I thought the Missouri Pacific train was a passenger, because of the bright light. I saw both lights." Cross-examination: "I am a mail clerk on the St. Louis & San Francisco Railroad, employed by the United States government. I have been running on Frisco trains for the past four or five years. I am under no obligation to the defendant company. My residence is about a quarter of a mile from this pumphouse and three blocks north of the depot. I think a block there is 300 feet. That would be 900 feet north of the depot in addition to the railroad tracks and streets. I did not hear the bell ring upon the Frisco engine; do not remember hearing the bell of the Missouri Pacific engine. I could see the coal oil lamp, lighted. Looking from my residence I could see the train. The Frisco train stopped to take water at the east tank. I did not see this from the house, however. The tank is straight down from my house, and there are four or five houses between. That evening I was on the porch smoking, and I walked down town, and I found that the Frisco train was in there going on the siding. I was on the depot platform after the train got in. I left home when I saw the train coming round the curve. I saw the train coming from my house. I saw the Frisco train after I went down to the depot standing east of the tank heading on the siding. It pulled through the siding and I started home."

G. E. Fryman (recalled): "The red line south of the depot and the Frisco Railroad and running east, as far as shown on the plat, shows the line of defendant's right of way."

This was all the evidence in the case, and

at the close thereof defendant asked an instruction in the nature of a demurrer thereto, which was by the court refused, and to the action of the court in refusing same defendant duly excepted. Thereupon the plaintiff prayed the court to give to the jury the following instructions, numbered 1, 2, 3, 4, and 5: "(1) The court instructs the jury that under the law, if they find for the plaintiff, their verdict must be for \$5,000, and cannot be for more nor less than that sum if for plaintiff. (2) The court instructs the jury that if they shall believe from the evidence that Annie Everett, at the time she was killed, was the wife of plaintiff, and that this suit was brought within six months after her death, and shall further find from the evidence that at the time and place when and where the catastrophe occurred the defendant omitted to have placed in front of the engine drawing said train a headlight lighted up and burning, and that the place on defendant's track where deceased was struck by the defendant's train was about 200 feet west of a public road crossing over said track, and that the track, at the time, was in such condition and position for a distance from about 700 to 1,300 feet east of the point of the catastrophe that a person standing thereon or along the side of the outer edge thereof could have been seen by the persons in charge of said train, had they been in their proper posts and on the lookout ahead of them, and that said track at the place where said Annie Everett was struck and killed was frequently used by pedestrians in going to and from the city of Pacific, and the sand cut, tie chute, and Meramec river, and points between said places, that said Annie Everett, while standing upon defendant's track or along the side of the outer edge thereof, became in imminent peril of being struck by defendant's train, and defendant's employees in charge of said train, by the exercise of ordinary care, could have become aware of her peril and used the means at their command in time to have averted said injury to said deceased, and they failed to exercise such care and used the means at their command so as aforesaid, and that by reason of such failure to exercise such ordinary care said Annie Everett was struck and killed, then the jury must find for the plaintiff, though the jury may find the deceased, Annie Everett, was guilty of negligence in standing upon defendant's track or along the side of the outer side thereof, and by 'ordinary care' is meant such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances. (3) If the jury believe from the evidence that at the point on the track of the defendant where plaintiff's said wife was killed, if they believe she was then and there killed by defendant's train, said track was clear and unobstructed and sufficiently straight to permit a plain view along the track from any approaching train, and if the jury believe, fur-

ther, that at said point where said deceased was struck by the train the roadbed of the defendant, both east and west of said spot, was at that time used, and had for a long period of time prior thereto been used, with the knowledge of the defendant, its servants and employes, by pedestrians as a passway leading to and from the city of Pacific, then it was the duty of the employes of the defendant in charge of the train, when approaching such portion of the roadbed of the defendant as was used as aforesaid as a passway, to keep a lookout for persons and to ascertain that the track was clear. (4) And if the jury further believe from the evidence that the engineer or fireman in charge of the train which struck the deceased, if you believe from the evidence its said train struck the deceased then and there, might have seen her by the exercise of ordinary care on their part, and if the jury further believe from the evidence that the deceased was unaware of her peril and was standing upon the defendant's track or along the side of the outer edge thereof, unconscious of the approach of the train of the defendant, then it was the duty of such engineer or fireman to give her such warning by such a signal as was within his power, as could be likely heard and would be likely heard by any person possessing in an ordinary degree the sense of hearing in the position the deceased occupied. And if such signal was given and unheeded, then it was the duty of such engineer or fireman to use the means at his hand to have saved Annie Everett, when by the exercise of ordinary care he would have discovered her peril in time to have done so, and unless at the time of the injury the engineer and fireman in charge of said train used the means at their command to provide for the safety of the deceased, when by the exercise of ordinary care they or either of them would have discovered her peril in time to have saved her from injury, then the jury may find a verdict for the plaintiff in this case, although they may believe that the plaintiff's said wife was guilty of negligence in being upon the track of the defendant or along the side of the outer edge thereof and in permitting herself to be inattentive to the dangers surrounding her. (5) The court instructs the jury that three-fourths of your number may return a verdict in this case. If less than the whole of your number return a verdict, those of the jury who concur in the verdict must sign the same. If all of your number agree to the verdict, it may be signed by the foreman alone." The court gave said instructions numbered 1, 2, 3, 4, and 5, so requested by the plaintiff. To the giving of each of them the defendant then and there duly excepted at the time.

L. F. Parker, W. F. Evans, and J. G. Egan, for appellant. Jesse H. Schaper and W. L. Cole, for respondent.

WOODSON, J. (after stating the facts as above). 1. The first insistence of the ap-

pellant is that the trial court erred in refusing to give its instruction in the nature of a demurrer to the evidence, and assign three reasons therefor, namely: First, because the evidence shows that the deceased was a trespasser upon appellant's right of way at the time she was injured, and that it owed her no duty, except not to willfully and wantonly injure her; second, that the record contains no evidence which tends to prove appellant willfully and wantonly injured the deceased; and third, that the evidence shows that deceased was guilty of negligence which directly contributed to her injury, which should prevent a recovery in this case. We will discuss those three propositions in the order stated.

First. Under the evidence as disclosed by the record, can the court declare as a matter of law that at the time of the injury respondent's wife was a trespasser upon the right of way of the appellant? It is the contention of appellant that the undisputed evidence, as disclosed by the record, is that the deceased at the time she was injured was standing upon its right of way and within a few feet of the south rail of its railroad track, and that she was in no manner connected with or employed by the company, and that the record contains no evidence which tends to prove that she was rightfully there under a license or permission granted to her. If the record sustained appellant in that contention, then, according to the provisions of section 1105, Rev. St. 1899 (Ann. St. 1906, p. 945), and the repeated adjudications of this court, there could be no escape therefrom. The authorities principally relied upon by counsel for appellant as sustaining their position are the following: *Frye v. St. Louis, Iron Mountain & Southern Railway Company*, 200 Mo., loc. cit. 403, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; *Koegel v. Missouri Pacific Railway Company*, 181 Mo., loc. cit. 396, 80 S. W. 905; *Hyde v. Missouri Pacific Railway Company*, 110 Mo. 272, loc. cit. 279, 19 S. W. 483. In the *Frye* Case, the accident occurred in the country, between crossings, and where the track was fenced on both sides, together with winged fences and cattle guards, with notices posted up in several different places warning the people not to trespass upon the right of way. Under those facts this court held that the defendant had the right to expect a clear track, that the plaintiff, who was walking along the track, was, under this statute, a trespasser, and, being a trespasser, he had no right to complain of the absence of a headlight. The other cases cited express the same views. But counsel for respondent do not question the soundness of the law as enunciated in those cases, but earnestly maintain that they are not applicable to the facts of this case. In the case at bar, the undisputed evidence shows that the place of the injury was just at the outskirts of a city of 1,200 inhabitants, that the railroad right of way was not inclosed, that there was no sign

warning the people against trespassing upon the railroad property, except the one painted upon the exterior of the wall of the passenger station at Pacific, which was about 2,500 feet west of the place where the accident occurred, that the people of Pacific for many years had habitually used the right of way and track of appellant in going to and returning from the sand works, tie chutes, and boat landing, mentioned in the evidence, and that there was a well-defined footpath along and across the track where they walked upon these occasions, averaging from 20 to 25 daily, independent of those who used it in going to and from the boat landing, who were quite numerous. The evidence also shows that the engineer and fireman who were in charge of the engine upon this unfortunate occasion had knowledge of the fact that the track was so used by pedestrians, and both of them testified that they were on the lookout for persons and rang the bell and sounded the whistle to give warning to whomsoever might happen to be upon or near the track at that time. In discussing a strikingly similar case, in a very able and exhaustive opinion, written by Lamm, J., this court held that, where a railroad track was used by the public for a footpath, the question of license or implied invitation to so use the track was a question of fact for the jury, and that it was the province of the jury to determine whether or not those operating a train thereon, under the circumstances, had reason to anticipate the presence of people there. *Eppstein v. Missouri Pacific Ry. Co.*, 197 Mo. 720, 94 S. W. 967. The same rule is announced in the following cases: *Reyburn v. Railroad*, 187 Mo. 573, 86 S. W. 174; *Fearons v. Railroad*, 180 Mo. 222, 79 S. W. 394; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Chamberlain v. Railroad*, 133 Mo. 587, 33 S. W. 437, 34 S. W. 842. In the *Morgan Case*, it was held: That it did not follow, because the statute declares one walking upon a fenced railroad track to be a trespasser, that every such person was a trespasser; that usage and custom could not repeal a statute, but might change the condition of the thing on which the statute operates; and that if the railroad company for many years acquiesced in its track being used as a footpath by the community and permitted steps over its fence to stand as a permanent invitation to them to walk on its track, it could not take refuge behind such statute in a suit to recover damages for personal injuries received by the plaintiff through the negligence of the servants in charge of the train while he was walking along the track of the company. According to the law as announced in this class of cases, we are unable to declare as a matter of law that respondent's wife at the time she was injured was a trespasser upon the right of way of the appellant, but are of the opinion that it was a mixed question of law and fact, which was

rightfully submitted to the jury under the instructions of the court.

The second reason assigned by appellant in support of its contention that the court erred in refusing to give its demurrer to the evidence is that the record totally fails to show any evidence which tends to prove that their agents and servants in charge of the train wantonly or willfully ran the engine against the deceased and thereby injured and killed her. Under the view we have taken of this case in paragraph 1 of this opinion it is wholly immaterial whether they recklessly and wantonly ran the engine against her or not. That doctrine only applies to cases where the injured party was a trespasser upon the track at the time of the injury, and at a place where the agents and servants in charge of the train had no notice or reason to apprehend that any person would be present at the place where the injury occurred. *Frye v. Railway Co.*, supra; *Engleking v. Kansas City, Ft. Scott & Memphis Railway Company*, 187 Mo. 158, 86 S. W. 89. The mere fact that the petition charges that the injury was willfully and wantonly caused by the agents and servants in charge of the train will not prevent a recovery, provided the evidence shows that the injury was the result of their negligence and carelessness. The charge of willfulness is sustained by proof of negligence. *Owens v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 95 Mo. 169, loc. cit. 182, 8 S. W. 350, 6 Am. St. Rep. 39; *Brown v. Railroad*, 66 Mo. 583; *Nelson v. Railroad*, 85 Mo. 605; *Graham v. Railroad*, 66 Mo. 538; *Lange v. Missouri Pacific Ry. Co.*, 208 Mo. 458, 106 S. W. 660.

The third and last reason urged by appellant in support of its contention that the action of the court in refusing its demurrer to the evidence is that the evidence shows that plaintiff's wife was guilty of such negligence that directly contributed to her injury as should prevent a recovery even though it be conceded that its agents and servants in charge of the engine which struck and killed her were guilty of negligence in failing to ring the bell or sound the whistle, or to have the headlight of the engine burning, or in failing to properly look out for persons upon or near the track at the time and place where she was killed. Now, what are the acts of contributory negligence of which counsel for appellant complain? Briefly stated, they are as follows: Deceased, a lady in full possession of all her faculties, and on May 24th, about 8 p. m., was returning from a fishing and pleasure trip on the Meramac river, with her husband and her niece, and the Reverend Mr. Wright and his wife. She and the two ladies mentioned alighted from the boat and proceeded homeward, along the footpath before mentioned, which led along and across the right of way and the track

of appellant, while the two gentlemen who accompanied them on the trip tarried to tie up the boat. About the time the ladies reached the point where the path crossed the railroad track, they heard a train coming from the east, and they stepped back to the south side of the track, and in a very short time a train passed them going west, presumably the first section of appellant's freight train, which was due at Pacific about 7:20 p. m. Immediately after this train passed, all three of them lined up along the end of the ties in the edge of the gravel, on the south side of the track, facing north, but looking east for another train, which they heard approaching from that direction. Shortly after this alignment, and while standing there, a freight train with a bright headlight on the Missouri Pacific track hove around the bend in the track. That was an electric light and was very bright, which attracted their attention, but it did not, however, so absorb their minds as to prevent them from looking down the track of the appellant also to see if there was an approaching train. While they looked down appellant's track to see if there were any approaching trains, yet it was perfectly clear from all the evidence that none of the ladies saw or heard the approach of the train which struck and killed Mrs. Everett. The evidence shows that the accident occurred about 8 o'clock p. m., which was between twilight and dark, yet sufficiently light for persons and objects to have been seen and distinguished from 200 to 400 feet. (By making an investigation, I found that on May 24th, the day on which the accident occurred, the sun set at 7 o'clock and 13 minutes.) The reason why none of the ladies saw or heard the train is left somewhat to conjecture. The two survivors, however, testified that the bell was not rung nor the whistle sounded as it approached, which was so quick and so sudden that it passed them before they were able to realize what had occurred. We gather from the whole record that the brilliancy of the electric headlight on the Missouri Pacific engine largely engaged their attention, while in the rather shadowy twilight the train of appellant suddenly and swiftly swung around the curve in the road, somewhat obscured by the smoke from the Missouri Pacific engine, unobserved, at a rate of speed of about 52 feet a second, and struck and killed Mrs. Everett before any of them were aware of its approach. These are the facts which counsel for appellant say constituted contributory negligence on the part of Mrs. Everett. It must be conceded that it was negligence for the ladies to stand so close to the track when they were looking for approaching trains, and it must be also conceded that the deceased could have seen the approaching train had she used ordinary care in looking for it. The plaintiff's evidence shows that, while it was

somewhat dark at the time the injury occurred, yet it also shows that, by looking, persons and objects could have been seen and recognized from 200 to 400 feet. If the foregoing were all the facts in the case, then there would be no question but what the plaintiff should not recover; but they are not all the facts of the case, as disclosed by the record. Counsel for respondent in his petition and brief concedes the negligence of Mrs. Everett, yet they earnestly contend that, notwithstanding her negligence, the appellant, by the exercise of ordinary care, could have avoided the injury, and, having failed to do so, it is liable to plaintiff, notwithstanding the negligence of his wife. They point out the evidence which tends strongly to prove: That the train which struck and killed Mrs. Everett was racing with a Missouri Pacific train from Allenton to Pacific, and was running about 35 miles an hour; that the bell was not rung nor the whistle sounded; that there was no headlight upon the engine; that by the exercise of ordinary care the agents and servants of appellant could have seen the dangerous position in which the ladies had placed themselves in time to have warned them of the approach of the train, or to have stopped or slackened the speed thereof in time to have prevented the injury; and that running the train at the rate of speed along and across the footpath mentioned, where they knew many persons were continuously passing, without a headlight and without ringing the bell or sounding the whistle, was negligence.

These facts, according to the law as declared by the repeated adjudications of this court, make out a prima facie case for the jury. In discussing this same question in the case of *Eppstein v. Missouri Pacific Ry. Co.*, 197 Mo., loc. cit. 734, 735, 736, 94 S. W. 971, in a well-considered case, Lamm, J., with remarkable clearness, stated the law as follows: "In this case it is stoutly affirmed on one side, and as stoutly denied on the other, that the latter principle applies to the facts. Does the principle apply? We think it does. In a given case there might be such scant or neutral evidence of public user of a portion of a track—mere sporadic instances thereof—that a court, as a matter of law, would determine that the servants of a railroad company charged with the running of a locomotive engine had no duty to look and see. In such case, unless they did see the dangerous exposure of a person on the track, and in time to avert injuring him by the use of ordinary care, the court would take the case from the jury. On the other hand, there might well be a case where the public user of a portion of the track by pedestrians was so constant, so pronounced, so manifest and uncontradicted that there could be no two opinions about it among reasonable men, and the court, as a matter of law, might assume that locomotive operatives owed a duty to the public to be on

the lookout there. Then, too, there might be a case lying between said extremes, and in our opinion this is one, where the use by the public of the track was of such sort that it became a mixed question of law and fact whether those running a locomotive engine had reason to anticipate the presence of people, and in such case that issue should be submitted to the jury, as a fact to be determined by it. Liability in each instance is predicated of knowledge or notice of the user. Such notice may be proved by the existence of paths well worn by human feet, and by gaps, stiles, and gates appurtenant to such path, by the long continued going to and fro of people more or less constantly, and by the proved presence of schools, places of recreation, etc., and the use of the track by visiting pedestrians and habitués, all of which elements are presented in this case to an extent of each significance as made the issue, in our opinion, one for the triers of fact to decide. Confronted by the evidence indicating notice and knowledge, appellant remained silent, and in the practical administration of the law the everyday significance of that silence should not be ignored. Assuming, then, as found by the jury, that Mr. Eppstein was killed at a place where appellant's servants had reason to anticipate the presence of people on its track, appellant is confronted with the duty of using ordinary care to see and ordinary care to prevent injuring him. How was that present and humane duty performed? It was not performed in this instance, because the ordinance requiring a bell to be rung was disobeyed. Because, moreover, appellant's servants, had they seen Mr. Eppstein, would have had no call to assume that he heard the notice of their train, or would step from the track to avoid danger. And this is so for the reason that the mere running noise of their train might well be submerged in the greater running noise of the heavy freight on the adjoining track. It is so for the further reason that his attitude, his arm, his hand, the direction of his vision, would demonstrate to any reasonable man that he was quite engrossed in the passage of the Missouri, Kansas & Texas train and oblivious of all else. Appellant's servants with plenty of space and plenty of time to see, with no obstruction in the way of seeing, warned by his preoccupied attitude and conduct of the fact that he was oblivious of their approach, owed him, we think, the simple and easy duty to tell him they at once purposed occupying the identical spot he was on with their ponderous engine. This is not requiring anything extraordinary at their hands—a twist of the wrist would have done it, presumably. Indeed, the absence of all warning signals, by whistle or bell, would indicate to us, as a charitable view, that they did not see him, but were possibly doing precisely what he was doing, namely, watching the Missouri, Kansas & Texas train, and the silence of the appellant in this particular, when confronted by the

evidence in this case pertaining to the straight track, the peculiar attitude of this venerable man at the time he was struck and before, and the other facts in proof, must be held to indicate either an inability or an indisposition to controvert respondent's array of facts. That this case should have been allowed to go to the jury we think is within the reasoning of many of our decisions, of which a sample must suffice: *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195, and *Fearons v. Railroad*, 180 Mo. 206, 79 S. W. 394—where the cases are reviewed, differentiated, and applied. See, also, the remarks of Gantt, J., *arguendo*, in *Scullin v. Railroad*, 184 Mo., loc. cit. 705 and 707, 83 S. W. 760."

In the case of *Fearons v. Kansas City El. Ry. Co.*, 180 Mo., loc. cit. 222, 223, 79 S. W. 397, 398, Fox, J., in discussing this question in his strong and able style, stated the rule in this language: "The principle involved in the case at bar is by no means a new one in this state. This court, in a number of cases, has given expression in no doubtful terms to its views upon the subject. A careful examination of the Missouri cases, where similar questions have been involved, will demonstrate clearly a line of demarcation between the two contentions. The doctrines announced in the two lines of decisions are not in conflict; but the principles are correctly declared, as applicable to the facts in each case. These rules, as to the care and caution to be exercised by operatives of railways, spring from the dangerous character of the business. The law has a right to demand, in the operation of railways, whenever the person or life of an individual is in danger, the exercise of such reasonable care and caution as will avoid the infliction of injury. It is sought, in the announcement of legal principles, to make the application of the rules upon this subject reasonable both as to the railways and the public. From the application of these reasonable rules springs the distinction made manifest by the decisions, not only of this court, but, as well, in other jurisdictions. The distinction drawn by this court may be briefly stated thus: That, whenever the motorman or engineer in the operation of its cars, before reaching a point along the line of its railway, has reasonable ground to expect or anticipate the presence of persons so near the railroad track as to endanger them, then the law, through its high regard for the preservation of human life, requires and demands such operatives to be on the alert, and to keep a lookout for the realization of the anticipation or expected presence of the person. Of course, this rule requires that the facts surrounding the given case shall be of such character as would warrant any reasonably prudent man to expect or anticipate the presence of the persons at the point on its road, and the burden of establishing these facts rests upon the party alleging them. On the other hand, the operatives of a railway are entitled to the presumption that there is

a clear track, and, while care and caution should be exercised in the operation of their trains, they are not responsible to trespassers for failure to be on the alert to discover them, in the absence of any reasonable grounds for the expectation or anticipation of their presence on the track. In other words, they are not specially required to look out for persons who have no right to be there and whose presence was neither expected nor anticipated. Under those circumstances, the liability results from a wanton and reckless injury inflicted, after the discovery of their presence. But, again, if it is at a point where there is reasonable ground for expecting or anticipating the presence of persons, the presumption of a clear track is destroyed, and, even though the persons be trespassers, it does not relieve those in charge of the moving cars from keeping a careful lookout for the person so expected to be present at that point. There was sufficient testimony in this cause, at least, tending to show a state of facts, in respect to the use of this tunnel as a foot passageway, from one section of the city to the other, as would authorize the submission of the case to the jury."

And in the case of *Reyburn v. Railroad*, 187 Mo., loc. cit. 573, 574, 86 S. W. 176, Valliant, J., states the rule with equal clearness in the following language: "It has long been the doctrine of this court that, though a man voluntarily adopts the dangerous track of a railroad for his footpath and walks in it apparently heedless of the danger entailed, yet if the servants in charge of the locomotive see him and realize his danger (or, under some circumstances, when they ought to see him, if they do not), it then becomes their duty to exercise ordinary care to do what they can with the means then at hand to avoid injuring him, and, if they fail in that duty, the railroad company is liable, notwithstanding the negligence of the injured man. Some of the cases in which this doctrine is declared are: *Kelny v. Railroad*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Klockenbrink v. Railroad*, 172 Mo. 678, 72 S. W. 900; *Hinzeman v. Railroad*, 182 Mo. 611, 81 S. W. 1134."

And the Kansas City Court of Appeals, through Judge Johnson, in the case of *Cole v. Metropolitan Street Ry. Co.*, 121 Mo. App., loc. cit. 612, 97 S. W. 557, has well expressed the rule in the following language: "The principles of right and justice do not tolerate the idea that the negligence of the person imperiled involved in his act of placing himself in position to be injured without giving proper heed to his own safety can co-operate with the negligence of one who, comprehending his danger, or being in a position to comprehend it by the use of ordinary care, and having at hand the means and opportunity of avoiding it, fails to reasonably employ them, and by such failure inflicts an injury. Such negligence engrosses the entire field of cul-

pability and eliminates contributory negligence as a factor in the production of the injury. It logically follows, from the principles stated, that the issue of negligence in the performance of the humanitarian duty must be governed by the rules applicable to ordinary negligence. The determinative question in such cases is: Did the operators of the car use ordinary care to ascertain the peril of the plaintiff and to avoid the injury after they discovered it or should have discovered it? In some of the decisions of the Supreme Court the idea appears to be expressed that, in order to find a defendant guilty of a breach of the humanitarian rule, the elements of wantonness and willfulness must appear in its conduct; but, as we have attempted to show, the mere failure to observe ordinary care in situations of this character is of itself a wanton act, since it is abhorrent not only to fundamental principles of law, but to the dictates of common humanity. The views expressed are supported by the weight of authority in this state, including the most recent decisions of the supreme and appellate courts. *Moore v. Transit Co.*, 194 Mo., loc. cit. 411, 412, 413, 91 S. W. 1060; *Rodgers v. Transit Co.*, 117 Mo. App. 678, 92 S. W. 1155; *Eppstein v. Railway*, 197 Mo. 720, 94 S. W. 967; *Ross v. Railroad*, 113 Mo. App. 600, 88 S. W. 144."

These are but samples of the many cases that abound in our reports announcing the law as above stated, and there can be no question but what that rule is applicable to the facts of this case. Both the engineer and fireman who were in charge of the engine which struck and killed Mrs. Everett testified that they knew people were in the habit of using the track in passing to and from their work and to and from the boat landing. I copy the following from the evidence of Mr. Ramle, the engineer, as printed by counsel for appellant on page 46 of their abstract of the record, viz.: "I have been acquainted with the defendant's railroad at Pacific for about 14 years. I know the surroundings there, the pumphouse, tie chutes, and sand works. I know the people work there. Have seen people upon our track walking to Pacific and to the sand works and tie chutes and the Meramec river. I cannot say I know where they were going, but I have seen people in the track there. I know that on May 24, 1904, I looked out along there everywhere on the railroad. That is my rule. There was no difference in this particular instance." And the evidence of Mr. Ryan, the fireman, was substantially the same as that of Mr. Ramle. It is made perfectly clear from their evidence that they not only had reason to apprehend the presence of persons upon their track at the point where Mrs. Everett was killed, but that both the engineer and fireman who were in charge of the engine which struck her had actual knowledge that the people of Pacific had for years been in the habit of using the track at that place in

going to, and from their places of work and also to and from the river; and, not only that, both of them testified that on that account they were upon this occasion looking to see if any one was upon or near their track, and that they saw no one, and actually had no knowledge of the fact that they had killed Mrs. Everett until they reached St. Clair, the next station west of Pacific, where they were informed of the unfortunate incident by telegram. If the facts were as the evidence of respondent tended to show they were, namely, that the trains were racing, that appellant's engineer and fireman knew of the constant use of their track by the people of Pacific at the place where Mrs. Everett was killed, that the engine had no headlight burning, that the bell was not rung nor the whistle sounded, and that persons could have been seen and distinguished from 200 to 400 feet at the time of the injury, then the conduct of appellant's employes amounted to gross negligence, and, were we called upon to weigh the evidence, we would have no hesitancy in saying that it preponderates in favor of the respondent. In the case of *Becke v. Railroad*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157, where the facts of the case were strikingly similar to those of this case, this court, in speaking through Brace, J., on pages 551 and 552 of 102 Mo., page 1055 of 13 S. W. (9 L. R. A. 157) used the following language: "But it is not possible that reasonable minds could come to any other conclusion than the failure of those having in charge a passenger train, running through a populous country, at the rate of 25 miles an hour, approaching a crossing near the suburbs of a city, in the night, on a dark night, to have the headlight of the engine lighted and burning was an act of negligence. This is a common and necessary means adopted by all railroad companies for the protection alike of those rightfully on the train, and on the track, or approaching it in the nighttime. No engine is constructed without such a light, and no train is run in the nighttime by any railroad company under any ordinary circumstances without having it lighted. This is a fact known to all reasonable minds by common experience, and the court committed no error in declaring that it was negligence if the defendant's servants failed to have such light lighted and burning at the time of the collision. It is the duty of those approaching a railroad track at a public crossing in the nighttime to look that they may see an approaching train, and the corresponding duty is imposed upon the employes of the railroad company to have the

light burning by means of which the approach of the train may be seen by those whose duty it is to look." We are therefore of the opinion that, not only the negligence of the deceased should not have prevented a recovery in this case, and that the action of the court in refusing appellant's demurrer to the evidence upon that ground was proper, but also that the jury was amply justified in finding that issue for the respondent, and also that, notwithstanding her negligence, the injury would not have happened if the agents and servants of appellant in charge of said engine, after they discovered, or by the exercise of ordinary care could have discovered, the perilous position in which she had placed herself in time to have warned her of the approaching train, or in time to have stopped or slackened the speed thereof in time to have averted the injury.

2. Counsel for appellant have presented many objections to the instructions given by the court on behalf of the respondent. We have set out the instructions in full, and have carefully considered each and all of the objections thereto, which we think are more technical than substantial. By reading the instructions in the light of the cases cited under the third subdivision of paragraph 1 of this opinion, and the quotations made from some of them, it will be seen that they declare the law to the jury in the spirit in which it is there expressed by this court.

3. It is finally insisted by counsel for appellant that the court erred in refusing to permit it to show that the plaintiff had the Reverend Mr. Wright subpoenaed as a witness in the case of his behalf, that he was in the courtroom in response there during the progress of the trial, and that he was not called as a witness. Counsel for appellant have not pointed out to us in what way that evidence was material, nor are we able to see its materiality. It tends neither to prove nor disprove any issue in the case. Besides, all the evidence regarding Mr. Wright shows he was at the boat landing with respondent at the time the accident occurred, and he saw nothing whatever of the occurrence. We are therefore of the opinion that the action of the court in that regard was not error.

For the reasons before stated, we are of the opinion that there was no error committed during the progress of the trial, and that the judgment is for the right party, and should be affirmed.

It is so ordered. All concur, except VALLIANT, P. J., absent. LAMM, J., concurs in result.

FLOWERS v. SMITH.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. PLEADING — MOTION TO STRIKE AMENDED PETITION—WAIVER.

A defendant answering over to the amended petition, after the overruling of a motion to strike out the same, on the ground that it changes the cause of action, cannot avail himself of the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1426.]

2. SAME—MOTION TO REQUIRE PLAINTIFF TO ELECT.

The overruling of a motion to require plaintiff to elect on which one of several causes of action pleaded in a single count he will proceed to trial, filed before answering to the merits, is, on exception, reviewable on appeal, though after the ruling defendant answered to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1426.]

3. SAME—CAUSE OF ACTION—ELECTION.

Where the petition improperly joins in one count different causes of action, defendant may require plaintiff to elect the charge on which he will seek a recovery and dismiss the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1199.]

4. LIBEL AND SLANDER—PETITION—MISJOINDER OF CAUSES OF ACTION.

A petition, in libel for newspaper publications, which sets forth in one count publications made at different times, as to plaintiff's action in appointing a clerk for a city, to his denial of a petition for a correct census of the city, to his mismanagement of the electric light and water plants of the city, and to his closing of the saloons on Sunday, improperly joins different causes of action in one count, though libels may be joined in one petition in different counts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 185.]

5. JUDGMENT—MISJOINDER OF CAUSES OF ACTION—OBJECTIONS—MOTION IN ARREST.

The improper joinder of causes of action in one count in the petition is open to defendant in motion to arrest after a trial on all the causes of action and a simple verdict in favor of plaintiff.

6. TRIAL—VERDICT—CONFORMITY TO PLEADING—DEFECTIVE COUNTS.

Where the petition contains several causes of action stated in separate counts, one of which is bad for insufficiency in statement, a general verdict for plaintiff on all the counts will not be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 779.]

7. SAME.

Where several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of plaintiff is rendered, and one or more of the causes of action is bad so as not to support the verdict, the verdict is bad as to all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 779.]

8. LIBEL AND SLANDER—REFERENCE TO PLAINTIFF IN DEFAMATORY MATTER—QUESTION OF FACT.

Where the defamatory matter complained of in libel points to no person in particular, it is a question of fact whether it applies to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 360.]

9. SAME—ANSWER—ADMISSIONS.

Where, in libel for newspaper articles, some of which did not point to any person, and some

of which precluded the idea that plaintiff was the person intended, the answer was a general denial and a special defense averring that defendant in publishing the articles reflecting on the official conduct of plaintiff acted in good faith and after inquiry as to the truth of the matters stated and with the belief that they were true, and alleging that the articles were substantially true, defendant did not admit that the articles complained of referred to plaintiff, and an instruction that defendant admitted the publication of the articles of and concerning plaintiff and justified the publication, by alleging that the charges made against plaintiff were true, was erroneous.

10. SAME—PLEADING—STATUTES.

Under the statute declaring that in an action for slander it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application of the defamatory words complained of, but it shall be sufficient to state generally that the same was published concerning plaintiff, the extrinsic facts, when not embraced in the imputed words, to show their meaning and the character of the person to whom applied, must be stated as at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 187-197.]

11. SAME—ARTICLES LIBELOUS PER SE.

Articles, published in a newspaper called the "Democrat," referring to another paper called the "Empire," reciting that the Empire seemed to take it for granted that it could say what it pleased, that it made charges against the Democrat without foundation, that in regard to the appointment of a city clerk the Democrat had stated that good lawyers differed in their view as to the act governing cities, that the Empire stated that the electric lights should be dispensed with and a bridge built, that some preferred darkness to light, and inquiring why the mayor (plaintiff) did not think the readers of the Democrat worthy of consideration when he gave his notice of a city election, and averring that some of the people of the country were indignant over the scheme of taking the census of the city, etc., are not libelous per se as to any person, and, in the absence of extrinsic facts showing that the articles imputed any crime or conduct to plaintiff rendering them libelous, were not actionable.

12. SAME—EVIDENCE—INSTRUCTIONS.

Where, in libel for newspaper articles, some of which did not refer to plaintiff, there were no averments to show that he was referred to, an instruction that, unless the jury believed that all the charges in the publication were true, they should find for plaintiff, unless they believed that none of the charges were libelous, was erroneous as misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 366.]

13. SAME.

Where, in libel for newspaper articles, some of which did not refer to plaintiff, and some of which were not libelous per se, there was no averment of extrinsic facts that the articles referred to plaintiff or any innuendo from which it could be inferred that they charged plaintiff with such conduct as to render it libelous per se, an instruction that "malice" means the intentional doing of a wrongful act without excuse, and that if the articles published were libelous in whole or in part, and were published concerning plaintiff, and were not true, the law presumed that they were published maliciously, and it was not necessary to prove any malice to warrant a verdict for plaintiff, was erroneous, because it did not confine the presumption of malice to the articles which were libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 369.]

14. SAME—ARTICLES NOT LIBELOUS PER SE—PROOF OF DAMAGES.

Where the libel complained of is not libelous per se, it is necessary for plaintiff to allege and prove damages before he can recover.

15. SAME — PUNITIVE DAMAGES — INSTRUCTIONS.

Where, in libel, the plaintiff demanded compensatory and punitive damages, and the evidence showed the good faith of defendant in making the publications complained of, an instruction that the jury should disregard evidence of good faith, or defendant's belief of the truth of the charges based on information or reports of others, was erroneous for failing to authorize the jury to consider the evidence of good faith in mitigation of exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 369.]

16. SAME—EVIDENCE—ADMISSIBILITY.

In libel, the circumstances concerning the publication complained of and the information on which defendant acted in forming the views expressed therein, showing his good faith and want of malice, are competent on the issue of exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 284.]

17. TRIAL—EVIDENCE—REBUTTAL.

In libel, evidence that a witness went to defendant and requested him to cease publishing things reflecting on plaintiff, and that defendant said he thought that plaintiff had done defendant wrong, was not competent in rebuttal.

18. LIBEL AND SLANDER—EVIDENCE.

In libel for newspaper articles referring to another newspaper, evidence of defendant explaining the articles as in reply to articles in the newspaper referred to was competent.

19. SAME.

A defendant, in libel for newspaper articles which made no reference to plaintiff, may show that the articles were not intended to refer to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 282, 283.]

20. SAME.

In libel, referring to the action of plaintiff, as mayor of a city, regarding his denial of a petition for a correct census of the city, under Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), providing for a census to determine whether or not the city shall be governed by the provision thereof, etc., the exclusion of evidence discrediting the census taken which was taken without taking names and making returns of the lists thereof, and without entering the result on the records of the city, as required by the statute was erroneous, for, though defendant could not libel plaintiff in regard thereto, he had the right to discuss the question whether the census taken was properly taken, and it was competent in mitigation of damages to show that the enumerators erred in taking the census.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 321-323.]

21. EVIDENCE—HEARSAY.

In libel, referring to the action of plaintiff, as mayor of a city, in denying a petition for a correct census thereof, under Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), the testimony of a witness as to statements made to her was incompetent to discredit the census taken, unless she could testify of her own knowledge that the enumerators actually counted persons who were not residents of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1189.]

22. CENSUS—MUNICIPAL CENSUS—STATUTES—COMPLIANCE.

Where the affidavits of the enumerators taking the census of a city as authorized by Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), pro-

viding for a census to determine whether a city shall be governed thereby, were the only matters on file in the office of the city clerk, and no action was taken by the council accepting and approving the report of the enumerators and spreading the same on the record, as required by the statute, the requirements of the statute were not complied with, and the affidavits were not prima facie evidence of the correctness of the census.

23. JUDGMENT—MOTION IN ARREST—DEFECTS IN PLEADING.

Where plaintiff in libel joined 18 independent libels in one count, and 5 of which were wholly insufficient to support a verdict, a general verdict for plaintiff could not be sustained as against a motion in arrest.

Appeal from Circuit Court, Lawrence County; F. C. Johnston, Judge.

Action by D. S. Flowers against J. C. Smith. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Joseph French and Wm. B. Skinner, for appellant. W. Cloud, J. M. McPherson, R. H. Landrum, and R. H. Davis, for respondent.

GANTT, J. This is an action for libel, commenced and tried in the circuit court of Lawrence county. The defendant was the editor and proprietor of the Pierce City Democrat, a daily and weekly newspaper printed and published in Pierce City in said county. The petition covers 16 pages of printed matter and contains in 1 single count 18 independent and distinct alleged defamatory publications of and concerning the plaintiff by the defendant. A proper conception of the case can only be gained by the reproduction of this petition in full, however desirable it may be that a summary of it should be made so as to not incumber our reports with unnecessary matter. The case was tried upon an amended petition, which is in words and figures as follows:

"Plaintiff for amended petition herein says that the defendant, J. C. Smith, published of and concerning the plaintiff, in the Pierce City Democrat, a daily and weekly newspaper regularly printed and published in Pierce City, Mo., the following false, defamatory, and libelous matters, to wit:

"The Pierce City Democrat, June 8, 1905: 'The Empire seems to take it for granted that it can say just what it pleases, and it does. It makes charges against the Democrat which it has no foundation in truth to sustain. In regard to the city clerk business, we stated the case frankly and said that good lawyers differed in their views as to the new act governing cities of our class. Mr. Flowers and his advisers claim he has the right to appoint city clerk. Mr. Mayhew and his friends claim otherwise. He also has the opinion of able lawyers to sustain him, so there you have it.'

"Same issue: 'Was there any politics in the election of Mr. Essex city clerk? The city never had a better clerk than they turned down to put him in, and of course there

is no politics in the present contention for the office; so "My side" says.'

"The Pierce City Democrat, June 10, 1903 (page 1, col. 3): 'Dispense with the electric light plant and build a bridge, says the Empire. Some prefer darkness to light. We say turn on more light that the people may see the official acts of our administration.'

"Same issue (page 4, col. 3): 'A little patronage cuts no figure with the Democrat when it comes to principle. While we prefer to have the good will of every one, we will never sacrifice principle to do it. "One who knows" opened on the Democrat in Thursday's Empire in a very ungentlemanly manner. Because we answered him in a more mild way, he flies into a passion and says stop his paper and advertisement. A man who is that weak morally is unfit to be mayor of a city like Pierce.'

"The Pierce City Weekly Democrat, June 12, 1903 (page 7, col. 2): 'The communication in the Empire yesterday signed by "One who knows" misrepresents the Democrat. He says we misstated the facts. We did not go into the full details of the matter in regard to electing city clerk, from the fact that there was a difference of opinion as to the law points governing the case. Good lawyers hold opposite views about it. So far as we spoke upon the subject we stated the case as it took place. There was no twisting of the facts to suit "My side." Democracy believes in the majority ruling, and Mr. Mayhew was elected by a majority of the board of aldermen. If not, why were the book and papers turned over to him? "One who knows" seems to have very poor judgment of what constitutes a Democrat. His "partisan Democrat" is just about as much a Democrat as he is.'

"The Pierce City Daily Democrat, July 3, 1903 (page 1, col. 6): 'The city will be without lights. The smokestacks at the electric plant fell with a crash this morning. It was burnt and rusted out, and the wind laid it flat. This means that the city will be without lights for about ten nights, as it will take at least that time to get a new smokestack. We are told that other parts of the machinery of the plant are in very bad shape and liable to collapse at any time. The entire plant needs overhauling and fixing, but the wise business administration of our mayor is to build a bridge we do not need, and let the city's property that cannot well be dispensed with go to rack and ruin. The Democrat called attention to the condition of the electric plant, but the policy is to do nothing along that line until forced to it by complete breakdowns. The people of Pierce City can now sit in the dark and think these things over.'

"The Pierce City Daily Democrat, March 10, 1904 (page 4, col. 3): 'The mayor has ordered Marshal Tucker to see that the saloons are all closed on Sunday and blinds raised. Our people should remember that it is only a

few weeks until Election Day in Pierce City and not be fooled. This is only for effect. It is strange that after nearly two years in office our mayor should give this order just before election time. What fools we mortals are.'

"The Pierce City Democrat, March 11, 1904: 'Why is it that our mayor did not think the readers of the Democrat worthy of considering when he gave his notice of the city election? Ever since we have been in the newspaper business in Pierce City, the election notice has always been published in both papers. This is another fact where our mayor showed his littleness.'

"The Pierce City Democrat, March 16, 1904: 'It is said that no man can be elected to office in Pierce City that the saloon men won't support. What a record for our town! Men, voters, how do you like this medicine? The boast is made, and it is up to you to do something. Be men and vote for principle.'

"The Pierce City Daily Democrat, May 3, 1904 (page 1, col. 5): 'The city council met last night. Mayor Edwards was not in the city. The elected officers present were sworn in. The usual monthly bills were passed and ordered paid. The census returns, as reported by those sent out to do the work, showed 2,530, but it is said they went to the country in order to raise it to that number. The scheme was well planned and carried out. It was ground hog case. They had to have enough to get out of the woods even if they had to take to the woods to do it. Will it work?'

"The Pierce City Daily Democrat, May 5, 1904 (page 1, col. 4): 'Is there any Count Rodman in Pierce City? Blocks of five, addition and silence. The people must keep silent. The king is on his throne.'

"Same issue (same column): 'To be frank with the people, why was not the census taken in the right manner? Not a name was taken, and we were told by a number of citizens that no one of those sent out to take the enumeration ever called at their home or asked them any questions as to how many they had in their family. They also went to the hotels and took the number of every person stopping there. There is a right and a wrong way of doing things. Our people are willing to abide by the truth, but they are from Missouri and must be sight.'

"Same issue (same page, col. 5): 'We are told by responsible parties, who have taken the enumeration of school children, that it has fallen in number for the last several years. Yet our population, according to the recent census, has increased rapidly. How can you explain it?'

"Pierce City Daily Democrat, May 5, 1904 (page 4, col. 4): 'There was a great kick at the city council Monday night over the question of extending the waterworks in the Fourth Ward to parties that wanted the service. Some said they did not believe in going outside the corporation limits to supply wa-

ter to the country people, but at the same time the census board had gone out to the country to help swell the enumeration for the machine and that was all right and perfectly legitimate, in their estimation. Oh, consistency, thou art a jewel.'

"The Pierce City Daily Democrat, May 11, 1904 (page 1, col. 4): 'Some of our citizens say they do not know whether they live in Pierce City or not. On some occasions they are in, on other occasions they are not. It is kind of a new shell game. Now you see it; now you don't see it.'

"Same issue (same page, col. 5): 'It is very convenient to have an elastic corporation line. When the powers that be want to run a scheme, they can stretch it out and take in territory enough for their purpose. But when people living in that strip thus taken in want city water, the elastic lines suddenly flies back and shut them out of the corporation.'

"Same issue (same page, col. 6): 'Some of the people of the country are very indignant over the scheme of taking the census of Pierce City. They live near to nature and nature's God and are quick to see and resent a wrong.'

"The Pierce City Democrat, May 6, 1907: 'Marshal Alsop tells us he simply obeyed in the matter of taking the census. We believe all that were sent out to do the work did the same. The Democrat finds no fault with them. They were instructed to take no names, not even the head of families. It was an urgent matter; no time to take names. Why was it so urgent? Those who concocted the scheme can better explain than we can, and the people would like for them to do so.'

"The Pierce City Daily Democrat, May 13, 1904 (page 1, col. 4): 'There is a deep feeling working among our people that something ought to be done to advance the interests of Pierce City; to increase our population; to put business life into active operation; to bring about a unity of feeling among our citizens; to stay the power of dissatisfaction that exist over the evil influences that are at work to overthrow the letter of the law and good government, against the will of the people. Bosses should be retired. The man or set of men who get out and boycott every one who has a moral opinion and dare to advocate and stand by it is an enemy to our government and a traducer of good society.'

"Same issue (page 7, col. 1): 'The scheme of taking the census was so urgent and important to have it completed by Monday night that the mayor put in considerable time last Sunday consulting with his lawyers.'

"The Pierce City Daily Democrat, May 15, 1904 (page 1, col. 5): 'The saloon men of Granby called on the mayor to have the census taken. They thought they could run the same scheme there as they did in Pierce City, but Granby had a mayor that had the census taken according to law, and they lost out. The enumeration showed that Granby lacked about 100 of having the required number

to shut it out of voting with the county on local option.'

"Same issue (page 4, col. 4): 'Pierce City has grown quite fast since the census was taken.—Stotts City Times. Yes, Pierce City is a fast town when it comes to taking the census. The instruction given to get the required number even if they had to take the census of the "unborn" brought the desired result.'

"The Pierce City Daily Democrat, June 25, 1904 (page 1, col. 4): 'The last year of D. S. Flowers' administration the electric light plant run behind nearly \$3,000.00. Under Ex-Mayor Cloud's administration, the last year that W. T. Lecompte was chairman of the electric light plant committee, he brought it out, after paying for some improvements and all expenses, with over \$500 in the treasury. What was the matter last year? The people would like to know. * * * Query: If our electric light plant earns \$3,900.00 per year, and it takes \$7,600.00 per year to run it, how long will it take the city to pay for it?'

"The Pierce City Daily Democrat, July 8, 1904 (page 1, col. 5): 'We understand some of the Republicans have disputed the statement made in the Democrat that under the management of W. T. Lecompte the electric light plant during the first year of Ex-Mayor Cloud's administration paid all expenses, beside making some improvements and had over five hundred in the treasury. There is no guesswork about this. It is a fact of record, as the papers will show. At the last meeting of the board, at the close of the first year under Mayor Cloud's administration, he asked W. T. Lecompte, chairman of the electric light plant committee, to make a written statement of the condition of the work. He did so, and after the bills had come in on that night and were allowed he deducted the amount from the amount of money in the treasury, which left a balance, after all debts up to that date were paid, of \$540.30. They do not want to admit this fact, after the wreck and extravagance of Ex-Mayor Flowers' administration, which brought the plant out last year about \$2,800.00 in debt. Republican administrations do come high, but the people pay the bills.'

"The Pierce City Daily Democrat, July 11, 1904 (page 1, col. 4): 'The statement that W. T. Lecompte brought the electric light plant out with over \$500 in the treasury the last year he served on the board of aldermen has not been disproved. Henry Shoemaker, who served on the committee with Mr. Lecompte, says it was made more than self-sustaining that year, and feels that if he had had the management of it another year he could have brought it out over \$1,000.00 above all expenses. The Democrat, in calling attention to this matter, desires, above all personal or political feeling, to stimulate a closer watch over the interest of the plant and a better management of it, for with such extravagance it is only a question of time until we

would have no public enterprises. Our charges for electric lights are higher than those of some of the surrounding cities, we are told by those who are posted. It is not a question of putting a heavier tax burden upon our people for electric lights, but a question of management. The ordinances of our city clearly say that no city officer shall take contracts or furnish the city with supplies. Has not this law been violated? There is no argument in personal abuse, but it is always the resort of those who have a weak cause to defend.'

'The Pierce City Daily Democrat, July 12, 1904 (page 4, col. 1): 'When Mayor Flowers sent his agents to take the census of Pierce City his instructions were: Get the required number even if you have to get the unborn. What would you call such a man? Does his own language apply to him? Is he no fool, though he did sit upon the judgment of our city.'

'The Pierce City Daily Democrat, August 3d (page 1, col. 3): 'The city had to borrow money at the last meeting of the council to pay running expenses of our government. The reckless management of Ex-Mayor Flowers is the cause of the empty treasury. The sinking fund had to be drawn upon. No money in any other fund to tide over with.'

'The Pierce City Democrat, July 13, 1904 (page 1, col. 4): 'It is a very plain matter that the Democrat brought before the people of Pierce City. We stated in plain figures that the last year that W. T. Lecompte was on the board of aldermen, under Ex-Mayor Cloud's administration, he managed the electric light plant so as to make it pay all expenses and for some improvements, and had a balance to the credit of the fund of \$540.30. In contrast to his management, Ex-Mayor Flowers' administration last year brings the plant out \$2,800.00 in debt. The plant earns about \$3,900.00 a year, so this would make it cost the city under Flowers' administration \$6,600.00, or over \$3,300.00 more than under Cloud's administration.'

'Pierce City Daily Democrat, July 12, 1904 (page 1, col. 2): 'My, how D. S. Flowers does swell out in self-praise. In his estimation he could have chosen a much better city council than the people did by their votes. In his estimation they made a big mistake in not turning the whole thing over to him and proclaim him king, from which no appeal could be made. But it is said figures won't lie, and there is a big difference between his estimate of himself and the fact the figures give, when not twisted to his notion. Several good business men have remarked that they cannot understand Ex-Mayor Flowers' statements as published. The figures are so juggled that nothing definite can be made out of them. In the first financial statement published at the end of the first year of his administration, the figures showed on their own face a mistake of over a thousand dollars in the city's favor. On

three or four different occasions the Democrat called attention to the mistake and asked for an explanation. None has ever yet been given.'

'The Pierce City Daily Democrat, August 4th (page 1, col. 3): 'Tabled without debate, said the dictator at the city hall last night, and it was so. It rests in its grave on the table. The petition of the citizens asking for a correct census was "ridiculous," said the great mogul. What right have they to dispute the authority of the king on his throne? Free speech denied the people. The right of petition snatched from them.'

'The Pierce City Daily Democrat, August 1, 1904 (page 1, col. 4): 'Nero fiddled while Rome burned. Take your medicine and say nothing. The city council met in adjourned session last night. All the aldermen were present. Mayor Edwards was absent. L. L. Allen presided over the deliberations. Two petitions, each signed by a number of our citizens, were before the councilmen. Only one of them was considered worthy of their attention. The other was quickly laid upon the table. Ex-Mayor Flowers spoke and that settled it. Only one class of our citizens have any voice in public questions. Moral reforms and obedience of law are not to be considered. The petition presented, asking the honorable board to have a correct census taken according to law, was tabled. The one presented by the saloon element asking for an election in Pierce City to vote on local option was promptly granted. In fact, it was already slated and the ordinance drawn up, the judges of election appointed, and the date fixed before the council met. The day of election fixed to vote on local option in a town with less than 2,000 population is September 2, 1904. They call this obeying the law. You fellows that believe in the majesty of the law, that want justice and right to prevail, that want to see our college opened, that want to do something to build up Pierce City and increase the trade, can just take your bitter medicine and keep your mouths shut. What rights have you in this land of liberty? The dictator is on his throne and has his gall with him. Go out and take the census, take all the people stopping at the hotels, all visiting in the city, all camped on the banks of Clear creek; go get the required number, even if you have to include the unborn. Last night Ex-Mayor Flowers stood up before an intelligent audience at the city hall and said: "The census was taken under my administration and was taken right so far as I know." For unmitigated gall, vote him the whole bake shop.'

'The Pierce City Daily Democrat, August 5, 1904 (page 1, col. 4): 'The talk of Ex-Mayor Flowers at the city hall last Wednesday night was anything but dignified. It was an insult to every man who had his name on the petition asking for a correct census, as well as every citizen in favor of law and

order. The petition presented to the city council Monday night asking it to call an election to vote on local option was an outlaw, because it was the same one presented months ago. If it was a new one gotten up since Monday night, it was acted on in an unjust manner. The petition presented Monday night by the citizens asking the board to have a correct census taken was read and put on file that night and should have been taken up and acted on first Wednesday night. The petition asking for a local option election was treated with all due courtesy. The one asking for a correct census, signed by citizens and taxpayers of our city, was held up for ridicule of Mr. Flowers. It is a very dull person who can't see and understand that only the interests of the liquor traffic was thought worthy of consideration. Take either point made above in regard to the petitions and you can see the unjust way in which the one was treated and the partiality shown in the other.

"Plaintiff says: That said publications were malicious, false, and untrue, and published by the defendant for the purpose of injuring the plaintiff; that said newspaper had a general circulation in the counties of Lawrence, Barry, Newton, Jasper, and McDonald, in the state of Missouri; that the defendant caused wickedly and maliciously copies of said newspaper to be published and circulated in the Missouri building at the St. Louis World's Fair at St. Louis, Mo., in addition to its circulation in the counties above mentioned. Wherefore plaintiff says that by reason of said false, libelous, and defamatory publications in Pierce City Democrat by the defendant of and concerning the plaintiff aforesaid the plaintiff has been greatly damaged in business, reputation, and good name, has suffered great mental anguish, shame, and disgrace, to his damage in the actual sum of \$25,000 actual damages, that by reason of said malicious, wanton, and wrongful acts and doings of the defendant, plaintiff is entitled to recover \$25,000 exemplary or punitive damages. Wherefore plaintiff prays judgment for \$50,000, being \$25,000 actual and \$25,000 exemplary damages, and for all proper relief in the premises."

To the filing of this petition the defendant at the time objected, on the ground that it was a change of the cause of action from the original petition, and because in the original petition only 5 of the said articles were mentioned and declared upon, and in the amended petition 13 other independent charges and publications are asked. The motion to strike out was overruled, and the defendant excepted. Thereupon the defendant filed his motion to require the plaintiff to elect upon which one of the several alleged causes of action pleaded in this single count he would proceed to trial. This motion was likewise overruled, and the defendant duly excepted. Thereupon the defendant filed his answer, which is in words and figures as follows: "Comes now

the defendant, and, for answer to plaintiff's amended petition herein, denies each and every allegation in such petition contained, except that which is herein specifically admitted to be true. Further answering, defendant says: That in publishing the articles complained of and set forth in the petition herein, which said petition charges reflect upon the public and official conduct of plaintiff as a member of the municipal government of Pierce City, Mo., he acted in good faith; that such articles so published are but a recital of facts and circumstances in respect to and concerning the administration of the municipal government of said city of Pierce City, in which the voters, citizens, and taxpayers of said city were and are interested, and which they have a right to know; that such articles were published after careful investigation as to the truthfulness of the matter stated and with the belief on defendant's part that they are true, and defendant says that they are substantially true."

Plaintiff replied by denying all the new matter alleged in the answer. The plaintiff, to maintain the issues upon his part, read in evidence from the Pierce City Democrat the articles set out in the amended petition, being Exhibits A to Y, included, and then introduced in evidence one witness Allen Hudson, who testified that he lived four miles south of Pierce City, Mo., and had known plaintiff for 37 years, and that his reputation as a law-abiding citizen was good. Reserving the right to call in Mr. Allen as a character witness, the plaintiff rested his case on this evidence.

Thereupon the defendant offered testimony tending to prove the truth of the statements made in the said articles, and especially evidence tending to prove that a number of citizens of Pierce City signed a petition addressed to the mayor and board of aldermen asking that a legal and correct census of the city be taken in order to ascertain whether Pierce City was a city of 2,500 inhabitants or more, in order to ascertain whether, in a certain local option election then about to occur in said county, the inhabitants of Pierce City could vote at said election, or whether it would be necessary to have a separate election by the qualified voters of the said city to determine whether intoxicating liquors should be sold or not in said city. The evidence tended to show that, when this petition was presented to the council, it was tabled upon a motion of the plaintiff, who at that time was a member of the board of aldermen. The evidence also tended to show that the population of Pierce City had declined since the last official census of 1900, by reason of the exodus of some 250 to 300 negroes, who had removed from said city since the taking of the census of 1900 and another census taken by the city itself in 1904. The defendant read in evidence the official report of the United States census of 1900, which showed the population to be at that time 2,151. The petition of the citizens

requesting to have a new census taken requested the board to have a correct census taken, giving the names of the inhabitants, and expressing the belief that the census taken by the city was not correct. There was also evidence tending to show that the census taken by the city itself was taken by persons who did not report the names of the inhabitants and was taken by some seven different persons who simply reported the result of their count in a lump, and that the petitioners had employed a Mr. J. B. Williams to take the census of the city, who took the same and made oath to its correctness. R. P. Osborn testified: That he was a member of the board of aldermen of said city for three terms, and was present as a member of the board at the last meeting presided over by the plaintiff as mayor in 1904, when the said subject of local option was brought to the attention of the board by the plaintiff. That something was said in regard to a movement then being made in the county to have local option and to include the city unless the census was taken, and that plaintiff said: "We would have to have 2,500, that the census would have to be as much as 2,500 in order to sustain our saloons and our revenue." And that plaintiff said that it would be all right to go outside of the city limits, and we would have to have 2,500, "if we had to take the unborn to get it." This witness also testified that the plaintiff appointed the enumerators, and they were to meet plaintiff the next morning for instructions, and after doing so some of them refused to serve. John B. Williams testified: That he lived outside of the city limits of Pierce City, and the city's enumerators came around and counted him in taking the census of 1904; that he was present at the meeting of the board of aldermen, after plaintiff's term of office as mayor had expired, and heard plaintiff make a statement as to the financial condition of the electric light plant, in which he said that it had run behind \$2,800 that year; and that the water plant had also run behind. This witness also testified to the notice given by the city marshal, Tucker, in respect to the saloons before the spring election in 1904, and that prior to that time the screens on the saloon windows were so hung as to preclude a view of the interior of the saloon, and that the back doors of such saloons appeared to be open, and men could be seen going in and out thereat carrying bottles of beer on the Sabbath Day. Defendant offered to prove by this witness that, within a day or two after the alleged census taking by the city authorities of Pierce City, witness took a regular and correct census of the city, and that there had been no change in the population from the time of the alleged census until his was taken, and by actual count he knew the population of such city to be but 1,944, and that, taking in the disputed territory, the population was 2,118. This testimony was excluded by the court and refused on general objection by counsel for plaintiff,

to which ruling the defendant duly excepted. George Soloman testified that he was an electrician and took charge of the city electric light plant at the close of plaintiff's administration as mayor, in the spring of 1904, and at that time the plant was not in extra condition. A new smokestack had been put in. The deposition of John Tucker, one of the enumerators appointed by the plaintiff to assist in taking the city census in 1904, was offered in evidence; it appearing that Tucker had left the state at the time of the trial. On general objection this deposition was also excluded, and defendant excepted. In this deposition said Tucker testified that his residence was in Pierce City, Lawrence county, Mo., and that in May, 1904, he was employed to assist in taking the census of Pierce City. He was asked by whom he was employed, and he answered: "Mr. French, to come right down to business, I refuse to answer any question on this case, simply because I do not want to criminate myself. Q. Would the answer to this question tend to criminate you? Ans. It might." E. S. Mayhew testified he was elected city clerk by the board of aldermen in 1903, by a vote of four for himself to three for Mr. Essex, and the record was turned over to him by Mr. Essex, but subsequently the plaintiff claimed the right as mayor to appoint the clerk, and did appoint Mr. Essex, and refused to recognize witness as clerk, and after some controversy withdrew, although he claimed to be legally chosen. He testified, further, that at the close of plaintiff's administration, there was an error of \$1,000 in the footing of the official statement published by the plaintiff in the Pierce City Empire. Essex, the city clerk, was called by defendant to identify certain city records. From his testimony it appears that plaintiff appointed the enumerators to take the city census in 1904, and there were seven of them, of which number witness and John Tucker were two. He heard no instructions from the plaintiff as to how the census should be taken, but the method followed was for each fellow to go out and make a count of the territory assigned to him. No names were to be taken or recorded, and no names were ever turned in by the witness or any of the other enumerators. That the only thing done in the way of taking, filing or reporting a census to the board was that each fellow said how many he had counted, and five out of the seven joined in the one affidavit as to the total number counted by all. Two of the enumerators, Gilman and Williamson, refused to serve and did not join in the affidavit: Alsop and Tucker claiming to have covered the territory assigned to them. Witness testified that this affidavit was all that was ever filed with the board, and there was nothing on file from which it could be ascertained who had been counted in reaching the result. The defendant offered to prove by Mrs. Sheets that one of the enumerators came to her house, and that she had two daughters, one

of whom had been gone for 16 years and another 4 years, and counsel for defendant offered to prove by her that these two daughters were counted by the enumerator, but this evidence was excluded, and defendant excepted. Defendant offered to prove similar facts by other witnesses, but the testimony was excluded.

Defendant Smith testified, in his own behalf: That in the first article set forth in the petition of June 8, 1903, where the name "Empire" appears, reference was had to the other local newspaper published in Pierce City, and the statement concerning the "Empire" was true; that the first part of the second article mentioned in the petition of June 10, 1903, was a quotation from the "Empire," it was advocating the building of a bridge; and that "one who knows" was an anonymous correspondent who wrote for the Empire. On objection by counsel for plaintiff, the court refused to permit the defendant to explain the third article of June 12, 1903, to which ruling the defendant excepted. Witness was likewise denied the privilege of explaining the fourth article, the one of July 3, 1903, in regard to the falling of the smokestack. The same ruling was made in regard to the article of March 10, 1904, to the effect that the mayor had ordered the city marshal to see that the saloons were closed on Sunday, and the screens raised, and exceptions saved. Defendant testified that he had been connected with the publication of the Democrat for 30 years, and the custom had always been with all city administrations to publish election notices in both the local papers, and such notices prior to 1904 had always been handed to him. Witness' attention was next called to the publication of May 13, 1904, with reference to boycotting. No person is mentioned in the article, and there was no allegation that the defendant thereby referred to the plaintiff. Witness was asked to state to whom reference was made in the article, but on objection of the plaintiff he was not permitted to answer, and the testimony was excluded, and the defendant excepted. Witness then testified: That he had been told by Mr. Edwards, the mayor, to notify the people through his paper to meet the council when the petition of the citizens, asking that a correct census be taken, was to come before that body, and that they would be accorded a hearing; that witness did so, and he, with others, were present on that occasion, but Mr. Edwards was absent, and a man named Allen was in the chair, and plaintiff took up the petition that had been presented and pronounced it ridiculous, and said that those who had taken the census would compare favorably with those who had signed the petition, and on his motion the petition was tabled, and the petitioners were given no chance to be heard.

In rebuttal, a Mr. J. G. Kelley, over the objection of the defendant, was permitted to testify that he had requested defendant not

to publish the articles concerning the city administration, which were appearing from time to time, but defendant had continued to do so. Essex testified that he did not hear the talk of plaintiff as detailed by the witness Osborn, and that the ordinance requiring the saloons' screens on the windows on the Sabbath Day to be kept up was passed March 17, 1904. Mr. Garrett testified he was a member of the council, and did not hear plaintiff give any instructions to the enumerators, and could not remember plaintiff's speech when he moved to table the petition for a new census. Stalter testified he was one of the enumerators and was at plaintiff's store the next morning after his appointment, but received no instructions as to how he was to discharge his duties. Alsop testified he was one of the enumerators for taking the city census, but did not hear the remarks of plaintiff testified to by Osborn, that he went to the hotels and private houses of people in his territory and inquired how many people lived there and put down the number given him, and that he was not sworn, but entered upon his duty and took no names, but just kept count by marks, because he was told to do so. Williamson testified that plaintiff gave him no instructions, and that, while he was appointed to help with the census, he became sick and quit the job. Gilmore's deposition was read, in which he said that plaintiff said: "They had to have 2,500 people." L. L. Allen testified that plaintiff's reputation as a law-abiding citizen was good, that he (witness) presided in the council the night the petition of the people for correct census came before that body, but he did not know that the people desired to be heard, or he would have given them an opportunity.

The plaintiff, Flowers, testified at length, giving his version of the matters in controversy. He corroborated in the main the testimony of the defendant in regard to his appointing Essex city clerk in lieu of Mayhew, who had been elected by the city council. He detailed at length the question in regard to who had power to appoint the clerk. He also testified to calling in the defendant, Smith, and directing him to stop his paper and take out his business advertisement. In regard to the electric light plant, he testified that it was old and worn out when the city bought it 15 years before that time. He testified that his management of that plant was all right with no extravagances. The city council was voting the money to keep it going, and not himself. In regard to the cost of running it, he said the increase in the cost was in the price of coal, and that the expenses were greater than the receipts from the plant. In 1904, there was a deficit of \$2,107.23. The published statement showed a deficit of \$2,841.63, when it should have been \$2,572.03. The defendant had never requested witness to allow him to make an examination of the books. He was asked what effect the falling of the smokestack had on the elec-

tric light, and he answered none whatever. In regard to the census, he testified that on the 28th of April a petition came before the board for a local option election, signed by, possibly, 50 or 51—anyway, it was over one-tenth of the required number. Witness, as mayor, called a meeting of the board for the purpose of determining what action should be taken. At that meeting witness presented a local option petition and explained to the board that, in order to determine whether we could hold a local option election in Pierce City or not, we would first have to determine whether we had 2,500 or over. This meeting resulted in our adopting an ordinance to take the census, and by that ordinance he was authorized to appoint enumerators. He testified that, after an informal talking around the council table, they settled upon the number of enumerators, and they were appointed. He himself had no list and presented no list of names to the board before he appointed them. He gave no instructions to them. He testified that he did not say that they must get 2,500 if they had to go outside of the city to get them, nor that they must get 2,500 if they had to take the unborn. He testified that he made the motion to lay the petition of the citizens for a new census on the table, and it was carried. He admitted that he made the statement that the electric light plant was \$2,800 short, and that the water plant was also behind. In regard to the \$1,000 mistake in the footing, he said it was really not a mistake, but was misleading. He was asked if he remembered telling Mr. Robinson that the city did not have 2,500 population, and he said he did not. In rebuttal, Mr. Robinson was called, and defendant offered to prove by him that plaintiff said to him in January, 1904, that Pierce City did not have 2,500 people; but, on objection by counsel for plaintiff, the court refused to permit witness to answer the question, and defendant excepted. This was substantially all of the evidence. Such of the instructions as are challenged will be noted and discussed in the course of the opinion. There was a verdict and judgment for plaintiff for \$1,000 compensatory and \$5,000 punitive damages.

1. The defendant having answered over to the amended petition after the overruling of his motion to strike out the same, his motion to strike out is no longer available to him.

2. The defendant moved the court to compel plaintiff to elect upon which of the alleged libelous articles he would seek to recover, but the court overruled the motion, and defendant duly excepted. A reference to the petition will show that there are 18 different articles charged to have been libelous, and all inserted in one count. These various articles are alleged to have been printed and published on different days. Some of them relate to plaintiff's action in appointing a clerk for the city, others to plaintiff's action in regard to the denial of the

petition of the citizens for a correct census, still others contain a criticism of plaintiff's financial management of the electric light and water plants of the city, and others refer to his closing the saloons on Sunday. All of these are joined in one count. It is obvious that, if these various articles amount to libel, they constitute separate and distinct libels, and the defendant resorted to the only course open to him to require the plaintiff to elect the charge on which he would seek a recovery and dismiss the others. *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *Otis v. Mechanics' Bank*, 35 Mo. 128; *Christal v. Craig*, 80 Mo. 367; *McHugh v. Transit Co.*, 190 Mo. 85, 88 S. W. 853. Having filed his motion in due time, and the court having overruled it, his exceptions to the action of the court are properly before us for review. The motion should have been sustained. While such alleged libels may be joined in one petition in different counts, it was bad pleading to state them all in one count. The contention of plaintiff that they constitute but one cause of action and were properly joined in one count finds no support in the cases of *Birch v. Benton*, 26 Mo. 153, and *Pennington v. Meeks*, 46 Mo. 217. As said by Judge Phillips in *Christal v. Craig*, 80 Mo., loc. cit. 370: "The case of *Pennington v. Meeks*, 46 Mo. 217, related solely to one offense, the alleged stealing of a hog. So in the case of *Birch v. Benton*, 26 Mo. 153, there was really but one actionable speaking alleged, though in different phraseology." Whereas, as already said, if any one of these articles amounted to libel, they refer to entirely different conduct on part of plaintiff, and to wholly different matters. A criticism of the plaintiff because he appointed *Essex* clerk, instead of *Mayhew*, has no place in the count reflecting upon plaintiff's financial management of the electric light plant, nor the most remote connection with plaintiff's conduct in relation to the city census of 1904. The defense to each of these charges would naturally call for entirely different evidence. Moreover, this improper joinder is open to the defendant on his motion in arrest, as was said in *Christal v. Craig*, 80 Mo., loc. cit. 371: "Suppose the fact be in this case that, among the causes thus united in the same count, one or more be bad for failure of a sufficient statement, and there is a general verdict on all the causes. Would the verdict and the judgment be upheld? The rule is well settled that, where the petition contains several causes of action stated in separate counts, if one of the counts be bad for insufficiency in statement, a general verdict for plaintiff on all the counts will not be sustained. *Brownell v. P. R. R. Co.*, 47 Mo. 243, and cases cited. On principle it must obtain that where the several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of the plaintiff, if one or more of the causes of action assigned be bad, so

as not to support the verdict, the verdict must be bad as to all. How is it possible for the court to tell whether the jury took one or all the alleged slanderous words into their estimation? How much proof of the imperfect cause, and how much on the good, did the jury consider? Was it the fact proved touching the bad count that influenced the verdict, and, if so, to what extent?"

3. In its first instruction the court instructed the jury that: "The defendant admits the publication of all of said articles of and concerning the plaintiff and justifies the publication of said articles by alleging that the charges made against the plaintiff in said publications are true, and defendant further alleges that said articles are not libelous." This instruction involves the proper interpretation of the answer of the defendant. The answer was a general denial of each and every allegation in the petition, except the following special defense: "Defendant says: That in publishing the articles complained of and set forth in the petition, which said petition charges reflect upon the public and official conduct of plaintiff as a member of the municipal government of Pierce City, Mo., he acted in good faith; that such articles published are but the recital of facts and circumstances in respect to and concerning the administration of the municipal government of Pierce City, in which the voters, citizens, and taxpayers of said city were and are interested, and which they had a right to know; that such articles were published after careful inquiry as to the truthfulness of the matter stated and with the belief on defendant's part that they were true, and defendant says they are substantially true." The question is: Can this answer fairly be said to admit that the publications charged in the petition and read in evidence were published "of and concerning the plaintiff," as stated in the instruction? Many of the articles complained of point to no person in particular, and some of them preclude the idea that plaintiff could be the person intended. In *Caruth v. Richeson*, 96 Mo. 186, 9 S. W. 633, it was said by this court: "The law is too well settled that, if a defamatory matter points to no person in particular, it then becomes a question of fact whether it does or does not apply to the plaintiff." In *Odgers on Libel & Slander*, 118, 127, 128, it is said: "Even when the meaning of defendant's words is clear or has been ascertained, the question remains: Has he said enough? Was the imputation sufficiently definite to injure the plaintiff's reputation? Is it clear that it is the plaintiff to whom he refers? Unless these questions can be answered in the affirmative, no action lies. There must be a specific imputation cast upon the person suing." The special matter pleaded in this answer simply admits the publication of the articles, and not that they were published "of and concerning the plaintiff." The defendant had denied all the allegations of the petition, among others, the essential

avowment that those articles were published of and concerning the plaintiff, and in his special plea admitted only that he published the articles, and alleged, in addition, that they were published as a recital of facts in respect to and concerning the administration of the city government. In *Long v. Long*, 79 Mo., loc. cit. 649, this court had this precise question under consideration, and said: "The reply to new matter in the answer is similar to the answer to the petition, and it may contain a general or special denial. Vanzant, Pleading, 408, declares that the 'Code allows the defendant to elect whether he will answer by a general or special denial, and, having elected, he is bound by it. He cannot answer in both ways.' Dennison v. Dennison, 9 How. Prac. (N. Y.) 247. We are not prepared to say that both modes of pleading may not be employed in the answer or replication; but we do not hesitate to hold that, when both are employed, the denials ought to be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what is admitted. This course not only sharpens the issues, but it aids in the preparation of evidence and lessens expenses in bringing witnesses to meet matters not designed to be controverted at the trial. This reply says: 'Plaintiff denies each and every allegation not herein admitted or otherwise pleaded to.' Then what is admitted or otherwise pleaded to to determine this opposing counsel and the court must go through the pleading analytically, step by step, to discover what, perchance, may be admitted or denied. Bliss, Code Pleadings, § 351, says the pleader ought so frame the denial as not to leave his adversary to thus hunt through the plea to see what is and what is not therein admitted." Accordingly, it was ruled in that case that the court should have sustained a motion to have compelled the plaintiff to make certain what he denied and what he admitted. Fully recognizing the authority of that case, and fully concurring in the view therein expressed, we do not think this answer is open to the objection made to the reply in that case. Here there is a general denial of every allegation in the petition, followed by a specific admission of the publication only of the articles and a plea of good faith, and that the same were simply a recital of facts and circumstances concerning the administration of municipal government. We do not think this was an admission that the various articles set forth in the petition were published of and concerning the plaintiff. Our statute declares that: "In an action for slander, it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff." In *Christal v. Craig*,

80 Mo., loc. cit. 373. It was said: "This provision, however, dispenses with the employment of the colloquium only so far as it shows 'that the defamatory words applied to the plaintiff,' and goes no further." "All the averments necessary in common-law pleading to show the meaning of the words must still be made." Bliss, Plead. § 305. The change made by the statute in the rule of pleading in this respect is not to require a statement of the extrinsic facts showing the application of the words to the plaintiff; but the extrinsic facts, when not embraced in the imputed words to show their meaning and the character of the person to whom applied, must still be stated, as at common law. Fry v. Bennett, 5 Sandf. (N. Y.) 54; Pike v. Van Wormer, 5 How. Prac. (N. Y.) 171; Curry v. Collins, 37 Mo. 328, 329. But it is said the innuendo supplies the defect, in that it says: "Meaning that he was not a child of plaintiff's husband." The office of the innuendo is simply to apply the words. It is never a substitute for an averment. It is not the statement of a fact, but an inference. Being merely explanatory in its function, the only question raised by it is whether the explanation is given by a legitimate deduction from the facts stated. Birch v. Benton, 26 Mo. 154; Bundy v. Hart, 46 Mo. 464, 2 Am. Rep. 525. It was then a question of fact whether such articles did apply to the plaintiff, and it was error for the court to assume that the defendant had admitted that he published the same of and concerning the plaintiff.

4. In this connection the defendant prayed the court to instruct the jury as follows: "The court instructs the jury that, under the evidence in this case, the articles charged to have been published of and concerning the plaintiff as of the following dates: June 6, June 8, 1903, on page 2 of plaintiff's petition; June 10, 1903, on page 3 of plaintiff's petition; June 12, 1903, on page 4 of plaintiff's petition; March 11, 1904, on page 6 of plaintiff's petition; May 11, 1904, on page 9 of plaintiff's petition; May 15, 1904, on page 11 of plaintiff's petition—there is no evidence to sustain, and you will not consider them in arriving at your verdict." Which instruction the court refused, and defendant excepted. In other words, the court was requested to direct the jury that the publications in the petition numbered 1, 2, 3, 6, 11, and 14, did not as a matter of law constitute libel; but the court refused to so instruct. It is perfectly obvious that the said articles not only did not refer to plaintiff, but they forbid any application to him by their very terms. Not only that, but they were not libelous per se of any person, and as to the others there were no prefatory averments of extrinsic facts showing that said articles imputed any crime or conduct to plaintiff, which would render them libelous of plaintiff. We think the circuit court erred in refusing to instruct the jury that said articles would not be consider-

ed in arriving at their verdict. Wood v. Hildish, 23 Mo. App. 389; Lewis v. Humphries, 64 Mo. App. 471; Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882.

5. In the third instruction, the jury were told: "Unless the jury believe from the evidence that all charges in the publications in the Pierce City Democrat and read in evidence are true, then you must find the issues for the plaintiff, unless you further believe that none of said charges are libelous." As already said, in many of these publications no reference whatever was made directly or indirectly to plaintiff, and there were no averments to show that he was referred to in them, or would any reader of such publications understand him to be referred to, so that, even if it did appear that they were neither true nor libelous, plaintiff could not recover. The instruction was erroneous and misleading. The fifth instruction given by the court in behalf of the plaintiff is as follows: "The court instructs the jury that the term 'malice,' as used in these instructions, does not mean mere spite or ill will; but it means the intentional doing of a wrongful act without just cause or excuse. You are therefore instructed that if you believe the articles published in the Pierce City Democrat and read in evidence were libelous in whole or in part, and that they were published of and concerning the plaintiff, and were not true, then the law presumes that they were published maliciously, and it was not necessary to prove any express malice in order to warrant a verdict for the plaintiff." It will be observed that this instruction permits the jury to infer from the various articles published and set forth in the petition, without confining the presumption to those charges, if any, which were libelous per se. It is perfectly evident, we think, that a number of said articles not only did not refer to the plaintiff, but others of them were not libelous per se, and there were no averments of extrinsic facts to show that they referred to the plaintiff, or any innuendo from which it could be inferred that they charged the plaintiff with such conduct as to render them libelous per se. This being so, we think the instruction was entirely too general and broad. In Mitchell v. Bradstreet Company, 116 Mo., loc. cit. 240, 22 S. W. 362 (20 L. R. A. 138, 38 Am. St. Rep. 592) it was said by this court: "It is next contended that the publication was not libelous per se, and that therefore it was necessary for plaintiffs to allege in their petition and also prove such damages before being entitled to recover. The authorities cited by defendant do not sustain this contention. If the libel complained of is not actionable per se, then the defendant's position is correct; otherwise not." And this we understand is well-settled law.

6. In the sixth instruction, the court instructed the jury that they would disregard

any evidence tending to show the defendant's good faith or honest belief of the truth of the said charges, or any of them based upon information or reports of others. It will be remembered that in this case the plaintiff sued for punitive damages. In *Callahan v. Ingram*, 122 Mo. 372, 26 S. W. 1024 (43 Am. St. Rep. 583) it was said by this court: "Exemplary damages may always be given in suits for slander when the words are maliciously spoken, but whether such damages should be given in any case is a matter within the discretion of the jury. In order to show good faith or want of malice, the defendant has the right to put in evidence all the circumstances under which the words were uttered, and, if such circumstances tend to rebut malice, such damages could only be awarded in case the words were maliciously spoken, or may in themselves be sufficient proof if malice is implied therefrom. Plaintiff by innuendo charges that defendant by slanderous words used intended to impute to him corruption in office. Defendant by answer and in mitigation of damages admitted that the words spoken had respect solely to plaintiff's official conduct. Defendant offered, as was his right to do, evidence tending to prove the circumstances under which the objectionable words were used in order to prove good faith and want of malicious intent. As has been said, defendant, as an interested citizen, had the right to make reasonable comment and fair criticism upon plaintiff's official conduct; but he had no right to go beyond that and slander him. It was, in view of all the circumstances, for the jury to say how far the evidence mitigated the malice, if at all, and to award the damages accordingly. We think the effect of the instruction on the measure of damages was to ignore this defense, and, as the question of exemplary damages was a matter independent of the right to recover, the error was not cured by the first instruction, which required a finding that the words were maliciously spoken in order to recover for any amount." This court, in that case, further said: "The motive or purpose with which the words were spoken lie at the very foundation of malice, they are the very conditions upon which exemplary or punitive damages are predicated, and no good reason appears why defendants should not be permitted to prove what his methods were." Odgers says: "In all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but, if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case therefore the defendant may in mitigation of damages give evidence to show that he acted in good faith and with honesty of purpose and not malicious-

ly." Odgers on Libel & Slander, 317. This statement of the law was approved in *Jones v. Murray*, 167 Mo., loc. cit. 49, 66 S. W. 981. In our opinion it was competent for the defendant to show in mitigation at least of the damages, under the facts developed. In this case the facts and circumstances concerning the publications complained of, the information on which the defendant acted in forming the views expressed in such publications, as tend to show his good faith and want of malice, were competent, and the instruction was therefore erroneous, in that it was not confined to allowing such evidence as a mitigation to the exemplary damages, if any, suffered by the plaintiff.

7. Again, the court permitted the plaintiff, in rebuttal, to prove by one J. G. Kelley that he went to the defendant and requested him to quit publishing those things, and asked him not to publish any more of them, and defendant said he thought the plaintiff had done him wrong, and believed this matter was a fact, and other similar statements. This evidence, we think, was not competent in rebuttal and should have been excluded by the court. *Christal v. Craig*, 80 Mo., loc. cit. 375.

8. It is insisted that the court erred in excluding evidence offered by the defendant, as to the proffered testimony of the defendant himself to explain articles appearing in his paper in reply to articles in the *Empire*. We think defendant unquestionably had a right to this evidence. Likewise he had the right to explain that certain articles which made no reference to plaintiff were not intended to refer to plaintiff. The court excluded evidence tending to discredit the census taken under the direction of the city council of Pierce City in April, 1904, and this is urged as error with much earnestness by the defendant. By section 3028, Rev. St. 1899 (Ann. St. 1906, p. 1735), it is provided: "That for the purpose of determining the fact of whether or not any town shall be governed by the provisions of this section, such body having legislative functions therein may under an ordinance thereof, take a census of the inhabitants of said town and the result of such census shall be entered upon the journals or records thereof, and such entry or a certified copy thereof shall be proof of such facts and shall be filed with the clerk of the county in which said town is situated." In this case neither party introduced the ordinance under which the alleged census was taken, or at least it does not appear in this record anywhere, so it is impossible to state whether the census was taken pursuant to the ordinance itself; but from the testimony of Mr. Essex, the clerk of the city, it affirmatively appeared that the enumerators who took the said census took no names and made no return of the list of persons whom they counted in estimating the population of said city. The statute just cited, which authorizes such a census, requires that "the result shall be entered upon the journals or records

thereof," and such entry shall be proof of such fact and shall be filed with the county clerk. No such entry was ever offered in evidence, or, if it was, it has not been preserved in the record. From Mr. Essex's testimony it appears that the only paper filed by the enumerators was a joint affidavit of the result of their count. There was nothing on file from which it could be ascertained who had been counted in reaching said result. If the ordinance contemplated this character of a census, it was, to say the least, a very loose piece of legislation. The taking of this census was a public matter of deep local interest of the citizens of that city, and the criticism of the manner in which it was taken was directed to public official conduct. While the defendant had no right to libel the plaintiff in regard thereto, he did have the right to discuss the question whether said census was properly or improperly taken, and we think it was entirely competent, in mitigation of any damages that plaintiff might recover, for defendant to show that the enumerators went outside of the corporate limits of the city in making their count. The question was not whether this census would be prima facie evidence of the population of the said city in a collateral proceeding, but the question was whether defendant had maliciously libeled and slandered the plaintiff in regard to the method by which that result had been achieved. We think that the court clearly erred in rejecting this testimony on this issue in this case. It went at least to the mitigation of damages on the claim for exemplary damages. The statute permitting the taking of this census is very indefinite, and it may be that, in the absence of a requirement that the names of the various inhabitants should be listed and returned to the city council, is not necessary; but, as to that, we express no opinion at this time, further than we have already said, that this method was certainly open to criticism in view of the efforts made at that time by the citizens of Pierce City to have a correct and reliable census taken in accordance with the statute cited and also section 6300, Rev. St. 1899 (Ann. St. 1906, p. 8147). However, we are not to be understood as holding that the testimony of Mrs. Sheets as to the statement made to her was competent, unless she could testify of her own knowledge that Stalter actually counted her two daughters who were not residents of said city. And the same ruling must prevail after the offer to make similar proof by Mr. Par and Mr. Hawkins. We will add, however, that if the affidavit of the enumerators is the only thing on file in the office of the city clerk, and no action was taken by the council accepting and approving that report and spreading the same on the record, it does not comply with the requirements of the statute and would not be prima facie evidence of the correctness of said census.

9. Finally, we think the motion in arrest of judgment should have been sustained for

the reason that the plaintiff joined 18 separate, distinct, and independent alleged libels in one count, at least 5 of which, as we have seen, were wholly insufficient to support a verdict, and, this being so, the general verdict for the plaintiff is bad and cannot be sustained. *Mooney v. Kennett*, 19 Mo. 533, 61 Am. Dec. 576; *Christal v. Craig*, 80 Mo., loc. cit. 370, 371; *McHugh v. Transit Co.*, 190 Mo., loc. cit. 93, 88 S. W. 853.

We are aware that this opinion will occupy entirely too much space in our reports, but we see no escape from it, as no one can understand the character of the pleadings, the question as to the misjoinder of counts, and the sufficiency of the allegations to constitute libel, without having the petition before them, and the statute requires that we should make a statement sufficient for the understanding of the opinion.

The judgment is reversed, and the cause remanded in order that the circuit court may proceed in accordance with the views herein expressed.

FOX, P. J., and BURGESS, J., concur.

BRANDS v. ST. LOUIS CAR CO.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. MASTER AND SERVANT — OBLIGATION OF MASTER TO FURNISH APPLIANCES.

A master is bound to use reasonable care to furnish his servants safe appliances, but is not bound to furnish any particular appliances, nor the newest and best appliances; his duty being performed when he furnishes those of ordinary character and of reasonable safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 173, 178, 181.]

2. SAME—ASSUMPTION OF RISK—USE OF UNSAFE MACHINERY.

A servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so obvious that a reasonably prudent person would not attempt to use it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

3. SAME—FURNISHING APPLIANCES—NEGLIGENCE.

No inference of negligence of a master arises from evidence that an appliance furnished was such as is ordinarily used for like purposes by persons engaged in the same kind of business, and negligence cannot be imputed from the employment of machinery in general use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 185.]

4. SAME.

A master furnished a straight emery wheel of the character in general use in all manufacturing establishments in the vicinity where he did business. Experts testified that a convex wheel was safer. An expert stated that in an experience of 22 years he had known five wheels to break. Other experts with experiences ranging from 3 to 27 years testified that they had never known an emery wheel to explode, while others knew of one wheel exploding in that time. In the master's shops there were 50 emery wheels in operation, and about 500 were used during a year, and only one had broken prior to the injury to an employé. *Held*, that the

master as a matter of law furnished a safe appliance, and was not negligent for failing to provide a convex wheel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 185, 188.]

5. SAME—FAILURE TO WARN SERVANTS—NEG-LIGENCE.

Where a master furnishing a straight emery wheel, instead of a convex wheel, furnished a kind of wheel in general use, and there was nothing to show that such kind of wheels was inherently dangerous to employes using them, the master was not negligent in failing to warn an employe incident to the use of the wheel.

6. SAME.

Where a servant was directed how to operate an emery wheel, and the wheel did not break on account of any misuse thereof by him, the failure of the master to inform him that emery wheels will explode at times did not contribute to the injury caused by the breaking of the wheel.

7. EVIDENCE—OPINION EVIDENCE—EXPERTS—COMPETENCY.

Where a witness testified that emery wheels were made in different ways and out of different ingredients, but did not show any knowledge of the ingredients of a particular kind of emery wheels, or any experience in watching such wheels, it was error to permit him to testify as to the general breakability of all emery wheels.

8. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Where, in an action for injuries to a servant by the breaking of an emery wheel, an expert testified that in an experience of 22 years he had known two wheels to break, but there was no evidence that the master had knowledge of such explosions, and it appeared that he had been using wheels for 6 years, and only one had exploded, and that, while it was being tested, there was no evidence that the master knew that the wheel which exploded was dangerous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 966.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Otto Brands against the St. Louis Car Company. From a judgment for plaintiff, defendant appeals. Reversed, without remanding.

Seddon & Holland and James R. Van Slyke, for appellant. A. R. Taylor, for respondent.

GANTT, J. This is an action for the recovery of damages on account of personal injuries sustained by the plaintiff, at that time a minor 19 years old, on the 29th day of May, 1903, by reason of the explosion of an emery wheel while the plaintiff was in the service of the defendant at its factory at 8000 North Broadway in the city of St. Louis. The petition, in substance, alleges: That the defendant is a corporation by virtue of the laws of this state, and was at the time of the said injury engaged in the manufacturing business. That on the 29th of May, 1903, plaintiff, who was then a minor 19 years of age without experience in the use of emery wheels and ignorant of the dangers incident to such use, was required by the defendant's foreman to do certain grinding work upon the emery wheel. That emery wheels when in revolution are inherently apt to break, and when so breaking pieces of

the wheel are liable to strike and injure persons working at or near them, on account of which it was necessary, for the reasonable security of defendant's employes working about such wheels, that they should be convex; that is, of a construction of greater thickness at the center than near the rim. That slanting clamps should be adjusted on said wheels to prevent the broken pieces from escaping in case of breakage. That the wheel at which plaintiff was required to work, as aforesaid, was defective and dangerous, in that it was made of uniform thickness, instead of being made thicker at the center, as above described, and in that it was not guarded by slanting clamps. That on the date above mentioned said emery wheel at which plaintiff was required to work broke on account of the said susceptibility of such wheels to break, and a piece of it struck the plaintiff in the head and seriously injured him. The plaintiff was without experience in the work of operating an emery wheel and was ignorant of the dangers and qualities aforesaid, and the defendant's foreman who ordered plaintiff to work at said wheel wholly failed to warn him of the dangers of said work. That defendant was negligent in providing said wheel for said work and in ordering said plaintiff to do said work on said wheel, and was further negligent in failing to warn plaintiff of the said dangers of said work and in failing to instruct him as to said work and the dangers thereof. That on account of the foregoing, plaintiff is damaged in the sum of \$15,000. The answer was a general denial and a general plea of contributory negligence. The reply was a general denial. The trial resulted in a verdict for the plaintiff for \$5,000, from which in due form the defendant appeals to this court.

It will thus be seen that the petition is based upon three counts of negligence: First, providing to the plaintiff work with an appliance of a defective and dangerous construction; second, that the appliance, to wit, an emery wheel, is inherently dangerous, in that it will explode and break while in use, and that the defendant was negligent in not providing guards to prevent the pieces of the broken wheel from flying and striking and injuring the plaintiff at work; and, third, that said appliance being so dangerous, and the plaintiff being ignorant of the dangers of said appliances and without experience in the use of the same, defendant was guilty in failing to warn him of the said dangers, or to sufficiently instruct him as to the safe manner of its use. The testimony tended to show that, as a result of being struck by a piece of emery wheel that exploded in defendant's plant on the 29th day of May, 1903, plaintiff sustained a fracture of the skull. He was treated by a surgeon, and an operation performed to remove the piece of bone that

was depressed. Plaintiff testified that his eyesight was not as good as it was before the accident, and that he had trouble in stooping over or raising weights. Plaintiff testified that he was 19 years of age at the time of the accident, and prior to that time had been living in Illinois, engaged in farm work, and had done some work in a coal mine. On the day prior to his injuries, he went to work for the defendant. He was set by the foreman to do a piece of work on the 12-inch emery wheel, and worked at that about two hours. After that he was put to work at a smaller emery wheel. On the morning of the 29th of May, 1903, plaintiff was put to work on the large 18-inch emery wheel. The foreman showed him how to do the work. Plaintiff worked on this wheel about six hours before it exploded. About 2 o'clock of that day the wheel burst, and a piece of it struck plaintiff over the right eye. The wheel was about two inches thick throughout. The wheel is what was called in the testimony a straight wheel, as contrasted with a convex wheel. On each side of the wheel there was a clamp. At the time the wheel burst, plaintiff was using it in a way in which he had been instructed to use it. Since the accident, and in the summer of 1903, plaintiff began to work as a cager in a coal mine and averaged some seven or eight hours a day and earned about \$1.25 per day. Prior to his injury he was receiving \$1.75 per day.

Upon the first charge of negligence, to wit, that plaintiff was put to work with a defective and dangerous appliance, the plaintiff called two experts, Harry S. Schott and John Jacob Kerr. Schott testified: That he was an experimental machinist; that he had had experience in using emery wheels for about 23 years; that he did not know the composition or ingredients of emery wheels; that an emery wheel is subjected to different temperatures, and is likely to explode at any time; that this is true of most any kind of emery wheel; that prior to May 29, 1903, there was made an emery wheel that was larger in the center and tapered towards the edge with a slanting clamp on each side; and that these clamps are so constructed as to hold the parts of the wheel in case of a break. On cross-examination he was asked: "Was your knowledge of condition such during those three years that you can tell what was in common usage? Was it in common usage to use a straight wheel in factories in this vicinity, or common usage to use a convex wheel? Ans. There were a great many, I expect you might say in common use, of straight wheels, because the average wheels I expect used in the city were mostly small wheels; but, when it comes to the larger wheels, I expect there were probably nearly as many convex or concave wheels as of the other kind. Q. As I understand you, in the vicinity of St. Louis you think as to the small wheels there were probably more

straight than convex, but as to the large wheels you think they were about equal in number? Ans. Perhaps so, I could not form any opinion of that. Q. Take 18-inch wheels, 18 inches in diameter, and 2 inches thick, do you tell the jury under oath that in the vicinity of St. Louis there were as many convex wheels of that size in use at that time as there were straight wheels? Ans. No, I would not. Q. No, you would not. Can you tell me of a manufacturing plant in the city of St. Louis, or in the vicinity of it, that used an 18-inch wheel that was convex at that time? Ans. No, I don't believe I could tell you who is using it. Q. Did you see a single 18-inch convex wheel in use in the vicinity of St. Louis during that time? Ans. No, sir; I was not interested in that line at that time. Q. You have just told me you had not seen one 18-inch wheel, convex in shape, used in this vicinity during those three years. Now I ask you this: You will not undertake then to state to the jury that as to 18-inch wheels the usual custom was to use convex ones, will you? Ans. No; but wheels 18 inches in diameter and over are provided with that sort of contrivance. Whether they are practically or universally used I could not tell that. Q. You would not undertake to say that 18-inch wheels of convex shape were in general use in this vicinity at that time? Ans. No, I have no record of what were used at that time. Q. You will not state what portion were convex and what portion were straight at that time? Ans. No, sir. Q. You will not state that in the city of St. Louis, nor in the vicinity, during those years there was a single convex wheel of the size we have just mentioned used, will you? Ans. That I do not know." Asked how many emery wheels 18 inches in diameter and 2 inches thick he had seen explode while in use, he answered that he had never used any, or been around much where they were used. He had never seen one explode; had seen one 12 inches in diameter explode, and one six inches in diameter. Had never himself seen any other explode, and he had 23 years' experience. As to convex wheels, the witness testified that prior to the date of the accident, May 29, 1903, he had seen convex wheels on exhibition in shops, but had never seen one in use anywhere. The other expert, Kerr, testified in a general way: That there were various kinds of emery wheels, and they are apt to break some more readily than others; that in an experience of 22 years he had seen not more than five break; that prior to May 29, 1903, there was made what were called convex wheels—that is, wheels larger at the center and tapering to the edge equipped with slanting flanges. The theory of this design is to lessen danger in case of an explosion. Witness had seen such a wheel in two places in St. Louis prior to May 29, 1903. He could not state what was the common or general usage before that time. On this topic the defendant's testimony contra-

dicted the plaintiff's that there was negligence on the part of the defendant in using the said wheel. Carl Horix testified he had dealt with emery wheels for 13 years, and they were not inherently liable to break, and that during that period he had only known one to break or explode. He testified that prior to May 29, 1903, he had never seen a convex emery wheel. John F. Hawkins testified that he had had an experience of 27 years with emery wheels, and had never known one of them to break during that period, and that they were not inherently liable to break. Prior to May, 1903, he had never seen a convex wheel. Witness Pothoff had an experience of 21 years, and had only known one emery wheel to break. In his opinion they were not inherently liable to break or explode, and prior to injury to plaintiff he had never seen what is known as a convex emery wheel. J. L. Starr, with an experience of 12 years, and W. H. Kane, with an experience of 24 years, had handled emery wheels in large numbers, and had never known one to break or explode during their experience. They testified they were not inherently liable to break. Walter Miller, who had been foreman of the defendant for six years, testified that there were 50 emery wheels in operation all the time, and that about 500 were used during the year, and only 1 had exploded before this one which injured plaintiff. William Ahring testified that during an experience of three or four years with emery wheels he had never known but one to break, and that one was broken while it was being tested, and not while in use. This, practically, was all the evidence on this point.

1. A vital, if not controlling, question in this case, is whether there was sufficient evidence to submit the case to the jury. It is the settled law of Missouri that the master is bound to use reasonable care and precaution to furnish his servant safe appliances with which to do his work and in keeping them in good order and condition, and the servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so glaring and obvious that a reasonably prudent man would not attempt to use them. *Bender v. Railway Co.*, 137 Mo., loc. cit. 245, 37 S. W. 132, *Minnier v. Railway Co.*, 167 Mo., loc. cit. 112, 66 S. W. 1072. It is not the duty of the master to furnish any particular kind of tools, implements, or appliances. His duty in this respect is to use ordinary care and prudence in furnishing safe and suitable tools and implements. No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business. *Bohn v. T. Railroad*, 106 Mo., loc. cit. 433, 17 S. W. 580. In *Steinhauser v. Spraul*, 127 Mo., loc. cit. 562, 23 S. W. 625, 27 L. R. A. 441, it was said: "It is well-settled law that an employer is not

bound to furnish his employes the safest known appliances, tools, or machinery, the latest approved pattern of tools and improvements therein, etc. Nor does he render himself liable by failing to discard tools or appliances which are not such, and to supply their places with those which are more safe." And in *Minnier v. Railway Co.*, supra, it is said: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter, for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." This statement of the law was adopted and approved by this court in *banc in Chrismer et al. v. Bell Telephone Co.*, 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492. This statement of the law is announced in many well-considered cases in other jurisdictions. *Higgins v. Fanning Co.*, 195 Pa. 599, 46 Atl. 102; *Service v. Sheneman*, 196 Pa. 63, 46 Atl. 292, 69 L. R. A. 792, 79 Am. St. Rep. 689; *Shadford v. Street Ry. Co.*, 111 Mich. 390, 69 N. W. 661; *Titus v. Railway Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 N. W. 821, 80 Am. St. Rep. 673; *Demers v. Marshall*, 178 Mass. 9, 59 N. E. 454; *Breig v. Railway Co.*, 98 Mich. 222, 57 N. W. 118; *Allison v. McCormick*, 118 Pa. 519, 12 Atl. 273, 4 Am. St. Rep. 613.

With these fundamental principles as our guide, the question is: Did the plaintiff establish his first ground of negligence, to wit, that the defendant furnished him with an appliance of a defective and dangerous construction with which to do his work? On the part of the plaintiff, it is insisted that the testimony of his two experts, Schott and Kerr, established the fact that any and all

emery wheels are inherently liable to break or explode, and therefore he was entitled to go to the jury. It is true that these two experts testified, in substance, that any kind of an emery wheel was liable to break; but it was developed from the examination of these same witnesses that emery wheels were constantly in use in all the great manufacturing establishments of this country for the purpose of grinding castings and tools, and that the so-called straight emery wheel, a wheel of the character of the one which broke in this case and injured the plaintiff, was of general use in all large manufacturing establishments, at least in the vicinity of St. Louis. Witness Schott testified that he knew little or nothing about the constituents of emery wheels, or how they were made, and, when called upon to give his knowledge of the liability of these wheels to break, he testified that in an experience of 23 years he had known only two to break. And witness Kerr stated that in an experience of 22 years he had only known five to break. And the witnesses for defendant with experiences ranging from 3 and 4 to 27 years testified some of them, that they had never known an emery wheel to explode, and others knew one in all that time, and it was shown that in the shops of the defendant there were fifty emery wheels in operation all the time, and about five hundred would be used during the year, and only 1 had ever broken or exploded prior to the jury to the plaintiff. So that the substance of this testimony from both sides established that occasionally at rare intervals a straight emery wheel had been known to explode. Can it be said from this testimony that this character of emery wheels broke so often, or was so inherently dangerous, that they can be characterized as implements inherently apt to break, or that they break with such frequency as to require the users of them to adopt a sort of guard or fender to protect the workmen in the use of them, or require the manufacturer to abandon this form of a wheel and adopt a convex wheel with convex flanges in lieu thereof. We think not. If we are not to disregard the rule announced in *Minnler v. Railway Co.*, supra, then, when an employer furnishes his servant implements and appliances of ordinary character for the work according to the average habits and ordinary risks of the business in which he is engaged, he has performed his duty to his servants. We think that this evidence shows without any doubt that the defendant in using this character of an emery wheel was conforming to the ordinary and usual practice of all the large manufacturing establishments in the vicinity of St. Louis and throughout the country, and the mere fact that now and then, in an experience of 20 years, a witness had known of two or five explosions of these emery wheels in various parts of the country, did not establish that it was negligence

on the part of the defendant to use these emery wheels in its work. So varied and so different were the methods of making these wheels that it might well happen that some wheel of a certain make might explode, and yet be no evidence of negligence on the part of defendant in using the wheels of the manufacture of which the wheel in evidence was a sample.

But, more than this, the negligence upon which this case is grounded is that the defendant did not use the convex wheel, instead of the straight wheel. It cannot be contended under this evidence that this convex wheel was in general use prior to the injury to the plaintiff. The most that can be said of the testimony on this point is that there was some showing that a convex wheel had been invented prior to the accident, and was on exhibition in some of the stores, and had been seen in use in two places only. Whereas, the defendant in furnishing the straight wheel was using a device in general use, and one which had been in use for a long time, and, this being true, it must be held that the defendant complied with the test, in that it was exercising the ordinary care exercised by others in the same character of business, and as said in *Higgins v. Fanning Co.*, 196 Pa. 590, 46 Atl. 102: "Whatever is according to the general and usual and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law. *Kehler v. Schwenk*, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. The test is negligence, and negligence cannot be imputed from the employment of machinery in general use. *Reese v. Hershey*, 163 Pa. 258, 29 Atl. 907, 43 Am. St. Rep. 795." We think it is clear that under the evidence in this case up to the time, at least, of the injury to plaintiff, the defendant was not negligent in failing to adopt what is known as the convex wheel, as the proof was overwhelming that in all manufacturing establishments of a similar character to that of the defendant's this convex wheel was only in use by two of them. Accordingly, in our opinion, it was error to leave to the jury the question of negligence based on the failure of the defendant to adopt the convex wheel, even though it might have known that there was such a device at that time, as it was not bound to adopt every new appliance which might be devised for its work, so long as it was using an appliance in general use by other similar establishments in the same character of business.

2. The second proposition is that the defendant, with actual knowledge that emery wheels were liable to explode, was negligent in not warning plaintiff of the danger incident to working with emery wheels. But if we are right that there was no negligence on the part of the defendant in using the said straight emery wheel then in general use, and no testimony that such wheels were so inherently liable to break up as to require

defendant to take notice that they were dangerous, it cannot be said, we think, that the defendant had actual knowledge that such wheels were inherently dangerous to its employes. If we are right in holding, as we have held, that plaintiff failed to establish that the ordinary usage of the business required defendant to use a convex wheel, then defendant was guilty of no negligence in using the straight emery wheel, and no negligence in failing to warn plaintiff of the dangers incident to its use. The plaintiff's own testimony demonstrates that he was directed how to work with this machine, and it is not pretended that the wheel broke on account of any misuse of the same by plaintiff, and hence the fact that plaintiff was not told that emery wheels did explode or break in some instances in no wise contributed to cause this particular one to break or explode. The mere failure to inform plaintiff that emery wheels will explode at times had nothing to do with causing this emery wheel to explode, and had he been told that emery wheels at long intervals had been known to explode, it could not in any manner have lessened the likelihood of explosion in this case.

3. Recurring to the expert testimony on the part of the plaintiff, it should be observed that the wheel, which exploded in this case, was what was known as the "Springfield, Ohio, Safety" pattern. The witness Schott was not asked whether he knew the ingredients of that particular make of emery wheels, or whether he had ever had any experience in watching them, but, on the contrary, was asked the general question as to the breakability of all emery wheels, after he had testified that they were all different in construction. If this witness had known the constituents of this Springfield wheel, whether they were made like other wheels he had observed, or that he had had actual experience with Springfield wheels, it would have been competent to ask him as to the danger of explosion of such wheels; but we think that the general question asked him in regard to emery wheels generally, and after he had testified that they were made in different ways and out of different ingredients, and when he had shown no knowledge of the ingredients which entered into the composition of the Springfield wheel, was improper. The defendant was not called upon to try the records on all different kinds of emery wheels, and the same objection, we think, obtains as to the testimony of the witness Kerr. He had no knowledge of the ingredients of the different wheels, nor of the manner of putting them together, so as to qualify him to speak intelligently as to the durability and reliability of the different makes.

4. Again, the plaintiff charges in his petition that the defendant knew that the said emery wheel which exploded and caused the plaintiff's injury was known by the defendant to be dangerous, and yet employed plaintiff to work at and upon it. We think there was no

evidence to sustain this charge that this particular emery wheel was dangerous. The only testimony in reference to this point on the part of the plaintiff was that of his expert, who testified that in an experience of 22 years he had known two straight wheels to break or explode; but there was no evidence that the defendant had knowledge of such explosions, and, on the contrary, it was shown that defendants had been using these wheels for 6 years, and one only had exploded, and that while it was being tested, and did not stand the preliminary test, which tended only to show, not that this pattern of wheel was dangerous, but simply that this particular wheel so being tested was defective.

The defendant offered several instructions embodying the principles which we have already announced, and they were refused by the court. It is not necessary, in our view of the case, to discuss these serials, as we have reached the conclusion that there was no substantial evidence of negligence upon which to submit the cause to the jury; but, if there had been, these instructions in the main should have been given. In our opinion there was no evidence of negligence on the part of the defendant either in using the straight wheel, from the explosion of which plaintiff was injured, or not in adopting what is known as the convex wheel, because at that time there was no evidence that this convex wheel with flanges had come into general use among manufacturing establishments in St. Louis and its vicinity.

It results from what we have said that the judgment must be reversed, without remanding.

It is so ordered.

FOX, P. J., and BURGESS, J., concur.

CITY OF ST. LOUIS v. KLAUSMEIER.

(Supreme Court of Missouri. June 6, 1908.
Rehearing Denied June 26, 1908.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—CONSISTENCY WITH STATUTES.

The ordinances of the city of St. Louis, in order to be valid, must be consistent with the general laws of the state, and must be in harmony with the legislative policy of the state, manifested by its general enactments, and as provided for in express terms by the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1308-1314.]

2. FOOD—MUNICIPAL REGULATION—CONSTITUTIONAL PROVISION.

The enactment of ordinances by the city of St. Louis, supplemental and in addition to the state laws relating to the establishment of standards of purity, and providing for the inspection of dairy products, is not prohibited, either by the Constitution or by any of the laws of the state of Missouri, but, on the contrary, is expressly authorized by section 26 of article 3 of the charter of the city of St. Louis (Ann. St. 1906, p. 4807).

3. STATUTES—CONFLICTING PROVISIONS.

In order that there be a conflict between two laws, both must contain either express or

implied provisions which are inconsistent and irreconcilable with each other, and when either is silent, where the other speaks, there can be no conflict between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 228, 229.]

4. FOOD—STATUTORY PROVISIONS—MUNICIPAL REGULATION—CONSISTENCY BETWEEN.

Section 19 of Ordinance No. 20,808 of the city of St. Louis, prescribing the percentages and standards of purity of dairy products, fixed, with the exception of one of the elements of skimmed milk, a lower standard of strength and purity than that fixed by Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), and Sess. Laws 1907, pp. 238, 246, relating to the same subject, and, in addition, required certain ingredients and percentages thereof in whole milk and skimmed milk not called for by the statutes. *Held*, that the additional requirements of the ordinance did not render it invalid as inconsistent with the statutes, except as to the skimmed milk requirement, where the additional requirements were not in conflict with the statutory requirements, but were merely additional to and supplemental of the statutes in fixing the standard of purity, and where the city charter expressly authorized the city council to establish standards of strength and percentages of purity of dairy products and the power to provide for their inspection.

5. MUNICIPAL CORPORATIONS—REGULATIONS—PENALTIES—CONFLICT WITH STATE LAWS.

Where a city has concurrent power with the state, it may prescribe a penalty for the violation of its ordinance different from that prescribed by the state for the violation of a statute regarding the same subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1313.]

6. SAME — ORDINANCES — CONSISTENCY WITH STATE STATUTES.

Where a city under express authority of its charter enacted an ordinance along the same lines covered by state statutes, but the requirements of which fell short of the requirements of the statutes, the fact that the ordinance was not as broad as the statutes did not render the ordinance void as inconsistent with the statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1313.]

7. FOOD — STATE FOOD LAWS — MUNICIPAL REGULATIONS—OFFENSES—PROSECUTIONS.

Where a municipal ordinance prescribing the percentages and standard of purity of dairy products fixed a lower standard of strength and purity than that fixed by the state statutes relating to the same subject, but was not inconsistent with the state statute, no prosecution whatever would lie against a person selling dairy products which came up to the standard fixed by the statutes; but, where he sold products below that standard, he would be liable to punishment under the state laws and not under the municipal ordinance, unless the standard of strength and purity fell also below the standard of the city ordinance, in which event he would be liable to punishment under both the ordinance and the statutes.

8. SAME — ORDINANCES — CONSISTENCY WITH STATE LAWS.

Under Const. art. 9, § 23 (Ann. St. 1906, p. 271), providing that the charter and ordinance of a city should be in harmony with and subject to the Constitution and laws of the state, the provision of section 19 of Ordinance No. 20,808 of the city of St. Louis, fixing the total solids to be contained in skimmed milk at not less than 10.5 per cent., was inconsistent with Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), and Sess. Laws 1907, pp. 238, 245, fixing the standard of solids at 9.25 per cent., and hence was void, since it fixed a higher standard than that provided for by statutes, thereby denouncing as a crime what the statutes authorized to be done.

9. STATUTES—REPEAL—IMPLIED REPEAL.

Repeals by implication are not favored at law, and must be strictly construed, and will be permitted only where two laws are so inconsistent and repugnant to each other that both cannot stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 228, 229.]

10. FOOD — MUNICIPAL REGULATIONS — ORDINANCES—IMPLIED REPEAL.

The fact that a provision of a city ordinance fixing the standard of purity of dairy products to be sold within the city was repealed as to the standard for skimmed milk by statutes relating to the standards of purity of dairy products, because they fixed a higher standard for skimmed milk than the statutes, did not impliedly repeal the provisions of the ordinance relating to other dairy products which fixed a lower standard than did the statutes.

In Banc. Error to St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

Prosecution by the city of St. Louis against William Klausmeier to recover a penalty for violating ordinance prescribing standard of purity of dairy products. From a judgment of the St. Louis court of criminal correction quashing the information on appeal from the police court, the city brings error. Reversed and remanded.

This prosecution was instituted against the defendant in error to recover a penalty of \$100 for violating section 19 of Ordinance No. 20,808 of the city of St. Louis. Said section reads as follows: "No cream shall be sold, offered for sale, exchanged, delivered or be transported for the purpose of sale, offering for sale, exchange or delivery, that contains less than twelve per centum of butter fat, or that is taken from any impure, diseased, unhealthy, unclean, adulterated, or unwholesome milk, or milk to which any foreign or other substance of any kind has been added. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars for each and every offense." The complaint charged that the defendant in error carried and exposed for sale, in the city of St. Louis, cream containing less than 12 per centum of butter fat. The defendant in error was fined in the police court and took an appeal to the St. Louis court of criminal correction. In said last-mentioned court, the defendant in error filed a motion to quash the information. The court entered judgment sustaining the motion to quash and discharging the defendant upon the fifth ground set out in the said motion to quash, which is as follows: "Because said ordinance is void as being inconsistent with the statute of this state." After the case had been removed by writ of error to this court, the defendant in error filed a motion to dismiss the writ of error, together with the cause, upon the ground that certain statutes had been enacted which were irreconcilably inconsistent with the further enforcement of the ordinance. The statutes which are invoked to defeat and to dismiss this prosecution are

as follows: Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), entitled "Dairy Commissioner—State—Terms, Powers and Duties Defined." Sess. Laws 1907, p. 246, entitled "Dairy and Food Commissioner." Sess. Laws 1907, p. 238, entitled "Crimes and Punishments—Adulteration of Foods and Drugs."

Chas. W. Bates and Chas. P. Williams, for plaintiff in error. E. F. Stone, for defendant in error.

WOODSON, J. (after stating the facts as above). 1. There are many legal propositions presented and learnedly discussed by counsel for both plaintiff and defendant in error; but, when reduced to their final analysis, only one question remains for the consideration of this court, namely: Was the ordinance mentioned, which was in force at the time of the institution of this prosecution, subsequently repealed by the acts of the Legislature of 1905 and 1907? The ordinance in question fixed the percentages and standards of whole milk and skimmed milk as follows: "Whole Milk: Butter fat not less than 3 per cent. Non-fatty solids not less than 8.5 per cent. Ash not less than 7 per cent. Total solids not less than 12.2 per cent. Butter fat to be determined exclusively by the Adam's paper coll process. Cream: Butter fat 12 per cent. Skimmed Milk: Total solids not less than 10.5 per cent. Butter fat not less than 1.5 per cent. Specific gravity between 1.032 and 1.038." While the acts of the Legislature mentioned prescribed the following percentages: "Whole Milk: Butter fat not less than 3.25 per cent. Non-fatty solids not less than 8.5 per cent. Total solids not less than 11.75 per cent. (No process for analysis designated.) Cream: Butter fat 18 per cent. Skimmed Milk: Total solids not less than 9.25 per cent." It is the contention of the plaintiff in error, who will hereinafter be called the plaintiff: That these laws and the provisions contained therein were intended for the guidance of the state officers referred to in those acts; that it was not the intention of the Legislature to take away the powers of cities granted by charter to make additional and further regulations in respect to the same subject-matter; that the standards referred to in the statutes were intended to be descriptive only of the state offense; and that the ordinances of the city of St. Louis in question remain unimpaired, in full force and effect. The defendant, upon the other hand, insists that there is an irreconcilable conflict and inconsistency existing between the standards for such of said products as are fixed by the ordinance and those prescribed by the statutes. These respective contentions of the parties sharply present the legal proposition involved in this case.

It is not disputed, but it is conceded by plaintiff, that the acts of 1905 and 1907 are general laws of the state, and that they by their terms apply to the entire state and to all the cities thereof, and it is well settled

that the ordinances of the city of St. Louis, in order to be of any validity, must be consistent with the general laws of the state, and must be in harmony with the "legislative policy of the state manifested by its general enactments," and as provided for in express terms by the Constitution. This proposition is fully supported by the following authorities: Dillion on Mun. Corps. (4th Ed.) § 329; *St. Louis v. Meyer*, 185 Mo. 593, 594, 84 S. W. 914; *State ex rel. v. St. Louis*, 117 Mo. 1, 13, 22 S. W. 910; *State v. Kessels*, 120 Mo. App. 239, 96 S. W. 494; *Ewing v. Hoblitzelle*, 85 Mo. 64, 78. But there is nothing in the Constitution or laws of the state which prohibits the city council from enacting ordinances supplemental of and in addition to the state laws in the establishment of standards of purity and providing for the inspection of dairy products. In fact, section 26 of article 3 of the charter of the city of St. Louis (Ann. St. 1906, p. 4807), expressly authorizes the enactment of just such an ordinance as the one here in question, and the validity of this particular ordinance has been repeatedly sustained and upheld by this court. *City of St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 936; *St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048.

This brings us to the vital question involved in this case: Are the acts of 1905 and 1907, prescribing the percentages and standards of purity of dairy products and providing for their inspection, in conflict with the ordinance in question, which deals with the same subjects? The ordinance in every instance, excepting one, fixes an equal or a lower standard of strength and purity than that fixed by the statute. The exception mentioned relates to one of the elements of skimmed milk. The ordinance fixes the total solids of skimmed milk at not less than 10.5 per cent., while the statute fixes the total solids at 9.25 per cent. The ordinance also requires certain ingredients and percentages thereof in whole milk and in skimmed milk which are not called for by the statutes. Those things called for by the ordinance and not by the statute are as follows: In whole milk, ash not less than 7 per cent., and in skimmed milk, butter fat not less than 1.5 per cent.; specific gravity between 1.032 and 1.038. We suppose it will not be claimed, nor could it be logically contended, that there could be a conflict between the statute and the ordinance regarding those matters called for in the latter, and upon which the statute is silent. In order to be a conflict of any kind, two things must of necessity exist, and when it is contended that there is a conflict between two laws both must contain either express or implied provisions which are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there can be no conflict between them. The

ordinance in those particulars is but additional to and supplemental of the statute in fixing the standard and purity of dairy products to be sold in the city of St. Louis. Those requirements of the ordinance are not in conflict with the statute, and there is nothing in the letter or spirit of the statute which prohibits the city from adding those requirements, while, upon the other hand, the charter of the city in express terms grants it the powers here claimed for it. If it can re-enact only such laws as are enacted by the Legislature, then the grant of such power to the city would be vain and useless in its object and purposes; the test being: There must be such inconsistency between the provisions of the ordinance and the statute as to annul the former. *St. Louis v. Cofferata*, 24 Mo. 94; *City v. De Lassus*, 205 Mo. 578, 104 S. W. 12. And it is equally well established that, where a city has concurrent powers with the state, it may prescribe a penalty for the violation of its ordinances different from that prescribed by the state for the violation of a statute regarding the same subject-matter. *Hill v. St. Louis*, 159 Mo., loc. cit. 167, 60 S. W. 116, and cases cited.

That being true, then we are unable to distinguish on principle why the city of St. Louis, which has express authority to establish standards of strength and percentages of purity of dairy products, and the power to provide for their inspection, may not by ordinance fix a lower standard and percentage of strength and purity than that fixed by the state law. It must be conceded that, even though the city possesses the power to pass such ordinances, it is not compelled to do so. If it sees proper, it may enact no ordinance whatever upon the subject and rely exclusively upon the state law for protection against the sale of impure milk and butter. If the city can entirely decline to legislate upon the subject, then why may she not partially decline; that is, why may she not legislate so far along the lines covered by the statute and no further? The legal effect of such an ordinance would not be to authorize the sale of dairy products which do not equal the standards fixed by the state. It would merely impose a penalty for selling such products that do not come up to the standards fixed by the city, and thereby in no manner interfere with the state law. No good reason has been pointed out why the city may not remain inactive so long as milk dealers do not sell milk below a certain standard, even though that standard may be lower than that fixed by the Legislature of the state. Nor are we able to see any valid objection that can be urged against an ordinance prescribing a penalty for selling dairy products at a standard below that fixed by the state. The city might wisely rely upon the state law for protection against such illegal sales, unless the products so sold fell below a certain standard of purity fixed by ordinance, and at

the same time prescribe a penalty for selling such products which fall below the standard fixed by ordinance. While such ordinance might not be as broad as the statute, yet it would not be inconsistent with the statute on that account. Both would proceed along the same lines, but the requirements of the former would fall short of the requirements of the latter. This, however, would not render the ordinance void, as was held in the case of *City of St. Louis v. De Lassus*, 205 Mo. 578, 104 S. W. 12. If a person sells dairy products in the city of St. Louis which come up to the standard of strength and purity fixed by the state, then he would be guilty of no offense either under the state law or the ordinances of the city; but, if he should sell such products which do not come up to that standard, then he would be liable to punishment under the state law and not under the ordinance, unless the standard of strength and purity thereof should also fall below the standard prescribed by the city ordinance, in which event he would be liable to prosecution and punishment under both. Such has been the ruling of this court for many years, as is shown by the following cases: *St. Louis v. Cofferata*, 24 Mo. 94; *St. Louis v. De Lassus*, 205 Mo. 578, 104 S. W. 12; *State v. Muir*, 164 Mo. 610, 65 S. W. 285; *State v. Gustin*, 152 Mo. 108, 53 S. W. 421; *Canton v. McDaniel*, 188 Mo. 228, 86 S. W. 1092; *Hill v. St. Louis*, 159 Mo., loc. cit. 167, 60 S. W. 116; *St. Louis v. Bentz*, 11 Mo. 61.

In the particulars just considered we are of the opinion that there is no conflict between the ordinance and the statutes mentioned, and for the reasons stated the latter does not repeal the former as to the matters indicated: but so much cannot be said of the standard of solids prescribed by the ordinance for skimmed milk. For skimmed milk the ordinance fixed the total solids at not less than 10.5 per cent., while the statute fixes it at 9.25 per cent. In this particular there is a clear conflict between the statute and the ordinance, for a person might sell skimmed milk containing 9.25 per cent. of solids, as prescribed by the state law, and still be guilty of an offense under the ordinance. In other words, the ordinance denounces that to be a crime which the statute authorizes to be done. That cannot be true, because section 23 of article 9 of the Constitution expressly provides that the charter and ordinances of the city shall be in harmony with and subject to the Constitution and laws of the state. To hold otherwise would be to subject the statute of the state to the operation of the ordinance of the city. *Dillon on Mun. Corps.* (4th Ed.) § 329; *St. Louis v. Meyer*, 185 Mo. 593, 84 S. W. 914.

We are therefore clearly of the opinion that the clause of the ordinance just mentioned is in direct conflict with the acts of the Legislature mentioned, and is repealed by necessary implication; but what bearing does that

holding have upon the defendant in this case? It must be borne in mind that he is not charged with selling skimmed milk of any standard, but with selling cream, in violation of section 19 of the ordinance, containing less than 12 per cent. of butter fat. The defendant's contention in that regard is that a repeal of any portion of the ordinance operates as a repeal of the entire ordinance. We are unable to lend our assent to that contention. The law does not favor repeals by implication, and must be narrowly and strictly construed, and will be permitted only where the conflict is so inconsistent and repugnant to each other that both laws cannot stand together. *State ex rel. v. Hopkins*, 87 Mo. 519; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372. Clearly, under this rule, the other portions of the ordinance are not repealed, for the reason before stated, namely, the statute and the ordinance in all other respects stand together. Thus viewing the case, we must conclude that the court of criminal correction committed reversible error in quashing the information.

It is therefore ordered that the judgment be reversed, and the cause remanded, to be proceeded with in conformity to the views herein expressed. All concur, except VALLIANT, J., absent.

CITY OF ST. LOUIS v. WORTMAN.

(Supreme Court of Missouri. June 6, 1908.
Rehearing Denied June 26, 1908.)

1. STATUTES—SUBJECTS AND TITLES.

Acts 1905, p. 135, § 5 (Ann. St. 1906, § 4761-5), entitled "An act to create the office of state dairy commissioner, and to define his term of service, duties and powers," defines creameries, public dairies, butter and cheese factories, and provides that in all prosecutions under the laws pertaining to the production, sale, and distribution of dairy products, the standard of purity and the definition of such products shall be such as are adopted, recognized, and published by the officials of the United States Department of Agriculture, and that whosoever shall sell or offer or expose for sale anywhere in the state milk or cream containing any foreign substance or preservative of any kind whatsoever injurious to health shall be guilty of a misdemeanor, and on conviction fined not less than \$10 nor more than \$100 for such offense. *Held*, that the provisions, attempting to establish the standard of purity of dairy products, and providing for the prosecution and punishment of persons violating the provisions, were not germane to the matters expressed in the title, and hence that portion of the section was invalid, under Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.

2. SAME—CONSTITUTIONAL PROVISION—OBJECT.

The object of the provisions of the organic law, requiring an act to contain only one subject, to be clearly expressed in its title, was to have the title, like a guideboard, indicating the general contents of the act, and containing but one general subject, which might be expressed in a few or a greater number of words, which, if they constituted only one general subject, and did not mislead as to what the act contained,

and were not designed as a cover to vicious and incongruous legislation, would be a sufficient compliance with the constitutional requirement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 136-139.]

3. SAME.

Courts are vested with no dispensing power in relation to the title of statutes, and cannot enlarge the scope of the title of an act to make it a sufficient compliance with the constitutional requirements that the subject of the act be clearly expressed in the title, since the Constitution has made the title the conclusive index to the legislative intent as to what shall have operation.

4. MUNICIPAL CORPORATIONS—ORDINANCES—IMPLIED REPEAL.

Section 17 of Ordinance No. 20,808 of the city of St. Louis, providing that no foreign substance of any kind shall be placed in milk or cream for "any purpose whatsoever," would be repealed by implication by Acts 1905, p. 135, § 5 (Ann. St. 1906, § 4761-5), providing that no foreign substance or preservative of any kind whatsoever shall be placed in milk or cream "which is injurious to health," if that act was constitutional, since the provisions were so inconsistent that they could not stand together; the ordinance prohibiting the placing of any foreign substance and preservative in milk or cream for any purpose, while the statute only prohibits the placing therein of foreign substances which are injurious to health.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 271.]

5. SAME—INVALIDITY OF REPEAL—STATUTES.

An ordinance, inconsistent with a state law invalid because not clearly expressing the subject of the act in the title, was not repealed by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 271.]

6. COMMERCE—INTERSTATE COMMERCE—REGULATION—SALES—ORIGINAL PACKAGES.

Sales of dairy products, consisting of interstate shipments sold in the original unbroken packages, are governed by the acts of Congress, and not by state laws, and hence are not subject to a city ordinance prohibiting the use in such products of formaldehyde or other foreign substances or preservatives.

7. SAME.

Where original packages containing dairy products, consisting of interstate shipments, are broken, and the products are sold in different packages from those in which they were shipped into the state, the transactions are changed from interstate to intrastate commerce, and become subject to state laws.

8. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL.

Acts 1907, p. 239, § 4, cl. 5, entitled "An act to prohibit the manufacture and sale of foods, * * * and prescribing penalties for violation thereof," provides that food shall be deemed to be adulterated if it contains any added substance which is poisonous or injurious to health. Section 17 of Ordinance No. 20,808 of the city of St. Louis prohibits the adding to milk and cream of any foreign substance of whatsoever kind for any purpose. *Held*, that the ordinance and statute are so inconsistent and repugnant that they cannot both stand, as the ordinance prohibits adding any foreign substance, whether poisonous or injurious to health or not, while the statute prohibits only adding foreign substances which are poisonous or injurious to health, and hence the ordinance is repealed by necessary implication, and a prosecution cannot be maintained thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 271.]

9. FOOD—FOOD LAWS—FOREIGN SUBSTANCES—QUANTITY OF.

Under Acts 1907, p. 239, § 4, cl. 5, making it a misdemeanor to place any foreign substance in food of any kind "in any quantity" for any purpose which is poisonous or injurious to health, a prosecution can be maintained for putting formaldehyde in milk, such substance being a poison, even though the quantity placed in the milk was so small that it was not sufficient to cause death or injury to health.

10. SAME.

Acts 1907, p. 242, § 12, providing that no dealer in dairy products shall be prosecuted under the act when he can establish a guaranty as provided in the national food and drug act, approved June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]), or a guaranty signed by a wholesaler, jobber, or manufacturer either residing within the state or who shall have complied with the requirements for service of process in proceedings under the act, to the effect that the products are not adulterated or misbranded in the original unbroken packages, does not militate against the liability, under the act of dealers in food and dairy products, for placing therein substances which are "poisonous or injurious to health in any quantity for any purpose whatsoever"; the meaning of the section being merely to relieve the dealer of the necessity of analyzing each and every unbroken package sold or consigned to him, and to authorize him to sell from such packages, under the guaranty mentioned therein, provided the wholesaler, jobber, or manufacturer has complied with the provisions of the section.

11. MUNICIPAL CORPORATIONS—ORDINANCES—PROSECUTION FOR VIOLATION—EFFECT OF REPEAL OF ORDINANCE.

Where there is no saving clause in a statute repealing a city ordinance, providing that the statute shall not apply to offenses already committed, the repealing statute operates to relieve a defendant being prosecuted under the ordinance for an offense committed before the enactment of the statute, and the omission of the saving clause in the statute cannot be supplied by an ordinance of the city containing such a clause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 267; vol. 14, Criminal Law, § 17.]

In Banc. Error to St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

Prosecution instituted by the city of St. Louis against Henry Wortman to recover penalty for violating ordinance prescribing standard of purity of dairy products. From a judgment of the St. Louis court of criminal correction quashing the information on appeal from the police court, the city brings error. Affirmed.

It is conceded by the defendant in error that the plaintiff's statement of the case is full and fair, and for economy of time I will adopt that statement as the statement of court, which is as follows: "This was a prosecution instituted by the city attorney of the city of St. Louis against Henry Wortman, the defendant in error, to recover a penalty of \$100 for the violation of section 17 of Ordinance 20,808, approved August 27, 1902. Section 17 of the city ordinance, upon which the prosecution was founded, is as follows: 'Sec. 17. Any person, firm or corporation, who shall sell, expose for sale, exchange, deliver, dispose of or transport, convey, carry, or with any such intent as aforesaid have in

his or her care, custody, control or possession, any milk or cream having therein, or containing any foreign substances of any kind whatever, or coloring matter, or any adulteration or preservative, whether for the purpose of artificially increasing the quality of the milk or cream, or for preserving the condition or sweetness thereof, or for any purpose whatever, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars for each and every offense.' The information in this case charged that the defendant in error carried and exposed for sale, in the city of St. Louis, skimmed milk, containing a preservative known as formaldehyde. The defendant in error was fined in the police court and took an appeal to the St. Louis court of criminal correction. In said last-mentioned court, the defendant in error filed a motion to quash the information. The court entered judgment sustaining the motion to quash and discharging the defendant upon the fifth ground set out in the said motion to quash, which is as follows: 'Because said ordinance is void as being inconsistent with the statute of this state.' After the case had been removed by writ of error to this court, the defendant in error filed a motion to dismiss the writ of error, together with the cause, upon the ground that certain statutes had been enacted which were irreconcilably inconsistent with the further enforcement of the ordinance. The statutes which are invoked to defeat and to dismiss this prosecution are as follows: Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), entitled 'Dairy Commissioner—State—Terms, Powers and Duties Defined.' Sess. Laws 1907, p. 246, entitled 'Dairy and Food Commissioner.' Sess. Laws 1907, p. 238, entitled 'Crimes and Punishments—Adulteration of Foods and Drugs.'"

Chas. W. Bates and Charles P. Williams, for plaintiff in error. Wm. L. Bohnenkamp, for defendant in error.

WOODSON, J. (after stating the facts as above). 1. Counsel in this case, as in the case of *City of St. Louis v. William Klausmeier* (decided at this term) 112 S. W. 516, have presented and discussed many legal questions, most of which have been disposed of by this court in a series of cases, known as the "Milk Cases," reported in 190 Mo. 464-524, 89 S. W. 611-628. No wise or useful purpose would be served by reopening or discussing those questions again in this case. The questions presented by this record, not common to those presented in those cases, are but three in number, and they are as follows: First. Is Acts 1905, p. 135, § 5, entitled, "An act to create the office of state dairy commissioner and to define his term of service, duties and powers," constitutional? Second. Is section 17 of Ordinance No. 20,808 of the city of St.

Louis repealed by the acts of 1905 and 1907 before mentioned? Third. Have dealers in dairy products the right under said ordinance to sell or offer for sale in the city of St. Louis milk, cream, butter, and other such products which contain formaldehyde or other foreign substances? We will consider these three propositions in the order stated.

It is the first contention of the plaintiff that the act of 1905 mentioned is unconstitutional and void for the reason that it was not enacted in accordance to the mandate of section 28 of article 4 of the Constitution of the state. 'That provision of the Constitution reads as follows: "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." The act of 1905, now under consideration, is entitled as follows: "An act to create the office of state dairy commissioner, and to define his term of service, duties and powers." Section 3 of the act points out the duties of the commissioner, and therein provides that: "It shall be the duty of the state dairy commissioner to inspect or cause to be inspected all creameries, public dairies, butter and cheese factories at least once a year, and oftener if possible, prescribe such reasonable rules and regulations for their operation as he deems necessary to fully carry out the provisions of laws now in force or that may be hereafter enacted relative to dairy products for the promotion and maintenance of public health and safety. * * * He shall keep on hand a supply of standard test tubes or bottles and milk measures or pipettes adapted to the use of each milk testing machine the manufacturers or dealers of which have filed with the state dairy commissioner a certificate from the director of the Missouri agricultural experiment station that said milk testing machine when properly operated will produce accurate measurements of butter fat, and to furnish same at actual cost to any person desiring them, upon written request therefor, such tubes, bottles, measures and pipettes to be stamped with the letters 'S. D. C.' as certifying to their accuracy." Section 4 of the act points out the powers of the commissioner, and therein provides: "In the performance of his official duty the state dairy commissioner is hereby authorized and empowered to enter during business hours all creameries, public dairies, butter and cheese factories or other places where dairy products are sold or kept for sale, for the purpose of inspecting same; to take samples anywhere of any dairy product, or imitation thereof, suspected of being made or sold in violation of law, and cause the same to be analyzed or satisfactorily tested by the State Agricultural College chemist, and such analysis or test shall be recorded and preserved as evidence, and the certificate of such test, when sworn to by such chemist, shall be admitted in evidence in all prosecutions that may result under the operations of this act." Section 5 of the act and the section objected to defines

what creameries, public dairies, butter and cheese factories shall be, and further provides that: "In all prosecutions and proceedings for the enforcement in any of the courts of this state, of all laws and regulations of whatsoever nature now in force, or that may hereafter be enacted pertaining to the production, sale, and distribution of dairy products of any kind whatsoever, the standard of purity and the definition of said products, shall be such as are now, or may hereafter be adopted, recognized and published by the officials of the United States Department of Agriculture, and whosoever shall sell, or offer or expose for sale anywhere in this state, milk or cream containing any foreign substance or preservative of any kind whatsoever injurious to health, shall be guilty of a misdemeanor and on conviction fined not less than ten dollars nor more than one hundred dollars for each offense."

It will be seen from reading the title of the act that it only authorizes the passage of an act creating the office of state dairy commissioner, the term of his service, his duties and powers, while the act itself not only creates that office and defines his term of service, duties, and powers, but goes one step further, and by section 5 thereof attempts to establish the standard of strength and purity of all dairy products, and provides that whosoever shall sell or offer for sale any of such products containing any foreign substance or preservative of any kind injurious to health shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than \$10 nor more than \$100. The plaintiff insists that, if the validity of said section is tested by the constitutional provision before quoted, then that portion of it which establishes the standard of strength and purity of dairy products and prescribes the penalty for their adulteration is unconstitutional and void, for the reason that they are not expressed or mentioned in the title of the act. Counsel for defendant concede that the matters mentioned are not expressed in the title of the act, but contend that they are germane to the matters which are stated therein, and for that reason the section is valid notwithstanding said omission, for the reason that matters found in the body of the act and which are germane to those stated in the title need not be stated in the latter. If defendant's major premise is correct, then his conclusion must necessarily follow from the repeated decisions of this court; but, if the matters stated in section 5 of the act are not germane to those stated in the title, then under the plain mandate of the Constitution we must hold that part of the section to be invalid. This brings us to the point where we must determine whether the matters stated in section 5 are independent of and outside of the title of the act, or whether they are germane to those expressed therein.

This court, in discussing this question in the case of *St. Louis v. Weitzel*, 130 Mo., loc. cit. 616, 81 S. W. 1045, used the following language: "The evident object of the organic law relative to the title of an act was to have the title like a guideboard, indicating the general contents of the bill, and containing but one general subject, which might be expressed in a few or a greater number of words. If those words only constitute one general subject, if they do not mislead as to what the bill contains, if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits as an honest title and does not infringe on constitutional prohibitions." Judge Cooley, in treating this question, in his valuable work on *Constitutional Limitations*, at page 205 (7th Ed.) used this language: "It may therefore be assumed as settled that the purpose of these provisions was: * * * Second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people through such publication of legislative proceedings as is usually made of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire." And continuing, on page 212, he says: "The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The Constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been more comprehensive, if, in fact, the Legislature had not seen fit to make it so. Thus an act concerning promissory notes and bills of exchange provided that all promissory notes, bills of exchange, or other instruments in writing for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulation therein mentioned should be negotiated, and assignees of the same might sue thereon in their own names. It was held that this act was void as to all the instruments mentioned therein except promissory notes and bills of exchange, though it was obvious that it would have been easy to frame a title to the act which would have embraced them all and which would have been unobjectionable." At an early date this court, in the case of *State v. Persinger*, 76 Mo., loc. cit. 347, said: "We are of the opinion that the motion to quash was properly sustained, for the reason that said act was entitled 'An act to change the penalty for disturbance of the peace.' This title only authorized the passage of an act changing the penalty for such disturbances of the peace as were then by law declared punishable. The said act of 1870

(page 46), while it changed the punishment for such offenses, went further and undertook to amend the act of 1868 (page 3), by so changing it as to make it an offense for one person to disturb the peace of another person. While the title of the act embraced but one subject, namely, a change of the penalty for disturbing the peace, the body of the act not only included that subject, but also another, viz., amending the law so as to make that a disturbance of the peace under the act of 1870 which was not an offense under the act of 1868. It therefore follows that as the act of 1870 embraced two subjects, one of which was not expressed in its title, it is violative of the thirty-second section, article 4 of the Constitution of 1865, and void as to so much thereof as is not expressed in the title." If we view the act in question in the light of the rule announced by the foregoing authorities, the conclusion is irresistible that the portion of section 5 under consideration is unconstitutional, null, and void for the reason it is not expressed in the title of the act nor germane to the subject stated therein.

2. The second question presented by this record for our consideration involves the contention of the defendant that section 17 of Ordinance No. 20,808 of the city of St. Louis is repealed by the acts of 1905 and 1907. One of the arguments presented here by defendant in favor of the repeal of section 17 of Ordinance No. 20,808 involved the sole question decided in the case of *City of St. Louis v. Klausmeyer*, supra, and we there held adversely to the contention of the defendant, and what we there said must be taken as conclusive against the defendant upon the same proposition presented here; but defendant presents an additional reason here in favor of the repeal not presented in that case, which we will now consider. Section 17 of the ordinance mentioned, the one defendant is charged with violating, provides that any person who shall sell or offer for sale any milk or cream having therein or containing any foreign substance of any kind whatever, or coloring matter, or any adulteration or preservative whether for the purpose of artificially increasing the quality of the milk or cream, or for preserving the condition or sweetness thereof, or for any purpose whatever, shall be deemed guilty of a misdemeanor. And section 5 of the act of 1905, before mentioned, provides that: "Whosoever shall sell or offer for sale anywhere in this state milk or cream containing any foreign substance or preservative of any kind whatsoever injurious to health shall be guilty of a misdemeanor." The defendant was charged with offering for sale in the city of St. Louis milk containing a preservative known as formaldehyde, contrary to the provisions of said section 17 of said ordinance. The defendant contends that the said section 17 of the ordinance and said section 5 of the act of 1905 are so inconsistent that both of

them cannot stand together, and that by necessary implication the latter repeals the former. There can be no doubt but what there is such an inconsistency and irreconcilable conflict between the statute and the ordinance that both cannot stand together. The ordinance provides that no foreign substance or preservative of any kind shall be placed in milk or cream for any purpose whatsoever, while the statute provides that no foreign substance or preservative of any kind whatsoever shall be placed in milk or cream which is injurious to health. The italicized words differentiate the meaning of the two sections. The ordinance absolutely prohibits the placing of all foreign substances and preservatives in milk or cream for any purpose, while the statute only prohibits the placing in milk and cream foreign substances and preservatives which are injurious to health. The former is an absolute prohibition, while the latter is conditional, or permissible if the preservatives are not injurious to health. We are therefore clearly of the opinion that there is an irreconcilable conflict between the two, and there would be no doubt but what the statute would repeal the ordinance by necessary implication if the statute was constitutional; but it is not, for the reasons stated in the first paragraph of this opinion. We must therefore hold that said section of the ordinance is not repealed by that section.

3. This brings us to the consideration of the third or last proposition presented by this record, namely, has a person in the city of St. Louis the legal right, under Ordinance No. 20,808, to sell or offer for sale dairy products which contain formaldehyde or other foreign substances? That question involves two legal propositions, viz.: First. If the sales consist of interstate shipments, and the products are sold in the original unbroken packages, then the answer would be in the affirmative, for the reason that all such sales are governed by the acts of Congress, and not by the state laws. But if the original packages are broken, and the milk, cream, or butter are sold in different packages from those in which they were shipped into the state, then the answer would be the same as that stated in the next succeeding clause of this opinion, for the reason that such transactions would then be changed from interstate to intrastate commerce. Second. Clause 5 of section 4 of an act of 1907, entitled "An act to prohibit the manufacture and sale of foods * * *; and prescribing penalties for violations thereof," (Laws Mo. 1907, p. 239), provides that: "Food shall be deemed to be adulterated: * * *

(5) If it contain any added substance which is poisonous or injurious to health." And section 14 of the same act prescribes a penalty of not less than \$10 nor more than \$500 for the violation of any of the provisions of the act. Said clause 5 of said section does not prohibit the adding of any sub-

stance to food (which, of course, includes dairy products) which is not poisonous or injurious to health; but it does expressly prohibit the adding thereto of any substance which is poisonous or injurious to health.

As shown by paragraph 2 of this opinion, the section 17 of the ordinance absolutely prohibits the adding to milk and cream any foreign substance of whatsoever kind for any purpose. The ordinance is much broader than is the statute. It covers all that the statute covers, and more too. The statute only covers matters which are poisonous or injurious to health, while the ordinance covers those matters and all others, whether poisonous or injurious to health or not. There is clearly an inconsistency and repugnancy between the two, and so much so that both cannot stand, and we must therefore hold that the statute by necessary implication repeals said section 17 of the ordinance. We must therefore hold that defendant cannot be punished for selling milk in the city of St. Louis, adulterated with formaldehyde, or other foreign substance, in violation of said section of the ordinance. But since formaldehyde is a well-known poison, it cannot be placed in food of any kind, in any quantity, and be sold or offered for sale anywhere in the state without violating the express terms of clause 5 of said section 4 of the act of 1907, and if such is being done, then the guilty parties may be prosecuted under the state laws and punished for such violation. Learned counsel for defendant misapprehend the meaning of the statute in that regard. They contend that, under the statute, poison or other substances which are injurious to health may be lawfully placed in food and dairy products, provided the quantity used was not sufficient to cause death or injury to health. That is neither the letter nor spirit of the act. The statute makes it a misdemeanor to place any substance in food of any kind, in any quantity, for any purpose, which is poisonous or injurious to health. If this is not the meaning of the statute, then who would determine what quantity is or is not injurious to health? Which one of the thousands of dairymen and farmers who sell milk throughout the state would determine that most important question? If one may determine that question, then each and all of them may do the same, and in that case the quantity of poison contained in milk and cream sold on the market would depend solely upon the individual judgment of each and every producer and vendor of dairy products. Of course, where the law absolutely prohibits the use of all poisonous matters and other substances which are injurious to health, there could be no legal standard by which any one could determine what quantity is or is not dangerous to health. And under that condition of the law one person might conclude that a certain quantity was not injurious, another might think twice that

quantity was not, while a third might believe both were too large and injurious, and so on to the end of the long list. If counsel for defendant are correct in their contention, then the foregoing would be the practical manner in which the dairy business of the state would be conducted, and the citizens of the state would thereby be subjected to the extremely dangerous judgment or caprice of each and every dairyman doing business in the state. Such a result shows the unsoundness of their contention.

Nor is there anything in section 12 of said act of 1907 which militates in the least against the conclusions above reached. That section reads as follows: "Sec. 12. No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty, as provided for in the national food and drug act, approved June 30th 1906, or a guaranty signed by the wholesaler, jobber or manufacturer or other party residing in the state of Missouri, or who shall have filed in the office of the dairy and food commissioner a designation of the name and residence of some competent person being and continuing a resident of this state, process served on whom shall be valid and acceptable as personally served upon such party in any suit or proceeding under this act, from whom he purchased such articles, to the effect that the same are not adulterated or misbranded in the original unbroken packages within the meaning of this act. Said guaranty to afford protection shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the proceedings, fines and other penalties, which would attach, in due course, to the dealer under the provision of this act." The clear and manifest meaning of that section is to relieve the dealer of the necessity of analyzing each and every original and unbroken package of milk and cream sold or consigned to him by the wholesaler, jobber, or manufacturer, and to authorize him to sell from said packages under the guaranty mentioned therein, provided the wholesaler, jobber, or manufacturer from whom he purchases has complied with the provisions of said section. In such case, if the wholesaler, jobber, or manufacturer places any substance in such packages which is poisonous or injurious to health, then he, and not the retail dealer, is liable to prosecution and fine for violating the statute. In other words, the clear meaning of the statute is that neither the wholesaler, jobber, manufacturer, nor retail dealer of food or dairy products can lawfully place any substance in any food or dairy products which is poisonous or injurious to health, in any quantity, for any purpose whatsoever.

The argument of the learned city counselor that, to place the above construction upon the acts of 1905 and 1907, and Ordinance No. 20,808, would virtually destroy the city's

system of inspection is, it seems to us, without much real merit, for the reason that the city is protected by the state law, and whoever sells or offers to sell dairy products in the city of St. Louis in violation thereof is guilty of a misdemeanor and is liable to a fine of not less than \$10 nor more than \$500. With that law in force, no very great injury could be inflicted upon the citizens of St. Louis before the city could pass an ordinance in harmony with the views herein expressed, and by so doing the entire laws of Congress, the state of Missouri, and the ordinances of the city would be brought into one general harmony, and thereby furnish to the citizens of that great city perfect protection against adulterated milk and cream, and at the same time relieve the city and milk dealers of the disorder and confusion that now prevails there. We are therefore of the opinion that section 17 of Ordinance No. 20,808 of the city of St. Louis was repealed by clause 5 of section 4 of the act of 1907, and, consequently, the action of the court of criminal correction in quashing the information was correct notwithstanding the fact that the act of 1907 was not enacted until subsequent to the commission of the offense charged in the information, for the reason that the law is well settled in this state that the repeal of an ordinance pending a prosecution under its provisions operates to relieve the defendant unless it is otherwise provided in the act repealing the ordinance. *City of Kansas v. Clark*, 68 Mo. 588. There is no such saving clause in the act of 1907, and that omission cannot be supplied by an ordinance of the city containing such a clause. The city council have no authority to act for the Legislature of the state, nor bind the Legislature by the passage of such an ordinance.

The judgment should be affirmed, and it is so ordered. All concur, except VALIANT, J., absent, and LAMM, J., dubitante.

CITY OF ST. LOUIS v. UNION DAIRY CO.

(Supreme Court of Missouri. June 6, 1908.
Rehearing Denied June 26, 1908.)

In Banc. Error to St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

Prosecution instituted by the city of St. Louis against the Union Dairy Company to recover penalty for violating ordinance prescribing standard of purity of dairy products. From a judgment of the St. Louis court of criminal correction quashing the information on appeal from the police court, the city brings error. Reversed and remanded.

This is one of a series of four test cases, brought to test the validity of Ordinance No. 20,808, known as the milk ordinance of the city of St. Louis. It is conceded that plaintiff's statement of the case is correct, and, omitting formal parts, it is as follows: "This was a prosecution instituted by the city attorney of the city of St. Louis against the defendant in error to recover a penalty of \$100 for the violation of section 18 of Ordinance 20,808, approv-

ed August 27th, 1902. Section 18 of the city ordinance, upon which the prosecution was founded, is as follows: 'Sec. 18. No milk shall be sold, kept, offered or exposed for sale, stored, exchanged, transported, conveyed, carried or delivered, or with such intent as aforesaid be in the care, custody, control or possession of anyone, unless it show on analysis not less than three per cent. by weight of butter fat, eight and five-tenths per cent. of solids not fat, seven-tenths of one per cent. ash, of which fifty per cent. shall be insoluble in hot water. Provided, however, that in contested analyses of milk condemned under this ordinance, butter fat shall be estimated gravimetrically by the Adams paper coil process; total solids by evaporation, and non-fatty solids by the difference between total solids and butter fat, and ash by weighing the residue incineration of total solids at a dull red heat until all the organic matter is destroyed. Any one violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each and every offense.' The information in this case charged that the defendant in error carried and exposed for sale, in the city of St. Louis, milk showing on analysis less than 3 per centum by weight of butter fat. The defendant in error was fined in the police court and took an appeal to the St. Louis court of criminal correction. In said last-mentioned court, the defendant in error filed a motion to quash the information. The court entered judgment sustaining the motion to quash and discharging the defendant upon the fifth ground set out in the said motion to quash, which is as follows: 'Because said ordinance is void as being inconsistent with the statute of this state.' After the case had been removed by writ of error to this court, the defendant in error filed a motion to dismiss the writ of error, together with the cause, upon the ground that certain statutes had been enacted which were irreconcilably inconsistent with the further enforcement of the ordinance. The statutes which are invoked to defeat and dismiss this prosecution are as follows: Sess. Laws 1905, p. 133, entitled 'Dairy Commissioner—State—Terms, Powers and Duties Defined.' Sess. Laws 1907, p. 246, entitled 'Dairy and Food Commissioner.' Sess. Laws 1907, p. 238, entitled 'Crimes and Punishments—Adulteration of Foods and Drugs.'

Charles W. Bates and Chas. P. Williams, for plaintiff in error. E. F. Stone, for defendant in error.

WOODSON, J. (after stating the facts as above). The complaint in this case is substantially the same as that filed in case No. 13,427 (111 S. W. 507), wherein the city of St. Louis was plaintiff in error and William Klausmeier was defendant in error, and decided at this term; opinion not yet officially published. In that case, as in this, the defendant was charged with the violation of the eighteenth clause of Ordinance No. 20,808 which relates to what is known as "whole milk," and the evidence disclosed he was not selling or offering to sell whole milk, but was selling skimmed milk, which was governed by section 22 of the ordinance, and for that reason we held there was a fatal variance between the information and proof, and discharged the defendant; but in this case the proof corresponded to the complaint and showed that defendant was carrying and exposing for sale "whole milk" which contained less than 3 per cent. of butter fat, in violation of section 18 of said ordinance. Counsel for defendant make the same contentions and present the same arguments in this case as they presented in the case No. 13,907 (112 S. W. 516) against William Klausmeier. After a care-

ful consideration of that case, we came to the conclusion that those contentions were unsound, and reversed the judgment and remanded the cause for trial. The views expressed in that case are conclusive upon defendant in this case.

We therefore reverse the judgment, and remand the cause to be proceeded with in harmony with the views herein expressed. All concur, except VALLIANT, J., absent.

SIRES v. CLARK et al.

(Kansas City Court of Appeals. Missouri. June 29, 1908. Rehearing Denied July 15, 1908.)

1. IMPROVEMENTS—COMPENSATION.

One who, believing himself to be the true owner of land, enters thereon and makes valuable permanent improvements without notice of the claim of the true owner, may recover the value of the enhancement which such improvements give the land, but is limited to the addition in value which the improvements have made to the land above what the value would have been had they not been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Improvements, §§ 4-22.]

2. SAME—ACTIONS—INSTRUCTIONS.

In an action to recover for improvements placed on the land of another, the instructions conditioned plaintiff's right to recover on his having entered into possession, and made the improvements in good faith, and without knowledge of the true state of the title, or such information as would put an ordinarily prudent man on inquiry, and that, though there was a general report in the neighborhood that certain heirs claimed the land, yet, unless plaintiff knew of such reports, they could not affect him. The court further instructed that, if he recovered, the amount should be the difference in the value of the lands with said improvements and without said improvements, not, however, to exceed the reasonable value of the cost of said improvements, and not to exceed a certain sum, and not to embrace any value that may have been added to said land aside from said improvements. *Held*, that the instructions were unobjectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Improvements, §§ 4-22.]

3. SAME.

Plaintiff cleared certain land, and put it in cultivation, in the belief that he held title in fee simple, and he had no notice of any adverse claim. Defendant subsequently established title to eight-tenths of the tract, and plaintiff sued to recover for the improvements. *Held*, that it was not error to refuse an instruction that clearing land and putting it in cultivation is simply a privilege that the life tenant may enjoy in his use and occupancy of the land, and therefore that plaintiff was not entitled to recover anything for such clearing and putting in cultivation; there being no evidence to show knowledge on plaintiff's part that his interest was less than the fee.

4. TRIAL—REPETITION OF INSTRUCTIONS.

Where the jury has already been informed as to the correct measure of damages, an instruction is properly refused which restates the measure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 513, 651-657.]

5. IMPROVEMENTS—RECOVERY OF COMPENSATION—EVIDENCE.

In an action to recover for improvements placed by plaintiff on the land of defendants, witnesses were permitted to testify as to what the work of placing such improvements on the

land was worth. *Held*, that such evidence was admissible as bearing on the question of the enhanced value of the land by reason of such improvements; the jury being warned that, in the event of a verdict for plaintiff, he was not entitled to recover what the improvements cost him, nor their actual value, but only the sum by which the value of the land was increased.

6. APPEAL AND ERROR — REVIEW — CONCLUSIVENESS OF VERDICT.

Where a case is fully and fairly tried, the verdict will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3. Appeal and Error, §§ 3912-3924.]

Appeal from Circuit Court, Grundy County; G. W. Wanamaker, Judge.

Action by Columbus Sires against W. A. Clark and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Platt Hubbell and George Hubbell, for appellants. A. G. Knight and E. M. Harber, for respondent.

ELLISON, J. This action was begun and prosecuted to recover the value of certain improvements made on certain lands in Grundy county, being eight-tenths of a 40-acre tract. The judgment in the trial court was for the plaintiff for \$500, and the defendants prosecute this appeal.

The case is a simple one, involving questions which have been frequently determined by the Supreme and appellate courts of the state, but it has been so filled in with extraneous and unnecessary matter that it has been somewhat difficult to select out of the mass the points pertaining to the case. Plaintiff was the occupant of the land in question (40 acres) for near 30 years, claiming to be the fee-simple owner, and, as he insists, believing in good faith that he was such owner. Finally the true owners brought an action of ejectment against him and ousted him, recovering with the land itself damages and rents and profits. For a history of that case, see *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224. One who believes himself to be the true owner of land, enters thereon, and makes valuable permanent improvements, without notice of the claim of the true owner, may recover the value of the enhancement which such improvements give the land. The ordinary advance in the value of the land is no part of the measure; nor is the cost of the improvements the measure, as they may have cost too much, or may not have been judicious. The measure is the addition in value the improvements have made to the land over and above what the value would have been had they not been made. For improvements of that character the ousted claimant may recover of the owner, provided he makes them without notice of the adverse claim. *Stump v. Hornback*, 94 Mo. 26, 6 S. W. 356; *Gallenkamp v. Westmeyer*, 116 Mo. App. 680, 93 S. W. 816; *Stump v. Hornback*, 15 Mo. App. 367. The improvements for which judgment is sought consist-

ed mainly in clearing the land of trees and brush and straightening a creek. There was evidence tending to show that the land, as it stood, was heavily covered with timber and brush, and that it was worthless for use in that condition; that the clearing and grubbing brought it into a productive state, and the enhanced value was between \$600 and \$700. The evidence does not leave room to doubt that plaintiff supposed himself to be the true owner of the fee-simple title. He paid full value for the entire 40 acres, and received a warranty deed therefor, but, as it turned out, he only obtained title to two-tenths, leaving his claim confined to the eight-tenths.

An examination of the record discloses that there was evidence tending to show that after plaintiff's purchase, and during the period the improvements were being made, he did not have actual knowledge of the defendants' title, nor did he become possessed of sufficient information to put an ordinarily prudent man upon inquiry. Our consideration will therefore be directed to the instructions. If they are free from error materially affecting the merits of the case, we must affirm the judgment. Those for the plaintiff conditioned his right to recover on his having entered into possession of the premises and made the improvements "in good faith—that is, with an honest belief that they owned and had title thereto"; that, if he recovered, it should be the difference in the value of eight-tenths of said lands with said improvements and without said improvements, not however to exceed the reasonable value of the cost of said improvements, and not to exceed \$20 per acre or \$640 for such improvements, and not to embrace in aforesaid difference any value that may have been added to said land aside from said improvements. On the question of notice they submitted his right to recover, unless he had knowledge of the true state of the title or such information as would put an ordinarily prudent man on inquiry, and, that although different persons may have upon different occasions expressed their opinions and beliefs that the Clark heirs had or would make some claim to the land, and though this may have been a general report of the neighborhood, yet, unless plaintiff knew of such talk or reports, they could not affect him. General report, while evidence of knowledge, is not conclusive. We cannot see any valid objection to these instructions. They state the law as understood and decided in this state.

Defendants asked 15 instructions, and the court gave 9 and refused 6 outright, though in 2 of those given there were immaterial changes made. Of those given Nos. 5, 6, and 7 set forth the state of the title to the land. No. 8 was the counterpart of plaintiff's as to notice, and put the burden on plaintiff. No. 9 informed the jury that notice to plaintiff could be proved by circumstantial evi-

dence, and that they could consider all the facts and circumstances shown. No. 10 informed the jury that it was plaintiff's duty as life tenant "to keep up the ordinary repairs and to pay the taxes on the land in controversy until the death of Cynthia Clark, and that plaintiff is not entitled to recover anything for so doing." No. 11 warned the jury that, if they found a verdict for plaintiff, he was not entitled to recover what the improvements may have cost him, nor their actual value, but only whatever sum they may have increased the value of the land, and that he was "not entitled to the natural commercial increase in value," or for any increase "which has resulted from any cause other than his alleged improvements." Of those refused for defendants all contained in them which was proper was embodied in those given, and we do not deem it necessary to comment on any save No. 2. That instruction informed the jury that "clearing land and putting it in cultivation is simply a privilege that the life tenant may enjoy in his use and occupancy of the land," and that, therefore, plaintiff was "not entitled to recover anything for such clearing and putting in cultivation." We will not enter upon a discussion of the rights of a life tenant as they relate to the remainderman. If the plaintiff had known he was only a life tenant, the question as to his rights in and to improvements would be totally different from what they are under the facts as we must assume them to be in this case. Here he made improvements in the belief of his fee-simple title, and without notice of an adverse claimant to whom he

must surrender them. In such case we do not see how the fact that he was, in reality, a life tenant, can affect his right, since all claim of waste, rents, and profits, etc., was determined in the ejectment against plaintiff. No. 12 is in reality but a statement in different form of the measure of damage. The jury had already been informed of what plaintiff should and should not recover. It was properly refused. Taking the instructions which were given as an entirety, no one can doubt but that the jury understood every issue in the case. They were made too plain for the probability of error on the part of the jury.

We think there was no error committed in the rulings made on evidence. It is insisted that the court should not have permitted witnesses to state what the work of clearing was worth. No issue of that kind was submitted to the jury. It is true that witnesses made statements of the worth of the work; but that was only a mode of obtaining the value. One of the means of showing the value of anything is to show the cost to produce it. It does not follow that an improvement is necessarily worth its cost. But at the same time it is one of the things which tend to show the value. As we have already seen, the jury were especially warned as to these matters.

We have gone over the whole record, and can find nothing to justify us in interfering. The case was fully investigated and fairly tried, and with the jury's conclusion we must rest content, since to them belongs the duty of finding the facts.

The judgment is affirmed. All concur.

RANDALL v. SNYDER et al.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. JUDGMENT—DEFAULT JUDGMENT—PLEADINGS TO SUSTAIN—AMENDED PLEADING—NECESSITY OF SERVICE.

A petition cannot be amended in a matter of substance after publication of notice so as to make a valid judgment thereon against a defendant not appearing.

2. SAME—COLLATERAL ATTACK.

Where the order of publication in an action on a foreign judgment correctly stated the object and general nature of plaintiffs' demand, and correctly recited the names of plaintiffs in the court of the sister state and the balance due on the judgment, and notified defendant that a judgment would be asked on the judgment in favor of plaintiffs, and that a certified copy of the judgment was filed and made a part of the petition, the fact that the order stated that the judgment had been rendered in the common pleas court of F. county in the sister state, instead of in such court of C. county, did not affect the validity of the judgment rendered in the action as against a collateral attack.

3. TAXATION—ENFORCEMENT OF LIENS FOR TAXES—ACTIONS.

Under the tax law to enforce the state's lien against specific real property, a statement of the object and general nature of the petition, which omits the land against which the lien is claimed, is insufficient.

4. JUDGMENT—COLLATERAL ATTACK—GROUNDS—ORDER OF PUBLICATION.

Under Rev. St. 1899, § 575 (Ann. St. 1906, p. 601), authorizing an order of publication in an action against a nonresident, etc., an order of publication, in an action against a nonresident to recover on a foreign judgment and have the judgment adjudged a lien on real estate, need not state that the land of defendant has been attached and describe the land in the order of publication, and attachment proceedings are not void as against a collateral attack because the order of publication did not describe the land attached.

5. SAME—OBJECTIONS TO CAPACITY OF PLAINTIFF TO SUE.

The objections that foreign executors, instituting an action in Missouri, have no right as such to maintain an action in Missouri, and have no authority to bring an action on a judgment in favor of testator after the estate has been administered and they have been discharged, are matters of defense which may be pleaded, and do not go to the jurisdiction of the court, and cannot be raised in a collateral attack on the judgment rendered in favor of the executors.

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by C. V. L. Randall against William H. Snyder and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Chilton and Ed. J. Shuck, for appellant. Shuck & Cunningham, for respondents.

GANTT, J. This is a proceeding under section 630, Rev. St. 1899 (Ann. St. 1906, p. 667), to try and determine the title to 320 acres, the S. ½ of section No. 1, in township 28, of range 6 W., in Shannon county, Mo. The proceeding was begun December 23,

1904, and was tried at the March term, 1905, resulting in a judgment for the defendants, from which plaintiff has appealed to this court. The land in controversy is wild and uncultivated timber land and not in the actual possession of any person or persons. The defendants answered. The defendant lumber company admitted that it was a corporation organized under the laws of this state, and that it claims the title and ownership of the said real estate, and denies all other allegations. The defendant Snyder admitted that he was a nonresident of this state, and alleged that the land described in the petition was owned by and in possession of the Bunker Lumber Company, and denied all other allegations in the petition. On the trial it was admitted by both plaintiff and the defendant that Onslow B. Todd was the common source of title. The plaintiff then introduced in evidence a quitclaim deed from said Todd and wife to plaintiff of date November 11, 1904, and filed for record on November 26, 1904, conveying to plaintiff all of the lands in controversy. Plaintiff then rested. The defendants then offered in evidence a sheriff's deed, executed by J. T. Bay, ex-sheriff of Shannon county, Mo., which recited a judgment rendered in the circuit court of Shannon county on the 16th day of September, 1898, in favor of William H. Snyder and James B. Pearson, executors of the last will and testament of Sarah Pearson, deceased, and against Onslow B. Todd for \$1,634.15 for debt and \$23.02 for costs, and reciting that said judgment had been adjudged a lien and charge upon said S. ½ of section 1, township 28 N., of range 6 W., upon which a special execution was issued from the clerk's office of said court in favor of the said Snyder and Pearson, executors of the last will and testament of Sarah Pearson, deceased, and against said Onslow B. Todd, of date December 31, 1898, by virtue of which the said sheriff levied upon and seized all the right of title, interest, and estate of said Onslow B. Todd of, in, and to said 320 acres of land. The deed then recites that, after having given 20 days' notice of the time and place of sale and of the real estate to be sold by advertisement in the Current Wave, a newspaper published in said county, he did on the 15th day of March, 1899, during the session of the circuit court of said county, at its March term, 1899, expose said land at public auction for sale for ready money, and, William H. Snyder being the highest and best bidder at and for the price of \$50, the same was stricken off and sold to him for that sum. The deed was duly acknowledged before the circuit court on the 16th of March, 1899, and filed for record on the same day. The plaintiff's objection to this deed will be noticed in the discussion of the case. The defendants then offered in evidence a warranty deed from the said William H. Snyder

and wife to the Bunker Lumber Company of date May 2, 1904, duly acknowledged and recorded February 1, 1905. The defendants then rested. Thereupon the plaintiff offered in evidence the original files in the attachment suit of William H. Snyder and James B. Pearson, executors of the last will and testament of Sarah Pearson, deceased, against Onslow B. Todd, being the suit upon which the defendants' sheriff's deed is based; also, a duly certified copy of the judgment and proceedings of the common pleas court for the second division of the second judicial district of the state of Ohio, which includes Clark county in the state of Ohio, upon which said judgment and action by attachment in the circuit court of Shannon county was based; also, a duly certified copy of the record of the probate court of Clark county, Ohio, showing the final settlement of said William H. Snyder and James B. Pearson, executors of the last will and testament of Sarah Pearson, deceased, of date January 31, 1898, and especially the order of publication in the circuit court of Shannon county in the attachment case of said Snyder and Pearson against Onslow B. Todd. From all of which it appears, in substance, that said William H. Snyder and James B. Pearson were appointed executors of the last will and testament of Sarah Pearson, deceased, by the probate court of Franklin county, Ohio, on the 5th day of August, 1892, but afterwards, to wit, on January 31, 1898, having fully administered said estate, they made their final settlement and were discharged. The said William H. Snyder and James B. Pearson, as executors of the last will of the said Sarah Pearson, deceased, began an action in the circuit court of Shannon county, Mo., against said Onslow B. Todd, and in their petition alleged that said plaintiff, as such executors, on the 26th of February, 1894, obtained a judgment against said Onslow B. Todd, in the common pleas court of Clark county, Ohio, in the sum of \$2,164.16, a copy of which said judgment was filed with the petition, and made a part thereof, which said judgment was by the defendant or sheriff credited with \$530.07, and further alleged that the defendant Todd was a nonresident of Missouri, so that the ordinary process of law could not be served upon him; that said Todd is the owner in fee of the S. $\frac{1}{2}$ of section 1, township 28, range 6, in Shannon county, Mo., and prayed judgment in the sum of \$1,634.14, and that an attachment might issue against said land. At the same time, the plaintiffs filed an affidavit by the attorney of said plaintiffs stating that the said plaintiffs had a just judgment against said Todd, and that the amount due after allowing all just credits and set-offs was \$1,634 and that the defendant was a nonresident of this state. A writ of attachment was duly issued, and said land levied upon, and at the return of

said writ on the default of the said Onslow B. Todd judgment by default was taken against him and a special execution under which the land in suit was sold and William H. Snyder, one of the said plaintiffs, became the purchaser of said land at said sale for \$50. Onslow B. Todd was a nonresident of Missouri, and the only notice served on him of the said attachment suit was the order of publication, which recited that the object and general nature of the petition filed was "to recover a claim of \$1,634.34, by reason of a judgment obtained by the plaintiffs against defendant in the common pleas court of Franklin county, Ohio, being the balance due on said judgment." The said order of publication did not describe the land. The plaintiff's contention is: First, that the attachment proceedings were void because the court rendering the judgment therein had no jurisdiction of the person of said Onslow B. Todd, because the order of publication was void; and, second, that under no circumstances did the respondent obtain title by its deed from W. H. Snyder.

1. From the foregoing statement it will be readily observed that this is a collateral attack by the plaintiff upon the judgment of the circuit court of Shannon county in the case of Snyder and Pearson v. Onslow B. Todd. That was an action by attachment, and the lands in controversy herein were seized and levied upon by the sheriff in pursuance of a writ of attachment in due form, and an abstract of said attachment showing the names of the parties to the suit and the amount of the debt and date of the levy and the description of the real estate levied on was duly filed by the sheriff in the office of the recorder of deeds of Shannon county, on the 9th day of July, 1898. The first ground of assault upon said attachment proceedings and judgment is based upon the recital in the order of publication, which states: "The object and general nature of which is to recover from him (the said Onslow B. Todd) the sum of \$1,634.14, by reason of a judgment heretofore rendered in the court of common pleas of Franklin county, Ohio, in favor of said plaintiffs and against said defendant; the said amount being the balance due on said judgment, a certified copy of which is filed and made a part of the petition filed in said cause." The point is that such judgment, as shown by the exhibit filed with the petition, and upon which the suit was brought, was in fact rendered in the common pleas court of Clark county, Ohio, and not in the common pleas court of Franklin county, Ohio; the argument being that this order of publication did not notify the defendant, Todd, that he was being sued upon a judgment of the common pleas court of Clark county, and hence did not correctly state the object and general nature of plaintiff's demand against the said defendant,

and that the order of publication correctly recited the names of the plaintiffs in the common pleas court of Ohio and the balance due upon the said judgment, and notifies the defendant that a judgment will be asked upon a judgment in favor of the said plaintiffs against the said defendant, and that a certified copy of the said judgment is filed with and made a part of the petition, plainly appeared, from which it is plain that the clerk made a mistake in stating that said judgment was rendered in the common pleas court of Franklin county, instead of Clark county, which was readily ascertainable by reference to the petition itself, a certified copy of the judgment being filed therewith. In support of his contention, plaintiff cites us to *Janney v. Spedden et al.*, 38 Mo. 396. In that case it was ruled by this court that where defendant, a nonresident, is brought into court by an order of publication, and does not appear, the plaintiff cannot have any other or different relief than that prayed for in his petition. If, after publication, the plaintiff amends his petition and takes a different judgment from that originally prayed, the judgment will be null and void. After service of notice by publication the defendant cannot be held to have any notice of amendments to the petition. And that case was subsequently followed in *Bobb v. Woodward et al.*, 42 Mo., loc. cit. 489. In *Leavenworth Terminal Ry. Co. v. Atchison*, 137 Mo., loc. cit. 230, 37 S. W. 915, it is said: "A defendant is brought into court to answer the allegations of the petition. In condemnation proceedings it is essential that the land to be affected thereby should be described so that the owner may be advised of the demands made upon him. He may be indifferent as to the appropriation of one tract, and may seriously object to the appropriation of another. If he make default, he can only be bound by a judgment authorized by the petition he was summoned to answer. A petition cannot therefore be amended in a matter of substance, after publication of notice, so as to make a valid judgment thereon against a defendant who does not appear. *Janney v. Spedden*, 38 Mo. 395, and other cases." Applying the doctrine of the foregoing cases to the facts before us, it is clear there was no amendment to the petition in this case, and if, as said in *Railway Company v. Atchison*, supra, the defendant is brought into court to answer the allegations of the petition, an inspection of that petition would have demonstrated the clerical error of the clerk in misdescribing the court in which the judgment was rendered, and the defendant was at once apprised that the plaintiffs were seeking to recover a judgment on the unpaid balance of the judgment in the common pleas court of Clark county, Ohio. It is clear, moreover, that this case does not fall within the principle announced in *Janney v. Spedden*, supra, in this, that

no change in the relief sought was made by the mere fact of the clerk misdescribing the court in which the judgment was rendered. Had the defendant appeared in that case, as he had a right to do, and pleaded nul tiel record, no question whatever could arise as to the right of the court to have permitted the amendment to the extent of inserting the name of the proper county. Looking at these proceedings from the point of a collateral attack, we do not think they should be held void on this ground.

2. But it is urged that the attachment proceedings were and are void because the order of publication did not describe the land attached. In support of this contention, the plaintiff relies upon the decisions of this court in *Milner v. Shipley*, 94 Mo. 106, 7 S. W. 175; *Winningham v. Trueblood*, 149 Mo., loc. cit. 584, 51 S. W. 399; *Stewart v. Allison*, 150 Mo., loc. cit. 347, 51 S. W. 712. In those cases and others, which were actions under the tax law of this state to enforce the state's lien against specific real property, it was held that a statement of the object and general nature of a petition, which omitted the land against which the lien was sought, was wholly insufficient. With those decisions we are entirely satisfied, but in the present case we are confronted with another well-settled principle of law. In *Hardin v. Lee*, 51 Mo. 241, it was said by this court: "In attachment causes, the jurisdiction over any given matter is obtained by levy thereon of a writ properly issued. And no matter what or great errors or irregularities may subsequently occur, the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or by appeal or set aside in a direct or appropriate proceeding for that purpose." This statement of the law was reiterated in *Freeman v. Thompson*, 53 Mo. 194, and in this last-mentioned case it was further said: "The difference to be observed between those proceedings, whose seizure at the outset at once confers jurisdiction over that which is seized, and those methods of procedure which look to the acquisition or enforcement of some specific right, title or remedy, is this: That in the former class of cases, jurisdiction without seizure or levy never attaches, no matter how long or how often notice may be given; nor in the latter until publication be made. In other words, it is the levy of the writ in one case, and the publication in the other, that gives the court power to act, and this is jurisdiction." That case was cited with approval and followed in the recent case of *Williams v. Lobban*, 206 Mo., loc. cit. 408, 409, 104 S. W. 58. In *Holland v. Adair*, 55 Mo., loc. cit. 49, it was said: "The petition was regularly filed, the affidavit for the attachment was regular and sufficient, the writ of attachment was sufficient and regularly issued, the levy on the

land is unquestioned and publication regularly ordered by the court, and regularly published; but the simple question growing out of the declaration of law under consideration is whether the omission in the publication to state the amount of the damage claimed would render the after proceedings and judgment of a court so void that a sale under a special execution issued on said judgment would confer no title, and could be attacked in a collateral proceeding and be held void. That this defect in the notice is an irregularity is admitted, but the court having acquired jurisdiction of the cause, and of the property attached, and having in its judgment found that publication had been duly made, the judgment is not void and cannot be attacked in a collateral proceeding. *Kane v. McCown*, 55 Mo. 181; *Cooper v. Reynolds*, 10 Wall. (U. S.) 321, 19 L. Ed. 931. In *Shea v. Shea*, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779, this subject was again reviewed, and it was said: "Our answer is that in this court, in all collateral attacks, it is held that in attachment causes the jurisdiction over any given subject-matter is obtained by the levy thereon of a writ properly issued, and, no matter what or how great errors or irregularities may subsequently occur, the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal or set aside in a direct and appropriate proceeding for that purpose. *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183." While it may be conceded that the clerk could, with propriety, have stated that the land of the defendant had been attached and have described the land in the order of publication, the statute (section 575, Rev. St. 1889 [Ann. St. 1906, p. 601]) makes no such requirement, as did the statute of 1855 (Rev. St. 1855, p. 246, c. 12, § 23), upon which *Durossett's Adm'r v. Hale*, 38 Mo. 346, was decided. But even under that statute, in *Harris v. Grodner*, 42 Mo. 159, in which the publication notified a defendant his property was "about to be attached," it was held sufficient.

Counsel for plaintiff has urged that the plaintiffs had no capacity to sue because foreign executors, as such, had no right to maintain an action in this state, and, moreover, having administered the estate of Mrs. Pearson and been discharged, of course had no authority to bring suit on a judgment in favor of her estate, but these objections were clearly matters of defense, which could have been pleaded successfully against any judgment in their favor, but no such defense was interposed, and plaintiff, who was no party to that action, cannot in this collateral proceeding avail himself of these defenses to have the judgment obtained by said executors adjudged void. *Ouslow B. Todd* had

three years after the rendition of that judgment in which to have attacked the same on said grounds, but did not do so, and that judgment is now unreversed and final. These alleged errors and irregularities do not go to the jurisdiction of the circuit court of Shannon county and cannot avail plaintiff of this collateral action.

It results that the judgment of the circuit court must be, and is, affirmed.

FOX, P. J., and BURGESS, J., concur.

ORCUTT v. CENTURY BLDG. CO. et al.

(Supreme Court of Missouri, Division No. 1. July 3, 1908. Rehearing Denied July 14, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—ELEVATORS—PERSONAL INJURIES—SUBMISSION TO JURY.

In an action for injuries through the falling of an elevator, evidence tending to prove that defendants were operating the elevator, and were common carriers of passengers; that plaintiff was a passenger on the elevator, together with proof of the accident and attending circumstances and plaintiff's injuries—was sufficient to make out a prima facie case, entitling plaintiff to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1315-1325; vol. 37, Negligence, § 325.]

2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries, only general negligence was required to be charged, but plaintiff alleged specific acts of negligence, defendant could not complain of instructions shifting the burden of proof from defendant to plaintiff, by requiring him to prove the facts stated in the instructions; plaintiff being entitled, under the law, to recover without requiring the jury to find any of the facts stated in the instructions to be true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4056-4058.]

3. TRIAL—INSTRUCTIONS—CONSTRUCTION TOGETHER.

Where all the instructions when read together cover the entire case as made by the pleadings, and require the jury to find all the facts essential to a recovery, they are not open to the objection that each of them undertakes to cover the entire case, but erroneously omits some essential fact necessary for the jury to find to justify a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

4. SAME—ASSUMING FACTS.

An instruction assuming as true a fact proven by the uncontroverted evidence was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

5. CARRIERS—CARRIAGE OF PASSENGERS—ELEVATORS—PERSONAL INJURIES—BURDEN OF PROOF—INSTRUCTIONS.

Where, in an action for injuries to a passenger in an elevator through the falling thereof, plaintiff was entitled to go to the jury on the presumption of negligence, an instruction that the burden of proving the specific facts causing the injury rested throughout the case on plaintiff was properly refused.

6. SAME—EVIDENCE.

In an action for injuries to a passenger in an elevator, through the falling thereof, evidence relating to the condition of the elevator as far back as two years prior to the injury and on down to within a few days thereof, and tending to show that the elevator would not run properly, that the cable was rusty and rotten, that bolts were loose, that the guide shoes were constantly getting out of place, and that the rod governing the safety appliances was so bent they would not properly perform their functions, was admissible.

7. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for injuries to a passenger in an elevator, through the falling thereof, evidence that the guide shoes got out of position, and that the safety dogs would not work properly, was admissible; the error, if any, in permitting a witness to testify that he had reported to defendant's engineer about the shoes getting out of position, and that the dogs would not work, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Robert Lee Orcutt against the Century Building Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See 201 Mo. 424, 90 S. W. 1062, 8 L. R. A. (N. S.) 929.

Plaintiff instituted this suit to recover damages for personal injuries, sustained by him through the alleged negligence of the defendants in permitting a freight elevator, in which he was riding, to fall. There was a trial before the court and jury, which resulted in a verdict and judgment for plaintiff, and against both defendants, for the sum of \$13,150. After taking the proper preliminary steps, the defendants appealed the cause to this court.

The petition upon which the trial was had, in substance, alleged: That the Century Building, in the city of St. Louis, was owned by defendant Century Building Company on and prior to May 30, 1902, and that defendant Mississippi Valley Trust Company, for some time prior thereto was, and still is, the trustee in two deeds of trust, the first to secure bonds amounting to \$600,000, and the second to secure bonds amounting to \$150,000; that by a written contract, dated December, 1896, defendant Mississippi Valley Trust Company was, by defendant Century Building Company, appointed its attorney in fact to rent said Century Building, and in its name to collect rents, and out of the rents so collected to pay all taxes and ground rent, semiannual interest on bonds, and all expenses connected with the maintenance and repair of the building, and also to pay itself 3½ per cent. commission on the amount collected; that on the 30th day of May, 1902, the Mississippi Valley Trust Company was in the control and management of said building under said contract; that on and prior to said date it was custom-

ary for persons taking freight out of said building, or taking it into said building, to place the freight on a certain freight elevator, and also to ride with the freight on said elevator; that such persons were invariably allowed by defendant to use said elevator; that on said date, when plaintiff was on said elevator in said capacity, and was a passenger thereon, the elevator fell from the seventh floor to the basement, causing serious injuries to plaintiff; that the fall of said elevator was the result of negligence on the part of defendants. The answer was a general denial.

There was but little, if any, material conflict in the testimony of the witnesses for plaintiff and defendants. The plaintiff's evidence tended to prove that the Century Building Company, a corporation of Missouri, was, and at all times mentioned in the evidence continued to be, the owner of the Century Building at the northwest corner of Olive and Ninth streets, in the city of St. Louis, and that the building was opened for occupancy about February, 1897; and from the beginning a certain steam freight elevator was operated in said building, on the west side of same, opening on an alley, which formed the western boundary of the building; the elevator being located nearer to Olive than to Locust street. On January —, 1896, the Century Building Company executed a deed of trust, conveying to defendant Mississippi Valley Trust Company, as trustee, the Century Building, and all the assets of the company, to secure an issue of bonds amounting to \$600,000. On October 1, 1897, the Century Building Company executed to defendant Mississippi Valley Trust Company, as trustee, a second deed of trust upon the Century Building, and all other assets of the company, to secure the payment of an issue of bonds in the sum of \$150,000. On December 10, 1896, the Century Building Company and the Mississippi Valley Trust Company entered into a contract of agency, whereby the Century Building Company appointed the Mississippi Valley Trust Company irrevocably its agent and attorney in fact: To rent, for the Century Building Company and in its name, the Century Building, and each and every part thereof; to collect all rents accruing to the Century Building Company from any portion of said building; and to make out of same the following payments and disbursements: First. To pay all taxes of every kind and character on said building or the ground upon which same is situated. Second. To pay the ground rent. Third. To pay the semiannual interest on said bonds. Fourth. To pay all expenses with the maintenance, repairs, and management of said building and operating expenses thereof. Fifth. To pay all insurance, covenanted by the Century Building Company in said deed of trust, to be taken out on said premises. Sixth. To pay over

the balance of said rents to the Century Building Company, after deducting from the rents as collected, as compensation, to said Mississippi Valley Trust Company, for its service as attorney in fact and agent, the sum of 3½ per cent. on the amount collected in said rents of said building and property. It was further provided, in and by said contract of agency, that while the said matters were set out as "first," "second," etc., it was not intended thereby that the said Mississippi Valley Trust Company should be obliged to pay on account of said items in the order named; but, on the contrary, the said trust company was expressly given authority and right to use its discretion in the premises. It was further provided that the terms and conditions of the renting of the property, or any part thereof, and also the amount to be expended for maintenance, repairs, management, and operating the building, should be at the discretion of said Mississippi Valley Trust Company. The agreement of agency and attorney in fact was made irrevocable, and required to continue during the life of the bonds under the said deed of trust. And the Mississippi Valley Trust Company accepted said appointment as attorney in fact and agent, and agreed faithfully to perform its duties with respect to same. The said agreement of agency and appointment of attorney in fact was duly executed by the Century Building Company.

The Mississippi Valley Trust Company entered upon the execution of its contract of agency, and employed the McCormick, Kilgen & Rule Real Estate Company as agents, to look after renting the offices in the building. The McCormick, Kilgen & Rule Real Estate Company collected the rents, and looked after the repairs. The Mississippi Valley Trust Company had full charge and control of the Century Building and its elevators and employees in charge thereof. From the opening of the building in 1897 passengers were carried in the freight elevator in the Century Building. It was customary for the operator to carry passengers up and down on the freight elevator down to the 30th of May, 1902. Plaintiff himself had frequently been carried on this same elevator. Badwin, employed at McTague's restaurant, during a period of five years before the fall of this elevator, frequently saw passengers carried up and down on it. Fitzhugh, operator of this elevator, during a period of three or four years, up to May 30, 1902, always carried up or down those handling freight. Rupert Orcutt had been frequently seen, perhaps accompanying freight, ascending and descending on this elevator prior to the accident. In moving people in and out of the Century Building it was the usual custom, when handling freight, to ride in the elevator therewith. Kinyon had ridden on the elevator before the accident. Martin McGrath had seen effects moved in and out of the Century

Building ever since it was built, and himself had accompanied freight on this very elevator 200 or 300 times. The witness Crutwell had had men ride up and down on this elevator, and never knew of any objection being raised.

On the morning of May 30, 1902, plaintiff, then an employé of the Orcutt Storage, Moving & Packing Company, was engaged in moving effects, records, and office fixtures of the Frisco Railroad Company, outgoing tenants, from the Century Building. About half-past 8 the elevator came up to the seventh floor to receive freight. After it was loaded, plaintiff got on the elevator. The bell at the eighth floor rang, and the elevator was raised to that floor, and then it started to descend. After it had descended about a floor, there was a wobbling, shaking noise down below, and the elevator shot down to the basement. The operator had reversed the car at the eighth floor. Between the seventh and sixth floors the car listed, shook a little bit, and the operator could not stop the car, but it fell down to the bottom. There were about 2,600 pounds of freight, stationery, office fixtures, and boxes on the car at the time it fell. The car fell. One of the cables broke, or was "chawed up." The pinion that transmits power from the engine proper to the winding drum broke, was split in two. The winding drum, to which the hoisting cables are fastened, and on which they coil, was turned end for end, and the flang or perimeter of the winding drum was broken off. The bolts that held in place the pillow cap, which in turn held in place the winding drum on the pillow block, were broken. One of these bolts presented a shiny, worn appearance, which might have happened in one or two trips, or more, probably longer time, perhaps a week or more. The sides of the maple ways and guides upon which the car ran were indented in places and scratched. The rod that operates the safety devices under the car was bent. The elevator in question was an Eaton & Prince make, standard construction, both for engine and general style of car. The car was larger than usual for this character of building, being 8 by 13 feet, and fastened or held in position at diagonal corners. The car was equipped with safety devices. A governor on top of the car was so geared that, when the car descended at a speed in excess of its normal speed, the governor would operate upon a bar or rod connecting with a long transverse rod running diagonally across the bottom of the car and underneath it, thereby rotating this transverse rod (also called a "rocker shaft"), the effect of which was to throw instantly, into the sides of the maple uprights or guides, two sharp dogs, or pieces of steel. These dogs, being released, were supposed to embed themselves solidly into the sides of the maple guides and hold the car. These safety devices were the standard construction of safety devices upon elevators of this style at that time, the usual construction.

The city inspected the elevator at intervals of about three months. The last city inspection was on February 26, 1902. The elevator fell May 30, 1902. On these inspections by the city deputy inspector of boilers he found the cables, the ropes, and all in "fair" condition—"passable," "nothing bad enough to condemn." The city inspector never noticed the transverse rod under the elevator car, the rod that works the safety devices, but before the fall of the elevator, the defendant's engineers testified that they never found it bent. Two other persons (Baldwin and Stolzenberg) had seen the rod bent before the fall, perhaps a month or so. The night engineer had nothing to do with inspecting the machinery. The chief engineer and assistant engineer frequently saw the machinery operating this elevator, sometimes as much as ten times a day. The witness Baldwin testified that a few days before the fall of the elevator he noticed a low, rattling noise about the elevator. A few days before the fall Baldwin asked Pate why they did not fix the elevator. Defendant's chief engineer had been employed by defendants only 2 or 3 months when the elevator fell, and while he had had considerable experience as an engineer during a period of 20 years in St. Louis, he had been licensed as an engineer only 22 days prior to this catastrophe. The night engineer had been in the employ of defendants only 32 days when the elevator fell. The assistant engineer made no examination of the machinery on the morning of May 30, 1902, before the elevator fell. He had just come on duty. A few days before May 30th the chief engineer and assistant engineer made an examination of this elevator, and found nothing wrong. They used their hands, did not use wrenches. They tried the safety devices at that time with the hand. The condition of everything was "good."

Plaintiff suffered intense pain. Both legs were broken. He was taken, unconscious, to the City Hospital, remained there 5 days was taken to St. John's Hospital, remained there 4 or 5 weeks, and was taken home. The right leg was amputated above the knee. The wound on the other leg never has healed. Dead bone still keeps coming out. Plaintiff's face and head are scarred up. He had numerous other injuries. The severity of the injuries is conceded. In behalf of defendants the testimony tended to show that the night engineer was on duty from 6 o'clock in the evening until 6 o'clock in the morning. He had been there the night before the accident, and left at 6 o'clock the morning of the accident. Before leaving the morning of the accident he looked at the machinery, and found that everything was running well. The machinery was in good condition that morning. The testimony further tended to show that a deputy city inspector had examined this elevator and machinery on the 26th of February, 1902, approximately 3

months before the accident, and approximately every three months for a period of 2½ years; always found everything in good order and issued a certificate. The testimony in behalf of defendant further tended to show that Henry E. Tate, assistant engineer of the Century Building, and Oscar Malinda, engineer, had made an inspection of this elevator and all the parts thereof, and of the machinery, three or four days before this accident, and had found everything in good order. The three engineers of the Century Building, together with the superintendent of construction of the Otis Elevator Company, who came down to look after the repair of same, made an examination of the elevator and machinery after the accident, and found no bolt that had a polished appearance. On the contrary, all the breaks they saw in the bolts and machinery were new, fresh breaks. The testimony of defendants also tended to show that the elevator in question was one of standard construction.

Over the objections and exceptions of defendants, the court gave the following instructions on behalf of the plaintiff:

"(1) The jury are instructed that if they believe from the evidence that, on and prior to May 30, 1902, the Century Building was located at the northwest corner of Ninth and Olive streets, in the city of St. Louis, Mo., and conducted and operated as an office building; and that a freight elevator was maintained and operated in said building for the use and convenience of incoming and outgoing tenants; and that on, and for a long time prior to, May 30, 1902, it was and had been the custom to carry persons who were handling furniture, goods, articles, and effects belonging to incoming and outgoing tenants upon said elevator; and that plaintiff on May 30, 1902, while handling and in charge of furniture and effects of an outgoing tenant of said building, entered said elevator for the purpose of being carried therein; and that plaintiff was exercising ordinary care; and that said building was at all of said times owned by the Century Building Company, and was being operated and conducted by the Mississippi Valley Trust Company, pursuant to the terms of the agreement in writing between the trust company and the building company, bearing date December 18, 1896, and which has been read in evidence, and that, pursuant to the terms of said contract, said trust company was, at said times, in full control of said building and the management thereof, receiving all income, selecting, employing, and paying all the servants, engineers, and operators of said building, and in its discretion determining and making all repairs in said building; that it was the duty of both of said defendants, their agents, and servants in charge of said elevator, and the machinery operating the same, to use the highest practicable degree of care to carry plaintiff in

said elevator safely, and also to use the highest practicable degree of care to keep said elevator and its hoistings and lowering apparatus, and the engines, boilers, and machinery and appurtenances used in connection therewith, in good repair; and if the jury believe from the evidence that on May 30, 1902, the aforesaid elevator or the machinery, or any part thereof, was out of repair, and that said defendants knew, or by the exercise of the highest practicable degree of care and foresight could have known, that the same were out of repair, and if they believe that, by reason of said elevator or machinery, or any part thereof, being so out of repair while plaintiff was riding on said elevator, it gave way and fell, and that plaintiff was injured by such fall, then the jury should find for the plaintiff, against both defendants.

"(2) The jury are instructed that if you believe and find from the evidence that on or about the 30th day of May, 1902, the defendant the Mississippi Valley Trust Company, as agent of the Century Building, was operating a freight elevator in the Century Building, in the city of St. Louis, under the contract of December 18, 1896, in evidence, and at said time carried passengers thereon, who were taking freight in and out of said building for tenants, and that plaintiff was such passenger, and had taken passage upon said elevator in said building, and that while he was so a passenger, being carried upon the said elevator, operated by said defendant, as aforesaid, the said elevator fell from about the seventh story, and suddenly dropped to the bottom of the elevator shaft in the basement of said building, and that plaintiff was himself exercising ordinary care, and that he was, by such fall and dropping of the elevator car, precipitated to the bottom of said elevator shaft, and injured thereby, then the law presumes that such injury to plaintiff was caused by defendant's negligence, and such facts, if proved by a preponderance of the evidence, make out a presumptive case for the plaintiff, and you should find a verdict for the plaintiff against both defendants, unless you further believe from the evidence that, notwithstanding this presumption, the defendants, at the time of the happening of the injury, in fact had then fully performed, or were then fully performing, their duty, as defined and stated in other instructions herein, toward plaintiff as such passenger, or that such injury to plaintiff, if any, did not occur because of any failure of the defendants in such respect.

"(3) The jury are instructed that if they believe from the evidence that the Century Building Company had made the Mississippi Valley Trust Company its agent under the contract of December 18, 1896, in evidence, and given it the care and management of the Century Building, and that said Mississippi Valley Trust Company was operating and

managing said building under that contract, and made repairs therein at its discretion, then the Century Building Company was jointly responsible with the Mississippi Valley Trust Company for any injury that might arise from the negligent management of said building by said Mississippi Valley Trust Company, and the jury are instructed that it is the duty of the person or persons operating an elevator, such as the elevator in question, in the carriage and transportation of passengers upon such elevator, to have, take, and exercise the highest degree of care, reasonably practicable, for the personal safety and safe carriage of such passengers, and that this care should be used and exercised for the purpose of safely operating said elevator, in having said elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery maintained and kept in a reasonably good and safe condition, and for such purpose to take and exercise about the same the highest degree of care reasonably practicable in inspecting and keeping such elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery in good and reasonably safe working order and condition, and a failure to so do would be negligence; and, if you believe from the evidence that the elevator operated by defendants on or about the 30th day of May, 1902, fell from about the seventh story of the Century Building in the city of St. Louis, while the plaintiff was a passenger on said elevator, and plaintiff was injured thereby, and that he was exercising ordinary care, you will find your verdict in favor of the plaintiff, against both defendants, unless you further believe from the evidence that the defendants maintained and kept said elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery in a reasonably good and safe condition, and for such purpose took and exercised about the same the highest degree of care reasonably practicable in inspecting and keeping such elevator, its operating machinery, safety devices, and all machinery and apparatus constituting a part of said elevator and said operating machinery in good and reasonably safe working order and condition.

"(4) The jury are instructed that if they believe and find from the evidence that defendant the Mississippi Valley Trust Company, under the contract of date December 18, 1896, in evidence, was managing the Century Building, and operating the freight elevator therein and that plaintiff became a passenger thereon as set out in other instructions, and that plaintiff was exercising ordinary care, and that while plaintiff was a passenger in said elevator, it

fell without his fault, and he was injured thereby, the burden is not upon the plaintiff to show what particular thing caused the elevator to fall, but the burden is upon the defendants to overcome the presumption that the fall of said elevator occurred through their negligence; and, unless the jury believe from the evidence that the fall of said elevator was without their fault, you should find for the plaintiff, against both defendants."

"(6) The jury are instructed that if they find and believe from the evidence that the defendant the Mississippi Valley Trust Company, as agent of the Century Building Company, had the care and management of the elevator in question on May 30, 1902, and that the Mississippi Valley Trust Company was negligent in the care and management of the elevator in question, and that, as a result of said negligence, plaintiff received injuries, then they should find for plaintiff, against both defendants, in such sum as they believe from the evidence will compensate him for the damages which he has sustained by reason of his said injuries. And, in determining said damages, they may take into consideration the expense which they believe from the evidence he has paid, incurred, or become liable for medical and surgical services, if any, nursing and hospital charges, if any, artificial leg, and medicine and surgical appliances, if any; the loss of earnings that he has sustained, if any; the pain and suffering which he has endured, if any, and which the jury believe from the evidence he will be reasonably certain to sustain hereafter, if any; the impairment that he has sustained of his earning power, if any, and which he will be reasonably certain to sustain hereafter, if any; the amputation of his right leg, and the injury and impairment to his left leg, and the injury to his body and spine, heart and nervous system, head and face, if the jury believe from the evidence that plaintiff has sustained such injuries, or any of them."

And the court gave a number of instructions in behalf of defendants, none of which are complained of, but refused to give the following, asked by the defendants, to wit:

"(b) The court instructs the jury that the burden of proving that the elevator in question fell on account of negligence on the part of defendants is, throughout the case, upon the plaintiff, and if you find that the plaintiff has failed to prove, by a preponderance or greater weight of the evidence, that the fall of said elevator was due to negligence on the part of defendants, then and in that case your verdict must be for the defendants."

Seddon & Holland and Collins & Chappell, for appellants. John A. Gilliam and Luther Ely Smith, for respondent.

WOODSON, J. (after stating the facts as above). 1. This case was here on a former ap-

peal, and is reported in 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929. The former trial resulted in a judgment for defendants, which was, by this court, reversed and remanded for a new trial. Upon a retrial the judgment was for the plaintiff for the sum of \$13,150. Upon the former appeal the law and facts of the case were most exhaustively considered, which leave but little to be said by us upon this appeal. When the cause was remanded to the circuit court for a new trial, the plaintiff filed an amended petition, charging general negligence only, and upon the retrial introduced evidence tending to prove, not only that the defendants were operating the elevator and were common carriers of passengers, that he was a passenger upon that elevator, the accident and the attending circumstances, and his injuries, which would have been sufficient to have made out a prima facie case, entitling him to go to the jury, but he went further, and introduced evidence tending to show the specific acts of negligence which caused the injury, and asked instructions hypothesized upon the facts so proven.

Appellants present many objections to the instructions given for respondent, chiefly because, it is contended, that each of them undertakes to cover the entire case, but erroneously omits some essential fact, which was necessary for the jury to find in order to justify a finding and verdict for the plaintiff. Conceding, for the sake of argument, without deciding it, that such contention would be well founded in a case where the law requires the specific acts of negligence to be stated in the petition, yet that contention would be untenable in a case like this, where only general negligence is required to be charged, for the reason that it was not necessary for the plaintiff to hypothesize his instructions upon any of the specific acts of negligence which the evidence showed caused the injury. By so doing he took upon himself additional burdens which were wholly unnecessary, and thereby required the jury to find affirmatively that those acts caused the injury before they could find for him. Instead of that being an error against the appellants, it was in their favor, for the reason that under the law respondent was entitled to go to the jury upon the presumption of negligence, which would have cast the burden of disproving all negligence upon appellants; but the instructions for respondent as given shifted the burden of proof from appellants to him, by requiring him to prove the facts stated in the instructions before he could recover, while under the law applicable to this class of cases he would have been entitled to recover without requiring the jury to find any of the facts to be true which are stated in the instructions. We are therefore of the opinion that the instructions given for respondent were more favorable to appellants than they were entitled to under the law, and that the court did not err in giving

them. But independent of the foregoing suggestions, the instructions correctly declare the law, and are not vulnerable to the objections urged against them.

There is no complaint that the evidence does not tend to prove all of the facts stated in all of the instructions given for respondent, or that all of the instructions when read together do not cover the entire case as presented by the pleadings and evidence, or that they do not correctly declare the law of the case as it was enunciated by this court when the case was here on the former appeal. When all of the instructions are taken and read together, they cover the entire case as made by the pleadings, and require the jury to find all of the facts which are essential to a recovery. Then they are not open to the objections here presented. This rule is too well established in this state to necessitate, at this late date, the citation of authorities in support thereof.

Nor do we think that the objection that the instructions assume that the Mississippi Valley Trust Company was in charge of and in control of the Century Building, and operating the elevator at the time of the injury is well taken. All of the evidence in the case for both parties shows that it was so operating it, and there is not a particle of evidence to the contrary. Even though the instructions assume that fact to be true, which clearly they do not when all are read together, yet, under the state of the evidence as disclosed by the record, that assumption would not have been erroneous. *Soteblor v. Transit Co.*, 203 Mo. 702, 102 S. W. 651.

The instructions given for respondent declare the law as it is laid down by this court in many decisions, and especially in this case when formerly here.

2. It must follow from what is said in paragraph 1 of this opinion that the action of the court in refusing instruction b, asked by appellants, was not error. It told the jury that the burden of proving the specific facts which caused the injury rested, throughout the case, upon respondent. All of the authorities are to the contrary.

3. Appellants objected to the introduction of testimony which tended to prove the condition the elevator was in prior to the date of the injury. Some of this evidence related to its condition as far back as two years prior to that time, and on down within a few days of the injury. Learned counsel have not suggested why this evidence was not admissible, and we are unable to discover why it was not. It tended to show that the elevator would not run properly; that the cable was rusty and rotten; that bolts were loose; that the guide shoes were constantly getting out of place; and that the rod governing the safety appliances was so bent they would not properly perform their functions. We think this evidence was clearly admissible. The witness Fitzhugh testified, over defendants' objec-

tions, that he had reported to Engineer Pate about the guide shoes getting out of position, and that the safety dogs would not work properly. The evidence that the shoes got out of position, and that the dogs would not work, was clearly admissible, and we are unable to see how the fact that Fitzhugh reported those defects to Pate benefited respondent or injured appellants. If error, it was harmless; and under the statute we should not reverse the judgment for such error.

All other objections presented are fully answered by the opinion in the case when it was here before.

Finding no error in the record, the judgment is affirmed.

All concur, except VALLIANT, P. J., absent.

COLLINS v. CRAWFORD.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. EQUITY—PARTIES—EXTENT OF INTEREST.

In chancery suits, all persons legally and equitably interested in the subject-matter and result of the suit must be made parties; but there must be a present and substantial interest, as distinguished from a mere expectancy of future contingent interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 247-250.]

2. JUDGMENT—RELIEF—SCOPE OF PLEADINGS.

Testator bequeathed one-eighth of certain land to defendant in trust for C.; defendant to use any part thereof for C.'s support and at her death any remainder to go to her children. During C.'s lifetime, the devisees of the other undivided interests brought partition, and the trustee and C. were made parties; plaintiff, child of C., not being made a party. The land was sold, and C.'s part of the proceeds paid to the defendant as trustee and paid out by him for C.'s support. The petition for partition did not allege the trusteeship of defendant, but alleged that the estate had not been finally settled, but that all claims against it had been paid. The decree required the proceeds to be distributed under the provisions of the will. Rev. St. 1899, § 4383 (Ann. St. 1906, p. 2415), provides that no partition shall be made contrary to the intent of testator. Section 4384 (page 2416) provides that, if the estate has not been finally settled, none of the partitioned estate shall be distributed until the final settlement, and also requires the court to declare the interests of the parties. *Held*, that though the petition should have averred the trust, since the circuit court had jurisdiction of such suits, and the land was within its territorial jurisdiction, the partition proceedings bound plaintiff's interest in the estate.

3. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Testator devised lands to defendant in trust for plaintiff's mother; the proceeds to be used for her support, any remainder to be paid plaintiff. During her lifetime the estate was partitioned, and the mother's share paid to defendant, who expended it in her support; plaintiff, the remainderman, not being a party thereto. After her death, plaintiff sued defendant for his share of the land. *Held*, that defendant was not incompetent to testify as to the disposition

of the funds received by him under Rev. St. 1890, § 4652 (Ann. St. 1906, p. 2520), providing that, where one of the parties to a contract in issue is dead, the other may not testify; plaintiff not claiming through his mother, and no contract being involved.

On rehearing. Former opinion, dismissing the bill as to one of plaintiffs, and confirming a judgment for defendant as to the other plaintiff, affirmed.

For former opinion, see 103 S. W. 537.

GANTT, J. This cause was argued and the decision rendered herein on May 14, 1907. Thereafter, in due time a motion for rehearing was filed, and upon consideration a rehearing was granted. The cause has been reargued at this term of the court. The appeal is from a judgment of the circuit court of Audrain county in favor of the defendant in an action of ejectment by the plaintiff for the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 28, township 52, range 8, in said county.

Ouster was laid as of the ——— day of ———, 1903. The answer of the defendant was, first, a general denial; and, second, a special defense, wherein plaintiff pleads: That J. H. Crawford was the common source of title of both plaintiff and defendant. That prior to his death the said Crawford by last will and testament devised and bequeathed all of his property subject to his debts and certain advancements made by him to his eight children, and that, among these children, was Mrs. Mattie S. Collins, the mother of this plaintiff. The provision for Mrs. Collins in the said will was as follows: "I give and bequeath the shares of my daughter Mattie S. Collins and J. Robert Crawford, my son, in said estate, in trust, and the same shall be held in trust for them as herein provided. I hereby appoint my son Thomas W. Crawford trustee of my said daughter Mattie S. Collins and my son J. Robert Crawford, and will direct that all money and property coming to said Mattie S. Collins and J. Robert Crawford shall be paid to, and received and held by said Thomas W. Crawford in trust as trustee for them. I will and bequeath to my said daughter Mattie S. Collins, to have and to hold during her natural lifetime, and to the children of her body at her death, all in trust, all of lot three in block five in Clark's addition to Mexico, Missouri, which she is to take and the same to be charged to her at and for the sum of seven hundred dollars in the general distribution of the residue of my estate above mentioned. And it is my will and I give all money and property as the share of said Mattie S. Collins in my said estate in trust for her use during her natural life and at her death to her children absolutely. And I direct that said trustee shall hold her said share of her estate in trust for her during her natural life, she to be paid the income thereof annually, with power to said trustee to use such part of the principal of her part of said es-

tate as shall be necessary for her support and that of her children in case of sickness or need on the part of herself and children. At the death of said Mattie S. Collins, it is my will and request that her said estate remaining so held in trust shall go absolutely to her children, if living, but if she have no children surviving her, it is my wish and I direct that the same go, and I bequeath the same to her brothers and sisters or their heirs." The will further provided that Mrs. Collins should be charged with an advancement of \$286 and also with any indebtedness of the said Mattie S. Collins to said estate, or any liability of said J. H. Crawford for Mattie S. Collins should also be deducted from her share in his estate. That at the time of his death the said J. H. Crawford was security for Mattie S. Collins on a note held by one Harper to the amount of \$609.22, which was allowed against the estate of J. H. Crawford. That said J. H. Crawford died in April, 1898, testate, and that in the year 1900 the said children of J. H. Crawford, J. Robert Crawford, and Mattie S. Collins, by their trustee, Thomas W. Crawford, as plaintiffs, instituted a suit in partition in the circuit court of Audrain county against Mary Botts and Cordelia Botts, the minor heirs of Cora Botts, a daughter of the said J. H. Crawford, deceased, for the partition of the lands devised to them in said will in accordance with the provisions of said will. That in the said petition for partition the said plaintiffs set forth the provision of the said will of J. H. Crawford, the advancements therein charged, the indebtedness and liabilities of the various legatees of said estate, and that the interest of the said Mattie S. Collins was bequeathed and devised to the said Thomas W. Crawford in trust for said Mattie S. Collins, with power to said trustee to use her share for the support of herself and her children during her natural lifetime, and asked for a decree in partition of said land in accordance with the said will, and that the share of the said Mattie S. Collins be set off or paid in trust to said Thomas W. Crawford as provided by said will. That on the 23d of January, 1901, a decree was rendered in partition in accordance with the provision of said will, and, as prayed for, an order of sale made that the sheriff sell the said lands, and, after paying all costs and expenses of said suit out of the proceedings, to pay the remainder to the executors of the said estate of J. H. Crawford, deceased, to be held by said executors subject to the orders and judgments of the probate court of Audrain county, and to be distributed by said executors under the provisions of the said will. That all of the lands were sold by the said sheriff under said decree and partition, except lot 3 in block 5, Clark's addition to Mexico, bequeathed to Mattie S. Collins, and at said sale the defendant, T. W. Crawford, became the purchaser of the 80 acres of the

said land herein sued for. That said sale and partition was approved at the October term, 1901, of the circuit court, and the 80 acres described in plaintiff's petition was conveyed by the sheriff to the defendant T. W. Crawford. Defendant further stated that the said sheriff, in compliance with the said decree of the court, after paying the costs and expenses, paid the remainder of the proceeds of said sale to C. E. Crawford and Thomas W. Crawford, the executors of the estate of said J. H. Crawford. That afterwards, on December 9, 1901, said executors made a final distribution of the proceeds of said estate, including the proceeds of said lands and the share of the said Mattie S. Collins bequeathed to the said Thomas W. Crawford in trust, amounting to \$2,164.65, and, deducting therefrom the advancement charged against her in said will and the \$700 as the value of the said lot devised to her and her indebtedness to said estate, there remained \$546.63, which was paid to the said Thomas W. Crawford as trustee in trust for said Mattie S. Collins, and defendant says that at the time of the said distribution, and for a long time thereafter, up to the date of her death, on the — day of April, 1903, the said Mattie S. Collins was continuously ill with consumption, and her said trustee, the defendant herein, in obedience to the provisions of the said will, used said balance of \$546.63 for her support and maintenance, including doctor bills, nurses, medicine, etc., and the same was necessary for her maintenance. Defendant further states that the plaintiff herein had personal knowledge of all the facts hereinbefore stated, and knew of the said decree in partition at the date thereof, and was present when the said lands were sold under said decree, and knew of, and approved of, the proceeds of said sale to the amount of \$546.63 having been paid over to the said Thomas W. Crawford as trustee for the benefit of their mother, and during all that time the plaintiff was of age and had personal knowledge of the provisions of said will and of the condition of the estate, and of the institution of the said partition suit, and the decree therein and of the sale and order of distribution, as well as of the other facts and circumstances hereinbefore set forth, and, with said knowledge, the plaintiff during the lifetime of the mother, and after the death of said J. H. Crawford, ordered and directed said T. W. Crawford, trustee as aforesaid, to use said proceeds for the maintenance of the said Mattie S. Collins during her lifetime as provided by said will, and therefore the said plaintiff was and is estopped from maintaining this action and recovering and claiming any interest in said land. In reply the plaintiff alleges that he was not a party to the said partition suit, and denies each and every allegation of the said answer, except the heirship of their mother and the provision for her in said will.

On the trial it was admitted that Dr. J. H. Crawford was seised of the land described in the petition at the time of his death, in 1898, and that the defendant, T. W. Crawford, was in the possession of the 80 acres involved in this suit at the commencement of this action. It is further admitted that the plaintiffs Oscar Collins and Mrs. Blanche Groves were, and are, the only children of Mattie S. Collins, deceased, and that she died on the 7th day of April, 1903. The will of Dr. Crawford established all the averments of the answer in respect thereto. As to the partition proceeding, the petition alleged that J. H. Crawford died testate in Audrain county, Mo., on the — day of April, 1898. All of the devisees were made either plaintiffs or defendants to this partition proceeding, save and except the two children of Mrs. Mattie S. Collins, Oscar Collins, and Mrs. Groves. In the petition there was no allegation of the trusteeship of the defendant T. W. Crawford; but, after alleging that the said J. H. Crawford died testate, there were averments as to the provisions of his said last will, and especially that by his last will, after the payment of certain legacies and debts subject to certain advancements to certain of his children, he bequeathed his lands in said suit to his said children and to his daughter Cora L. Botts, who it was alleged had died since, who left the two defendants who were entitled to her share, in equal parts share and share alike. It was also alleged in the petition that the estate of Dr. Crawford had not been finally settled, but that more than two years had elapsed since notice of the letters of administration had been published, and all claims for which said estate was liable had been allowed. The prayer of the petition was for partition according to the respective rights and interests of the parties and for an order of sale, as the same could not be divided in kind and sufficient of the proceeds of said sale be paid over to the executors of the estate of Dr. Crawford to pay the debts of the said estate and the remainder of the proceeds divided among the parties in proportion to their respective interests. In its decree the circuit court found that Dr. Crawford died testate in Audrain county, on the — day of April, 1898, owning the lands described in the said petition for partition, and that the estate had not been finally settled, and there were claims that had been allowed against the same that were unpaid, and that the value of the land far exceeded the indebtedness. The court further found that, while said will provided for the payment of a certain amount to the widow, Mrs. Cynthia E. Crawford, the same has been paid, and she has conveyed all her interest in said lands to the other heirs and legatees of the deceased. The court then proceeded to find that by the will certain advancements had been made to certain of the devisees and or-

dered the same to be taken into consideration in the final distribution of the proceeds of the sale. Among others, the court found that Mrs. Mattie S. Collins was entitled to an undivided one-eighth of said lands, and thereupon the court ordered and adjudged that a decree of partition be made among the said parties according to their respective interests, and, it appearing to the court that partition in kind could not be made without loss to the parties interested, it was adjudged that the sheriff should sell the said land at public auction for one-half cash, the remainder in one year with 6 per cent. interest from date until paid, and that out of the proceeds the sheriff should first pay the cost of the sale and pay to the executors of the estate of J. H. Crawford the remainder of said money, to be held by said executors subject to the orders of the probate court of Audrain county in distribution under the will of the said deceased. To the introduction of this decree in partition the plaintiffs objected, for the reason that they were not parties thereto; but the objection was overruled, and plaintiffs excepted. The final settlement of the executors showed that they charged themselves with the allowances and the debts of said estate, and the balances appear as pleaded in the answer. The oral evidence tended to prove that Mrs. Collins, the mother of plaintiff, was the daughter of Dr. J. H. Crawford, deceased, and had two children, that Mrs. Collins was a widow at the time of her father's death, and that Oscar Collins was of age at the time, or at least was of age at the time the lands of J. H. Crawford were sold in the partition proceeding. It was also shown that Mrs. Collins was without the means of support of herself and her two children after her father's death, and that the trustee, the defendant herein, applied the \$548.63 to the support of his sister, Mrs. Collins, during her lifetime, and that the trustee had no other means by which to support her except to sell the land. Since the lodging of this appeal in this court, the defendant has filed a motion to dismiss the same in so far as Mrs. Groves is concerned, for the reason that she has settled said case as to her interest therein and executed a deed to the defendant to all the land involved in this suit, and has filed the original deed which was executed by Mrs. Groves and her husband to the defendant on the 18th of July, 1904, and recorded in Audrain county on the 22d of July, 1904, so that, as the case now stands, the plaintiff, Oscar Collins, is the only plaintiff in the case, and his interest in the land sued for is one-sixteenth of the 80 acres described in the petition.

1. The contention of the defendant that the instructions of the court and the motion for new trial are not before the court, because they were not carried into the original bill in full, is without merit. The bill of exceptions calls for the copying of the instructions and

the motion for new trial, and this is sufficient compliance with the statute.

2. The motion to dismiss the cause, so far as it relates to the interest of Mrs. Groves, is sustained. *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125.

3. The ground upon which plaintiff, Oscar Collins, seeks to recover one-sixteenth of this land is that, by the will of his grandfather, he is entitled to one-eighth of said land upon the death of his mother, and that he is not affected by the partition of said lands by the children and devisees of his grandfather, because he was not made a party to the said partition. By the will of his father, the defendant, Thomas W. Crawford, was appointed trustee of plaintiff's mother, Mrs. Mattie S. Collins, and the will directed that her share should be held in trust for her by the defendant, Thomas W. Crawford, and while the will itself provides that the share of Mrs. Collins should be held in trust for her natural life, and at her death should go to her children absolutely, it is further provided that the said trustee, the defendant herein, "should use such part of the principal of her part of said estate, as should be necessary for her support and that of her children in case of sickness or need on the part of herself or children," and, further: "At the death of the said Mattie S. Collins her said estate remaining so held in trust shall go absolutely to her children, if living." We think, under these provisions of the will, through which plaintiff must recover this land, if at all, a power of sale and disposition was given to the defendant of the share of land devised to Mrs. Collins and her two children, and we think that the evidence was sufficient to show that the condition had arisen which would justify a sale of the said share by him; but, keeping in view that the share of Mrs. Mattie S. Collins in her father's estate was but an equitable title to an undivided one-eighth interest in said lands, the legal title to which said share was vested in Thomas W. Crawford as her trustee, and all subject to the payment of her father's debts and the adjustment of the various advancements and legacies bequeathed by him to his other children. It is at once apparent that the sale of this undivided interest by the trustee would not have realized the full value of that share for the benefit of Mrs. Collins and her children if she left any after her death. It must be borne in mind, too, that the other heirs and devisees of J. H. Crawford under our laws were entitled to a partition of his estate pursuant to his will, and that they did bring such a partition, and in that proceeding both Mrs. Collins and the trustee who held the legal title to her share were made parties, and that proceeding resulted in a decree of the circuit court ordering all of the land to be sold, and the proceeds turned over to the executors of J. H. Crawford to be distributed by them among the several devisees in com-

pliance with the will. Had the testator devised to Mrs. Collins a distinct and separate piece or portion of his real estate, we have no doubt whatever that the terms of the will created an active trust in Thomas W. Crawford, and that this trust conferred upon him a power of sale of such share of said estate, and that it would not have been necessary for him to have gone into a court of equity and obtained leave to sell the same in order to supply Mrs. Collins with the necessary funds for her support, especially as all the evidence shows that the father recognized the nature of her sickness and need of support, and that the plaintiff and his sister were only entitled to whatever might be left of the said share devised to Mrs. Collins after her death. In 2 Underhill on Wills, p. 781, it is said: "If the purpose of the trust required that the trustee shall take the fee simple of the legal interest in order that those purposes may be carried out, he will take an estate of inheritance, though the words of inheritance have been used by the testator in devising the legal interest. If the carrying out of the purposes of the trust required that the trustee shall take a fee, equity will create a fee simple in him by implication without the use of the word 'heirs.'" *Cleveland v. Hallett*, 6 Cush. (Mass.) 403; *De Haven v. Sherman*, 131 Ill. 115, 22 N. E. 712, 6 L. R. A. 745. But the testator in this case did not devise to his daughter a segregated piece of real estate, but gave her an undivided one-eighth of his lands, and his whole will indicated that it would be necessary to effectuate his gifts to his children that his estate should be brought into hotchpot, and the advancements already made to his children be taken into account in the final distribution, and to that end a partition would be absolutely necessary by and among his devisees, so that much of the learning and discussion on the question as to whether a partition sale would or would not be a proper exercise of the power of sale granted to Thomas W. Crawford is inapplicable to the situation before us. As already said, Mrs. Collins and her trustee, Thomas W. Crawford, were powerless to prevent a partition of the estate of J. H. Crawford under his will, and all that they could insist upon was that the partition should be conducted in accordance with the law, and the share devised to Mrs. Collins should be set off to her either in kind, or that her proper share of the proceeds of the sale of the whole estate should be secured to her. It is true it is insisted by the plaintiff, Oscar Collins, that this partition proceeding was void as to him, for the reason that he was not a party thereto; but this contention ignores the fact that the legal title to this share was vested in Thomas W. Crawford as trustee by his father's will, and the duty was devolved upon him to protect and preserve the interests of Mrs. Collins and her children, and when the partition suit was brought he was made a party, as was also

Mrs. Collins, the beneficiary, and the court in its decree proceeded to find the rights of the parties in the estate of J. H. Crawford according to his will, among other things, that the interest of Mrs. Collins was willed to her in trust and directed the proceeds of the sale in partition to be applied first to the payment of the debts of said testator, and the remainder to be distributed by the executors according to the will of the testator.

We are cited by counsel for the plaintiff to *Waddell v. Waddell*, 90 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575, to sustain his contention that the plaintiff took a vested remainder in fee simple in said land. This case is an instructive one, and we need not go further into the subject of vested and contingent remainders to demonstrate that the remainder in this case to the children of Mrs. Collins was a contingent remainder—contingent, first, upon any part of said one-eighth portion of the testator's estate remaining after the death of Mrs. Collins, and contingent, also, upon the plaintiff surviving his mother. In this connection the case of *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366, is in point. In that case land was conveyed to a trustee to collect the rents and pay them to a certain woman during her life, and after her death to convey the land to her children, "if any should survive," and it was held that the interest of the children during the mother's life was contingent. At the time of the conveyance, the beneficiary had two children living. Afterwards the suit in equity was brought to set aside this deed, on the ground that it was made to hinder and delay creditors, and the two children were not made parties. The court set aside the deed as fraudulent. Years afterwards, these children, who had been omitted from the suit to set aside the deed, brought their action in equity to compel the heirs of the original trustee to convey the legal title to them, on the ground that they were not affected by the decree setting aside the deed as fraudulent, because they were not parties thereto. After citing authorities to show that the gift under the deed in that case was a contingent one, the court said: "We think it is plain that the interest which the children of Lucy W. Temple took under the deed was a contingent one. The death of Lucy W. Temple would terminate the particular estate carved out, but her death was not the event which was to give effect to the estate in remainder. But the right of the children depended on the event that they survive the mother. Survivorship, and that alone, would give effect to the remainder. If no child survived, no right to the property accrued to a child. In other words, the children of Lucy W. Temple were entitled to take under the deed of trust on condition that they survive her. It is true that Lucy W. Temple had two children when the deed was executed, but whether they would in the end take an interest in the property could not be found

until her death, as it could not be found whether they would survive her or not until she died. Whether the children would ever take depended upon event or condition which was uncertain and might never happen, and that is what is termed in Kent's Com. a contingent remainder. If therefore the legal estate was in the trustee, and the children of Lucy W. Temple possessed only a future contingent interest when the decree of the Marshall county court was rendered in 1844, they were not necessary parties to the proceeding.

* * * That they were not necessary parties to the proceeding to set aside the trust deed is fully established by the rule laid down in *American Bible Society v. Price*, 115 Ill. 624, 5 N. E. 126." In the last-mentioned case, in disposing of this question, the court said: "Ida Price, we concede, has a contingent future interest in the devise, but no present interest. The title is in the trustees, and the duty is imposed upon them to protect and preserve this interest for whomsoever shall be ultimately entitled to it. They are parties to the suit, and they stand for and represent in this litigation an ownership ultimately entitled to this fund, and such ownership is bound by their representation." See, also, *Bennett v. Garlock*, 79 N. Y. 304, 35 Am. Rep. 517; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805; *Green v. Grant*, 143 Ill. 61, 32 N. E. 369, 18 L. R. A. 381. These cases, as do our own decisions, all recognize the well-settled rule in chancery pleadings and practice that all persons who are legally and equitably interested in the subject-matter and result of the suit must be made parties; but such interest in the meaning of said rule must be a present, substantial interest, as distinguished from a mere expectancy of future contingent interest, so that, as was said in *Green v. Grant*, supra: "If you keep in mind the distinction between a mere contingent future interest in the trust estate generally and a perfect title or interest, the case is free from difficulty, notwithstanding the fact that the plaintiff may have an expectancy in the trust estate, as it shall exist at the death of his mother. That did not entitle him to be made a party to every suit that the trustee might be called upon to bring or defend in order to preserve the trust." And such is the rule announced by this court in *Oxley Stave Co. v. Butler County*, 121 Mo., loc. cit. 637, 26 S. W. 367.

Our conclusion on this point is that T. W. Crawford, the trustee, was invested with the legal title to the share of Mrs. Collins and her children under the will of her father, and that his trust was an active one, and that, when he and Mrs. Collins were made parties to the partition suit, the plaintiff in this case was not a necessary party to that partition, but that the ownership of those ultimately entitled to this fund was represented in said suit in the person of the trustee, T.

W. Crawford. Whatever contingent claim the plaintiff then had to the lands devised to his mother by his grandfather was converted by said will in partition into money, and the fund paid over to T. W. Crawford as trustee, as required by the will of J. H. Crawford; but, by the plain terms of the will, the plaintiff and his sister were to receive such interests under their grandfather's will as might remain of the share devised to their mother, after her death, if they survived her, and subject, also, to the disposition of so much of such share as should be necessary for the support of their mother in her lifetime, and the evidence amply supports the finding of the court that the trustee did apply the \$546.63 received by him as trustee for the support of his sister, Mrs. Collins, in her lifetime, and there was nothing left at her death to descend to the plaintiff and his sister.

4. But it is urged by plaintiff that the petition is fatally defective to give the circuit court jurisdiction in the partition suit to bind the interest of plaintiff, even though he could be represented by his trustee. It must be conceded that the petition was inartistically drawn, and should have been more specific, and ought to have alleged the trust; but it must be considered that the circuit court has jurisdiction of the class of cases, to wit, partition suits, and that the land was in the territorial jurisdiction of the court, and all the parties were before the court, and, when the scope of the pleadings is considered, it must appear that the object and purpose of the suit was to partition the lands of Dr. Crawford among his devisees in accordance with his will. While the allegations are scant and do not measure up to good pleading, the court was advised of the purpose to divide the lands among the devisees according to their interest under Dr. Crawford's will, and this the court proceeded to do and directed the lands to be sold, and after paying the costs the proceeds to be turned over to the executors to pay the allowed claims against the estate, and then the balance to be brought into hotchpot and the advancements taken into account and the distribution made according to the will, and this was done when the final settlement was made. The whole fee-simple title of Mrs. Collins and her children was sold, and that share converted into money and turned over, as the will directed, to the defendant, as trustee, to satisfy the interest of both Mrs. Collins and plaintiff in accordance with the terms of the trust. While the petition did not refer to the contingent interest of the plaintiff, the decree required the proceeds to be distributed under the will, and the statute requires the court to ascertain and declare the interest of the parties, and section 4383, Rev. St. 1899 (Ann. St. 1906, p. 2415), provides that "no partition or sale of lands shall be made contrary to the intention of the testator expressed in any

such will." Thus the contingent interest of plaintiff was safeguarded by being paid over to his trustee, who was a party of said suit. This is a collateral attack on the decree in partition, and, even though the petition was defective and the subsequent proceedings irregular, as the court had jurisdiction, and the partition under the will was within the scope of the pleadings, we hold they were not void, but bound the interest of plaintiff. *Chrisman v. Divinia*, 141 Mo., loc. cit. 129-130, 41 S. W. 920; Rev. St. 1899, §§ 4383, 4384 (Ann. St. 1906, pp. 2415, 2416).

5. Plaintiff insists that the evidence of defendant and Winscott and M. E. Crawford was incompetent, because it related to transactions between Mrs. Collins, who was dead, and defendant, her trustee, under section 4652, Rev. St. 1899 (Ann. St. 1906, p. 2520). Defendant did not testify to any contract with Mrs. Collins. He simply testified to the disposition he made of the trust funds in his hands. This was a suit by plaintiff for lands which he claimed were devised to him, not by his mother, Mrs. Collins, but by his grandfather, Mr. Crawford. Mrs. Collins was not interested in this action, and neither her heirs nor personal representatives were parties to the suit. Plaintiff does not claim under or through Mrs. Collins, but as a purchaser from the grandfather. We do not think the statute has any application to the facts developed.

Certainly defendant was competent to testify to the conversations between himself and plaintiff and to the latter's consent that the defendant should apply the trust fund to the support of Mrs. Collins and for physicians' bills in her sickness. Neither was Winscott incompetent. Even though it be conceded that Mr. Fry could not testify as to confidential communications, his evidence was merely cumulative and does not amount to substantial error.

We have reconsidered this cause in all its bearings in the light of the very able discussion by plaintiff's counsel. If plaintiff had had a vested interest in the lands, and had not been represented by his trustee in the partition suit, the contention that plaintiff was a necessary party is fully sustained by the decisions of this court cited by counsel; but as the lands were devised in trust to defendant, and that trust an active one, we think the plaintiff's interest was represented by his trustee, and it was not essential to make plaintiff a party, though he might have been a proper party, and we think the decree of the court was within the scope of the pleadings, though defective and carelessly drawn as they were, and must be held binding in this collateral proceeding.

The judgment is affirmed.

FOX, P. J., and BURGESS, J., concur.

CHARLES, et al. v. WHITE et al.

SAME v. NEILL et al.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. DEEDS—OPERATION—INTEREST CREATED—ESTATES TAIL—ABOLITION—EFFECT.

Where a grantor conveyed land to his five daughters by name, and the heirs of their body forever, the daughters took a life estate by virtue of the statute abolishing fee tails, with a remainder over to their respective children, born and to be born.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 358.]

2. FRAUDULENT CONVEYANCES—WHO MAY ASSERT INVALIDITY—PARTIES TO CONVEYANCE.

A transfer of property in fraud of creditors, while void as to the latter, is binding on the parties and their privies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 523.]

3. JUDGMENT—CONFORMITY TO PLEADINGS—NECESSITY.

When a court goes beyond the allegation of the pleadings, and the prayer for relief and decrees a matter between parties defendant, to that extent its judgment is void and open to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 948.]

4. SAME.

S. granted certain land to his five daughters, by name, for life, and then to the heirs of their body forever, and thereafter a creditor of S., after the latter's death, sued to set aside the deed: the petition alleging that S. had conveyed the land to avoid his debts, and prayed that the land be subjected to payment of his debts. The defendants in the creditor's suit, who were the daughters and three of the minor heirs, the remaindermen under S.'s deed, the rest being then unborn, answered, and the judgment decreed that the deed from S. to his daughters and their heirs be set aside and divested defendants of all interest under the deed, and vested the same in the widow and heirs at law of S.; but the land was never sold to satisfy the creditor's judgment, it being otherwise paid, and the decree setting aside the deed was never enforced. Defendants claim through the heirs of S., and contend that the decree in the creditor's suit setting aside the deed completely divested the remaindermen of all title therein. *Held*, that there was no issue raised in the creditor's suit between the life tenants and the remaindermen under S.'s deed, the only question in issue being whether the deed was void as against the complaining creditor, and the decree divesting the title of the remaindermen under the deed and vesting it in the heirs of S. was in excess of the court's jurisdiction and void.

5. SAME—CONSENT—SUFFICIENCY—EVIDENCE.

In a creditor's suit to set aside, as fraudulent, a deed to the grantor's daughters for life, remainder to their heirs, only three of whom were then in being, where the only evidence that the judgment therein was by consent was that the minutes on the judge's docket recited defendant's answer and a "decree by consent," but the minutes of the clerk showed "trial, judgment, and decree for plaintiff," and the judgment also showed that the parties announced ready for trial, and "the cause was tried by the court, and after hearing the evidence the court finds," etc., and the court made no findings that would warrant a decree of the character of the consent decree claimed to have been made, the preponderance of the evidence showed that the decree was made after trial, and not upon consent.

6. SAME—CONSENT BY INFANT PARTIES.

No court will go out of its way to hold infant litigants bound by a consent judgment, when they are incapable of giving consent, and, to invoke the doctrine that they are bound by consent of their guardian ad litem, the record should be entirely free from doubt as to the giving of consent.

7. SAME—RES JUDICATA—JUDGMENT AGAINST CODEFENDANTS—PROPRIETY.

While under proper pleadings a judgment may determine rights of defendants between themselves, the Code providing for such a proceeding, unless codefendants contest an issue with each other either upon the pleadings between themselves and plaintiffs or upon cross-pleadings between themselves, the judgment will not be res judicata in subsequent litigation between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1239.]

8. QUIETING TITLE—RIGHT OF ACTION—DEFENSES—TITLE FROM COMMON SOURCE.

In an action to try title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), permitting any person claiming title, etc., in real property, whether a present interest or in remainder, to institute an action against any person claiming any title in such property to ascertain the title and interest of the parties therein and to adjudicate their respective title thereto, where both plaintiffs and defendants asserted title through S. as the common source, if plaintiffs have a better title through S., it is immaterial that there was a defect in their title, and defendants cannot take advantage thereof, as it was not incumbent on plaintiff to show an indefeasible title in himself, but only a better title than defendants.

Appeal from Circuit Court, Newton County; F. C. Johnston, Judge.

Actions to try title by Betsy Ann Charles and others against Thomas White and others, and Betsy Ann Charles and others against George A. Neill and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded for further proceedings.

Horace Ruark and Sturgis & Geyer, for appellants. Geo. Hubbert and Clay & Sheppard, for respondents.

GANTT, J. As the records in these two cases are practically identical in the facts disclosed and the questions of law presented, they will be treated together.

The action is one to determine title under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667). They were tried together in the circuit court and are submitted to this court upon the same brief. The plaintiffs claim title to the land as remaindermen under the deed of Stephen D. Sutton to his five daughters of date October 25, 1860. Stephen D. Sutton is the common source of title, and by that deed he conveyed the lands in controversy, to wit, the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 19, in township 25, range 31, and also a portion of the W. $\frac{1}{2}$ of the aforesaid quarter section containing 64 acres, and a certain other tract containing 3 acres, or more in another portion of said quarter section described by metes and bounds, and another tract containing 9 acres more or less in said quarter section described by metes and bounds and lots 5, 6, and 7, in block 4, in the town of Neosho;

all of said real estate lying in Newton county, Mo. The habendum clause of the said deed was in these words: "To have and to hold, the aforegranted premises with all the rights, privileges and appurtenances thereto belonging or in any wise appertaining unto the said Betsey Ann Charles, Cintilda Sutton, Polina Sutton, Salina Sutton and Minerva Sutton and to the heirs of their bodies respectively forever, free from the claim or claims of any and all persons whatsoever." These daughters were at that time unmarried, except Mrs. Betsy Ann Charles; but they were all afterwards married, and all except Polina Sevier had children, "heirs of their bodies," and the plaintiffs herein are the heirs of the bodies of three of said daughters, the grantees in said deed. The plaintiffs claim, as remaindermen under said deed, that their mothers, each, took a life estate in one-fifth of the said land, with remainder to their respective children, these plaintiffs. The children of one of said grantees in said deed, Salina Ruark, are not parties to this suit. The one daughter, Polina Sevier, who never had any children, died in 1898. Minerva married James A. Stockton, and died in 1896, leaving three children, who are plaintiffs herein. Mrs. Betsy Ann Charles is still living, and she, with her four children, the heirs of her body, are plaintiffs herein. It is conceded by the pleadings, and the evidence shows, that the defendant George Neill and wife and Thomas White have acquired by mesne conveyances, and own, a life estate of all of the five grantees in said deed from Stephen D. Sutton to his daughters and the heirs of their bodies in the lands involved in these two cases, but that they have never acquired, by deed or conveyance, the interest or title of any of the heirs of the bodies of said grantees, the plaintiffs herein; nor have said heirs of the bodies of said grantees ever made any deed or conveyance of or parted with their interest in said land. The main defense is that a judgment was rendered in the circuit court of Newton county at the March term, 1872, which it is claimed had the effect of setting aside and annulling the Sutton deed to his daughters with the remainder over to plaintiffs, and that Sutton's children, inclusive of his daughters named as grantees in said deed, Sutton having died in the meantime, then took said land in fee, and consequently the defendants, who claim by mesne conveyance from them hold said land in fee. The circuit court took this view of the case, and, after finding "that under the pleadings and evidence Stephen Sutton is the common source of title under whom the parties claim," refused to declare "that the judgment obtained in this court in the case of Thomas Rutledge v. Betsy Ann Charles et al. furnishes no defense to this action," and rendered judgment for defendant. As to this judgment, plaintiffs contend: That the judgment and pleadings therein show that the said suit was a creditor's bill, wherein it was alleged and

found that Stephen D. Sutton was indebted to the plaintiff therein, Thomas Rutledge, on a promissory note at the time he made the deed to his said five daughters conveying to them and to the heirs of their bodies the lands in controversy; that such conveyance was made by Sutton "for the purpose of avoiding the payment of his just debts, and without any valuable consideration." It is further stated that said Sutton had died, that his estate was in the process of administration, the claim of plaintiff Rutledge allowed in the probate court, and the funds of the estate exhausted without paying but a small part of the claims. The prayer of the petition was that the deed be set aside and "the land subjected to the payment of plaintiff's debts." The defendants in that case were the children of Sutton, including the five daughters named as grantees in said deed, and also the remaindermen, "heirs of their bodies," so far as the same were then born, being only three of the 10 remaindermen, who are plaintiffs in this case. The life tenants answered by attorney, as did the three remaindermen, then minors, by their guardian ad litem, to the effect that they had no knowledge as to the truth of the allegations of the petition, and asking strict proof to be made. The court rendered a judgment reciting that Sutton, being indebted on the note sued on, made the deed to his daughters without any valuable consideration and to avoid the payment of his just debts, and that the note had been allowed by the probate court against Sutton's estate, and only a small part thereof paid, and then proceeded to decree as follows: "It is therefore considered, adjudged, and decreed by the court that the deed aforesaid then mentioned executed by Stephen Sutton and Nancy Sutton, his wife, to the said Betsy Ann Charles, Salina Sutton (now Salina Ruark), Polina B. Sutton (now Polina B. Sevier), Cintilda Sutton, and Minerva Sutton, be and the same is hereby set aside, vacated, and held for naught; and the said defendants, Betsy Ann Charles, John M. Charles, Nancy Charles, Fannie Charles, Newton Charles, Joshua Ruark, Salina Ruark, Theodocia Ruark, Belle Ruark, Walter Ruark, A. M. Sevier, Polina B. Sevier, Cintilda Sutton, and Minerva Sutton, and each of them, be and they are hereby divested of all right and title and interest in and to said real estate hereinbefore described under or by virtue of the said deed of conveyance made and executed by said Stephen D. Sutton and Nancy Sutton, his wife, before mentioned, and the right, title, and interest of said Stephen D. Sutton, in and to said real estate at the time of his death, subject to the payment of his just debts, vest and remain in the widow and heirs at law of said Stephen D. Sutton, deceased, as provided by law, in the same manner and effect, to all intents and purposes, as if said deed before mentioned had never been executed, and that plaintiff have and recover his costs in this behalf laid out and expended, and

that he have execution therefor." Nothing further was done under this judgment, and no sale of the land was ever had either in the circuit or probate court. It was shown that, after the rendition of this judgment in the circuit court, the administrator of Stephen D. Sutton's estate petitioned for an order of sale of this land in the probate court, but no such order was granted, and a final settlement of Stephen Sutton's estate was made, which showed the Rutledge claim and note was paid in full. The final settlement contains this item: "Cash paid by parties interested in realty, \$365.04." Some time after this judgment, it appears that the heirs of Stephen D. Sutton, two sons and the five daughters, made a parol partition of the land by quitclaim deeds to each other. Thereafter the land was sold and conveyed sometimes by quitclaim and sometimes by warranty deeds, until the defendants acquired whatever title the children of Stephen D. Sutton could convey. The defendant White, in his case, moreover, set up as another defense that Stephen Sutton, though the common source of title to himself and the plaintiffs, did not in fact own the land deeded to his daughters and the heirs of their bodies, but that the same belonged to the heirs of one Sexton, but defendant White in no way connected himself with the outstanding title of the said Sexton heirs, if any, and the circuit court found as a matter of fact that Stephen D. Sutton was the common source of title of the plaintiffs and said defendant White. In the Neill case, no such question arises. The evidence tended to show that Stephen D. Sutton went in the possession of all of said land under an administrator's deed from the Sexton estate in 1849, and lived on it and cultivated it down to the time of his deed to his daughters in 1860, and thereafter with and for them to his death in 1861. After his death his wife and daughters continued in possession as life tenants under the deed to them until after the Rutledge suit in 1872. During all this time the possession was adverse and hostile to any claim of title or right to possession by the Sexton heirs. Indeed, the possession of the defendants, down to the present time, is hostile and adverse to any such claim. The death of the first life tenant occurred in 1896, and this suit was commenced in 1904.

As to these two cases, the pivotal question is the effect of the decree in the cause of Rutledge v. Charles et al. on the creditor's bill to set aside the deed of Stephen D. Sutton to his five daughters, and the heirs of their bodies. On the part of the defendants, it is insisted that by that decree the title of the remaindermen, the plaintiffs herein, was forever divested, and that the matter is *res adjudicata*. Whereas, the plaintiffs insist: That said decree is not *res adjudicata* as to the remaindermen, the heirs of the body of the said five daughters, for the reason that the court had no power, under the pleadings and issues presented, to divest

the title of the remaindermen and vest the same in the life tenant; that no such question was submitted to the court, and its action in attempting to adjudge something not at issue was void; that the life tenants under the Sutton deed were not adversaries to the infant remaindermen, but codefendants with them; and that, in order for the judgment to bind parties as *res adjudicata*, they must have occupied adversary positions at the trial upon the issue framed between them by the pleading. The deed from Stephen D. Sutton to his five daughters named therein, and "the heirs of their bodies forever," by virtue of our statute abolishing fee tails, conveyed a life estate to the said daughters, with a remainder over to their respective children born and to be born. *Bone v. Tyrrell*, 113 Mo., loc. cit. 182, 20 S. W. 796; *Reed v. Lane*, 122 Mo. 311, 26 S. W. 967; *Utter v. Sidman*, 170 Mo. 284, 20 S. W. 702. Under the construction given section 650 by this court in the last-mentioned case, the plaintiffs are entitled to maintain this action, if they are not forever barred by the decree in the case of *Rutledge v. Charles et al.* There is no question that the defendants acquired the life estate of the five daughters, but they did not get the fee, unless the judgment in the creditor's bill brought by Thomas Rutledge in 1872 had the effect of divesting the remaindermen, the plaintiffs herein, of the fee in the land. It must be conceded that the language of the decree is broad and specific enough not only to render the deed from Sutton and wife to his daughters and the heirs of their bodies null and void as against the debt and judgment of Rutledge, but to divest all the title and interest, which the said daughters and the heirs of their body acquired as against their father and his heirs, and, moreover, to vest the same in the widow and general heirs at law of said Stephen D. Sutton, and the large question in this case is: What is the true legal effect of that decree as to these plaintiffs?

No rule of law is more firmly established than that the transfer of property in fraud of creditors, while void as to them, is binding on the parties and those in privity with them. The statutes against fraudulent conveyances are designed to protect the interest of creditors, and were not intended in any manner to affect the rights of the parties themselves to the conveyances. This has been the uniform rule of decision in this state since *Van Winkle v. McKee*, 7 Mo. 435; *Doggett v. Insurance Co.*, 19 Mo. 201; *Whitaker v. Whitaker*, 157 Mo., loc. cit. 353, 58 S. W. 5; 14 Amer. & Eng. Ency. of Law (2d Ed.) pp. 273, 276, note 3 and cases cited; 20 Cyc. 419, 608. As to the construction of such a decree, the authorities are exceedingly numerous. In *Graham v. Railroad Co.*, 70 U. S. 704, 18 L. Ed. 247, the Supreme Court of the United States announced what seems to us the best thought and most equitable

rule on this subject. Said the Chief Justice: "We have seen already that, according to the allegation of the Minnesota Company in their bill now before us, the issue between Cleveland, the complainant, and the La Crosse Company and Chamberlain, the respondents in the cause in which that decree was made, was upon the question whether the agreement and judgment were or were not void as against Cleveland and his judgment. The decree was evidently intended to determine that issue. It was, as evidently, not intended to determine the question whether the making of the agreement was beyond the corporate powers of the La Crosse Company, for there are no terms which affirm its inherent validity without regard to intent. It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic; but we cannot say that they were intended by the district court to have any greater effect than to avoid and set aside, as against Cleveland, the agreement and judgment impeached by his bill. We think, on the contrary, that a decree having such an effect could not have been properly rendered upon the pleadings and issue in that cause. Neither the La Crosse Company nor Chamberlain sought to avoid the agreement or the judgment, nor ask any relief whatever as against each other. Indeed, the case shows that both regarded the agreement and the judgment as essential to their respective interests. We cannot ascribe to any court an intention, by a decree on such pleadings, to annul such an arrangement as between the parties to it; nor could we approve such action even were the intent clear beyond question. No question was made between Chamberlain and the La Crosse Company, nor could any question arise between them, of any such nature as that between those parties and Cleveland; nor could they be required, in a suit prosecuted by Cleveland to enforce satisfaction of his judgment by setting aside their arrangement as void against creditors, to submit that arrangement, as between themselves, to the action of the court. It is true that it is the constant practice of courts of equity to decree between codefendants upon proper proofs, and under pleadings between plaintiffs and defendants, which bring the respective claims and rights of such codefendants between themselves under judicial cognizance."

In *Munday v. Vail*, 34 N. J. Law, 418, we have the prototype of the case before us. In that case, it appeared that both parties claimed under one Asa Munday. The said Munday, with his wife, conveyed the premises in dispute to Conger in fee in trust for the use of himself and his wife and the survivors of them, with a remainder to the children of said Munday and wife in fee. The plaintiff was the sole surviving child of such marriage. Munday died, and his wife and

the trustee conveyed the title to the plaintiff. The defense was that, prior to the death of Asa Munday, one Ephraim Munday had brought his bill in equity, in which he charged that the said Asa Munday had conveyed said lands to Conger to defraud said Ephraim. The prayer of the bill in that case was "that the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the said John Conger, and the said deed and declaration of trust so made and executed by the said John Conger and wife, as aforesaid, may, by the order and decree of the court, be set aside and declared to be fraudulent and void against the said judgment and right of execution, and that the said judgment be decreed a lien on said lands," etc. In that action the plaintiff, with her father and mother and Conger, were all defendants. Plaintiff was an infant, and appeared by her guardian and submitted her rights to the protection of the court. The decree was that the deed of Asa Munday and wife was fraudulent and void, and also the declaration of trust mentioned in the pleadings, and it was decreed that the said declaration of trust was null and void, and that said Conger and the said Asa Munday should deliver up the said deed and declaration of trust to be canceled. It appeared in that case, just as it does in this case, that no further proceedings were taken under the decree; but the money due the plaintiff therein was paid to him; but the lands were subsequently sold under another decree against Asa Munday for costs. Upon this state of facts, the Supreme Court of New Jersey said: "This decree is a most extraordinary one. My respect for the court and for the counsel engaged in this proceeding lead me to the conviction that it was the result of inadvertence. It is opposed to the well-settled practice of courts of equity and to the commonest principles of justice. This certainly is clear when it is said that its effect is, if it have validity, to deprive an infant defendant of an estate vested in her, without an issue or a hearing with respect to her rights." After having stated the objects of the bill, the court further said: "No one will maintain that either the prayer of the bill or the decree founded upon these facts could properly go beyond this (to have the deed declared void as against the creditor). The creditor had no standing to ask that the deed of trust should be annulled as between the trustee and the cestui que trust. If admitted to be fraudulent with respect to creditors even, the statute of frauds ordains its validity so far as relates to the parties to it. Such, likewise, is the admitted rule in equity; but in this case the decree does, in very unambiguous language, pronounce and adjudge the conveyance in trust to be invalid, not only so far as to let in the claim of the complaining creditor, but out and out as between the trustee and the parties beneficially interested. If legal, its effect was to destroy the estates of the cestui

que trust, and to revert the title in fee in the settlor." Counsel did not attempt to maintain the propriety of such a decree, but argued, as counsel do here, that, although erroneous, it could not be called in question in this collateral suit. Conceding the general proposition that a judgment or decree of a court having jurisdiction over the controversy and the parties cannot be impeached for error, except in a direct proceeding for that purpose, the learned Chief Justice proceeded to inquire whether that doctrine applied to the facts of that case. The inquiry was: Had the court jurisdiction to the extent claimed? Responding to this, Chief Justice Beasley said: "'Jurisdiction' may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present, and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue had not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined." Accordingly it was held, in that case, that the decree annulling the deed of trust was outside of the issues in the case, and the act of the court in declaring it void was clearly *coram non iudice*, and consequently void, and the estate did not revert to the original grantor.

The doctrine thus announced by the Su-

preme Court of New Jersey was approved and followed by this court in *Hope v. Blair*, 105 Mo., loc. cit. 93, 16 S. W. 595, 24 Am. St. Rep. 366, and in the more recent case of *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 368, 105 Am. St. Rep. 629, *Munday v. Vail*, supra, was again approved and followed. In *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, the Supreme Court of the United States quoted at great length from the opinion in *Munday v. Vail*, and said: "We regard the views suggested in the quotation from this opinion as correct and as precisely indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*." In *McFadden v. Ross*, 108 Ind., loc. cit. 517, 8 N. E. 161, the Supreme Court of Indiana adopted the views of the Supreme Court of New Jersey in *Munday v. Vail*, supra, and followed it, and so did the Supreme Court of Colorado (*Newman v. Bullock*, 23 Colo., loc. cit. 222, 223, 47 Pac. 379), and so likewise did the Supreme Court of Minnesota in *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, in which last-mentioned case it was said that *Munday v. Vail*, is a leading case of this subject, and it is followed in *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. In 1 Black on Judgments, 242, the opinion in *Munday v. Vail* is adopted as a part of the text. In *Waldron v. Harvey*, 54 W. Va., loc. cit. 613, 46 S. E. 603, 102 Am. St. Rep. 959, it is said: "A decree, or any matter of a decree, which has no matter in the pleading to rest upon, is void, because pleadings are the very foundation of judgments and decrees. * * * There must not only be jurisdiction as to the person affected by the decree by having him before the court by process or appearance, but there must be jurisdiction of the matter acted upon by having it also before the court in the pleadings. Multitudinous cases attest this elementary axiom of jurisdiction. If either is wanting, the decree or judgment is void, not merely voidable or erroneous." Accordingly, we think that the trend of the courts of this country is to enlarge the definition of jurisdiction with the statement that it should, properly defined, include not only the power to hear and determine, "but power to render the particular judgment in the particular case." And the foregoing cases maintain the doctrine that where, as in this case, the court proceeds beyond the allegations of the pleadings and the prayer for relief and decrees a matter between parties defendant, to that extent, at least, its judgment is void, and it is open to collateral attack.

Now, applying the foregoing principles to the decree in favor of Rutledge against the grantees of Stephen Sutton, it will be observed that the petition in substance charges that Sutton was indebted to Rutledge on a note for about \$300, and had conveyed this land to his daughters with remainder to their bodily

heirs, without any compensation and for the purpose of avoiding his debts, that Sutton was dead, and the debt had been duly allowed by the probate court, and that the defendants were the grantees in said deed and their bodily heirs. The prayer of the petition was "that the deed fraudulently executed as aforesaid be set aside and held as naught, and that the land therein described may be subjected to the payment of Rutledge's debt." The answers of the defendants in that case, the adults by their attorney and the minors by their guardian ad litem, contained nothing more than the allegation "that they have no knowledge or information whether the allegations in the plaintiffs' petition contained are true or otherwise, and they require strict proof of each and every material allegation in plaintiffs' petition contained." So that it appears that it was simply a creditor's bill for the purpose of subjecting this land to the payment of Rutledge's debt, and for this purpose, and no other, to remove the Sutton deed by declaring it void as to Rutledge. Rutledge was not interested in anything else but the collection of his debt, and the defendants were not called upon to meet any other charge. There were no issues raised between the defendants, the life tenants and the remaindermen, as to their respective claims and rights between themselves. No such question upon the pleadings could arise. There were no adverse interests between them, and they tendered no such issue to the court, and yet the circuit court proceeded, not merely to decree the Sutton deed to his daughters and their children to be null and void as against the plaintiff creditor, but went further, as we have seen, and divested all the right, title, and interest, not only of the daughters under their father's deed, but of the three grandchildren, who were then alive, and vested the same in the widow and general heirs at law of Stephen D. Sutton, deceased, and, although this decree was never enforced by a sale either in the circuit court or the probate court, it is now maintained by the defendants that, by virtue of that decree, the title of these remaindermen was completely wiped out. We are unwilling to so hold. We think, upon the great weight of authority in this country, that the decree divesting the title of these remaindermen, and vesting it in the general heirs of Stephen Sutton, deceased, was void and in excess of the jurisdiction of the circuit court of Newton county.

2. Stress, however, is laid by the defendants on what is claimed to be the proof that this judgment of Rutledge v. Charles was by consent. The only evidence of the judgment being by consent is that the minutes on the judge's docket reads: "Answer by defendants filed. Decree by consent." On the other hand, the minutes of the clerk of the court showed: "Trial, judgment, and decree for plaintiff." The judgment also shows that the parties announce ready for trial, and "this cause was tried by the court sitting as

a chancellor, and after hearing the evidence, the court finds," etc. The court made a finding of such facts as would warrant the usual and proper judgment in a creditor's bill, but found no fact warranting a decree divesting the infant remaindermen of their title and vesting it in other defendants. Doubtless, there are many cases in which the consent of the parties to a decree will estop them from afterwards controverting it; but to estop these minor plaintiffs by this mere minute, when all of them except three were unborn at that time, and those three were represented by a guardian ad litem, who was the attorney of record of their mothers, would be contrary to every principle of justice. Indeed, we take it that the great preponderance of the evidence is that the cause was tried by the court and its judgment reached as the amplified entry of the decree shown upon the finding of facts, and not upon the consent of these minor remaindermen. Certainly, no court will go out of its way to hold infant litigants bound by consent which they are incapable of giving. To invoke the doctrine that they are bound by consent of their guardian ad litem, the record should be entirely free from any doubt whatever on the subject.

3. In amplification of the first point in this opinion, it may be said that, unless the defendants contest an issue with each other either upon the pleadings between themselves and the plaintiffs, or upon cross-pleadings between themselves, the judgment or decree will not be res adjudicata in subsequent litigation between them. There can be no doubt that, upon proper pleadings, a judgment may determine the rights of the defendants even between themselves, and our Code provides for such a proceeding, but a judgment against defendants, if there are no issues between them, do not bind them as against each other. *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816; *Boogher v. Frazier*, 99 Mo. 325, 12 S. W. 885; 1 *Van Fleet's Former Adjudication*, § 256; *McMahan v. Geiger*, 73 Mo. 145, 39 Am. Rep. 489; *O'Rourke v. Lindell Ry. Co.*, 142 Mo. 342, 44 S. W. 254.

4. As to the defendant White and his codefendants, the invalidity of the administrator's deed, and the proceedings under which it was made to Stephen D. Sutton, it is not seriously insisted that White and his codefendants are in any position to deny the title of the plaintiffs to the land in suit therein, for the reason that both the plaintiffs and the defendants assert title under Stephen D. Sutton as the common source. In *Graton v. Holliday-Klotz L. & L. Co.*, 189 Mo. 322, 87 S. W. 37, the scope of the statute (section 650, Rev. St. 1899 [Ann. St. 1906, p. 667]) was adjudicated, and it was held that the statute did not require the plaintiffs in such a proceeding to establish an indefeasible title against the whole world. By its terms, no right nor title can be litigated except such as may be asserted by the plaintiff and the defendant respectively, and no one can be bound by a de-

cree in a suit brought thereunder except parties to the suit. And it was also ruled in that case, that, in a suit to recover title, it is not incumbent on the plaintiff, if he and the defendant claim title through a common source, to show an indefeasible title himself from the government down; but it is sufficient if plaintiff shows that he is the owner of a better title through the common source than defendant can show through the same source. And the defendant makes no effort to show title in this case except by and through Stephen D. Sutton, and has in no way connected himself with what is known as the Sexton title. We think the defect, if any, in Sutton's title, cannot avail the defendant White and his codefendants in this proceeding, and it will be unnecessary as to these two cases to pass upon the sufficiency of Sutton's title either by his administrator's deed or his adverse possession of the land under color of title.

In our opinion, the circuit court erred in holding that the plaintiffs, the remaindermen under the Sutton deed, were estopped by the decree in *Rutledge v. Charles et al.*, and in not holding that the plaintiff had shown a better title to the land in dispute than the defendants and in dismissing their bill.

The judgment is reversed, and the cause is remanded to the circuit court to be proceeded with in accordance with the views herein expressed.

FOX, P. J., and BURGESS, J., concur.

CHARLES et al. v. PICKENS et al.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS.

Findings of fact by the trial court are conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

2. ADVERSE POSSESSION—NATURE—TACKING SUCCESSIVE POSSESSIONS—LIFE TENANT AND REMAINDERMEN.

Where a grantor had been in adverse possession for a long period, and then conveyed the land to his daughters for life, remainder to their heirs, the continuing possession of the daughters and their grantees inured to the benefit of the heirs as remaindermen, and such possession cannot be asserted to destroy their remainder by defendants, who claimed through the life tenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 218.]

Appeal from Circuit Court, Newton County; F. C. Johnston, Judge.

Action by Betsy Ann Charles and others against Jake Pickens and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded for new trial.

Horace Ruark and Sturgis & Geyer, for appellants. Geo. Hubbert and Clay & Sheppard, for respondents.

GANTT, J. This is a proceeding by the plaintiffs against the defendants under section 650, Rev. St. 1899 (Ann. St. 1903, p. 637), to adjudge and declare the title to certain lands in Newton county, Mo. The land in controversy is a part and parcel of the land described in the deed from Stephen D. Sutton and his wife to his five daughters and executed in 1860, and recorded in Book F, p. 136, in the office of the recorder of Newton county. The cause was tried in the circuit court along with the two cases of Betsy Ann Charles et al. v. Thomas White et al. and George A. Neill et al., and the record is in all essential features the same as those in the two cases above mentioned and presents the same questions of law already discussed in the opinion handed down at this time in those cases, with the exception that in this case additional questions are presented with relation to the title of Sutton and as to whether he had any estate that might be conveyed by his said deed, and, if not, whether the defendant Pickens is estopped to deny Sutton's title and hold the land against the plaintiffs. As to the effect of the conveyance from Sutton and wife to his five daughters and the heirs of their body, and as to the effect of the decree in the case of *Rutledge v. Charles et al.*, the same consideration must control, and, accordingly, in our opinion the said deed of Sutton to Betsy Ann Charles et al., his five daughters; and "the heirs of their body," of date October 25, 1860, had the effect of conveying a life estate to each of the said daughters, in said lands, with a remainder over to "the heirs of their bodies," and that the decree of the circuit court of Newton county in the case of *Rutledge v. Betsy Ann Charles et al.*, of March 15, 1872, in so far as it undertook to divest the title of the said life tenants and remaindermen acquired under and by virtue of the said deed, and vest the same in the widow and the general heirs at law of the said Stephen D. Sutton, deceased, was void and of no effect, and did not divest the title of the plaintiffs in and to said land.

Conceding that the defendants, Pickens and his codefendant, were not estopped from pleading the outstanding title in the Sexton heirs, the circuit court found that Stephen D. Sutton was the source of their title, and certainly there was abundant evidence to support this finding. Indeed, these defendants, at most, only connected themselves with this outstanding title through the quitclaims of Thrasher et al. to $\frac{3}{27}$ of the land, made long after the statute of limitation had run in favor of Sutton and his grantees. The circuit court having found this fact against the defendants, they are in no position on this appeal to complain of it. Granting that the administrator's deed to Sexton's interest was void, the testimony overwhelmingly established the open, actual, and continuous possession of these lands after his purchase by Stephen D. Sutton and

his daughters until 1872, and then by their grantees, with the full knowledge and acquiescence of Sexton's heirs. We think that there is no foundation for the claim of an outstanding title in Sexton's heirs. The possession by the five daughters as life tenants and their grantees inured to the benefit of the remaindermen, "the heirs of the bodies" of said five daughters, and that possession cannot be asserted to destroy their remainder. *Sutton v. Casseleggi*, 77 Mo. 405; *Keith v. Keith*, 80 Mo., loc. cit. 127; *Salmon's Adm'r's v. Davis*, 29 Mo. 176; *Stevens v. Martin*, 168 Mo. 407, 68 S. W. 347; 1 *Kerr on Real Property*, § 576; *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600; *Manning v. Coal Co.*, 181 Mo., loc. cit. 373; 81 S. W. 140; *Melton v. Fitch*, 125 Mo. 281, 23 S. W. 612. We think the defendants in this case are in no attitude to avail themselves of any supposed outstanding title in Sexton's heirs. Mrs. Porter, the only one of the Sexton heirs who made any conveyance, had no title when that quitclaim deed was made, and the title by adverse possession by Sutton's daughters inured to the benefit of their bodily heirs, the plaintiffs herein, and the defendants claim through the deeds of the life tenants, and can no more contest the remaindermen's title by adverse possession than the life tenants themselves could.

It results that in our opinion the facts of this case bring it within the controlling principles of *Charles et al. v. White & Neill et al.* (handed down at this time) 112 S. W. 545, and for the errors noted the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

FOX, P. J., and BURGESS, J., concur.

PRATHER v. HAIRGROVE et al.

(Supreme Court of Missouri, Division No. 2.
July 14, 1908.)

1. BILLS AND NOTES—ACTIONS—EVIDENCE—PAYMENT.

In a suit to have a note declared paid and satisfied, the evidence examined, and *held* to show that the transaction by which defendant acquired the note was a purchase of the note, and not a payment and discharge thereof by him.

2. DIVORCE—CONVEYANCES IN FRAUD OF ALIMONY—TRANSFERS INVALID—INTENT OF GRANTEE.

If defendant purchased with his own money a note which had been assumed by plaintiff and her divorced husband, without any agreement between himself and plaintiff's husband to purchase it to prevent plaintiff from satisfying an alimony judgment against her husband out of a lot given as security for the note, he is not a trustee for plaintiff's husband or chargeable with the latter's statement that he intended to deprive his wife of the interest in such land.

3. SAME—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action to have a deed to defendant, executed by plaintiff's divorced husband, set aside on the ground that the transfer was made

to deprive plaintiff of her interest in the land under a judgment for alimony, the evidence *held* not sufficient to justify setting aside the deed on that ground.

4. JUDGMENT—LIEN—PRIORITIES BETWEEN JUDGMENT AND DEED.

Defendant borrowed money from D. to purchase a certain note assumed by plaintiff's husband and secured by deed of trust, and as security for the money borrowed defendant gave D. a deed of trust on the land, and, the note purchased by defendant thereafter accruing, the land was sold and purchased by defendant, and the interest of plaintiff's husband in the lot conveyed to defendant. Plaintiff had theretofore secured a divorce from her husband and a judgment for alimony. *Held* that, there being no surplus, upon the sale under foreclosure above the amount of the defendant's note, there was no interest of plaintiff's husband in the land to which her judgment could attach.

5. MORTGAGES—TRUST DEED—SALE—ADEQUACY OF PRICE.

Where land estimated to be worth from \$1,000 to \$1,500 was sold at a trustee's sale for \$832, there was no evidence of inadequacy of price.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 35, *Mortgages*, § 1087.]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Suit by Laura E. Prather against Elmer E. Hairgrove and others to have a certain note decreed paid and to set aside certain trust deeds. From a judgment in part for plaintiff, defendants appeal. Judgment reversed, with directions to dismiss.

Willis H. Leavitt, S. C. Price, and Hairgrove & Stubbs, for appellants. A. S. Marley, for respondent.

GANTT, J. This is an appeal from a decree rendered by the circuit court of Jackson county, Mo., in favor of the plaintiff against the defendants in a suit in equity, the object and purpose of which was to obtain a decree that a certain indebtedness, represented by a note of \$750, executed by Susie Hicks and E. Hicks, her husband, to E. S. Truitt, as trustee, conveying the W. ½ of lot 20, Saighman Place, an addition to Kansas City, Mo., had been paid and satisfied, and to set aside and decree as null and void a certain trustee's deed made by the said Garrett, as trustee, on August 1, 1903, for the purpose of foreclosing said deed of trust and satisfying said note, and also to set aside a certain quitclaim deed made by defendant Charles Prather to Elmer E. Hairgrove of date August 1, 1903, and filed of record in Jackson county, and also a certain deed of trust executed by the said Elmer E. Hairgrove to the defendant W. R. Lemley, as trustee, to secure an alleged indebtedness to Bertha J. Dockson in the sum of \$770, and that all of said conveyances be adjudged null and void and canceled. The defendant Hairgrove, for his separate answer, denied all of the allegations of the petition, except those hereinafter specifically admitted in his answer. He admits that the plaintiff, Mrs. Laura E. Prather, and

Charles E. Prather were at the time of the filing of the petition herein husband and wife, and that prior to August 1, 1903, the record title to the property known and described as the W. ½ of lot 20, Saighman Place, Kansas City, was in the said Charles E. and Laura E. Prather, and that at the time of the filing of the petition herein there was an action of divorce pending in the circuit court of Jackson county, Mo., wherein Charles E. Prather was the plaintiff and said Laura E. Prather was defendant, and that said court made an order on Charles E. Prather for the payment of \$150 alimony pendente lite, and that at the time this suit was brought the said amount had not been paid. Said defendant further admits that on August 1, 1903, Charles E. Prather made, executed and delivered to defendant a quit-claim deed to the aforesaid described real estate, and the same was on said date duly recorded. Defendant further represented to the court: That the said property was at and prior to the date of purchase thereof by said Charles E. Prather incumbered by a deed of trust in the sum of \$750, and the said deed of trust was a bona fide and existing incumbrance on said property therein described; that on the 24th day of September, 1900, said Charles E. and Laura Prather acquired the same by warranty deed; that by the terms of the contract of purchase it was agreed that the said Charles and Laura Prather acquired said property subject to the said deed of trust then existing and unpaid and assumed and agreed to pay said note and deed of trust as a part of the consideration and purchase price of said property. Said defendant Hairgrove further alleges that neither the said Charles E. Prather nor Laura E. Prather nor the makers of said note ever paid said note, nor has any one for them paid said note, as alleged in plaintiff's petition. Defendant then further alleges that said note becoming due and payable, and not having been paid upon demand of the legal holder of said note, the trustee, Garrett, in accordance with the terms and conditions of said deed of trust, caused the said property to be advertised for sale, and did on August 1, 1903, sell the same at auction for cash to satisfy said debt, and the said defendant Elmer E. Hairgrove was the highest and best bidder for the same, and thereupon the trustee, on the said last-mentioned date, made, executed, and delivered to said defendant Hairgrove a trustee's deed to said property, and by virtue of said deed said defendant is now, and has been since August 1, 1903, the legal owner thereof. The defendant Charles Prather admits that he was the husband of the plaintiff at the time alleged by plaintiff, that he was a joint owner of the property with her, and that he conveyed the same by quit-claim deed to his codefendant, Elmer E. Hairgrove. He denies that he ever paid off the note or the deed of trust on said prop-

erty, and alleges that the deed of himself to said Hairgrove was a bona fide deed for good and sufficient consideration. He denies all manner of unlawful combination and confederacy wherewith he is charged in the petition and prays to be dismissed.

On the 6th day of June, 1900, Mrs. Susie Hicks and her husband, E. Hicks, executed and delivered to E. S. Truitt a note for \$750, due three years after date, with interest thereon at the rate of 6 per cent. per annum, and on the same day executed and delivered a deed of trust in the usual form to W. E. Garrett, as trustee for E. S. Truitt, conveying the W. ½ of lot 20, in Saighman Place, an addition to Kansas City. This note was by E. S. Truitt indorsed "without recourse," and sold to the Mills heirs, Mrs. Dorothy Mills, guardian, for whom E. B. Field was the trusted agent in purchasing and handling such paper and collecting the interest thereon. On the 24th day of September, 1900, Charles E. Prather and Laura E. Prather, who were then husband and wife, acquired said lot by deed from Joseph Lorie subject to the said incumbrance of \$750, and as a part of the purchase price assumed and agreed to pay said indebtedness of \$750. The evidence tends to show that Charles E. Prather paid the interest from time to time through the firm of Truitt & Co., except the last three semiannual installments of interest, which were paid by Prather to E. B. Field. It appears that when Prather paid the semiannual interest due on the note in December, 1902, he asked Field what would be the prospect of renewing the note when it fell due in June, 1903, and was told by Field that in the next six months he ought to be able to save \$75 or \$100, and he (Field) would renew the balance for three years for \$10. Prather then told him he might be in a position to pay the note off.

In March, 1903, Charles E. Prather filed suit for divorce against his wife, Laura, which was returnable to the April term, 1903, of the circuit court of Jackson county. The defendant E. E. Hairgrove was his attorney in bringing the suit. On the 18th of April, 1903, at the April term of said court, the court allowed Laura E. Prather \$150 for alimony pendente lite. Mrs. Prather filed a cross-bill in said action for divorce, and on October 16, 1903, at the October term, 1903, the court dismissed Prather's petition for a divorce because he had not complied with the order of the court to pay the \$150 alimony. Afterwards, on October 31, 1903, Mrs. Prather was granted a divorce on her cross-bill and was given the custody of her children and a judgment for \$250 alimony and \$16 per month from December 1, 1903, for seven years. In the meantime the transactions out of which this suit originated occurred.

On the part of the plaintiff, E. B. Field testified that he held this note for \$750 as

the agent of Dorothy Mills, the guardian of the Mills heirs. He testified that on or about the 13th of May, 1903, a Mr. Stewart, a representative of E. S. Truitt & Co., a real estate firm, came to his office and said to him that Prather wanted to pay the Hicks note, and was told by Field that, if Prather wanted to pay it off, he would have to pay the interest up to June the 6th. Stewart then said: "You get the note, and I will try and see what he says"—that he would take the note to Prather, and see if he would pay the interest to June 6th, and, if he did not, he (Stewart) would bring the note back. Thereupon Mr. Field allowed him to take the note, and, after having been gone some 30 or 40 minutes, Stewart returned and handed Field a check for \$772.50, the amount of the principal and interest due on the note at its maturity, June 6, 1903.

On the part of the defendant, F. W. Stewart testified that he was engaged in the real estate business in the employment of the firm of E. S. Truitt & Co., and that he knew Mr. Field and defendant Hairgrove and Prather. He testified this loan of \$750 was made through the office of E. S. Truitt & Co., who sold the note to Mr. Field for the guardian of the Mills heirs, and that, before the note became due, Prather asked witness if Truitt & Co. could extend it, and witness took the matter up with Mr. Field, who said he would extend it, and Truitt & Co. agreed to extend it for \$10 or \$15. Witness thereupon told Prather of this, and the latter said he would let him know. A short time after this, he came into the office one day, and Mr. Truitt told him to call up Mr. Hairgrove. He called him up about this note, and Hairgrove said he wanted to get the note. After that he went and got the note from Mr. Field, and Hairgrove came down and paid him the money for it in cash, and he delivered him the note and deed of trust and an insurance policy. Witness stated that he did not think that he ever told Hairgrove who was the owner of the note. Witness was not the agent of Hairgrove, but represented E. S. Truitt & Co. in the transaction. When witness went to Mr. Field, he asked him what it would take to take up the note, and he said \$750 and six months' interest. Asked if he told Field that he wanted to pay the note, he answered that he did not remember what he said to Field about it further than he told him he wanted to take the note, and Hairgrove was going to get it from us. "I do not recollect of telling Mr. Field that Mr. Prather wanted to pay the note." He could not recollect the exact conversation between himself and Field. Prather was not present when he turned the note over to Hairgrove and received the money for it. He remembered that Hairgrove paid him the money.

Defendant Hairgrove testified in regard to this matter. He stated that he had been practicing law since the year 1884, and in Kansas City since the 29th of October, 1900,

and that, shortly after he became acquainted with Prather, the latter employed him as an attorney to commence a divorce proceeding. Pending that proceeding, he had negotiations with Mr. Mastin, Mrs. Prather's attorney, looking to the settlement of the property rights of the parties, and, while the suit was still pending, he learned that this note and deed of trust was about to become due. Defendant Prather was owing witness quite a considerable amount as attorney fees. He had a brother who wanted to invest in good securities of this city, and he went to Mr. E. S. Truitt, whom he had heard was the owner of this note, on the 11th of May, 1903. He was not personally acquainted with Mr. Truitt at that time, and he got defendant Prather to go with him and introduce him to Mr. Truitt. He at once broached the subject of purchasing the note and deed of trust, and asked Truitt if he had that note. "I asked him if he would sell the note, and he said he would, that he would sell anything that he owned, but if he sold the note to me he would sell it without recourse. I told him I had a client that would purchase it, but did not give him the name of the client. Truitt said he was very busy at the present time and said he would call me up later. On the following morning, Truitt called me over the telephone and asked if I was the party who came to see him in regard to the purchase of the note the day before, and I told him I was, and he said: 'Well, if you want to buy that note, you can get it if you will get it today.'" Witness procured the money from Mr. W. L. Lemley, part of it, and a part was what he had of his own money at that time, and went to Truitt's office and met Mr. Stewart, whom he knew and had had business with him as an employé of Truitt. Stewart said: "Did you conclude to buy that note?" And witness answered: "That is what I came here for." Stewart then went into another room and brought the note and trustee's deed, also an insurance policy. Witness examined the note, and Stewart called his attention to the fact that it was indorsed in blank without recourse. Witness asked what was the amount that was due, and Stewart said \$772.50, whereupon witness said: "There is not that amount due. I would be paying a premium on it, and I do not like to do that." "Well," he says, "the insurance policy runs until in August, and we let some one clear up the other." "He asked if I was buying it myself, and I told him 'no,' I was buying it for my brother." Up to that time he had no conversation with Stewart about the note. His talk had been with Mr. Truitt. Witness then sent the note and deed of trust to his brother, J. N. Hairgrove, Virden, Ill., and his brother sent him a draft for the same, which was turned over to Mr. Lemley in payment of the money he had borrowed from him to purchase the note. He had given Lemley a note at the time he got the money payable on demand. Later on, when the note fell

due, he called up Truitt and asked who the trustee was in this deed of trust, and Truitt said that the trustee had an office in the building, and asked: "What do you want to see him about?" And he told him that he wanted to have the deed of trust foreclosed, and Truitt said: "Go ahead and foreclose. It will be all right with Garrett." He then proceeded to advertise the sale, but an error was made in the advertisement in spelling Garrett's name "Garritt," instead of Garrett, and on the day of the sale Garrett refused to make the sale. Thereupon he served notice to readvertise, and the sale was set for August 1, 1903. At the sale there was one bid made by a party, and then witness made two bids. His first bid was \$800. He then raised his bid on a computation as to what the cost would be. The reason he did this was that, not exceeding four days before the sale, Mr. Field called him up over the telephone and asked him if he was representing the party that was foreclosing the Hicks note on the Saighman property, and he told him that he was. Mr. Field inquired at what hour the sale would take place, and he told him he would like to have it at 10 o'clock, and asked Mr. Field, who he was interested in, and Field said he was interested in, or rather representing, Mr. and Mrs. Hicks, and "we do not want the property to sell for less than the incumbrance and cost." Whereupon witness told him: "I will see that it brings that amount, because the property is worth more than that." He then asked Field if he cared to go higher, and he said he had no interest in it other than to see Mr. and Mrs. Hicks represented. He testified that Mr. Prather had nothing to do with the furnishing any part of the money that purchased the note. He testified, further, that he had no agreement with Prather by which he was to procure the title or any interest in it and hold it for Prather's benefit. There was not now and never had been any such agreement. In regard to the Dockson note, the deed of trust in which Lemley was the trustee, he said: About one or two days before the 1st of August, 1903, he went to see Mrs. Dockson and told her that he was thinking of making a bid upon some property, and what the property was, and wanted to know if she would loan him some money temporarily to buy it, and she said she would, and on the morning of August 1st, she brought \$1,000 to his office in cash and delivered it to him, and this deed of trust was given to her to secure that loan. That he only used \$770 of the \$1,000, and the balance of the bid was his own individual money. He testified that he was not aware, at any time previous of the purchase of the Hicks note, that Mr. Field had anything at all to do with it. He never knew Mr. Field in the transaction in any way until he called him up. In regard to the quitclaim deed of the defendant Prather to himself for the lot, he stated it was given to him to protect him as to his attorney fees due him from

Prather, in the event the property sold for more than the incumbrance. He testified positively he never told him that it was his (Field's) understanding that the Hicks note had been paid either at the time Field testified he did or at any other time.

On the contrary, Field testified that, after he discovered the property was advertised the second time, he had a conversation with defendant E. E. Hairgrove, and asked him why he had advertised this property when the note had been paid off. Hairgrove said it had never been paid, but Field answered by saying: "I got my money and paid it up to the 6th of June." Hairgrove then said: "I advertised because the taxes are not paid." To which Field answered: "The taxes are due the 13th of May, but really not due until August some time, city taxes." Field also emphatically testified that nothing was said to him about selling the note to anybody. The value of the Saighman lot was shown to be from \$1,050 to \$1,350.

W. R. Lemley testified that he loaned the defendant E. E. Hairgrove the money to purchase the Hicks note, and it was afterwards refunded to him in a draft from J. N. Hairgrove, and that he was made trustee in the Dockson deed of trust without his knowledge.

This is about the substance of all the testimony. The circuit court by its decree adjudged that the transaction between Hairgrove, Truitt, Stewart, and Field constituted a payment of the note secured by the deed of trust executed by Susie and E. Hicks, and at first decreed that the sale by Garrett, as trustee, to Hairgrove, was null and void, and also a quitclaim deed from Charles Prather to Hairgrove; but afterwards, on a motion for a new trial, the court, upon further consideration, struck out so much of the decree as annulled and held void the quitclaim from Prather to Hairgrove and the deed of trust from Hairgrove to secure the Dockson note, and in lieu thereof adjudged and decreed that said quitclaim deed to Hairgrove and said deed of trust by Hairgrove in favor of Mrs. Dockson were subsequent liens to the lien to the judgment for alimony and costs in the divorce case.

1. The plaintiff's contention is that the transaction between Field, on the one hand, and Prather, Hairgrove, and Stewart, on the other, constituted a payment of the note known as the Hicks note and discharged the lien of the deed of trust; whereas, the defendant insists that the evidence clearly shows that the Hicks note secured by the deed of trust on the property in controversy was purchased by J. N. Hairgrove through his brother, E. E. Hairgrove, and that the debt was not paid by his acquisition of it. Of course, if the debt was extinguished by that transaction, then the sale under the deed of trust was unauthorized and null and void, and Hairgrove took no title by the trustee's deed. There is no pretense that

the plaintiff, Mrs. Prather, in the case, paid the Hicks note, or any part of it; nor is there any evidence that her former husband, Prather, paid said note, or any part of it. Prather testified that he did not pay the note and did not arrange with anybody to pay it for him, and that he furnished no money with which to pay off the note. At the time of the alleged payment, or the date when Field received the amount of the note and interest for the Mills heirs, the note was not yet due. E. S. Truitt was the original payee in this note. He had transferred it to the Mills heirs without recourse on himself, and the note was being held for Dorothy Mills by her agent, Mr. Field. While Field testified that Stewart spoke to him in regard to the note and said that Prather wanted to pay it off, the evidence of Stewart and Hairgrove and Lemley leaves, we think, no doubt whatever that Hairgrove borrowed the money from Lemley with which to purchase the note, and that Hairgrove made his proposition to obtain this note by purchase from Truitt, and that he up to that time supposed that Truitt, who was the payee in the note, was still the owner of the note, and Truitt proposed to sell it to him, and there is little, if any, room for doubt that Stewart was carrying out Truitt's instructions in acquiring the note from Field. It is not pretended by Field that, prior to the time he received the amount of the note and interest from Stewart, he had ever spoken to Hairgrove, or that Hairgrove had any knowledge whatever that Field had the note, instead of Truitt. That Truitt and Stewart's purpose was to effectuate a purchase of this note from Field for Hairgrove we think there is no doubt whatever. Stewart could not recall the exact language he used to Mr. Field when he spoke to him and made the arrangement to reacquire the note for Truitt, but it is not strange that a transaction of that kind would not have made such an impression upon him as to cause him to remember the exact words that he used. When Field delivered the note to Stewart, the original indorsement by Truitt was on the back of the note, unerasd, and the note, thus indorsed by Truitt, the original payee, was delivered by Stewart, the agent of Truitt, to Hairgrove. The only evidence to support the claim of the plaintiff that this transaction worked the payment of the note and the extinguishment of the debt which it evidenced is the testimony of Field that, when Stewart came to him to get this note, Stewart said that Prather wanted to pay it off, and that, when he turned over the note to Stewart, he did not say anything about selling. Stewart testifies that he has no recollection of saying to Field that Prather wanted to pay it off, and Prather testifies that he did not pay it off, and made no arrangement with anybody to pay it off for him, and furnished no money with which to pay it.

The learned counsel for the plaintiff in-

sists that *Wolff v. Walter*, 56 Mo. 294, is decisive of this contention that this transaction was a payment, and not a transfer of the note, and bases his insistence upon the language of Judge Adams in that case to the effect that: "There could be no legal transfer of the note without the assent of the holder. The bank only had the authority to receive the payment, and not to sell or transfer the note." It is to be noted that the difference between that case and this is that the note had been deposited by the payee in the bank for collection, and the bank had no authority to transfer the note, but only to receive payment, whereas, in this case, all the testimony tended to show that Mr. Field, as the general agent of Mrs. Mills, had full authority to dispose of this note in any manner he saw fit. The reading of that case will show that the great preponderance of the evidence was that the note was simply left with the bank for collection, and that Wolff, the plaintiff, went with the payor, L. H. Walter, to the bank on the day of the maturity of the note and said they wanted to pay the note, and the teller received the amount in payment of the note and erased the payee's name, which had been indorsed on the back of the note, and this court said that the weight of the evidence was in favor of the finding of the circuit court, of which there can be no doubt whatever, neither do we doubt the proposition that there could be no transfer of the note without the assent of the holder; but that case in no manner discusses what would amount to evidence of the assent of the holder.

In *Allen v. Dermott*, 80 Mo., loc. cit. 59, it was said by this court: "It is only when a person is primarily bound by contract to pay a note that his payment of it works an extinguishment and satisfaction of the obligation, and then only as to those to whom he is bound." This statement of the rule does not conflict with the other well-recognized principle of law that, if a volunteer or stranger pays the debt of another without his request, he acquires no rights as against the debtor thereby.

In *Thompson v. Longan*, 42 Mo. App. 153, Judge Gill, in discussing the identical proposition advanced by the plaintiff herein, said: "In the matter of the purchase and the transfer of this note and attendant mortgage, plaintiff's counsel contends rightfully that, like other contracts, there must be a consensus of minds of indorser and indorsee. There can be no legal transfer of the note without the assent of the holder. *Wolff v. Walter*, 56 Mo. 292. There appears here one 'physical fact,' at least, which argues very strongly in favor of this assent by the holder to O'Day's purchase of the note. I refer to the written indorsement of Bothwell, transferring the note in express terms. Mrs. Schmidt, it is true, did not in person pen this transfer, yet Russel, her agent, did, and the

same was by him sent to St. Louis preparatory to securing the money thereon. The note, thus indorsed by the apparent holder and owner, was notice of itself to O'Day that the owner had agreed to sell and transfer the same to whomsoever should pay the amount called for. It is said in *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78, that, "where the true owner of a negotiable note overdue clothes another with the usual evidence of ownership and with full power of disposition, and third persons are thereby allowed or led into dealing with such apparent owner and receive a transfer of the same, they will be protected." As to O'Day's intention of becoming a purchaser of the note, the evidence is all one way. He never intended a payment of the note and mortgage, but simply to take up and carry the incumbrance for the temporary relief of an embarrassed friend. This being his intention, the duty of the court is to give effect to such intention. *Campbell v. Allen*, 38 Mo. App. 27." Now, applying the law announced in that case to this, it is clear that Field clothed Stewart, or Truitt, for whom Stewart worked, with the evidence of ownership of this note. The note was indorsed by Truitt, the original payee, and Hairgrove applied to Truitt to purchase the same. As said in *Thompson v. Longan*, *supra*, as to Hairgrove's intention to purchase the note, the evidence is all one way. He had applied to Truitt to know if he could buy it, and was assured by Truitt that he would sell it to him if he would purchase it that day, and thereupon he borrowed the money from Lemley, and went at once to Truitt's office, and the note was produced to him, and he paid his money for it. It needed no transfer in writing by Field, under these circumstances, to pass the title of the note to Hairgrove, and, while Field says that no one said anything to him about selling it, he turned it over for the check and did not mark it paid, nor suggest the satisfaction of the deed of trust. In fact, it seems to have been a matter of utter indifference what became of this note, so that he could get the full amount of the principal and interest thereon for it.

In *Swope v. Leffingwell*, 72 Mo. 348, the question of purchase or payment was the point for decision, and this court said: "The authorities are all to the effect, if money be paid by one who is a party to a judgment and liable upon it, but by some third person, the judgment will be extinguished or not according to the intention of the party paying." In that case this court quoted with approval from *Harbeck v. Vanderbilt*, 20 N. Y. 398. In that case Gray, Judge, said: "Every judgment purchased and paid for is, so far as the plaintiffs in it are concerned, paid; but if, at the time of payment an assignment is made by the plaintiffs to a third party for the benefit of one with whose money or credit the payment is made, the judgment, although in one sense paid, is not

satisfied, but remains subsisting and valid until it has answered the purpose for which it was assigned." And Selden, Judge, in a concurring opinion, says: "It is equally clear that if the money be paid, not by one who is a party to the judgment and liable upon it, but by some third person, the judgment will be extinguished or not according to the intention of the party paying."

In *Lyon v. Maxwell*, 18 L. Tr. N. S. Rep. 28, the Court of Exchequer held that the payment of a bill by a stranger may operate as a purchase, although not so understood at the time by the holder, who supposed it to be made on behalf of the acceptor, and the purchaser was allowed to maintain his action against the maker. This last-cited case is applicable here because in that case the third party purchased a bill of exchange, and in this case Hairgrove purchased the negotiable promissory note before maturity.

In *Campbell v. Allen*, 38 Mo. App. 27, it was said: "The question is: Did the transaction amount to a payment, or was it a purchase of the note? There can be no doubt as to Mrs. Price's intention in the matter. She proposed becoming the owner of the note. She intended a purchase of the instrument, not its payment. It is true that the bank officer holding for collection for Mr. Black refused to pen an assignment on the note, and that Mrs. Price took the same without such indorsement, yet she paid the \$112, and the note and the deed of trust were given into her possession with a distinct understanding. Is the evidence shown that she was then the owner, and she was then the owner to every intent and purpose? It did not require an indorsement in writing to invest her with the ownership of the property. Mrs. Pollie Price was not a party to the note, and was under no legal obligation to pay it. This being so, and it being the clear intention from the inception of the transaction that she should use her own money, as she did, to purchase, and not to pay for and discharge the debt, the law will heed such intention and enforce the rights to the property."

As already said as to Hairgrove's intention to purchase and not to pay the note, there is absolutely no doubt in the case. On the other hand, it is equally clear that Truitt did not regard this transaction as a payment of the note. Hairgrove had applied to him to buy it, and he had offered to sell it to him, and when Hairgrove appeared at his office Truitt had the note in his possession indorsed by himself, with nothing upon it to indicate any ownership by Field, or the Mills heirs, or any other person. Hairgrove was no party to the note, was under no legal obligation to pay it, and it would be in the face of all business experience to hold that Truitt or Hairgrove either considered the purchase of this note by Hairgrove as a payment of it, simply because Field testifies that he did not intend to sell it, and that

Stewart told him that Prather wanted to pay it off. All the evidence shows that Stewart was the employé of Truitt and went to Field from Truitt because Truitt had told Hairgrove he would sell him the note, and the latter had come to purchase it. A payment by Prather was not in the contemplation of any of these parties at the time. Moreover, after Field had parted with this note, and Hairgrove had purchased it and paid for it, and the land had been advertised for sale, Field called up Hairgrove to know what day and hour the sale would take place, and was informed and was asked by Hairgrove what interest he had in it, and said nothing further than to protect Mr. and Mrs. Hicks, and Hairgrove thereupon agreed to make the lot bring the amount of the interest and costs, and he did so. This conduct of Field is out of harmony with his other testimony in which he claims that he told Hairgrove the note had been paid, which Hairgrove denied. In view of all of the evidence in the case, we are of the opinion that the transaction by which defendant Hairgrove acquired this note was a purchase of the note, and not a payment of it.

2. But it is insisted that the record discloses a conspiracy to deprive the plaintiff of her interest in the lot in question and of her right to subject the interest of her former husband, Charles E. Prather, to the payment of alimony awarded her by the court. In the first draft of the decree in this case, the learned circuit judge decreed that the quitclaim deed from Prather to E. E. Hairgrove and the deed of trust from the latter to Lemley, as trustee for Mrs. Dockson, were null and void; but, upon reconsideration at the same term, the learned judge struck out that portion of the decree, and in lieu thereof simply adjudged that said quitclaim deed and deed of trust should be subsequent liens on said lot to the judgment for alimony and costs adjudged against Charles E. Prather prior to July 31, 1903. In plaintiff's petition, this deed and deed of trust were alleged to be fraudulent, and for that reason void, and such was the finding of the court in the first instance; but, in the amended decree, there is no finding or intimation that the deeds were fraudulent, but simply subsequent liens. The circuit court having refused to sustain the charge of fraud so as to invalidate these two conveyances and render them null and void, the plaintiff not having appealed therefrom, it would seem unnecessary to devote much space to the discussion of the charge of fraud further than the finding and decree that said two offenses should be held subsequent liens to the plaintiff's judgment for alimony. It is obvious, we think, that the charge of fraud is predicated upon the conduct of the defendant Charles E. Prather, and his efforts to deprive the plaintiff of any interest in the lot; but back of all of his conduct, which resulted in a decree of divorce in favor of plain-

tiff, stands the fact that, when Prather and plaintiff obtained this lot, they took it subject to the lien of the first deed of trust in favor of Truitt to secure the Hicks note, and not only that, but they agreed to pay the same as a part of the consideration for their interest in the lot. There is no pretense that there was any fraud to impeach this first note. Obviously, if plaintiff can get rid of that note and the title acquired thereunder by E. E. Hairgrove, it was and is essential to show that Hairgrove either purchased this lot at the trustee's sale with the money of Charles E. Prather, or had entered into an agreement with Prather fraudulently to acquire the same in his own name and hold it for the benefit of Prather. However reprehensible the conduct of Prather may have been, the whole testimony shows that he not only did not furnish Hairgrove money with which to buy this lot, but the whole burden of the testimony shows that Prather was not able to buy and had no means with which to raise the money to pay for the same.

The question, then is: What evidence was there that Hairgrove was guilty of a fraud in buying this first lien? He was the attorney of Charles E. Prather in the divorce case, and Prather was indebted to him for fees for his services to him in that case, and it may be added that he had a right to purchase the note and incidentally the equity, over and above the said first lien, to secure his fees for his services. Bearing the relation of attorney to Prather, his purchase of the deed of trust and the lot may be and is open to the closest scrutiny; but, when this is done, it clearly appears from the testimony of Lemley, as to whom, we take it, there is no ground of suspicion whatever of any suspicious or improper conduct, that he furnished E. E. Hairgrove with the money with which he purchased the note. The evidence as to Stewart's complicity in the matter amounts to no more than that Stewart, as an employé of Truitt, represented Truitt in procuring the note from Field and paying the latter the full amount of the note and interest. Stewart was in no sense the agent or representative of Hairgrove, but represented Truitt in the transaction. Whatever the motive of E. E. Hairgrove in purchasing this note and subsequently the land at the trustee's sale, we take it there can be no doubt whatever that he had a perfect legal right to do so with his own money, and, in the absence of an agreement with Charles E. Prather to purchase it for him, he was not a trustee for Prather; nor is he chargeable with Prather's assertions of his own intention to deprive his wife of an interest in the land. Having the right to purchase the note for his brother, J. N. Hairgrove, we do not see that the plaintiff is interested in the way he procured the funds from other disinterested parties to make the purchase. The plaintiff seeks equity in this case, and yet, in the face of the plainest equity, she seeks.

to have this property turned over to her entirely released from the deed of trust, which was the first lien thereon, and which she had bound herself to pay before she could obtain a clear title thereto. We think it would be against the plainest principles of equity to permit her to avail herself of the money paid by Hairgrove for the purchase of this first lien without having ever paid one cent to satisfy it. It may be and probably is true that her husband was guilty of improper conduct towards her, and had the purpose, as far as he was concerned, to defeat her judgment for alimony and deprive her of her interest in the lot; but it seems from the evidence that for want of means he was utterly powerless to carry out his designs to that end.

In view of the evidence in the case, we are satisfied the learned circuit court judge properly concluded that there was not sufficient evidence of fraud to justify him in annulling and setting aside the deed of Prather to his interest in the lot to the defendant E. E. Hairgrove, and the deed of trust given by the latter to secure the loan from Mrs. Dockson. The most that can be said of it is that, at first blush, a suspicion is aroused, because the transaction of E. E. Hairgrove involved his brother and other relatives in raising the money to buy the note and purchase the land. But if he had the right to buy the note, as we think he clearly did, he also had the right to go to his own relatives and friends to raise the money with which to make the purchase. But when it appears unmistakable that Prather did not furnish the money, or a dollar of it, but that Hairgrove did, we are utterly unable to see upon what ground the plaintiff could have the first lien, the Hicks note, which neither she nor her husband had paid, declared satisfied, and the property turned over to her discharged therefrom. Unlike the case of Wolff v. Walter, 56 Mo. 294, in which it was pointed out by this court that the debt was not a debt to Mrs. Walker, and that she, as a married woman at that time, could not bind herself personally therefor, at the time this property was acquired by the plaintiff and her husband, plaintiff had a perfect legal capacity to contract and bind herself, and this property was deeded to her and her husband whereby they acquired an estate by the entirety therein, and she agreed and bound herself to pay off this first lien, of Hicks note, and it stood confessed that she had never paid a cent thereon, and the whole evidence satisfies us that her husband had never paid any thereon.

Under such circumstances, to deprive J. N. Hairgrove of the benefits of his purchase of that note, and the defendant E. E. Hairgrove of his rights acquired by the sale of the property to satisfy that note, would be, in our opinion, inequitable and unjust. Neither do we see any ground upon which the circuit court could adjudge the deed of trust

given by the defendant E. E. Hairgrove to Mrs. Dockson a subsequent lien to plaintiff's judgment for alimony. By the sale of the lot under the Hicks deed of trust, all the right, title, and interests of both Charles E. Prather and the plaintiff herein were wiped out, and there was no surplus left over which could have been applied to the payment of said alimony. That this was unfortunate for plaintiff may be and is freely conceded, but the only way to have avoided it was to have made the land bring enough to pay the said alimony, but this was not done. The lot was variously estimated from \$1,000 to \$1,500 in value and brought at the trustee's sale \$832.33, so that there is no evidence of inadequacy of price in the case.

It results that the judgment and decree of the circuit court should be, and is, reversed, with directions to the circuit court to dismiss the bill.

FOX, P. J., and BURGESS, J., concur.

OATLETT et al. v. KNOXVILLE, S. & E. RY. CO. et al.

(Supreme Court of Tennessee. May 21, 1908.)

1. ELECTIONS—CONTESTS—PROCEEDINGS.

In the absence of a statute providing for the contest of an election to determine whether a county shall subscribe to the stock of a railway company, a proceeding to contest it should be brought in the chancery court, which has jurisdiction over such controversies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 256.]

2. SAME.

Under Shannon's Code, §§ 4887, 6063, 6074, authorizing the circuit court to determine a suit of an equitable nature, where objection to its jurisdiction has not been taken by demurrer, etc., the circuit court has jurisdiction of a proceeding to contest an election to determine whether a county should subscribe to the capital stock of a railway company, where no objection was taken by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 250-256.]

3. APPEAL AND ERROR—SCOPE OF REVIEW—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where, in a proceeding in the circuit court to contest an election to determine whether a county should subscribe to the stock of a railway company, the circuit judge determined that he had the right to make an independent investigation and examine the ballots, and he made such an investigation and rendered judgment, the court on appeal is required only to re-examine the judgment of the circuit judge, and the question whether the commissioners of election and the county court had the right to go behind the poll lists and returns and examine the ballots was immaterial.

4. ELECTIONS—BALLOTS—VALIDITY.

Ballots at an election to determine whether a county should subscribe to the stock of a railway company, which were not on plain white paper, were void on that ground.

5. SAME.

Under Acts Ex. Sess. 1891, p. 42, c. 21, as amended by Acts 1893, p. 208, c. 101, making it unlawful to place any marks or insignia on any ballot, etc., ballots at an election to determine

whether a county should subscribe to the stock of a railway company, which contained marks by pencil or pen, striking out the word "for" in the phrase "for subscription," with the word "against" written in pencil below, etc., are invalid.

6. SAME—"VOTES."

The word "votes," in Acts 1887, p. 59, c. 3, § 9, authorizing an election to determine whether a county shall subscribe to the stock of a railway company, and providing that, if three-fourths of the votes cast at the election are in favor of subscription, the election officers shall take such action as may be required to make the subscription effective, means legal votes, for illegal ballots do not really constitute votes and are not to be counted in determining whether or not three-fourths of the votes are in favor of subscription.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7358-7359.]

Appeal from Circuit Court, Sevier County; G. McHenderson, Judge.

Action by W. R. Catlett, Jr., and others against the Knoxville, Sevierville & Eastern Railway Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

James H. Welcker and W. A. Bowers, for appellants. Templeton & Templeton, Penland & Paine, and Zirkle & McMahon, for appellees.

NEIL, J. After the necessary preliminaries required by the statute had been complied with, the quarterly court of Sevier county ordered that an election should be held on the 14th of December, 1907, by the election commissioners of the county, to obtain the sense of the people as to whether the county should subscribe \$150,000 to the capital stock of the defendant railway company. Pursuant to the statute, it was directed that those in favor of the subscription should put upon their tickets the words "For subscription," and those opposing should put upon their tickets the words "No subscription." The election was accordingly held, and the quarterly county court again met on the 21st of December, 1907, to receive the report of the election commissioners and to act thereon. Prior thereto—that is, on December 18, 1907—the election commissioners, through two of its three members, Chairman John W. Sharp and J. B. Brabson, filed with the clerk of the court their report as to the result of the election, showing that they had opened and held the election, after due advertisement, as directed, in all of the civil districts of Sevier county, enumerating them. They further certified that all the returns from all the voting places in the county had been duly received by them from the election officers as required by law, and that on the 16th of December, 1907, they met in the courthouse at Sevierville—that is, two of them, the two above mentioned, the other member, J. L. Yarberry, being absent on account of sickness—and on the date just mentioned began the work of opening, comparing, and compiling the returns, which work not being completed

on that day, adjournment was had until the following day, when it was resumed and finished. It was also certified that in all the voting precincts in the county, except those in the Sixth civil district thereof, the officers and judges of election had transmitted and delivered to them as part of their returns the ballots cast at the election, and that the total number of votes cast "For subscription" was 2,008, and the total number cast "No subscription" was 555; that therefore three-fourths of the votes cast were in favor of subscription. They further certified that the returns embraced 270 ballots which bore distinguishing marks or words, contrary to the statutes of this state, and were illegal and void; that these illegal and void ballots were not counted by them, but were reserved and submitted with their report, along with the general returns, including all the poll lists and ballots, to the court.

On the 21st day of December, 1907, the quarterly county court reassembled in special session, pursuant to adjournment and to notice, for the purpose of receiving and acting upon the returns, and the report of the election commissioners of said county, as to the result of the election held on the said 14th day of December. At that session the court passed and directed the entry of an order, among other things, finding and adjudging that the election had been held by the election commissioners, as directed by the court and as required by law, in every established voting place in the county; that the judges and officers of the election, in making returns from the different voting places, included in their returns, and as part thereof, the ballots that had been cast in the election, except those from the voting precincts in the Sixth civil district, from which the ballots were not returned by the election officers; that there were cast in said election 270 ballots which were not in conformity with the law under which said election was held and with the order of the court directing the holding thereof; that these 270 ballots bore distinguishing marks, or were otherwise disfigured, and did not contain the words "No subscription" or the words "For subscription"; that after the 270 ballots were inspected by the court, and a full investigation and consideration thereof had by the court, it was adjudged that these 270 ballots were illegal and void, and not to be taken into consideration in ascertaining the result of the election, and ratifying and affirming the action of the election commissioners in rejecting and throwing out the said 270 ballots; that thereupon it was adjudged by the court that the number of votes cast "For subscription" was 2,008, and the number of votes cast "No subscription" was 555, and that more than three-fourths of all the votes cast in the election were in favor of the subscription, and that the election was in all respects fair; that by virtue thereof said subscription had been

made, and was accepted by the court, and the court directed that its chairman be constituted the agent of the county for the purpose of having bonds prepared, and to arrange for the payment of the subscription when it should become due under the terms and conditions of a former order of the court, pronounced October 29, 1907.

A motion was made by the plaintiffs in the present case, asking delay in order that they might investigate the election and find means of showing its invalidity. The motion was overruled, and the order entered as above stated.

Thereupon a petition was filed in the circuit court, complaining of the election and asking that the subscription be declared void. The special ground of the complaint was that the board of election commissioners and the county court had thrown out the 270 ballots above referred to, without authority to take such action, and it was insisted that these votes were valid ones, and should have been counted, and, if counted, that the result would be that the subscription had not carried by a three-fourths vote, but had been lost. This bill was filed against the railway company, the board of election commissioners, the county court, and Sevier county. All of these defendants answered upon the merits, and at the same time the railway company filed a cross-petition in which it complained of the 270 ballots, alleging that they were void and should be stricken out on the trial of the matter in the circuit court. To this cross-petition the petitioners or plaintiffs in the original petition were made defendants; also Sevier county. This was likewise answered. The original petitioners were taxpayers of the county.

In the court below the case was heard on an agreed statement of facts, supplemented as to some points by the evidence of two witnesses.

The circuit judge, after considering the case upon the pleadings and the evidence, held that neither the election commissioners nor the county court had the power to go behind the returns and purge the ballots, but that he himself, under the case made by the pleadings, had the right to do so, and the correct result had been reached by both of the bodies referred to. In other words, the circuit judge held, upon an independent investigation, that the 270 ballots were illegal and should be excluded, and that on excluding them it appeared that there were 2,008 votes "For subscription" and 555 votes "No subscription," which resulted in a judgment that the subscription had carried by the requisite three-fourths vote prescribed by Acts 1887, p. 57, c. 3.

From the foregoing judgment the original petitioners appealed to this court and have here assigned errors.

The errors assigned are five in number, but they are all in substance that the circuit

judge reached an incorrect conclusion and that his judgment should be reversed.

Before going further, it is proper to note that the counsel and the court below seem to have assumed that the present action was, in effect, a contested election, and that the jurisdiction rested upon that ground. This is a mistaken view. There is no provision made for a contest of an election of this character. Regularly the action should have been brought in the chancery court, which has jurisdiction of controversies of this kind, as shown in *Lindsay v. Allen*, 112 Tenn. 637, 660, 82 S. W. 171, *Braden v. Stumph*, 16 Lea, 581, *Winston v. Tennessee & Pacific R. R. Co.*, 1 Baxt. 60, and *Bouldin v. Lockhart*, 1 Lea, 195. However, there is a provision in the Code which gives to the circuit court jurisdiction of all cases in chancery, provided no one objects by demurrer. In this case no demurrer was filed, and therefore the jurisdiction was secure. We infer that this was the ground on which the court sustained jurisdiction of the circuit court in the case of *Bouldin v. Lockhart*, 3 Baxt. 262. However, the question is not made there, nor is the record accessible. In the syllabus to that case it is called a contest erroneously.

The section to which we refer is section 6074 of Shannon's Code, which reads as follows: "Any suit of an equitable nature brought in the circuit court where objection has not been taken by demurrer to the jurisdiction may be transferred to the chancery court of the county or district or heard and determined by the circuit court upon the principles of a court of equity with power to order and take all proper accounts and otherwise perform the functions of a chancery court."

Section 6063 reads: "The circuit courts of this state are courts of general jurisdiction, and the judges thereof shall administer right and justice according to law, in all cases where the jurisdiction is not conferred upon another tribunal."

Another section which bears upon the same subject, and confirms the jurisdiction, is section 4887, which reads: "Either party dissatisfied with the judgment or decree of the circuit or chancery court, in a matter of equity tried according to the forms of the chancery court, may appeal to the Supreme Court, and have a re-examination in that court of the whole matter of law and fact appearing in the record."

Another preliminary matter that should be noticed before going to the merits of the controversy is that the General Assembly of 1907 made some additions to our election laws. Chapter 435, p. 1480, provides for a state board of elections, and prescribes the duties of that board. Chapter 436, p. 1483, prescribes that the state board for and in each and every county in the state shall appoint a board of three commissioners, that shall be known as commissioners of elec-

tions. The chapter just referred to prescribes their duties. Section 15 provides "that it shall be the duty of the officer holding the election to deliver the polls or returns of the election sealed as received, together with the ballots cast in said election, to the said commissioners of elections not later than 12 o'clock noon on the first Monday after the election."

This requirement as to the delivery of the ballots is a new one. On this the commissioners of election in Sevier county, and the county court, based their right to go behind the poll lists and returns and examine the ballots. We need not consider the question whether they acted correctly in so doing or not, as the circuit judge held that he also had the right to make an independent investigation, and we are to re-examine his judgment, and not that of the board of election commissioners, or the count made by the county court.

We shall now state the facts on which the merits of the controversy turn. The bill of exceptions describes the various ballots composing the 270 rejected votes under 10 classifications, as follows:

"(1) Batch A1, containing 119 ballots, which have each on same the words 'For subscription' printed, the printed word 'For' being stricken or marked out by pencil, or pen marks through said word and the word 'Against' written in pencil below.

"(2) Batch A2, containing 2 ballots, having the same words printed on each as above set out, the word 'For' being rubbed or scratched out, and in place thereof the word 'Against' written in pencil just before the printed word 'subscription.'

"(3) Batch A3, containing 3 ballots, 2 having no printed words thereon, but the words 'Against subscription' written on and across each, and the third one having the words 'For subscription' printed on it, which words have a pencil mark through them, with the words 'Against subscription' written below, and two marks below the last-named words, thus '1 1.'

"(4) Batch A4, containing 20 ballots, with the printed words thereon 'For subscription,' the word 'For' being marked by pencil or pen marks, so as to deface or disfigure same, and the word 'Against' written above one or both of said words.

"(5) Batch A5, containing 89 ballots, none having any printed words thereon, but all having the written words 'Against subscription' thereon. Six of them are not of plain white paper.

"(6) Batch A6, containing 1 ballot, having the words 'For subscription' printed, and the words 'Against subscription' written underneath same, and none of said words being marked or erased.

"(7) Batch A7, containing 1 ballot, having the words 'For subscription' printed thereon, which words are stricken out by two lines

drawn through them, and the word 'Against' written under the same.

"(8) Batch A8, containing 1 ballot, having the words 'For subscription' printed thereon, which words are stricken out by three lines drawn through same, and the words 'No railroad' written thereunder.

"(9) Batch A9, containing 1 ballot, having the words 'For subscription' printed on it, and the word 'For' being stricken out by three lines drawn through it, and the word 'Not' written just below said word 'For.'

"(10) Batch A10, containing 83 ballots, having on each the words 'For subscription' printed thereon, which words are stricken out by lines drawn through same, and the words 'Against subscription' written under same; that 1 of them has the said printed word 'For' only stricken out, and the word 'Against' written below, and the other, which is like the last-named ballot, except the word 'Against' is written above."

Two of the ballots in batch A3 and 89 ballots in batch A5 raise the question whether a paper of the statutory length and width, having written thereon the words "Against subscription," should be held equivalent to the words "No subscription," prescribed by the Acts of 1887. However, 6 of the ballots in batch A5 are not on plain white paper, and are therefore void on that ground. Still, laying aside this last point, and treating all of the 41 ballots as raising the question just stated, we do not find it necessary to consider this question, nor do we express any opinion upon it, because it appears that the remaining 229 of the 270 ballots are void, and, deducting these from the whole number returned, there is still a three-fourths vote in favor of the subscription.

We do not deem it necessary to go into an extended examination of the question whether the various marks and defacements found upon the ballots in batch A1, batch A2, the third ballot in batch A3, and the ballots in batches A4, A6, A7, A8, A9, and A10, render these ballots void, since we think the question is fully covered by the case of *Cross v. Keathley*, decided at the last term at Knoxville, and reported in 119 Tenn. 567, 105 S. W. 854. For the reasons stated in that case, we hold the ballots referred to were in violation of our election laws therein set out, and hence void. Chapter 21, p. 42, Acts Ex. Sess. 1891; chapter 101, p. 208, Acts 1893.

Acts 1887, p. 59, c. 3, § 9, provides that it shall be the duty of the county court to convene on the call of its presiding officer for the purpose of acting on the returns of the election officers within 10 days after the election, and if it shall appear that the same was in all respects fair, and that three-fourths of the votes cast at such election were in favor of subscription, then "it shall have full power, and shall proceed to make and execute all necessary orders, and take such action as may be required to make the subscription ef-

fective, according to the terms thereof and the provisions of this act." It is observed that the act does not say three-fourths of the legal voters, but three-fourths of the votes cast. The question arises as to whether the illegal votes should be considered in determining the number of votes cast. We think they should not be so considered. This question is covered by the cases of *State ex rel. Hocknell v. Roper*, 47 Neb. 417, 66 N. W. 539-541, and *Hopkins v. City of Duluth*, 81 Minn. 189, 83 N. W. 536, 537, 538. In addition to these authorities, the matter rests on sound reason, because the Legislature necessarily meant all legal votes cast. An illegal ballot does not really constitute a vote at all.

In what we have said we have disposed of the whole controversy, and the matter need not be further discussed.

Some questions were reserved in the court below as to the payment of costs and counsel fees, and, in order that these matters may be settled and disposed of, the case is remanded to the circuit court of Sevier county.

The original petitioners will pay the costs of this court.

The costs of the court below will be paid as decreed by the circuit judge.

FOSTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. HOMICIDE — MURDER — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 518-538.]

2. CRIMINAL LAW — APPEAL — VERDICT — CONCLUSIVENESS.

Where there is any evidence tending to show the guilt of accused, the case is for the jury, and their finding of guilt will not be disturbed, in the absence of prejudicial error of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

3. HOMICIDE — EVIDENCE — INSTRUCTIONS.

Where no eyewitness to the homicide testified to, and there was no proof of, any circumstance reducing the homicide to voluntary or involuntary manslaughter, or raising the defense of self-defense, and accused, if guilty, was guilty of murder, the court properly refused to charge on voluntary or involuntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 649-656.]

Appeal from Circuit Court, Whitley County. "Not to be officially reported."

Clara Foster was convicted of murder, and she appeals. Affirmed.

K. D. Perkins and W. R. Henry, for appellant. Jas. Breathitt, Atty. Gen., and Jno. F. Lockett, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. Under an indictment charging her with the murder of James Foster, her husband, the appellant was convicted

and her punishment fixed at imprisonment in the state penitentiary for life. At the conclusion of the evidence for the commonwealth, her counsel asked the court to direct the jury to return a verdict of not guilty. This request being refused, they declined to offer any evidence. One of the principal grounds relied on for reversal is that the evidence introduced for the commonwealth was wholly insufficient to support a verdict of conviction. The additional error urged is that the court failed to instruct the jury as to the whole law of the case. The evidence upon which the conviction was had was entirely circumstantial, and consisted chiefly of statements made by appellant. There were no eyewitnesses to the murder. The deceased was found lying in his bed dead. His death was produced by a ball from a pistol that entered the back or top of his head, killing him instantly. The pistol was held so close to the bed upon which his head was resting that the fire from it when discharged burned or scorched the bedclothes. Deceased was asleep, and did not move his position in the bed after he was shot. The work of the assassin was quickly done, and the victim without a struggle passed from sleep into death.

Appellant and deceased, with their children, lived in a small house in a rather thickly settled neighborhood. Deceased was in the habit of getting drunk, and, when under the influence of liquor, was violent and abusive to his wife. They had several serious and noisy quarrels, during which each would threaten to kill the other. The murder was committed on Sunday night. On Sunday afternoon the deceased left home for the purpose of going to a place where whisky could be obtained. Soon after his departure, the appellant took her children to the house of her daughter near by, and said that her husband would come home drunk during the night, and that she would go away and stay until he got sober. There was no evidence whatever, except a statement made by appellant, tending to connect any other person than appellant with the commission of the crime. The evidence conducing to establish her guilt consists of threats and the statement made to more than one person that "Foster had come home drunk, gone to sleep, and woke up in hell"; that "he never could come in drunk and put his pistol against the side of her head again"; and contradictory accounts of where she spent the night. To one person she said that, after leaving home Sunday afternoon, she became sick, and spent the night at a schoolhouse about a half mile from where she lived. At another time she said that she had gone to bed in her own house, and was awakened by her husband on his way home hollering and shooting; that she went out of the house with a view of escaping from him, and within a short distance came upon two men to whom she told why she was leaving home;

that they prevailed on her to return with them to her house, which she did, when one of them went in and fired the fatal shot, after which she went to the schoolhouse, and remained the balance of the night. Without relating the other circumstances of her guilt, based upon her conduct and conversations, we will content ourselves by saying that there was sufficient evidence to sustain the verdict. Under the well-established rule of practice prevailing in this state, if there is any evidence tending to show the guilt of the accused, the case should go to a jury, and their finding of guilt will not be disturbed unless some prejudicial error of law has been committed. *Martin v. Commonwealth*, 106 S. W. 863, 32 Ky. Law Rep. 657. The only error of law complained of is the failure of the trial court to instruct the jury upon the subjects of voluntary and involuntary manslaughter. The court refused to charge the jury upon these branches of the law of homicide, giving only an instruction upon the question of murder, and the usual one as to reasonable doubt of guilt entitling the defendant to an acquittal.

It has been ruled in several cases that, where no eyewitness to the homicide testifies, it is the duty of the court to give to the jury the law applicable to manslaughter as well as murder. The cases so holding were reviewed in *Bast v. Commonwealth*, 99 S. W. 978, 30 Ky. Law Rep. 967; and it was there held, after fully considering them, not to be necessary to give an instruction as to voluntary or involuntary manslaughter or self-defense, unless there was some fact or circumstance developed on the trial upon which such instructions or one of them might be predicated. In the case before us there is no room or place for an instruction except upon the subject of murder. There is not a word of proof or a single circumstance upon which an instruction as to voluntary or involuntary manslaughter or self-defense could be rested. It would be absurd to hold that in a case like this the trial court should have given instructions upon subjects concerning which there was no evidence whatever. The appellant, if guilty at all, was guilty of murder. The jury under proper instructions, after a trial free from prejudicial error, found that appellant was guilty; and the judgment of the lower court must be affirmed.

SULLIVAN v. HILL.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

1. BOUNDARIES—DESCRIPTION—COURSES AND DISTANCES.

Course and distance must give way to marked lines and corners found on the ground, or to established monuments called for in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 18, 23.]

2. SAME—ISSUES—QUESTIONS FOR JURY.

Where parties are mistaken as to where the lines and corners of surveys referred to in a deed are, and they call for such lines and

surveys, deeming them at one place while they are at another, the lines must be run as the parties intended them to be located; and, where the proof is conflicting, the jury must locate the lines of the land actually conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 202.]

3. SAME.

One call in a deed is entitled to as much respect as another, and often uncertainty may be avoided by reversing the calls from the beginning corner, and where, when the calls are reversed from the beginning corner, the monuments called for in the deed are found, that much of the survey will be located and the location of such lines will throw light on how other lines should be located so as to close the survey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 52.]

4. SAME.

Where the issue was whether land recovered by a third person from a grantee was covered by the deed of the grantor, and there was a dispute about the calls in the deed, the court must charge the jury that they should determine from the evidence whether any of the land which the third person recovered was included in the deed of the grantor, and, if any, how much was so included.

5. COVENANTS—COVENANTS OF WARRANTY—ACTION FOR BREACH—EVIDENCE.

In an action by a grantee for breach of warranty, the court should confine the evidence of the value of the land of which the grantee had been deprived to the time of the execution of the deed, and the grantee's recovery on account of the value of the land lost must be such a part of the price as the value of the land lost bore at that time to the entire value, with interest from that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 233.]

6. CHAMPERTY AND MAINTENANCE—CONVEYANCE OF LAND HELD ADVERSELY—POSSESSION—SUFFICIENCY.

A possession sufficient under the statute of limitations may not be sufficient under the champerty statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, §§ 66-83.]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by N. B. Hill against A. J. Sullivan. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

J. N. Sharp and H. H. Tye, for appellant.
T. Z. Morrow, R. L. Pope, and E. L. Stephens, for appellee.

HOBSON, J. A. J. Sullivan on September 2, 1901, conveyed to N. B. Hill a tract of land in Whitley county in consideration of \$600. The deed describes the land by metes and bounds, but it does not show the number of acres conveyed. In August, 1904, Louis Stanfill brought a suit against Hill to recover a body of land which Hill claimed under the deed from Sullivan, and in that suit Stanfill recovered from Hill about 30 acres of land. Hill gave Sullivan notice of the pendency of the suit, and, after it was decided, brought this action against Sullivan to recover of him damages for the breach of the warranty. The case was tried in the circuit court, and resulted in a judgment in favor of Hill for

\$203.22. From this judgment, Sullivan appeals.

The chief question in the case arises on the instructions of the court to the jury. The court told the jury that the quantity of land which the plaintiff lost in the suit with Stanfill which was covered by the deed from the defendant as shown by the evidence was 30 acres, and that they should find for the plaintiff such part of the whole consideration paid for the entire tract as the value of the 30 acres bore to the entire tract with 6 per cent. interest from September 2, 1901, and his cost in the former suit. There was an issue in the pleadings as to whether the land which Stanfill recovered was covered by the deed made by Sullivan, and this issue should have been submitted to the jury. There is no dispute about the calls of the deed running from the beginning corner until we reach a hickory on a ridge. From this point the deed calls to run with the top of the ridge "N. 55° E., 145 poles, to a stake in the line of a 100-acre survey; thence N., 54° W., 14 poles, to a locust corner of 75 acres, patented to John Hill; thence with it N., 55° W., 43 poles, to a small chestnut." If we run from the hickory on the ridge, we strike the line of the 100-acre survey before the distance gives out; and, if from this point we run the courses and distances of the deed as they are written, none of the land which Stanfill recovered will be included in the deed. On the other hand, if we run from the hickory the distance called for in the deed and then follow the other calls for course and distance, we do not reach the 75-acre survey of John Hill or the locust corner. To reach the locust corner from the point where the distance gives out or from the line of the 100-acre survey, we have to disregard entirely the course and distance of the deed, and when we do this, and undertake to run the other calls of the deed back to the beginning, it will not close, and includes a very large boundary of land, much larger. It would seem, than was contemplated by the parties in the sale of Sullivan to Hill. Where the lines and corners of the deed are located on the ground is a question for the jury, and should be submitted to them under appropriate instructions. Course and distance must give way to marked lines and corners found on the ground or to established monuments called for in the deed; but sometimes parties are mistaken as to where the lines and corners of the other surveys are, and they call for such lines and surveys deeming them at one place when they are at another, in which event the lines must be run as the parties intended them to be located (*Bowling v. Siler*, 42 S. W. 90, 19 Ky. Law Rep. 788); so it is necessarily a question for the jury, where the proof is conflicting, to locate the lines of the tract of land actually sold. One call of a deed is entitled to as much respect as another, and often uncertainty in a case of this sort may

be avoided by reversing the calls of the deed from the beginning corner. If, when the calls are reversed from the beginning corner, the monuments called for in the deed are found, this much of the survey will be located and the location of these lines will throw great light on how other lines should be located so as to close the survey.

The court, instead of the instruction given, should have instructed the jury that they should determine from the evidence whether any of the land which Stanfill recovered of Hill was included in the deed which Sullivan made Hill; and, if any, how much was so included. On another trial the court will confine all evidence as to the value of the land or the timber on it to the time of the making of the deed, and no evidence will be admitted of its value at a subsequent time. Hill's recovery on account of the value of the land lost must be such a part of \$600 as the value of the land lost at that time bore to the entire value of the place, \$600, with interest from that time.

No question of the champerty statute arises. There was no such actual occupancy of this timbered land by Stanfill as made Hill's purchase void under the champerty statute. A possession may be sufficient under the statute of limitations which is not sufficient under the champerty statute.

Judgment reversed, and cause remanded for a new trial.

LEE v. WHEAT.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

On petition for rehearing. Petition overruled.

For former opinion, see 111 S. W. 307.

HOBSON, J. A mere mistake in the calls of the deed cannot affect the title when the lines and corners are established, and adverse possession is taken and held for over 15 years to the lines and corners thus established and recognized on the ground.

Petition overruled.

EHRICK et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. CRIMINAL LAW—APPEAL—DECISIONS REVIEWABLE.

Under Cr. Code Prac. § 281, providing that the decision of the court on motion to set aside an indictment is not subject to exception, the action of the court in impaneling a special grand jury to investigate accused, which jury returned the indictment under which he was tried, is not reviewable on appeal.

2. NUISANCE—PUBLIC NUISANCE—INDICTMENT—SUFFICIENCY.

An indictment charging a public nuisance should describe the premises with sufficient definiteness to enable the sheriff to find the same after the entry of a judgment of abatement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 208.]

3. SAME.

Where the indictment for a public nuisance by operating a poolroom described the premises as a place where a poolroom was conducted by accused, at which large numbers of persons daily congregated, and alleged that the room was "located on the east side of the Alexandria Pike, south of the city of Newport," in a designated county, and the order of abatement might be amended from the record so that the premises could be found by the sheriff, the indictment sufficiently described the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 208.]

4. CRIMINAL LAW—HARMLESS ERROR—MISCONDUCT OF TRIAL COURT.

Where the testimony of a witness was not in favor of accused, and his answers showed that his memory was poor or that he was uncandid in his statements, the admonition of the court that it was the duty of a witness to answer the questions frankly, and that it would be good for the community if some people were prosecuted for perjury, was not prejudicial to accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3085-3088, 3125.]

5. SAME—VERDICT—CONCLUSIVENESS.

Where there is any evidence of the guilt of accused, the weight thereof, together with the punishment within the limits as given in the court's instructions, are solely for the jury in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

George Ehrlick and another were convicted of maintaining a public nuisance, and they appeal. Affirmed.

C. L. Raison, Jr., and Jno. B. O'Neal, for appellants. Jas. Breathitt, Atty. Gen., and Theo. B. Blakey, Asst. Atty. Gen., for the Commonwealth.

O'REAR, C. J. Appellants were convicted of maintaining a public nuisance, and fined \$500 and \$100, respectively. They set up and operated a poolroom in Campbell county just outside the corporate limits of Newport, where betting on horse races throughout the country was indulged in by large crowds attracted to the place by its facilities for betting. The crowds numbered from 200 to 2,000, and assembled daily, except Sundays, when races were being run anywhere in the United States.

The principal features of the case are very similar to, if not identical with, those of the case of Ehrlick v. Commonwealth, 102 S. W. 289, 31 Ky. Law Rep. 401, 10 L. R. A. (N. S.) 995. It is not deemed necessary to restate here the propositions of law there laid down. In the case at bar appellants complain at the action of the trial court in impaneling a special grand jury to investigate their conduct, which returned the indictment under which they were tried. It is not necessary, because not permissible, for us to notice the grounds of complaint on this score; for the Legislature has seen proper to withhold jurisdiction from this court to pass in review upon motions to quash indictments. Section 281,

Cr. Code Prac.; Commonwealth v. Simons, 100 Ky. 164, 37 S. W. 949. We do not mean to be understood as intimating that the action of the trial judge in selecting and impaneling the special grand jury was in any wise irregular. We have not considered that phase of the question at all.

Judgment of abatement was entered after the verdict of the jury. The complaint is that the indictment does not sufficiently describe the premises. The indictment as to the premises says: "Said room is located on the east side of the Alexandria Pike, south of the city of Newport." The preceding language describes it as a place where a poolroom was being conducted by appellants at which large numbers of persons daily congregated. The requirement of the law is that the description should be sufficiently definite to enable the sheriff to find the place. Probably in the light of this record, he could find a place which 1,000 or so other people were able to locate every day in the week. "That is certain which may be made certain" is a maxim applying to descriptions of this kind, as well as to forcible entry cases. If the sheriff should find it impossible to locate the premises, the order of abatement may have to be amended as it well could be from the record. If the sheriff should accidentally close the wrong poolroom under this order, the public would not suffer from that fact, provided appellants would obey the order of the court and close the right one.

One of the attendants at the poolroom being investigated was called as a witness by the prosecution. His answers showed that his memory was woefully bad, or that he was uncandid in his statements. He testified to nothing very hurtful to appellants, and to nothing in their favor. The judge, evidently believing that the witness was trifling with the court, thus admonished him: "I might say this to you by way of admonition: It is your duty to answer these questions frankly. This is not a place for sport. I want this conducted properly; and I might say, gentlemen, it would be good for this community if some people were prosecuted for perjury." Appellants object to the judge's statement. If this witness had testified to anything in their favor, it might have been argued that the effect of the statement was to discredit the witness' credibility, and therefore have damaged their case. Such was not the fact. The witness deserved disciplining. Whether the closing remark was too harsh is a matter that does not appear to us to bear on appellants' rights.

There was abundant evidence of appellants' guilt to take the case to the jury. The rule in this court is, if there is any evidence of guilt, the weight to be given it and the punishment (within the limits as given in the court's instructions) are questions solely for the jury.

Judgment affirmed.

CHAPMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

1. HOMICIDE—MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 539-541.]

2. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

Where accused told one that he had telephoned to a physician, who testified that the man who telephoned gave the name of accused, which message was the only one received from the house where decedent was killed, evidence as to what was said to the physician over the telephone was admissible against accused.

3. SAME—TRIAL—ARGUMENT—PROSECUTING ATTORNEY.

Where testimony was competent against accused as substantive testimony, it was not error for the prosecuting attorney to argue to the jury that the testimony proved a fact against accused, though the court charged that it could be considered only for the purpose of contradicting a witness for accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1670.]

4. SAME—REVIEW—HARMLESS ERROR.

Where decedent was killed while in his house as the result of a knife wound, and there was not only testimony that accused had said that he inflicted the wound, but there was also conduct on his part strongly confirming the evidence of his guilt, the introduction of evidence in rebuttal, instead of in chief, that accused had stated that he had put a knife on the mantle in the house, was not substantial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

5. SAME—IMPROPER ARGUMENT OF COUNSEL—REVIEW—OBJECTIONS IN TRIAL COURT—NECESSITY.

The court on appeal will not reverse a conviction for the improper argument of the prosecuting attorney, not objected to in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2645.]

6. SAME—CONFESSIONS—INSTRUCTIONS.

An instruction as to the weight to be given to the confession of accused made out of court must follow Cr. Code Prac. § 240, providing that a confession, unless made in open court, will not warrant a conviction, unless accompanied with proof that the offense was committed, and the instruction should not, in addition, require proof connecting accused with the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1868.]

7. SAME.

Where the corpus delicti is sufficiently established, an instruction in the language of Cr. Code Prac. § 240, as to the weight to be given to the confession of accused, should not be given.

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

Frank Chapman was convicted of manslaughter, and he appeals. Affirmed.

Breckinridge & Breckinridge, Fox & Jackson, and Jno. W. Rawlins, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HOBSON, J. Joe Rice ran a country store at Hedgeville, in Boyle county. Above the

store were some rooms in which he lived with his family. In September, 1907, his family consisted of his wife, her two brothers, Frank and Fred Chapman, and her sister, Myrtle Chapman; Myrtle being 13 years old, Fred 15, and Frank 22. Frank had been clerking in the store for Rice, and they were on good terms apparently. On the day in question they had been to the river fishing, and had returned in the afternoon about 4 o'clock. Rice then sent Fred Chapman for a keg of three gallons of whisky. When Fred returned with the whisky, Rice, the two Chapmans, and two or three other men who were in the store drank together. Rice and Fred Chapman got very drunk. One of the other men went home because he was getting drunk. The proof is not so clear as to how much whisky Frank Chapman drank. At about 8 o'clock the attention of the neighbors was attracted by quarreling and loud talking at Rice's place. A woman, whom they took to be Mrs. Rice, and a man, whom they took to be Frank Chapman, appeared at the front of the store. The man was heard to say to the woman: "All I want is to kill him before this night is gone; and that's what I am going to do." About 10 o'clock Myrtle Chapman appeared at a neighbor's house, asking them to come over at once to Rice's. When they got there, Rice was lying on the floor of the room in which he and his wife slept with a knife wound between the fourth and fifth rib, which penetrated the heart. He was dead. One hand was lying upon the floor, and near this hand was a bloody barlow knife. There was another knife on the mantle which had blood on it. As the neighbors approached the house, they saw through the window Frank Chapman bending over the body of Rice, his back being toward them, and, as they saw him, he was straightening up. Frank Chapman was indicted for the murder of Rice, and was found guilty of manslaughter, and his punishment fixed at 18 years in the penitentiary.

The proof for the commonwealth showed, in addition to the facts above stated, that, when the neighbors came in, Mrs. Rice asked Frank Chapman where he had put his knife, and he answered: "On the mantlepiece." This proof also showed that just after the cutting Frank Chapman called up Dr. Kinnauld on the telephone, asking him to come and see Joe Rice. The doctor asked: "What is the matter?" Chapman answered: "He is cut." The doctor said: "Where?" Chapman answered: "He was cut here, out here." The doctor said: "I mean what part of the body." Chapman answered: "Near the heart." The doctor asked: "Who cut him?" He answered: "I did." On the other hand, the defendant testified that he did not tell the doctor that he cut Rice, and he and his sister both denied she asked him where he put his knife, or his saying that he put it on the mantlepiece. He, his two sisters, and his brother, Fred, all testified that

there was a difficulty at 8 o'clock, but that this difficulty was between Frank Chapman and Fred Chapman, and that Fred then tried to cut Frank with a knife, and, this being taken from him by Rice, he got a hatchet which was taken from him by Mrs. Rice, and he then said of his brother that he would kill him before morning. Another witness who was in the store at the time substantiates them as to this difficulty. They also testified that Fred soon after this went to bed, being very drunk; that later Mrs. Rice went to bed, then her husband, and last of all Frank Chapman, who closed up the store; that, after Frank Chapman got in bed, he heard Mrs. Rice scream, when he ran into the room, and his sister said to him: "Frank, come quick. Joe is cussing me and threatening to kill me. Says he is going to take my money away from me." Rice asked him what he had in his hands. He answered, "Nothing Joe"; and Rice started at him with a knife. He grabbed Rice with both hands, and in the scuffle Rice fell to the floor, and, when they turned him over, his own knife was found sticking in his heart. When Myrtle Chapman got to the neighbors, as shown by the commonwealth, she told them that Joe and Frank were in a fuss, and Frank had cut Joe with a knife and he was down in the wardrobe, and Belle (Mrs. Rice) thought he was dying. When the neighbors got into the house, they found Rice's body on the floor. His feet were just inside of the doorsill of a closet used as a wardrobe. The commonwealth also introduced proof attacking the character of Mrs. Rice and Frank Chapman. The defendant, at the conclusion of the evidence for the commonwealth, and at the conclusion of all the evidence, moved the court peremptorily to find him not guilty. The court overruled the motion. Of this he complains. He also complains that there is no evidence in the case competent to be considered showing that he is guilty. We cannot concur in this. Frank Chapman told one of the persons who came in that he had phoned to Dr. Kinnaid. Dr. Kinnaid testified that the man who phoned to him said his name was Chapman, and this was the only message he got from the house. There was sufficient evidence, therefore, to admit the evidence as to what was said to Dr. Kinnaid over the telephone. The evidence that Frank Chapman said he had placed his knife on the mantle was competent against him. This was a declaration by him. What his sister said to him, asking where he had put his knife, was only introductory to this statement. The deceased was killed by a knife wound in the breast, and there was not only testimony that Frank Chapman said that he did it, but there was conduct on his part tending strongly to confirm the testimony of the commonwealth.

It is earnestly insisted that a new trial should be granted because the employed attorney in arguing the case to the jury for the

commonwealth insisted that the proof showed that Frank Chapman had a knife, and had killed Joe Rice with it, arguing that two witnesses had testified that Mrs. Rice asked Frank Chapman in their presence the question, and he said that he put it on the mantle, when the court had instructed the jury that they could only consider the evidence of these two witnesses as to what Mrs. Rice said in their presence for the purpose of contradicting Mrs. Rice. But, as we have said, the evidence of what the defendant himself said was competent against him as substantive testimony. It is true it should have been introduced in chief, but the failure to do so was not a substantial error, in view of all the facts of the case.

It is also insisted that the commonwealth attorney in his concluding argument said that Chapman had cut Rice while in the closet, basing the argument upon the statement which two witnesses made as to what Myrtle Chapman said when she came to them and asked them to come over to Rice's, when the court had instructed the jury that this testimony could only be considered for the purpose of contradicting Myrtle Chapman. But there is no objection to the argument. If an objection had been made to it, the court would have had an opportunity to correct the matter; and we cannot reverse here for an argument of counsel which was not objected to in the circuit court. The counsel also argued that other facts shown in the case showed that this was the way the cutting was done.

The instructions of the court to the jury were more favorable to the defendant than they should have been. Instruction 4 should not have been given. When there is an instruction under section 240, Cr. Code Prac. as to the weight to be given the defendant's confession out of court, it should follow the language of the section, and should not in addition require proof tending to connect the defendant with the commission of the offense. Such an instruction should not be given where the corpus delicti is sufficiently established. *Dugan v. Commonwealth*, 102 Ky. 251, 43 S. W. 418; *Green v. Commonwealth*, 83 S. W. 638, 26 Ky. Law Rep. 1228, and cases cited.

Judgment affirmed.

COMMONWEALTH v. WELLS.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

INDICTMENT AND INFORMATION — CONVICTION OF OFFENSE INCLUDED IN CHARGE.

Under Cr. Code Prac. § 264, providing that, if an offense be charged in an indictment to have been committed with particular circumstances, the offense without the circumstances, or with part only, is included, the court, on the trial of a violation of Ky. St. 1903, § 807, punishing one maliciously disturbing any fixture attached to a railroad track, may, in the absence of evidence that accused was actuated by malice in taking away a switch light, essential to a conviction, authorize a conviction under section

1256, punishing any person who unlawfully, but not with felonious intention, carries away the property of another.

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Willie Wells was indicted for maliciously carrying away a switch light on a railroad, in violation of Ky. St. 1903, § 807; and from a judgment of conviction of violating section 1256, punishing the unlawful carrying away of the property of another, the commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellee was indicted for the offense named in section 807 of the Kentucky Statutes of 1903, which section is as follows: "Any person who shall willfully and maliciously tear up, displace, break or disturb any rail or other fixture attached to the track or switch of any railroad in operation, or break any bridge or viaduct of such road, or who shall place any obstruction on the track or switch of such road, or do any act whereby any engine or car might be upset, arrested, or thrown from the track of such road or switch, or any branch or turnout, shall be confined in the penitentiary not less than one nor more than five years." Upon the trial the court gave to the jury an instruction upon the offense defined in this section, and also gave an instruction upon the offense defined in section 1256 of the Kentucky Statutes. To this last instruction the commonwealth objected and excepted. The jury convicted the defendant of the offense defined in the last instruction, and the commonwealth appeals.

The substance of the evidence produced upon the trial is about as follows: Appellee, a boy, and a younger companion, were in the town of East Bernstadt, from where they started to their home, about three miles in the country. It was getting dark, and they tried to borrow a lantern in town, but failed; but, as they passed out of town, they came to a switch light on the railroad. Appellee took it down, opened the frame in which the light was inclosed, took the light out, and carried it home with him. The evidence tended to show that he did not do it maliciously, that he had no thought of any malicious purpose or of throwing an engine or any cars from the track. In our opinion, in view of the facts proven, the court properly instructed the jury with reference to the offense defined by section 1256 of the statutes; that is, if he took and carried away the switch light without a felonious intention, that he should be punished as provided by that section. Section 264, Cr. Code Prac., authorized this instruction. That section is as follows: "If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or in-

tention, the offense without the circumstances, or with part only, is included in the offense, although that charge may be a felony, and the offense, without the circumstances, a misdemeanor only." Section 807 of the Kentucky Statutes, under which the indictment was prepared, required the jury to believe that appellee was actuated by malice in the removal of the switch light before they could convict him under that section; but no evil intention was required to be proven to authorize a conviction under section 1256 of the statutes. This section of the Code was enacted for the purpose of meeting just such cases. See *Barnard v. Commonwealth*, 94 Ky. 285, 22 S. W. 219, and *Housman v. Commonwealth*, 83 Ky. Law Rep. 311, 110 S. W. 236.

Wherefore, the clerk of this court is directed to certify this opinion to the lower court as the law of the case.

REINECKE v. BAILEY.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. CORPORATIONS — MISAPPROPRIATION OF CORPORATE FUNDS — SETTLEMENT WITH STOCKHOLDER—VALIDITY.

A stockholder of a corporation has no power to settle with the manager thereof for the latter's embezzlement of corporate funds, though such stockholder owns the principal interest in the stock, and he and the manager and a third person, who is a nominal stockholder, are the only stockholders, and though the corporation is solvent, since the wrong committed by the manager was against the corporation, and the money embezzled by him was its property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1594.]

2. CONTRACTS—CONSIDERATION—COMPROMISE OF DOUBTFUL CLAIMS.

A compromise of a doubtful claim is a good consideration to uphold a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 328-330.]

3. CORPORATIONS — ACTIONS — RIGHTS OF STOCKHOLDERS.

An action to recover corporate property must be brought in the name of the corporation, and such action cannot be maintained by one or more stockholders unless the corporation or its directors decline to bring the action, and the interests of the stockholders make it necessary that one should be instituted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 777, 791, 792.]

Appeal from Circuit Court, Hopkins County.
"Not to be officially reported."

Action by Conrad Reinecke against Inkerman Bailey. From a judgment for defendant, plaintiff appeals. Affirmed.

Yost & Laffoon and Gordon & Gordon & Cox, for appellant. Waddill & Dempsey, for appellee.

CARROLL, J. Appellant, who was plaintiff below, in his petition as amended, stated his cause of action substantially as follows: That some 20 years ago he founded a corporation known as the "Reinecke Coal Company,"

with a capital stock of \$100,000, which corporation continued until the fall of 1901, when a new corporation, styled the "Reinecke Coal Mining Company," took over the property of the Reinecke Coal Company. That he gave to Bailey, who was defendant below, 100 shares of stock in the original corporation, and, when it was absorbed by the new corporation, gave him the same number of shares in the new, and also made him secretary and general manager of each of the corporations. That, after the organization of the new corporation, the appellee purchased 150 shares of its stock, and after this purchase all the stock in the corporation, except three shares, was owned by the appellant and appellee. That during the last 10 years appellant has owned one-half and appellee one-half, less 3 shares, of the capital stock of the corporation, known as the "Bailey Light & Water Company," and also all the stock, except 3 shares, in the corporation known as "Bailey & Co." That appellee had the management and control of each of the corporations, and received and disbursed the funds thereof. That, while holding these positions, the appellee wrongfully converted to his own use funds of the corporations to the extent of at least \$135,000, no part of which he accounted for either to appellant or the corporations. That, upon discovering the fraud committed by appellee, a compromise settlement was made between them, by which appellee agreed to pay appellant the sum of \$50,000. Twenty thousand dollars of this amount was to be paid by the assignment and transfer of capital stock of the Reinecke Coal Mining Company, and the balance by the transfer of stock in Bailey & Co., and the Bailey Light & Water Company, and the execution of promissory notes. He averred that, under and by virtue of this settlement, appellee assigned and transferred to him \$20,000 of the capital stock of the Reinecke Coal Mining Company, but refused to comply with the other terms of the settlement, and he sought to recover from appellee \$30,000, with interest. He also averred that each of the corporations was solvent, and that neither their creditors nor any other person would be affected injuriously by the settlement referred to; that the holders of the three shares of stock had really no interest in the corporations, but were stockholders merely for the purpose of qualifying them to act as directors. Appellee filed an answer, denying the indebtedness as charged, although admitting that he did wrongfully convert certain funds of the corporations, and that no agreement to compromise or settle on the terms stated in the petition was made, and asked that the shares of stock in the Reinecke Coal Mining Company that were delivered to appellant be restored to him. The case being submitted on the pleadings, the demurrer to the petition as amended was sustained; and an order entered directing appellant to return to appellee the shares of stock received by him.

Pending the action the Reinecke Coal Mining Company filed an answer, consenting to the compromise settlement that was the basis of the action, and averred that it had no interest in the litigation. Neither of the other corporations were before the court. The settlement sued on was made by the son of appellee, acting under a power of attorney. We do not, however, deem it necessary in the disposition of this case to consider the question raised as to the sufficiency of the power of attorney to authorize the settlement, or whether or not the settlement was procured by fraud. Our conclusion is that the special judge who heard the case correctly ruled that appellant as a stockholder in the corporation had no power or authority to make the compromise settlement that was the basis of the action, or to institute in his own name a suit for the embezzlement of the funds of the corporations.

The petition on its face shows that if appellee converted to his own use or embezzled the funds, concerning which a settlement was made, the funds converted or embezzled belonged to the corporations, and not to appellant. There being no averment that the corporation declined to institute the action, the right to institute it was in the corporations, and not appellant, who was merely a stockholder. The argument is made for appellant that as there are only three stockholders in the corporations—that is, appellant and appellee and the nominal owner of the three shares not held by them—and as the corporations are solvent, and the rights of creditors will not be injuriously affected by the settlement, that these facts take the case out of the general rule, which it is conceded would vest the right of action as well as the right to make a compromise settlement of claims due the corporations in the corporations. But this argument is not sound, nor is it supported by any authority. There is no escape from the proposition that the wrong, if any, committed by appellee, was against the corporations; that the money he embezzled, if any, was the property of the corporations. This seems conclusive of the question that any settlement concerning the wrongful acts of appellee upon which an action could be maintained must have been made by and with the corporations, and that a suit to enforce the settlement must be in the name of the corporations. No matter how many shares of stock Reinecke and Bailey owned, they were merely shareholders in the corporation. The amount or value of stock that one shareholder owns does not confer upon him any greater rights with respect to the corporate property than are vested in smaller stockholders, except in so far as his holdings may enable him to control the interests or dictate the policy of the corporation through its directors or officers. The large stockholder, no more than the smaller one, can substitute himself for the corporation, or make in his own name a settlement affecting its affairs or

institute as an individual an action concerning its property. This controversy is not an individual matter between Reinecke and Bailey. Nor does the fact that Reinecke owns the principal interest in the stock of the corporations confer upon him the right to make the corporate business a personal matter. That a compromise of doubtful claims is a good consideration to uphold a contract we have no doubt; and, if the claims alleged to have been compromised between Reinecke and Bailey related to their individual affairs, it is clear that an action might be maintained upon the compromise agreement, if one was made. But back of this is the question whether or not the parties making the compromise have the right to do so, or the authority to maintain an action upon the agreement resulting from it. It is well settled that an action to recover corporate property must be brought in the name of the corporation, and that such an action cannot be maintained by one or more stockholders unless it should be shown that the corporation or its directors declined to bring the action, and that the interests of the stockholders make it necessary that one should be instituted. When this state of case is presented, an action to recover corporate property or to protect the interests of the corporation may be brought by the stockholders. *Collier v. Deering Camp Ground Association*, 66 S. W. 183, 23 Ky. Law Rep. 1799; *P., C., C. & St. L. R. R. Co. v. Dodd*, 115 Ky. 176, 72 S. W. 822, 74 S. W. 1096; *Jones v. Johnson*, 10 Bush, 649; 10 Cyc. pp. 963, 967.

The judgment is affirmed.

CLARK v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

CRIMINAL LAW — EVIDENCE — ADMISSIONS — IDENTITY OF PERSON MAKING ADMISSIONS.

Where accused was the only person confined in a cell, and the jailer the only person having access thereto, a conversation between the person in the cell and a witness confined in a cell immediately above it, carried on through a pipe leading from the lower to the upper cell, could be proved by the witness as an admission against accused, though the witness did not see the person who talked to him through the pipe and he did not know his voice.

Appeal from Circuit Court, Breckenridge County.

"Not to be officially reported."

J. H. Clark was convicted of murder, and he appeals. Affirmed.

See 106 S. W. 1191.

Mercer & Mercer, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. We do not deem it necessary to write an extended opinion in this

case. The only ground for reversal seriously urged is that the lower court erred in not excluding the evidence of Norville Blair. Upon a former appeal by appellant (105 S. W. 898, 32 Ky. Law Rep. 63) the judgment of conviction was reversed because of error committed by the trial court in admitting the evidence of this witness. In a response to the petition for a rehearing in that case by the commonwealth, Judge Hobson, in delivering the opinion of the court, said: "The testimony of Blair can only be competent upon the ground that it shows a confession made by the defendant. But to make the statement Blair heard competent against the defendant the commonwealth must show that he made the statement. The difficulty with the proof offered on this subject is that it does not establish that fact. Blair did not see the person who talked to him through the sewer pipe, and he did not know the voice. The proof does not show that only a person in the cell downstairs in the southwest corner of the jail could talk through this sewer pipe to a person upstairs where Blair was. It does not show that Clark was confined in this cell, and that no one else had access to the sewer pipe. It is not common for prisoners to be allowed the use of the corridors of the jail during the day. The evidence of Blair shows this was the case upstairs where he was, and there is no proof that things went differently downstairs. The commonwealth may show by circumstantial evidence that it was Clark who talked to Blair through the sewer pipe; and if on another trial the evidence should show that Clark was confined in this cell, and that no one else had access to the sewer pipe, and that no one else could talk through it to the cell where Blair was except a person in this cell, the testimony of Blair as to what was said may be admitted."

Upon the trial from which this appeal is prosecuted the evidence is conclusive that at the time Blair had the conversation with Clark no other person was confined in the cell occupied by Clark except himself, nor did any other person except the jailer enter or have access to the cell. The sewer pipe through which the conversation was had extended from the cell occupied by Blair, which was immediately above that occupied by Clark, to the cell in which Clark was confined. Blair testified that the conversation he had through the sewer pipe was with the person in the cell immediately under him. As there was no person in this cell at that time except Clark, and as the sewer pipe in Clark's cell was so located that a person who was not inside the cell could not talk into it, the evidence of Blair, under the opinion delivered by Judge Hobson, was competent, and the judgment must be affirmed.

GEARHART v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. CRIMINAL LAW—JURISDICTION—TRANSFER OF CAUSES.

Cr. Code Prac. § 230, provides that, if, during trial, it appears the offense was committed out of the court's jurisdiction, but within that of another court within the state, the court shall discharge the jury and take the proceedings directed in sections 166 and 167. Section 166 provides, if a demurrer to an indictment is sustained because the offense was committed in another jurisdiction and the offense is a felony, the indictment, etc., shall be transferred to the clerk of such jurisdiction and defendant's body delivered, etc., the order of transfer to operate as a magistrate's order holding a defendant to answer. Section 167 requires the same proceedings when it appears on the trial that the offense was committed in another jurisdiction. *Held* that, while sections 166 and 167 applied only to felonies, section 230 did not so limit their application, but made them applicable to misdemeanors also.

2. SAME—INDICTMENT—VARIANCE—ALLEGATIONS AND PROOF.

Where defendant was indicted in C. county for illegally selling liquors in that county, and, it appearing on the trial that the offense was committed in E. county, the cause was transferred thereto for trial, it was error to try defendant, there upon the indictment found in C. county, and he should have been held to answer to an indictment in E. county, since proof that it was committed in E. county would not sustain the indictment, charging an offense in C. county.

Appeal from Circuit Court, Elliott County.
"To be officially reported."

Peter Gearhart was convicted of selling liquor in violation of the local option law, and he appeals. Reversed and remanded, with directions to hold defendant to bail to answer to an indictment in another county.

Henry L. Wood, for appellant. Jas. Breat-hitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Appellant, Peter Gearhart, was indicted by the grand jury of Carter county for the offense of selling spirituous, vinous, and malt liquors in that county in violation of the local option laws. When the case was called for trial at the special term of the Carter circuit court, it developed, upon the hearing, that the offense was committed in Elliott county. Thereupon the commonwealth's attorney moved the court to transfer the case to the Elliott circuit court for trial, which was done over the objection of appellant. The case was not recommitted to the grand jury of Elliott county, but appellant was tried on the original indictment by the Carter county grand jury. The jury returned a verdict of guilty, and fixed appellant's punishment at a fine of \$60 and 20 days in jail. This appeal involves two questions: (1) Was the case properly transferred from the Carter circuit court to the Elliott circuit court? (2) Was it proper to try appellant on the indictment returned in the Carter circuit court?

Section 230 of the Criminal Code of Prac-

tice is as follows: "If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections 166 and 167." While it is true that sections 166 and 167 apply only to felony cases, there is nothing in section 230 that limits its application to such cases. We therefore conclude that it applies alike to felonies and misdemeanors. It follows that it was proper for the Carter circuit court to transfer the case to the Elliott circuit court.

But was it proper for the Elliott circuit court to try appellant on the indictment returned by the Carter circuit court? The indictment in question charged appellant with the offense of violating the local option laws by selling spirituous, vinous, and malt liquors in Carter county. Manifestly, therefore, the Elliott circuit court could not try a man for an offense committed in Elliott county upon an indictment for an offense committed in Carter county. In the first place, the Elliott circuit court would have no jurisdiction of the offense if committed in Carter county. In the second place, proof to the effect that an offense was committed in Elliott county would not sustain an indictment charging an offense in Carter county. We therefore conclude that the action of the Elliott circuit court in trying appellant upon the indictment in question was erroneous. Instead of trying him upon that indictment, he should have been held to bail to answer for his appearance to an indictment by the Elliott circuit court.

For the reasons given, the judgment is reversed and cause remanded, with directions to hold appellant to bail to answer for his appearance to an indictment by the Elliott circuit court.

STANDARD SANITARY MFG. CO. v. MINOR.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. MASTER AND SERVANT—OBLIGATION OF MASTER—FURNISHING SUFFICIENT FORCE FOR THE WORK.

A master must furnish enough force to do the work with reasonable safety to all servants engaged in it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 328.]

2. SAME—INJURY TO SERVANT—NEGLIGENCE.

Where a master knew, or by ordinary care could have known, that a force was inadequate for the work, and a servant who did not know it was in consequence of lack of adequate force injured, the master was liable except for the servant's own negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 328.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by Goodloe Minor against the Standard Sanitary Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant. J. A. Skaggs, for appellee.

O'REAR, C. J. Appellee, a laborer in appellant's employ, was set to work, with three other men, to unload from a car a number of iron pipes, about 20 feet long and 12 inches in diameter. It was raining and sleeting, and it is charged that the force was inadequate for the task. Notwithstanding complaint was made by the boss in charge of the work to appellant's foreman, they were ordered to proceed with the work. The men handling one end of one of the pipes let it slip, and it rolled down on appellee, crushing his ankle and otherwise injuring his leg. He recovered a verdict and judgment for \$500 as damages in this action.

On this appeal the appellant has not argued or briefed the case; but we assume from the motion for a new trial in the circuit court that the grounds of complaint are that the court misinstructed the jury as to the law governing appellant's liability. The instructions in substance were that it was the duty of the master to furnish enough force to do the work with reasonable safety to all those engaged in it; that if it knew, or by ordinary care could have known, that the force was inadequate and if the plaintiff did not know it, and in consequence of such lack of adequate force plaintiff was injured, the master was liable to the injured servant, except for the latter's own negligence in the matter, if any. And such we understand to be the law. The facts warranted the submission of the case to the jury, whose verdict cannot be said to be flagrantly against the evidence.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. RAILROADS—OBSTRUCTING CROSSINGS—CRIMINAL RESPONSIBILITY—"WILLFULLY."

An indictment against a railroad company for "willfully" obstructing a street crossing for an unreasonable length of time, by the use of the word "willfully," meant that the crossing was intentionally obstructed, and not accidentally.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835-7836.]

2. SAME—INSTRUCTIONS.

The use of the words "to wit, thirty minutes," in an instruction on the trial of a railroad company for obstructing a street crossing for an unreasonable length of time, was not prejudicial error, as determining what was a reasonable time in which to clear the crossing, instead of leaving that question to the jury, where, under the evidence, the jury could not have been misled, and especially when considered in connection with another instruction, which left to the

jury the whole matter as to the reasonableness of the time and the necessity to obstruct the crossing to make repairs.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

The Louisville & Nashville Railroad Company was convicted of obstructing a street crossing for an unreasonable length of time, and it appeals. Affirmed.

J. I. Blanton and Benjamin D. Warfield, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellant appeals from a judgment against it for blocking a street crossing in the city of Cynthiana for an unreasonable length of time. The material part of the indictment upon which it was found is as follows: "The Louisville & Nashville Railroad Company, an incorporated company under the laws of the state of Kentucky, on the 8th day of September, 1907, in the county and state aforesaid, and before finding of this indictment, did unlawfully and willfully suffer, permit, and cause a train of cars under the control, management, and directions of said company to obstruct a public highway in the city of Cynthiana by placing and causing to be placed a train of cars of a freight train upon and across a public highway known as the 'Oddville Road' in the said town of Cynthiana, and between Church street and Walnut street in said town, and suffering, permitting, and causing said train of cars to remain and obstruct said highway for an unnecessary and unreasonable time, to wit, for 30 minutes, to the common nuisance of May Ammerman, Mrs. S. A. Mickey there and then, and all good citizens there and then in the neighborhood, passing, repassing, and residing and being, and then and there having the right to pass, repass, reside, and be."

Appellant asks a reversal, first, for the reason that it was charged that it "willfully" obstructed the crossing, and there was no proof to sustain the charge that it was "willfully" done. This word was used in the indictment as meaning that it was intentionally done, and not accidentally. It was proven without contradiction that this train of cars was intentionally permitted to remain across the street for a period from 30 to 40 minutes, preventing the passage of 25 or 30 persons, who had assembled there, for that length of time. The defense of appellant was that this was caused by accident which it could not avoid. The stopping of this train across the street was caused by the pulling out of a drawhead in one of the cars near the rear end of the train, which was south of the crossing. The engine and a considerable portion of the train were north of the crossing. The conductor testified that he could not prevent the blocking of the cross-

ing, for the reason that he sent, as he was required to do by the rules of the company, the front brakeman up the road ahead of the train, and the other brakeman to the rear, for the purpose of protecting his train, and that it left no one but himself to repair the damage to the train. He did not explain why he did not cut the crossing and let the engine move up and make an opening at the crossing while he was repairing the damage, or why he did not call upon the fireman to aid him do so. The station in Cynthiana was about one block ahead of the engine when it stopped. This station was a signal station, and no train had the right to pass it without a signal given by the agent at the station authorizing it to do so. The front brakeman testified that he only went to that station to protect his train.

Appellant objected to the use of the words, "to wit, thirty minutes," for the reason, its counsel says, that by this language the court determined what was a reasonable time in which to clear the crossing, and the question should have been left to the jury. The use of the these words in the instruction we presume was caused by the court copying them from the indictment inadvertently, and would have been a prejudicial error but for the fact, under the evidence, the jury could not have been misled, and especially when considered with instruction No. 3, which is as follows: "If you believe from the evidence that by reason of an accident to the train at the time and place mentioned in the evidence it was necessary to obstruct said highway in order to make the necessary repairs on said train, and further believe from the evidence that the defendant, its agents and employes, did not obstruct said highway longer than it was reasonably necessary under the circumstances to make the necessary repairs, the law is for the defendant, and it should be acquitted." Under this instruction the whole matter was left to the jury as to the reasonableness of time, and whether or not it was necessary to obstruct the crossing to make the repairs.

Finding no error prejudicial to the substantial rights of appellant, the judgment is affirmed.

THOMAS v. HOBBS' Ex'r.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. WITNESSES—TRANSACTION WITH DECEDENT.
On a claim against decedent's estate for services rendered her, claimant could not testify as to anything that occurred between her and decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 582.]

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—PERSONAL SERVICES.

A claim against an estate for caring for decedent for two years preceding her death is not established, where it does not appear that she ever expected to pay for the services, or that the circumstances were such that claimant was warranted in expecting compensation, though claim-

ant cared for decedent faithfully; they having lived together for 22 years in family relation, decedent having paid the greater part, if not all, of the family expenses for many years, and claimant never having asserted a claim for services during decedent's lifetime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 903.]

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by Alice M. Thomas against Margaret B. Hobbs' Executor. From a judgment disallowing the claim, claimant appeals. Affirmed.

Geo. S. & Jno. A. Fulton, for appellant. J. D. Wickliffe, for appellee.

HOBSON, J. Margaret B. Hobbs died in Nelson county, about 86 years of age, leaving an estate worth about \$12,000 or \$15,000. She had no children, and made a will by which she disposed of her estate. After her death Alice M. Thomas asserted a claim against her estate for nursing and taking care of her at \$200 a year for the five years preceding her death, amounting in all to \$1,000. The claim was controverted by the executor, and, proof being taken, was disallowed by the circuit court. Mrs. Thomas appeals.

Some 22 years before Mrs. Hobbs' death, and soon after Mrs. Thomas was married, she and her husband went to live with Mrs. Hobbs in her home; the arrangement apparently being that Mrs. Thomas and her husband would board Mrs. Hobbs for the use of her home. They lived there in this way until Mr. Thomas died, about 15 years later; and after his death Mrs. Hobbs and Mrs. Thomas continued to live there together until Mrs. Hobbs' death, about 7 years afterward. During the life of Mr. Thomas, Mrs. Hobbs paid some of the family expenses, and after his death the weight of the evidence shows that she paid the greater part, if not all, of the family expenses. The family consisted of herself and Mrs. Thomas and an old family servant, who did the cooking and lived in a cabin near the house; her daughter and her daughter's child being there with them more or less of the time. Mrs. Thomas was a dressmaker by trade, and followed her business of dressmaking. Mrs. Hobbs was a fairly well preserved old lady for her age. Four or five years before her death she had a spell of grippe, from which she was quite sick for about two months. Three years after this she had another attack of sickness; but this did not last very long, and in her final sickness she was sick something like three weeks. Beside these attacks, she had minor attacks from time to time. During all of these spells Mrs. Thomas waited upon her and took care of her with commendable faithfulness. But the proof utterly fails to show that there was any expectation on the part of Mrs. Hobbs to pay Mrs. Thomas for her services, or that the circumstances under which the services

were rendered were such as to warrant any expectation on the part of Mrs. Thomas that she would be paid. She cannot testify as to anything that took place between her and Mrs. Hobbs, and no other witness testifies to any facts from which a promise to pay for these services can be inferred. The two ladies had lived together as one family for 22 years; and after Mr. Thomas' death it is evident that Mrs. Thomas was in straightened circumstances.

There is no more reason why Mrs. Thomas should be paid for the last 5 years' services than for the previous years. They lived together as one family during the last 5 years, just as they had lived before. Mrs. Hobbs, as shown by the weight of the evidence, not only bore the expenses of the family, and thus gave Mrs. Thomas a home, but she was a person who did not make debts. She paid for everything as she went, and the proof leaves no doubt in our minds that, if she had understood that Mrs. Thomas was asserting a claim against her for services, it would have been settled then and there, and the existing arrangement would have been broken up. The facts shown by the proof are sufficient to raise a presumption that the services sued for were rendered by one member of the family to another, without any expectation of a charge being made therefor, and no reason is shown why the claim for the services was not presented to Mrs. Hobbs in her lifetime; and manifestly the entire claim, except for the services in the last sickness, could have been so presented. Under all the evidence we conclude that the circuit court properly disallowed the claim.

Judgment affirmed.

COMMONWEALTH v. CONWAY.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

INTOXICATING LIQUORS—OFFENSES—RENTING ROOM FOR UNLAWFUL SALE.

Under Ky. St. 1903, § 2557, penalizing one who knowingly rents a room to another in which spirituous liquors are sold in violation of the local option law, the knowledge of the landlord which makes him liable is not alone in renting the room, or in the fact that after the renting he knows that the tenant is using the room for the illegal sale of liquor, but in knowing, when he rents the room, that such use is to be made of it.

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

B. T. Conway was indicted for a violation of Ky. St. 1903, § 2557, penalizing one who knowingly rents a room to another in which spirituous liquors are sold in violation of the local option law. From a judgment dismissing the indictment on demurrer, the commonwealth appeals. Affirmed.

Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and R. J. Durham, for the Commonwealth. John McChord, for appellee.

O'REAR, C. J. Appellee, owner of a house which was situated in local option territory, was indicted for violating section 2557, Ky. St. 1903, penalizing one who "knowingly furnishes and rents a room to another in which spirituous liquors are sold in a territory where the local option law was in force, in violation of said local option law." The indictment charges that appellant did "unlawfully" furnish and rent a room to one Putnam in a territory where the local option law was in force, and that appellant "knew said Putnam was selling spirituous liquors, to wit, whisky, in said room so furnished and rented," in violation of the local option statutes. The indictment was held bad on demurrer, and the commonwealth has appealed from the judgment dismissing it on that ground.

It may be conceded that it is within the competency of the state to make the owner of real property liable for its use for illegal purposes by the tenant; but such is not the statute in this case. The Legislature has gone no further than to make punishable the renting of a tenement for the illegal sale of liquors in certain territory, where the owner knew, when he contracted, that such was the use to which it was to be put. While the sentence in the statute does not express with grammatical accuracy the idea of the owner's liability if he lets his premises to be used for the illegal purpose with knowledge at the time of the renting that such is its intended use, we gather such to be the legislative intent from the context of the whole section. A renting could scarcely be otherwise than knowingly done. It is a contract, in which the assent of the mind of each party to it is an essential. The adverb "knowingly" must be referable, then, to some other word or clause than renting or furnishing the room or house. The object of the Legislature was, we think, to reach that class of landlords who enter into the outlawed business by furnishing one of the necessary means for carrying it on, namely, the house or room in which it is to be conducted. The knowledge of the landlord that makes him criminally a party to the illegal transaction is not alone in renting the house. Nor could it well be in the fact, after the renting (which might be otherwise perfectly legal), that the tenant put the premises to an illegal use. It is true that, if property is rented for one use, the tenant cannot apply it to a wholly different use without forfeiting his lease; and in such case, if the landlord, after knowledge of the wrongful perversion by his tenant, suffers the tenancy to continue, and the illegal traffic be continued in it by his tenant, the case might fall within the statute being considered. But there is no such allegation in this indictment. So we conclude that the purpose of the legislation in question was to illegalize the renting of the property for the unlawful traffic in liq-

uors in local option territory; the landlord knowing, when he leased it, that such was to be its use.

Some states have legislated upon this subject more stringently than Kentucky has. They make leases voidable where, subsequent to their execution, the tenant puts them to use as places for the illegal sale of liquors. *Machias Hotel Co. v. Fisher*, 56 Me. 321; *O'Connell v. McGrath*, 14 Allen (Mass.) 289; *Zink v. Grant*, 25 Ohio St. 352; *Feret v. Hill*, 15 C. B. 207; *Goelet v. Lawor*, 16 Misc. Rep. 59, 37 N. Y. Supp. 691; *Prescott v. Kyle*, 103 Mass. 381. And in those jurisdictions the courts hold that the landlord may be punished who rents or suffers his property to be so used. That is because, as seems likely, that the law gives the landlord a continued control over his premises as to such uses in spite of his contract. But there is no such statute in this state; and at the common law such use by the tenant for illegal purposes does not avoid the lease, and consequently does not give the landlord the right to re-enter. *Miller v. Forman*, 37 N. J. Law, 55. If the tenant were a druggist, we may say, and if, having rented the house in question for a drug store, yet the tenant unlawfully sold liquors therein, the main business for which he rented the property would not necessarily be abandoned, and the landlord, without some reservation in the contract of a right to declare the lease at an end, would have no control over the matter. The Legislature has not yet said that the owner is to be responsible for the use to which his premises are put, without his knowledge, when leasing it, that it was to be so used.

The offense denounced by section 2557, Ky. St., supra, is entirely different from those made by sections 2571 and 2572, Ky. St.; the latter sections being aimed at the "person in possession" of premises in which liquors are illegally sold in local option territory, upon the idea that the one in possession of property has complete control over its use by himself and all others. We think the indictment in this case did not state a public offense.

The judgment is therefore affirmed.

FIBLE v. CRABB.

(Court of Appeals of Kentucky. Sept. 25, 1903.)

BANKRUPTCY—EFFECT OF DISCHARGE—FAILURE TO LIST CREDITOR.

Under Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requiring the bankrupt to submit with his petition a list of his creditors, showing their residence, if known, and the amount due to each, and section 17, providing that a discharge in bankruptcy shall release a bankrupt from his debts, except such as have not been duly scheduled, bankrupt having purchased property of the widow of D. M. F., and, on her death, the

notes given by bankrupt for deferred payments having been divided between her daughters, to the knowledge of bankrupt, and he having listed such liability as an indebtedness to "D. M. F. estate," and such daughters having had no notice or knowledge of pendency of the bankruptcy proceedings—the discharge did not release bankrupt from liability on the notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 775.]

Appeal from Circuit Court, Henry County.
"To be officially reported."

Action by Sarah Fible against W. L. Crabb. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

W. O. Bradley, for appellant. W. S. Pryor, for appellee.

O'REAR, C. J. W. L. Crabb and D. M. Fible were partners in a whisky distillery in the 70's and later. They incorporated their business, the stock to have issued equally to each of them; but before the shares were actually issued and delivered D. M. Fible died. By his will he bequeathed the stock to his widow, Harriett Fible. Certificates were subsequently issued to her by the corporation, and delivered by Crabb. Later she sold her shares to appellee, Crabb, for about \$15,000, about \$12,000 of which was deferred and represented by certain notes now sued upon in this action. Crabb made small payments on the notes from time to time. Harriett Fible died intestate at Chicago. Her two daughters were her only heirs. One of them administered upon her estate, and the Crabb notes were divided between them. He was apprised of the fact of their ownership. Besides, he was on intimate terms of acquaintance with them, knew their post-office addresses, and received letters from them and wrote letters to them on the subject of these notes, making a number of small payments on them to the two daughters. In 1903 appellee, having some years previously made a deed of assignment of all his property for the benefit of his creditors, filed his petition in the United States District Court for Eastern District of Kentucky to be discharged of his debts and liabilities. In his schedules he listed among his liabilities as follows: "D. M. Fible estate, Chicago, Ill., \$12,000." Notice was mailed to that address, but neither appellant nor her sister (who were the two daughters of the late Mrs. Harriett Fible) received the notice, nor had any notice or knowledge of the pendency of the bankruptcy proceedings. Appellant recently sued appellee to recover judgment upon the notes which she held, and which had been assigned to her by the administrator of Harriett Fible. Appellee relied on his discharge in bankruptcy. The question is: Was the debt sued on sufficiently scheduled in the bankrupt's proceedings to bring it within the benefit of the statute?

Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requires the bankrupt to submit with his petition "a

list of his creditors, showing their residence, if known, if unknown that fact to be stated, the amounts due to each of them, the consideration thereof," etc. And by section 17 (page 3428) it is provided: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) a judgment in action for frauds or obtaining property under false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) or have not been duly scheduled in time for proof and allowance, with name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The benefits of the statute can be had only by a compliance with its conditions. A discharge is obtainable from provable debts by "duly scheduling" such debts, which is to list the creditors, showing their residence, if known, and, if unknown, to state that fact. It is allowed, we see, that the debtor may not know his creditor's residence, or where he may be expected to be found, but it is not allowed that the creditor's name be omitted from the list at all. The statute is specific in its declaration that, "unless the name of the creditor is given," the discharge shall not operate upon his claim, unless he had actual knowledge or notice of the proceedings. The bankrupt law was designed to relieve overwhelmed debtors from their liabilities, if they but freely and truly surrendered all their property, saving exemptions, to all their creditors. Unless they should be compelled to give a correct list of all their creditors, so that they might be brought into the proceedings by the court, it might happen, and frequently would, that the debtor would not give a correct list of all his property. The unworthy would thus use the statute, passed for the benefit of the unfortunate, as the means of perpetrating a fraud upon his creditors. No one else is so apt to know all a man's property as his creditors are. All his creditors are required to be named, else by selecting such as he knew were ignorant of his property, and omitting such as had knowledge of it, the debtor could still work a fraud on his creditors, and make the law and its machinery the means of doing it. So the statute wisely requires the bankrupt, as a condition precedent to obtaining a discharge from his debts, that he shall name all his creditors, and as to such as not named (unless they themselves had notice) the discharge shall not operate to discharge their claims. The statute ought to be applied strictly, else its real purpose will be but an incident of its existence, while its perversion to ignoble ends will be its main use. We find that appellee did not list appellant as a creditor. The listing of "D. M. Fible estate, Chicago, \$12,000," was not enough. D. M.

Fible's estate was not his creditor, and had never been. Whether appellee made an error, due to misrecollection in making out his list, as we think likely, or whether he designedly omitted the name of appellant, is not material. His good faith, or lack of it, does not affect the question, as the statute makes no allowance on account of mistakes. Appellant's name not being given in the list filed with appellee's petition in bankruptcy, the benefits of that act as to her claim, by the express exception of the statute, do not apply, and her claim is unaffected by those proceedings.

There was an effort made to show that appellant had actual notice of the pendency of the proceedings. Mr. A. D. Hudson testified that, while she was visiting his home in 1905, he discussed with her the bankruptcy proceedings. Appellant denied the fact. But, whether one or the other was mistaken or misremembered, the matter is immaterial, as appellee was discharged in bankruptcy in March, 1906, and there is no evidence to show she had any knowledge or notice of the proceeding before that date. The judgment should have been in appellant's favor.

Reversed and remanded for proceedings consistent herewith.

ADAMS EXPRESS CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

1. INTOXICATING LIQUORS—DELIVERING LIQUORS INTO LOCAL OPTION TERRITORY—OFFENSES—INDICTMENT.

An indictment alleging that accused was a common carrier, an incorporated or joint-stock company, and that it brought and delivered liquor into a local option territory to another than a licensed physician or druggist, charged a violation of Acts 1906, p. 320, c. 63, prohibiting persons from delivering liquors into a local option territory, provided that individuals may bring into such territory on their own person, or as their personal baggage, such liquors, and provided the act shall not apply to licensed physicians or druggists to whom carriers may deliver such goods, etc., and it sufficiently negatived the provisos.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 226, 245.]

2. INDICTMENT AND INFORMATION—STATUTORY OFFENSES.

An indictment under a statute whose enacting clause contains exceptions must negative such exceptions, but need not do so in the terms of the statute, provided the whole indictment leaves no doubt that accused does not belong to the excepted class.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 295-298.]

3. INTOXICATING LIQUORS — BRINGING LIQUORS INTO LOCAL OPTION TERRITORY—OFFENSES—EVIDENCE—SUFFICIENCY.

On a trial of an express company for bringing and delivering spirituous liquors into local option territory, evidence held to justify a finding that the company or its agents knew or had reason to know that the package delivered contained intoxicating liquors, justifying a conviction.

tion, though, if the agents were actually deceived and acted in good faith, the company would not be liable.

4. CARRIERS—CONDUCT OF BUSINESS—NOTICE TO AGENT.

Carriers must obey the law, and their agents must exercise the same kind of judgment in the employer's business as if doing business for themselves, and what would convince them that a certain fact exists is notice to the carrier of the existence thereof, so that agents must act on knowledge, probabilities, information, and judgment and infer facts as men generally do in similar matters when acting for themselves.

5. INTOXICATING LIQUORS — BRINGING LIQUORS INTO LOCAL OPTION TERRITORY—OFFENSES—INSTRUCTIONS.

An instruction on the trial of an express company for bringing liquor into local option territory, in violation of Acts 1906, p. 320, c. 63, that if the jury believed that the company's agents receiving and bringing the box of liquor into the territory and in delivering the same to a person there acted in good faith, believing the box contained something other than whisky, they should find the company not guilty, was more favorable to the company than it was entitled to, for, in addition to the good faith, the agents must act with ordinary caution.

6. SAME—INSPECTION OF GOODS.

Where a carrier has reasonable suspicion that a shipper is attempting to use its vehicle to violate the law, it ought to require enough evidence of the legality of the shipment to satisfy a reasonably prudent mind that the suspicion is not well founded, though, in the absence of statutory right of inspection, a carrier is not bound to have more knowledge than he has notice of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 148.]

7. SAME.

Acts 1906, p. 320, c. 63, prohibiting any person from delivering liquor into local option territory, is not enacted for the benefit of commerce, but aims to protect people from the vices of an article of commerce deemed an evil, and the legislation is anti-commercial, and, where a carrier knows that an article is contraband, it must be rejected no matter what the shipper may say to the contrary.

Appeal from Circuit Court, Washington County.

"To be officially reported."

The Adams Express Company was convicted of bringing spirituous liquors into local option territory, and it appeals. Affirmed.

John W. Lewis and Lawrence Maxwell, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

O'REAR, C. J. Appellant, a common carrier, was indicted and convicted, charged with the statutory offense of bringing and delivering spirituous liquors into local option territory to another than a licensed physician or druggist. The indictment was drawn under Acts 1906, p. 320, c. 63, which makes it unlawful for "any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county,

district, precinct, town or city, where the sale of intoxicating liquors has been prohibited or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law. * * * Provided individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon: and provided, the provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time."

Appellant argues that the indictment is bad on demurrer because it does not negative all the provisos of the act. It did charge that the person to whom the liquor was delivered was not a licensed physician or druggist; but it did not say that the liquor was not brought into the local option territory by the defendant upon its person, or as its personal baggage, for its own use and in a quantity not more than one gallon. Nor was it necessary to have so pleaded in terms. The indictment alleges that the accused was a common carrier, an incorporated or joint-stock company. Such a person, being purely artificial, was not intended to be embraced in the exception just alluded to, but that exception was designed for the benefit of natural persons only. An artificial person cannot have personal baggage any more than it could drink the liquor. So that, while the general rule may be that, in drafting an indictment under a statute whose enacting clause contains exceptions, the indictment must negative such exceptions, it is not necessary to do so in the terms of the statute, provided the whole indictment does so in language that leaves no doubt that the accused does not belong to the excepted class. This indictment is good under that rule of pleading. The liquor in this case was a box containing bottles of whisky shipped from a point in Nelson county, Ky., to Springfield, Ky., and wholly within this state. Springfield is a local option town. The box did not have any marks upon it to indicate its contents, nor did the waybill accompanying it show what the box contained. The shipper and the consignee each declared that the box contained paint. The shipper was a distiller's clerk. The consignee a painter. Both were known, respectively, to the agents of appellant receiving and delivering the box. At the receiving point there was only a distillery—a flag station on the Louisville & Nashville Railroad. The express company's agent on the train who received the box suspected its contents. He inquired of the distiller's agent, whom he knew, what the box contained. The receiving agent also suspected the contents of the box. He asked the consignee what it contained. Each of

them testified that they believed the statements that it contained paint. The box was not marked, probably to conceal the nature of its contents. The waybill made out by the express train agent may or may not have failed to show what the box was represented to contain for the same reason. The shipper's clerk falsely stated the box's contents for the same reason, and the consignee, for like reason, misrepresented the fact, though he says in his testimony that he said to the agent jokingly: "It might be paint." Now, if all these facts had actually deceived both of appellant's agents and they had acted in good faith and with due caution, the carrier would not be liable; for, although the statute contains no such qualification, it is rare when the law makes one ignorant of the fact and innocent of intent a malefactor. *L. & N. R. R. Company v. Commonwealth*, 103 S. W. 349, 31 Ky. Law Rep. 687. So the question for the jury was: Did the agents or either of them know, or have reason to know, of the real contents of the package, and were they in spite of such notice as they may have had actually deceived, although acting in good faith and with proper caution in the matter.

Common carriers ought to obey the law just like other people, not in merely keeping its letter while breaking its spirit, but keeping both letter and spirit under such circumstances as other people are expected to do. An agent of a common carrier is required to exercise the same kind of judgment, and to have as much sense in doing his employer's business, as if he were doing the business for himself; and what would convince him, or ought to, that a certain fact exists, is notice to his master of its existence. He must act on knowledge, probabilities, information, experience, use judgment, infer facts from other established facts, as men generally do in similar matters when thinking or acting for themselves. In this way the corporation is humanized, is made to see, hear, know, and exercise care, skill, judgment, and prudence, and is made amenable to the laws where intent, motive, and knowledge are elements of wrongs. The jury in this case evidently did not believe that appellant's agents were actually deceived as to the contents of the package. The following additional circumstances were in evidence, tending to show the agents to be culpable: Other packages shipped from the same distillery by the same express, unlabelled as to contents, had been declared upon falsely in order to deceive the carrier, and to evade the law. These agents had learned of the fact. They had been in the service for years, and knew the parties and their business and shipping methods, yet they took no precaution to protect themselves, their employer, or the public against a repetition of evasions of this statute. No other business was done

at the point of shipment, except in connection with the distillery. The train stopped there for the accommodation mainly, if not solely, of that plant. It was in the habit of shipping whisky over that railroad and by express. It is quite likely that the agent was not deceived in fact; for, although it would probably have deceived him once or twice, he would become more wary, and would refuse to believe the trick which had been used successfully upon him before. The jury's verdict is not without a probable basis of truth. If every guilty man could demand a peremptory instruction merely because he said he was deceived, there would be a quick end to most jury trials. The jury was not deceived by the same facts. No one who is at all familiar with the history of the times, the cause of the enactment of the stringent laws of which the one now being discussed is a part, the tricks and wiles of those who violate these laws, is often deceived by such matters.

The trial judge gave the jury the following instruction, among others: "If the jury further believe from the evidence that defendant's agents receiving and bringing said box of liquor from Bourbon, in Nelson county, to Springfield, in Washington county, Ky., and defendant's agent in delivering same to said Rogers acted in good faith, believing said box contained something other than whisky, you should find the defendant not guilty." This instruction was more favorable to the defendants perhaps than it was entitled to; for, in addition to the good faith of defendant's agents, they must have acted with ordinary care or due caution to avoid violation of the statute. As Bishop puts it (*Bishop on Statutory Crimes*, § 132): "One who while careful and circumspect is lead into a mistake of facts" may be excusable. We are not prepared to say that the carrier has a right to open and inspect, or to require the shipper to submit to an inspection of, all goods shipped, unless the Legislature should so authorize, as we have no doubt it has the right to do; and, in the absence of such right of inspection, the carrier will not be bound to have more knowledge than he has or has notice of. But, where he has a reasonable suspicion that a shipper is attempting to use his vehicle to violate a law of the land, he may, as he ought, require enough evidence of the legality of the shipment to satisfy a reasonably prudent mind that the suspicion was not well founded. Authorities are cited by appellant, in some of which the ground is stated as that relied on for denying the right of inspection that it would be a burden to commerce. The state and federal governments have done much to foster commerce, and the public policy has been upheld. But the statute in question here is not for the benefit of commerce. It rests upon a different conception.

The Legislature is aiming to protect men, women, and children from the vices of an article of commerce, which is deemed by the Legislature an evil, and in doing so they have attempted to put a check upon a vehicle of commerce. The legislation is anti-commercial. It puts the peace and good order of society above its commerce in this particular. In construing and applying the statute, if the courts devitalize it by subordinating it to the supposed interests of commerce, the manifest legislative intent would be frustrated, which is contrary to every allowable rule of statutory construction. Yet we do not go so far as to say that the carrier may require all shipments to be subjected to its inspection before undertaking to deliver them. But we do say that, when the carrier knows that the article is contraband, it must be rejected, no matter what the shipper says to the contrary, and, if the carrier believes upon reasonable grounds that it is contraband, he may require reasonable assurances that it is not; and, if an inspection is reasonable and practicable under the circumstances, may require an inspection. Let them be as careful to obey the law as they are to further their own interests, and there will be little doubt but that the law will be obeyed.

Other questions presented are not deemed material.

Judgment affirmed.

COMMONWEALTH v. MORRIS et al.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. INTOXICATING LIQUORS — RENTING PREMISES FOR UNLAWFUL SALE—ESSENTIALS OF OFFENSE.

To sustain a conviction under Ky. St. 1903, § 2557, for knowingly renting a house, etc., in which intoxicants are sold, etc., unlawfully, it must be shown that the owner or controller of the leased property knew or by ordinary prudence would have known, when or before the lease was made that the lessee intended to sell intoxicants unlawfully in or upon the property; and the lessors of a storeroom to be used as a drugstore are not guilty where they did not have such knowledge, and did not consent to or approve unlawful sales, though they knew that such sales were made after the lease was given.

2. LANDLORD AND TENANT—USE OF PREMISES—UNLAWFUL SALES OF INTOXICANTS—LANDLORD'S RIGHTS.

That a tenant sells intoxicants on the premises unlawfully will not warrant the landlord in ejecting him, in the absence of authority to do so conferred by statute or the lease contract; and a landlord need not stipulate in the lease that a violation of law by the tenant will forfeit the lease.

Appeal from Circuit Court, Barren County.

"To be officially reported."

Henrietta Morris and another having been acquitted, on a directed verdict, of violating Ky. St. 1903, § 2557, by renting premises knowing that intoxicants would be sold thereon unlawfully, the commonwealth appeals. Affirmed.

Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and D. A. McCandless, for the Commonwealth.

CARROLL, J. The appellees were indicted for a violation of that part of section 2557 of the Kentucky Statutes of 1903 providing that: "Any person who knowingly furnishes or rents a house, room, wagon, or any conveyance or thing in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall upon conviction thereof be fined not less than sixty nor more than one hundred dollars; and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same." The charge in the body of the indictment was that they "unlawfully and knowingly furnished and rented to E. T. Willis a certain drug store on Washington street, in the town of Glasgow, in which spirituous liquors were sold during the month of November, 1907, and at said time and place and in said house said Willis sold spirituous liquors by retail to T. B. Gibb, and said Mrs. Morris and Lewis Morris rented and furnished said house to said Willis during said month with the knowledge that he would so sell liquor in violation of law at said time and place." Upon the conclusion of the evidence for the commonwealth, the court directed the jury to return a verdict of not guilty.

The evidence shows that in July, 1906, the appellees rented to E. T. Willis a store-room to be used as a drug store for a term of two years, with the privilege on the part of Willis of renewing the lease for an additional term of two years. There is no evidence whatever that the lessors knew before or at the time the lease was entered into that Willis intended to or would sell liquor on the leased premises in violation of law, or that they in any manner consented to or approved of the sale of it, although it appears that in 1907 he did sell and deliver liquor in violation of law to various persons on the leased premises, for which sales he was indicted and convicted in the Barren circuit court. And there is evidence conducing to show that appellees knew that illegal sales of liquor were made on the premises in 1907. The question to be determined is: Do these facts constitute a violation by appellees of the statute? We think not. To sustain a conviction under this statute, it is necessary that there should be some evidence, direct or circumstantial, conducing to show that the owner or controller of the leased property or premises knew, or had such information as would put a person of ordinary prudence upon notice, at or before the time the lease was entered into that it was the intention of the lessee to sell, in violation of law, liquor in or upon the property or premises

leased. Where the owner or controller of the property or premises furnishes or rents it in good faith to be used for legal and legitimate purposes, he cannot be subjected to a criminal prosecution under the statute because the lessee violates the law. Statutes in some respects similar to the one under consideration, and having the same purpose in view, have been enacted in a number of states. In some of them it is provided that the landlord or lessor becomes liable to a penal prosecution if he permits the tenant or lessee to continue in the use of the premises or property with knowledge that he is conducting in them business in violation of law. To afford the landlord the means of relieving himself from liability, these statutes also provide that he may at any time during the term eject the tenant who has been guilty of violations of the statute; but our statute does not go this far. It does not make the landlord or owner liable because the tenant or lessee after obtaining possession of the property or premises violates the statute; nor does it give him the right for this cause to eject the tenant, and take possession of the premises or property during the term. In the absence of a statute, or a provision in the contract, authorizing the landlord to cancel the lease, or take possession of the rented property if the lessee or occupier violates the law, the mere fact that he does so will not warrant the landlord in ejecting him. Nor do we know of any authority that imposes upon the landlord the duty of stipulating in the contract that a violation of law by the tenant will work a forfeiture of the lease. In the absence of notice as herein indicated, the lessor who rents his property for legitimate purposes may assume that the tenant will not violate the law, but, if he does, the landlord cannot be subjected to criminal liability for his misdoings under the present statute. 17 Am. & Eng. Ency. of Law, p. 315; 23 Cyc. pp. 203, 322; Crocker v. State, 49 Ark. 60, 4 S. W. 197; Cordes v. State, 37 Kan. 48, 14 Pac. 493; Hall v. Germain, 131 N. Y. 536, 30 N. E. 591.

Judgment affirmed.

COMMONWEALTH v. LANDIS.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

RAPE—INDICTMENT—SUFFICIENCY.

Ky. St. 1903, § 1155, as amended by Acts 1906, p. 252, c. 24, provides a penalty for unlawfully carnally knowing a female under 16 years old, etc. Cr. Code Proc. § 122, subd. 2, requires an indictment to state the acts constituting the offense in ordinary and concise language, so as to enable a person of common understanding to know what is intended, etc. Section 124 defines the facts that must be stated with certainty in an indictment to be the "party" and the "offense" charged, the county in which the offense was committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete of-

fense. Section 136 provides that the words used in the statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used. *Held*, that an indictment under section 1155 is not insufficient for failing to charge that accused and prosecutrix were not husband and wife.

Appeal from Circuit Court, Pulaski County.
"To be officially reported."

J. C. Landis, having been convicted of rape, was granted a new trial, and the commonwealth appeals. Opinion rendered.

James Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and B. J. Bethurum, for the Commonwealth.

LASSING, J. Appellee was indicted, charged with the offense of carnally knowing a female under the age of 16 years. The indictment is as follows: "The grand jury of Pulaski county, in the name and by the authority of the commonwealth of Kentucky, accuse J. C. Landis of the crime of carnally knowing a female under the age of sixteen years, committed in the manner and form as follows, viz.: The said Landis on the last day of May, 1908, before the finding of this indictment and in the county and state aforesaid, did unlawfully carnally know Esther Miller, who was then and there a female under the age of sixteen years, against the peace and dignity of the commonwealth of Kentucky." To this indictment the appellee entered a plea of "not guilty," was tried, and his punishment fixed at confinement in the penitentiary for 10 years. He filed a motion and grounds for a new trial, and upon hearing this motion was sustained, the verdict of the jury was set aside, and appellee granted a new trial. The proof offered by the commonwealth warranted the finding of the jury, and it is alleged that the trial judge granted a new trial because the indictment failed to charge that appellee and the prosecuting witness were not husband and wife, and that the proof failed to establish this fact. The only question before us on this appeal is the sufficiency of the indictment.

This indictment is drawn under section 1155 of the Kentucky Statutes of 1903, as amended by Acts 1906, p. 252, c. 24, which reads as follows: "Whoever shall unlawfully carnally know a female under the age of 16 years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years." The indictment follows substantially the language of the statute. Subsection 2 of section 122 of the Criminal Code of Practice provides that: "An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, accord-

ing to the right of the case." Section 124 of the Criminal Code of Practice defines the facts that must be stated with certainty in an indictment to be "the party" and "the offense" charged, the county in which the offense was committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. The particular circumstances of the offense charged in the case at bar are those defined by the statute as amended by the act of 1906, creating the offense. Section 136 of the Criminal Code provides that the words used in the statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

Measured by these code provisions the indictment in the case at bar meets the requirements of the law, unless it can be said that under subsection 4 of section 124 above referred to, it is necessary to allege that the accused and the female whom he is charged with carnally knowing were not husband and wife, in order to constitute a complete offense. We know of no authority so holding, nor are we referred to any such. In Roberson's Criminal Law, § 271, it is stated that in "an indictment under the statute concerning rape on infants under twelve years of age * * * sex need not be alleged. The indictment is sufficient if it gives a woman's name and uses the pronouns 'she' and 'her' in speaking of the person on whom the rape was committed. The word 'female' in an indictment is equivalent to the word 'woman.' It need not be averred that the woman was not the wife of the defendant." And in the case of the Commonwealth v. Fogerty, 8 Gray (Mass.) 489, 69 Am. Dec. 264, the court in passing upon the sufficiency of an indictment for rape, said: "Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegations. A husband may be guilty at common law as principal in the second degree of a rape upon his wife by assisting another man to commit rape upon her, and under our statute would be liable to be punished in the same manner as the principal felon. An indictment charging him as principal would therefore be valid. Of course, it would always be competent for a party indicted to show, in defense of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife. But it is not necessary to negative the fact in the indictment." In the case of State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780, it was expressly held that an indictment for rape need not specify the sex of the defendant, nor that the person ravished was not his wife. These authorities are direct-

ly in point, and we have been able to find none holding the contrary view.

We are of opinion that the indictment is a good indictment for the offense charged, and this opinion is ordered to be certified to the lower court as the law of the case.

RICHARDSON v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. VENUE—ACTION IN WRONG COUNTY—MODE OF OBJECTION—WAIVER OF OBJECTION.

Under Civ. Code Prac. § 73, providing that an action against a carrier on a contract of carriage must be brought in the county where defendant resides, or where the contract is made, etc., and section 92, providing that a special demurrer is an objection to a pleading which shows that the court has no jurisdiction of defendant, etc., a demurrer to the petition in such an action for want of jurisdiction of the cause of action is bad, where the petition does not show that the county where the action is brought is not the county where the contract was made or where defendant resides, and the objection of want of jurisdiction over defendant, not being raised by answer, is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 30.]

2. PLEADING—PLEA TO JURISDICTION—CONTENTS.

Where the petition to which it is desired to demur specially on the ground that the court has no jurisdiction of defendant, or of the subject of the action, fails to disclose the want of jurisdiction, defendant, if he desires to raise the question, should point out distinctly, in an answer or other pleading, as provided in Civ. Code Prac. § 118, the reasons why the court has not jurisdiction, so that the court may be informed of the grounds on which the special demurrer is vested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 214.]

3. COURTS—CIRCUIT COURTS—JURISDICTION—PRESUMPTIONS.

Circuit courts are courts of general jurisdiction, and it will be presumed, in the absence of a showing to the contrary, that they have jurisdiction of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 140.]

"To be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 111 S. W. 343.

G. E. Lilly, for appellant. Fred P. Caldwell, Benjamin D. Warfield, and John T. Shelby, for appellee.

CARROLL, J. In the petition for rehearing it is suggested that the court in the opinion made no reference to the question raised by the appellee in the lower court, and urged by it in the brief filed in its behalf in this court, that the Madison circuit court had no jurisdiction to hear and determine this case. The action was brought under section 73 of the Civil Code of Practice, providing that: "Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in

the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. * * * It will thus be seen that the venue of the action is limited to either one of three counties. In the brief filed on the original hearing, as well as in the petition for rehearing, it is stated that the contract was entered into in Estill county, that the appellee's residence is in Jefferson county, and the property was to be delivered in Kenton county. Neither of these facts appear in the record. The jurisdictional question was not properly raised or made in the lower court. For this reason it was not noticed in the opinion, and would not now be considered, except for the insistence of counsel that the plea to the jurisdiction of the Madison circuit court should have been sustained.

Before entering its appearance in the Madison circuit court, the appellee filed the following special demurrer: "The defendant demurs specially to the plaintiff's petition herein on the ground that this court has not jurisdiction of this cause of action set forth in the plaintiff's petition and amended petition." It did not file any other pleading of record stating the reasons why the Madison circuit court did not have jurisdiction, or setting out that it resided in Jefferson county, or that the contract was made in Estill county, or that the property was to be delivered in Kenton county. The petition did not disclose the fact that the Madison circuit court was not the county in which the contract was made or the county in which the defendant resided. In the absence of a pleading showing a want of jurisdiction, the lower court properly overruled the special demurrer. Section 92 of the Civil Code of Practice provides that: "A special demurrer is an objection to a pleading which shows: 1. That the court has no jurisdiction of the defendant or of the subject of the action; or, 2. That the plaintiff has not legal capacity to sue; or, 3. That another action is pending, in this state, between the same parties, for the same cause; or, 4. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it. * * * When the petition, to which it is desired to demur specially upon the ground that the court has no jurisdiction of the defendant or of the subject of the action, fails to disclose the want of jurisdiction, the defendant, if he desires to raise the question, should point out distinctly in an answer or other pleading, as provided in section 118 of the Civil Code of Practice, the reasons why the court has not jurisdiction, so that the court may be in-

formed of the grounds upon which the special demurrer is rested.

Circuit courts are courts of general jurisdiction, and it will be presumed, in the absence of a showing to the contrary, that they have jurisdiction of the defendant. The Madison circuit court had jurisdiction of the subject-matter of the action, and as the pleading to which the special demurrer was filed did not disclose the want of jurisdiction over the person of the defendant, and the objection was not made by answer or other pleading, it was waived.

The petition for rehearing is overruled.

HUBER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. INTOXICATING LIQUORS—OFFENSES—SALES AT PROHIBITED PLACES.

Under Ky. St. 1903, § 4198, requiring applicants for a license to sell intoxicating liquor to state the county, city, town, and place where it is proposed to carry on the business, and that licenses shall specify the place where the business is to be conducted, and forbidding the exercise of the privilege granted in any other place than that mentioned in the license, two barrooms in separate and distinct buildings cannot be conducted under one license.

2. SAME.

Licensee's ownership of both buildings does not affect the question.

3. SAME.

Where, when licensee commenced the sale of liquor in a building, he was already selling liquor in another building, it is no defense to an indictment for selling liquor in the former building without a license that, as he had a right to run one bar, it cannot be said which of the two was unlawful, and that therefore the selling in the former building was not unlawful, as such defense overlooks the fact that licensee commenced the sale in the former building after he had located his license by selling liquor in the latter building.

4. SAME.

One who, under one license, opens two bars in separate and distinct buildings, cannot maintain that he cannot be punished for maintaining either, as one or the other is lawful.

5. SAME—INDICTMENT—SUFFICIENCY.

An indictment for conducting a bar for the sale of intoxicating liquor without a license, which gave the name of the offense with sufficient certainty to apprise defendant of what was meant, and described it in the usual form, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 224.]

6. SAME—EVIDENCE—ADMISSIBILITY.

On a trial for conducting a bar for the sale of intoxicating liquor without a license, evidence that other persons in the county were conducting two bars under one license, as defendant was doing, was properly excluded.

7. SAME.

On a trial for conducting a bar for the sale of intoxicating liquor without a license, evidence that the county officials had construed the statute to permit the conducting of two bars under one license, as defendant was doing, was properly excluded.

Appeal from Circuit Court, Campbell County.

"To be officially reported."

George P. Huber was convicted of conducting a bar for the sale of intoxicating liquor without a license, and he appeals. Affirmed.

C. L. Raison, Jr., and W. A. Burkamp, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth.

HOBSON, J. George P. Huber owns several small lots. On one of these is a brick building, in the upper part of which he lived with his family, and in the lower part he carried on business as a saloon keeper. Fifty or 100 feet from this building there was a large frame building, which was used for picnics and the like for a while, and afterwards was used as a pool room. He got a license from the county court to sell spirituous, vinous, and malt liquors. Under this license he conducted his saloon in the brick building, and while he was running the pool room business in the frame building he opened another bar in that and was selling liquor there. For this he was indicted, and, having been fined in the circuit court, he appeals.

Section 4198, Ky. St. 1903, provides as follows: "All applicants for license except peddlers shall state the county, city, town and place therein where it is proposed to carry on the business, and all licenses except to peddlers, shall specify the place where the business is to be conducted, and no one but the person named in the license shall sell under or exercise the privilege granted; nor shall the privilege granted be exercised in any other place than that mentioned in the license, except that retail dealers in spirituous, vinous or malt liquors, in any incorporated city or town, may remove their place of business to some other place in the same city or town by the consent of the county court and municipal authorities of such town or city, entered of record and indorsed on the license. But when the place is once changed the party shall not be allowed to change the location a second time or sell at the original place without first procuring a license." It is clear from this statute that it was not contemplated that a man under one license could run two barrooms in separate and distinct buildings. If he could thus run two, he could run as many bars as he saw fit, under one license.

His ownership of both buildings does not affect the question. If he had owned only one, and rented the other, or owned neither, the rule would be the same. The license is to run one business and at one place of business; and when Huber opened and conducted the bar in the brick building he exhausted his license. His opening the bar thereafter in the frame building was the running of that bar without license.

It is earnestly insisted that, as he had a right to run one bar, it cannot be said which of the two was unlawful, and that therefore

the selling in the frame building, for which he was indicted, was not unlawful. This argument overlooks the fact that the business in the frame building was begun after he had located his license by conducting his saloon in the brick building. In addition to this, a man who, under one license, opens two bars in separate and distinct buildings, cannot maintain that he cannot be punished for maintaining either, as one or the other was lawful. When the commonwealth has fined him for conducting one of the bars, it is an election by the commonwealth to treat the other place as the one that is licensed.

The instructions of the court aptly submitted to the jury whether the two bars were separate and distinct, and the proof before the jury left no doubt that they were in separate and distinct buildings.

The indictment was not defective. It gave the name of the offense with sufficient certainty to apprise the defendant of what was meant, and in the descriptive part of the indictment describes it in the usual form.

The court properly refused to allow proof to be heard to the effect that other men in Campbell county were running two bars under one license, just as he was doing, or to the effect that the county officials had so construed the statute. One violation of the law cannot justify another, nor can the county officials make nugatory the statutes of the state.

Judgment affirmed.

LATHAM v. LINDSAY.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. APPEAL AND ERROR—RECORD—INSTRUCTIONS.

Instructions, to constitute a part of the record, must be identified by an order of the court, or be contained in a bill of exceptions, duly signed and filed in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2376-2379.]

2. SAME—APPEAL FOR DELAY—MOTION TO AFFIRM—INDORSEMENT OF RECORD.

Motion to affirm the judgment as a delay case will be overruled; the indorsement of the record by appellee that he had carefully examined the record and believed the appeal was prosecuted for delay merely required by Civ. Code Prac. § 759, before the motion, not having been made.

Appeal from Circuit Court, Todd County.
"Not to be officially reported."

Action between G. N. T. Latham and Nellie E. Lindsay. From the judgment, G. N. T. Latham appealed. Appellee makes several motions. Granted in part; overruled in part.

Petrie & Standard, for appellant. Trimble & Mallory and C. A. Denny, for appellee.

O'REAR, C. J. Appellee's motion to strike the "bill of exceptions" from the record must be overruled. There is no bill of exceptions in the record. The "bill of evidence"—

which is the stenographer's bill, attested by the trial judge—is sufficiently identified to satisfy us, *prima facie*, it is the genuine bill, and it may stay in the record for whatever proper purpose it may serve on the trial.

The motion to strike the instructions from the record, as copied therein by the clerk, must prevail. There is no order identifying them as the instructions given on the trial. The instructions, to constitute a part of the record, must be identified by an order of court, or be contained in a bill of exceptions, duly signed and filed in the record.

The motion to affirm as a delay case is overruled. The attorneys for appellee failed to indorse the record as required by section 759, Civ. Code Prac. Besides, when the appellee feels that he must file a brief—a long brief—on the motion to affirm as a delay case, that itself indicates that the case presents a debatable question. In addition, we cannot say from the record that the appeal was prosecuted merely for delay.

WILSON v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. CARRIERS—CARRIAGE OF GOODS—DAMAGE TO GOODS—ACTIONS—VENUE.

By Civ. Code Prac. § 73, actions against a common carrier upon a contract to carry property must be brought in the county where defendant resides, or where the contract is made, or where the property is to be delivered, and actions for injuries to a passenger or other person must be brought in the county where defendant resides, or where plaintiff is injured or resides, if he resides in a county through which the road passes. By section 83 several causes of action may be united, if each affect all the parties to the action and may be brought in the same county, etc., and if all of them be brought upon contract or for personal injuries. Plaintiff, who resided in E. county, shipped goods to that county, he having the privilege of riding in the car with them; the shipment being over defendant road from St. Louis to R., in M. county, in this state, and from there to E. county by another road. A suit was brought in the M. county circuit court to recover for damage to the goods by a collision while the car was in the St. Louis yards, for personal injuries received by plaintiff at the same time, and for damages for delay in the shipment in M. county. Defendant's residence is not in M. county. *Held* that, since the property was to be delivered in M. county, an action to recover damages arising out of the breach of the contract of carriage for injury to the goods, delay, etc., may be brought in that county.

2. SAME—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—VENUE.

The circuit court of M. county, where the goods were to be delivered, had no jurisdiction of the action for personal injuries to plaintiff.

3. ACTION—JOINDER OF ACTIONS—CONTRACT AND TORT.

Since section 73, Civ. Code Prac., does not authorize an action for injuries to plaintiff in the county where the goods were delivered, plaintiff could not unite his action for personal injuries with that for the breach of contract, as section 83 permits a joinder of actions only when they may be brought in the same county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 384.]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by E. Wilson against the Louisville & Nashville Railroad Company for personal injuries and breach of contract of carriage. From a judgment dismissing the action for personal injuries, plaintiff appeals. Affirmed.

Grant E. Lilly, for appellant. Jno. T. Shelby, Chas. H. Moorman, Benjamin D. Warfield, and J. Tevis Cobb, for appellee.

CLAY, C. Appellant, E. Wilson, who then resided at Afton, Ind. T., contracted with the Frisco Line at that point to transport a car load of household goods and live stock from Afton to Rice's Station, in Estill county, Ky. By the terms of the contract he had the privilege of riding in the car or on the train carrying the car from Afton to his destination. The car was delivered to appellee, Louisville & Nashville Railroad Company, at St. Louis, and was transported by it from that point to Richmond, Ky. There it was delivered to the Louisville & Atlantic Railroad Company, to be taken to Rice's Station, in Estill county. After reaching Kentucky, appellant brought this action in the Madison circuit court against the Louisville & Nashville Railroad Company and the Louisville & Atlantic Railroad Company. In the first paragraph of his petition appellant asked for the recovery of \$36.80, which he alleged the Louisville & Atlantic Railroad Company wrongfully required him to pay as additional freight on the shipment. In the first clause of the second paragraph of the petition appellant asked damages on the ground that while the car containing the goods and live stock was on the side track in St. Louis the Louisville & Nashville Railroad Company carelessly and negligently ran one of its engines, or a portion of its train, against the car with such violence as to break and damage the goods contained therein to the extent of \$50. In the second clause of the second paragraph appellant asked damages in the sum of \$500 for personal injuries sustained by him in the same collision in which his goods were damaged. In the third paragraph of the petition appellant asked damages in the sum of \$50 on account of delay to his shipment at Richmond. Appellee, Louisville & Nashville Railroad Company, filed an answer in the nature of a plea to the jurisdiction of the Madison circuit court as to each of the causes of action set forth in the petition. The lower court adjudged that it had jurisdiction of appellee as to the cause of action for \$50 damages for injury to the household goods, and also as to the cause of action for the delay at Richmond, asserted in the third paragraph of the petition. It further adjudged that it had not jurisdiction of appellee as to the cause of action for \$500 damages on account of personal injuries, asserted in the second paragraph of

the petition. Appellant's petition as to the last-named cause of action was dismissed for want of jurisdiction, and from this judgment the present appeal is prosecuted.

It is the contention of appellant that his cause of action, both for the injury to himself and his property, arises entirely out of the contract of shipment; that the injury which he received, both to himself and to his property, was the result of one wrongful act; that the law does not contemplate that such an action, arising from one wrongful act, shall be split up, and one part of the damages sued for in one jurisdiction and the other part sued for in another jurisdiction. Appellant further contends that, under subdivisions 1 and 6 of section 83 of the Civil Code of Practice, express authority is given to join actions arising from contracts or for injuries to persons and property. For the purpose of discussing the question, we give below the provisions of the Code relative to the point involved:

"Sec. 73. Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county in which the carrier passes."

"Sec. 83. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought—1. Upon contracts, express or implied; or * * *

6. For injuries to person and property."

The first part of section 73 fixes the venue of the action against the common carrier upon a contract to carry property. Such an action may be brought at the residence of the defendant, in the county where the contract is made, or the county in which the carrier agrees to deliver the property. In this case the Louisville & Nashville Railroad Company agreed to deliver the property at Richmond, Madison county, Ky. Therefore it was proper to bring an action growing out of the contract of shipment in the Madison circuit court. But the latter part of section 73 expressly provides that an action for an injury to a passenger, "or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county in which the carrier passes." By the latter

provision no authority is given to bring an action for an injury to a passenger in the county where the carrier agrees to deliver the property. On this account section 83 does not remedy the matter, for under that section one of the conditions precedent to uniting several causes of action is that each may be brought in the same county. No authority being given to bring the action for injury to a passenger in the county where the carrier agrees to deliver the property, it necessarily follows that the two causes of action cannot be brought in the same jurisdiction.

It appears from the record that appellant's residence is in Estill county, Ky.; that appellee's residence is in Louisville, Ky. Madison county, therefore, is the residence of neither appellee nor appellant. The Madison circuit court had jurisdiction of the claims for damages relating to the household goods, because the action was instituted in the county where appellee agreed to deliver the property. The Code does not authorize the bringing of a suit in such county for an injury to a passenger. We therefore conclude that the judgment of the trial court, in so holding was proper.

Judgment affirmed.

COMMONWEALTH v. ALEXANDER.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

EMBEZZLEMENT—PUBLIC OFFICERS—STATUTES—CONSTRUCTION.

Under Ky. St. 1903, § 1205, providing that, when a person having custody of any money belonging to the state or county shall willfully misappropriate the same, he shall be punished, etc., and section 4067, prohibiting a sheriff from receiving any tax until a copy of the assessor's books has been delivered to him by the county clerk, etc., and section 4241, defining the duties of the sheriff as to property omitted by the assessor from taxation, a sheriff embezzling money collected from taxpayers on property not assessed for taxation does not violate section 1205, which assumes that the officer is legally in possession of the money for the state or county, and then misappropriates it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Embezzlement, § 27.]

Appeal from Circuit Court, Owen County.
"To be officially reported."

P. A. Alexander was indicted for embezzlement, and, from a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. H. W. Alexander, W. B. Moody, W. A. Lee, and H. G. Botts, for appellee.

NUNN, J. Appellee was indicted in the Owen circuit court for the offense of embezzlement. The court sustained a demurrer to the indictment, and the commonwealth appeals. The indictment was evidently

drawn to cover the offense defined by section 1205 of the Kentucky Statutes of 1903. In substance, appellee was charged in the indictment with having collected from divers taxpayers of the county the sum of \$2,286 during the year 1898; that he feloniously, knowingly, and fraudulently collected this money, retained, and applied it to his own use and benefit, thereby depriving the county of its use; that the property upon which he collected this money as taxes had not been assessed for taxation. The substance of the charge against appellee is that while he was sheriff, during the year 1898, he collected from various citizens of the county the sum named when the property had not been assessed—that is, had not been listed for taxation—and that he failed to turn over to the county the money thus collected. The question is: Does this constitute embezzlement as defined in section 1205 of the Kentucky Statutes of 1903? In our opinion it does not.

The section of the statute referred to provides that when a person having custody or control of any money, or other thing named in the section, belonging to or for the use of the state or of any county, etc., or under any trust or duty to keep, return, or specifically apply same, or any part thereof, shall in violation of such trust or duty willfully misappropriate or otherwise dispose of such money, or other things named in the statute, he shall be punished as provided in the section. This section assumes that the person or officer is rightfully and legally in the possession of the money, or other thing, for the use of the state or county, and then misappropriates it. The indictment in this case shows on its face that appellee was not rightfully and legally in possession of the money charged to have been collected and misappropriated by him. Section 4067 of the Kentucky Statutes of 1903 provides: "No sheriff shall receive or receipt for any taxes until a copy of the assessor's books, as approved by the board of supervisors, has been delivered to him by the county clerk, or the list filed in the county clerk's office has been certified to him by the said clerk. For a violation of this section the sheriff shall be fined one hundred dollars for each offense." This is a positive prohibition against the collection by the sheriff of any taxes on unassessed property. The sheriff has no power or authority to assess or list omitted property for taxation under the statutes. His powers and duties as to property omitted by the assessor and supervisors are defined by section 4241 of the Statutes, which requires him to file in the clerk's office of the county in which the property is liable to assessment a statement containing a description and the value of the property proposed to be assessed. The sheriff has no part in the assessment of property, except to report omitted property to the clerk as directed by

section 4241 of the Statutes; and he is forbidden, under a penalty of one hundred dollars for each offense, to collect any taxes at all until the property is assessed by a person authorized to assess it, and its proper assessment certified to him. The collection by appellee of the sum alleged from the various taxpayers of the county on property which had not been assessed for taxation was a plain violation of the law. It did not relieve the taxpayers from their liability to the county, and they could have sued appellee immediately and recovered each of the various sums paid to him. It was their money. It did not belong to the county. If appellee held it in trust, it was for the persons who paid it to him, and not for the county. *Commonwealth v. Boske*, 99 S. W. 316, 30 Ky. Law Rep. 400, 11 L. R. A. (N. S.) 1104. For these reasons, we are of the opinion that the lower court properly sustained a demurrer to the indictment.

Judgment affirmed.

PARACAMPH CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1908.)

1. CRIMINAL LAW—VENUE—LOCALITY OF OFFENSE.

In a prosecution for violating Ky. St. 1903, § 576, requiring all corporations to use the word "incorporated" after the corporate name in advertising matter, etc., by publishing an advertisement in a paper in H. county without indicating defendant's corporate character, the circuit court of J. county, where defendant had its place of business, had jurisdiction of the offense, and not the county in which the advertisement was published.

2. SAME—MANNER OF RAISING JURISDICTIONAL QUESTION—SPECIAL DEMURDER—PLEA.

The trial court's jurisdiction of a prosecution against a corporation for failure to indicate its corporate character in an advertisement, as required by statute, could not be raised by special demurrer, the record not showing defendant's place of business, but only by answer in the nature of a plea to the jurisdiction; but when defendant's place of business thereafter appeared from the pleadings, showing want of jurisdiction, the prosecution should have been dismissed.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

The Paracamp Company was convicted of publishing an advertisement without indicating the corporate character of the company, and it appeals. Reversed and remanded, with directions to dismiss.

Johnson & Jennings, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Appellant, Paracamp Company, whose place of business is in Louisville, Ky., was indicted in Hopkins county for a violation of section 576, Ky. St. 1903. The particular offense charged against appellant was publishing an advertisement of its business

in the Hustler, of Hopkinsville, without having under its corporate name the word "incorporated." Appellant first filed a special demurrer to the jurisdiction of the court. It then filed an answer in two paragraphs. In the first paragraph it pleaded not guilty, and in the second alleged that it had upon its letterheads, checks, and envelopes, and all other written or printed matter, the word "incorporated"; that it was impossible for any one to deal with appellant without knowing it was a corporation. Subsequently it offered to file an amended answer, in which it alleged that its principal place of business was in Louisville, Ky. It then set out more specifically the allegations contained in its first answer in regard to its having the word "incorporated" upon all of its literature. The court refused to permit this amended answer to be filed. The case was then submitted to the court, and judgment rendered imposing a fine of \$150 on appellant, of which it complains.

It is insisted by appellant that the Hopkins circuit court was without jurisdiction of the offense charged. The question here involved was recently before this court in the well-considered case of *Commonwealth v. Remington Typewriter Company*, 105 S. W. 399, 32 Ky. Law Rep. 189, wherein it was said: "The offense against the statute is more certainly committed where its home office in this state is than in any other county where a stray magazine or a fugitive newspaper might find its way, or other kind of advertising be used. In prosecutions for violations like this, it seems to us better, for the interest of all parties concerned, that the venue should be fixed in one county, if it can with propriety be done, so that persons desiring to proceed against the corporation in default may know where to institute proceedings, and

the corporation may know in what court it will be proceeded against. We doubt if the commonwealth would contend that, if an advertisement in violation of the statute was inserted in a newspaper that circulated in every county in the state, prosecutions might be instituted and convictions had in each of the 119 counties. In other words, could not a conviction in one county be pleaded as a bar to the prosecutions in the others? It is not, however, necessary to further elaborate this view. If it should be entertained by the court in a case where it was presented, only one recovery could be had; and this, it seems to us, should be in the county where its principal office or place of business in the state is located, or where its designated officer for service of process resides. Nor will the efficiency of the statute, which subserves a useful purpose, be impaired by this ruling."

As appellant's principal place of business or home office was in Louisville, Jefferson county, Ky., it necessarily follows that the Hopkins circuit court was without jurisdiction to try appellant. True, the question of jurisdiction could not be raised by special demurrer, for there was nothing in the record to show where appellant's principal place of business was located. The question should have been raised by an answer in the nature of a plea to the jurisdiction. However, when it was made to appear to the trial court by appellant's second amended answer that its home office or principal place of business was in Louisville, Jefferson county, Ky., it was then the duty of the court to discharge the defendant, for the reason that it was apparent that the court was without jurisdiction.

For the reasons given, the judgment is reversed, and cause remanded, with directions to dismiss appellant.

**TEXAS & G. RY. CO. v. FIRST NAT. BANK
OF CARTHAGE et al.**

(Court of Civil Appeals of Texas. Oct. 23, 1907.)

1. CARRIERS—CARRIAGE OF GOODS—BILL OF LADING—NONDELIVERY OF GOODS.

Bills of lading for cotton recited that it was received for delivery to the order of plaintiff. The shipper was a buyer of cotton, who paid therefor by drafts on plaintiff, secured by the bills of lading. The cotton was delivered to another, who guaranteed to hold the carrier harmless, and, without paying, plaintiff applied the cotton to a claim against the third person. The delivery was not made in accordance with custom, but in reliance on the guaranty. *Held*, that the carrier was liable to plaintiff for the loss of the cotton.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 310, 311.]

2. TRIAL—INSTRUCTIONS—IGNORING ISSUES.

A requested instruction, expressly excluding consideration of evidence and assuming facts contrary to evidence, is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

3. EVIDENCE—COMPETENCY—EVIDENCE OF INTENT.

Where, in an action against a carrier for failure to deliver goods to plaintiff in accordance with the bill of lading, the agent of the carrier testified that he was not willing at the time of the delivery of the goods to a third person to do so by reason of any practice, but did so because of the third person's guaranty to hold the carrier harmless, the refusal to permit the agent to state that he would not have consented to make the delivery, except for the previous practice, but that he signed the bill of lading covering the goods to the third person by reason of the guaranty made by him, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 440.]

4. CARRIERS—CARRIAGE OF GOODS—MISDELIVERY—ACTION—EVIDENCE.

In an action against a carrier for failure to deliver 93 bales of cotton in accordance with a bill of lading reciting the receipt of the cotton for shipment and delivery to the order of plaintiff, evidence *held* to sustain a finding that the 93 bales were delivered to a third person, authorizing a judgment against the carrier therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 382.]

5. APPEAL AND ERROR—STATEMENT OF FACTS—TIME TO FILE.

Where the failure to file a statement of facts in time occurred solely through the act of the trial judge, who labored under a misapprehension of the date on which the time limited expired, the court on appeal will consider the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2505.]

Appeal from District Court, Panola County; Richard B. Levy, Judge.

Action by the First National Bank of Carthage against the Texas & Gulf Railway Company and others. From a judgment for plaintiff against defendant Texas & Gulf Railway Company, it appeals. *Affirmed*.

Walker & Chamness and Young & Stinchcomb, for appellant. Brooke & Woolworth, W. R. Anderson, J. O. Brooke, and T. P. Young, for appellees.

JAMES, C. J. The First National Bank of Carthage, Tex., brought this suit against the Texas, Sabine Valley & Northwestern Railway Company for the value of 93 bales of cotton, alleging in substance that it delivered the cotton to the railway company for shipment from Carthage to Timpson, and to be delivered to order of the plaintiff at Timpson; that appellant failed to so carry and deliver the cotton, "but, on the contrary, so carelessly and negligently acted in regard to the same * * * that said 93 bales of cotton were wholly lost to plaintiff, to its damage the sum of \$3,543.88." The Texas, Sabine Valley & Northwestern Railway Company answered. Appellant, the Texas & Gulf Railway Company, appeared and alleged that it had succeeded to the property and liability of the former railway company, and was allowed to be substituted as the defendant. Certain parties were eliminated from the case, and the trial occurred with the First National Bank of Carthage as the plaintiff and the Texas & Gulf Railway Company as original defendant, and the Geo. H. McFadden & Bros. Agency, composed of the parties named in the answer of the defendant, and impleaded by it. In this answer it was pleaded that the McFadden Agency had agreed to hold defendant harmless in connection with the subject-matter of this suit, and asked for judgment over against said agency in the event defendant was held to be liable. Judgment was against defendant, and defendant was awarded judgment over against the members of said agency. No issue was made as to defendant's right to recover against the McFadden Agency in case defendant was adjudged to be liable.

The first, second, and third assignments of error insist that defendant was, upon the evidence, entitled to the peremptory instruction which it asked, and that for the same reason the court erred in overruling the motion for new trial. Under these assignments the proposition is: "By the course of dealing between the plaintiff and W. E. Ross concerning the cotton that W. E. Ross purchased by checks upon the plaintiff's bank, the said Ross was made the agent of the plaintiff, in that he was authorized to receive all of said cotton at Timpson, have it compressed and classified, and was permitted to sell it to whatever purchaser he chose and for whatever price he might agree to take, and procure through bills of lading for it, and therefore the said W. E. Ross was authorized to receive the cotton referred to in the plaintiff's petition, and the appellant company is not liable for the same."

The testimony disclosed that W. E. Ross was a cotton buyer from yards and wagons in Carthage and Timpson, paying for same by drafts on the First National Bank of Carthage and the Cotton Belt Bank of Timpson. He sold to the Geo. H. McFadden & Bros. Agency, of Shreveport, and others. The cotton in question was bought by him

at Carthage, and paid for by his overdrafts on the Carthage Bank, who took as their security the bills of lading therefor over defendant's road to Timpson, where it was sent for compression, classification, and sale by Ross. These are known in the record as the "local bills." They recited that the cotton was received of W. E. Ross for delivery to the order of the First National Bank of Carthage, or its assigns, at Timpson, Tex. It appears that, when Ross sold the cotton to others than the McFadden & Bros. Agency, the procedure was that he would get Rembert, the railway's agent at Timpson, to issue him a bill of lading to shipper's order and notify the purchaser at destination, and that he (Ross) would write on these bills showing that the cotton was received from him to be delivered to shipper's order, and get the agent to sign for them, and he would attach to it a draft from himself to the consignee and would take it to the Cotton Belt Bank, at Timpson, to be sent to the First National Bank of Carthage. Upon Ross receiving the bill of lading from the agent, he would give him an order on the Cotton Belt Bank, who had the local bills, to turn them over to the agent, who would go and get them. This was the usage during the season pertaining to cotton in which the Carthage Bank was interested and sold to others than the McFadden Agency.

In sales to the McFadden Agency, its agent, or Ross, prepared bills of lading for the particular cotton, which the agent would sign and deliver to McFadden's men, and Ross would write a note to the Cotton Belt Bank telling them to deliver the local bills, which the agent would get on the order. Ross testified in this connection that when he delivered cotton to the McFadden Bros. Agency he gave an order to the railway agent for the local bills; that he would first give Mr. Rembert (the agent) such order on the Cotton Belt Bank, covering that particular cotton; that he would then instruct the bank that he had delivered that cotton to the agency and that the local bills were ready to be surrendered to the railway company. That is what he would do if the local bills of lading had been issued. "When the sale was to others than the agency, I would get Mr. Rembert to give me the bills of lading to shipper's order, and I would give him an order for the local bills. I would notify the bank as soon as I could walk up there with the through bills of lading." Rembert testified: "I would get a note from him to the Cotton Belt Bank to deliver me the bills of lading. The order was generally just a note to the cashier to deliver me the bills of lading, and I would present it at the bank and get them. Sometimes when I was up town, or if it was not convenient for him to come, I would go to his office, and he would give me a written order for the bills, or he would sometimes have the bills of lading there." In this connection we may

state that the agent testified that "McFadden Bros. have not shipped much over our line. I knew Mr. Vick only that one time, and one other time he came in and I signed a bill of lading. I signed two that I remember during the season." When Mr. Vick (McFadden's agent) wished to get this cotton, Ross was at Carthage, and the railway agent would not deliver it. Ross, it seems, was left in control of all cotton at Timpson in which the Carthage Bank was interested, and the railway agent did as Ross instructed in regard to shipping out the cotton, and a custom or usage had grown up by which Ross' order for the local bills was equivalent to their actual delivery to said agent, so far as the Carthage Bank was concerned.

The appellant contends that the testimony shows conclusively that this usage induced and was responsible for the delivery by its agent of this cotton to McFadden Bros. without his first taking up the local bills. The result was that McFadden's Agency got the cotton without paying plaintiff, and applied it to its claim of indebtedness against Ross. The evidence of what was done by Ross in this regard is substantially as follows:

Rembert, the station agent, testified: "Mr. Vick was there and wanted to take the cotton on the platform. I told them that I would have to have an understanding with Mr. Ross as to the bills of lading. * * * About 10 o'clock Mr. Ross called me up from Carthage and told me to go ahead and let them take the cotton and everything would be all right. I told him that * * * the bills of lading were not at the bank, and he would have to have them sent there, to be delivered to me as before, and he would have to arrange with the bank at Carthage to send them down to me before I could let the cotton be worked up, or sign bills of lading for them. He said he would arrange that, and about 12:30 he told me over the phone that he had been to the bank and made arrangements to send me the bills of lading on the afternoon train, and they would instruct the bank at Timpson to notify me. In about 20 or 30 minutes Mr. Banks telephoned me to know if I would sign the through bills for Mr. Vick and let him go out on the 2 o'clock train. I told him Ross was not there, and it was unusual and out of the way of handling this business, and that if he would guarantee to protect the road from any liability that might occur with reference to the bills of lading covering this cotton that I would sign them. He came up there and I signed them. Col. Banks asked me if there was any way to arrange it, and I asked him to tell Mr. Vick to come to the phone, and I explained to him what I wanted to do. He said: 'All right. I will guarantee that everything is all right. I will guarantee to protect you from any damage that comes up.' Mr. Ross had always given me the local bills of lading. He had always been

there, except in this case. I always found them either in the Cotton Belt Bank or in his office."

W. E. Ross testified that Vick called him up over the phone at Carthage and asked to have the cotton released, that he wanted to get off on that evening's train, and that he told Vick he would do so, and that he tried to get it released so that Vick could get off as desired, and that Vick knew it belonged to the Carthage Bank. Ross then went to the cashier of said bank to get the bank to guarantee the delivery of the bills, and the cashier said he would do so; but he wanted the money, and he told the cashier to telephone the Cotton Belt Bank at Timpson to guarantee delivery of the bills with the distinct understanding that the Carthage Bank was to get the money for that cotton. He testified, also, that he called up Mr. Rembert, the railway agent at Timpson, and told him that he had talked to the bank in Carthage, and the bank had agreed to send the bills of lading down there that evening.

The cashier of the Carthage Bank testified that W. E. Ross came to him and said he was anxious to make a delivery of the cotton that day; that the people who were going to buy were in Timpson, and he could not make a delivery without the bills. "He asked me to phone to the Cotton Belt Bank to guarantee delivery on payment for the cotton, and I told him I would do so. I called up the bank and told them they could guarantee surrender of the bills of lading for 84 bales upon payment of the proceeds—not to be less than \$2,500. Eighty-four bales was the number mentioned. I do not know what became of the 9 bales besides that. I told the bank that I would send the local bills of lading on the evening train, and I did send them down in pursuance of the conversation."

It is upon substantially the above testimony that it is contended that the railway company is not liable as a matter of law. Our opinion is that these assignments should be overruled. There would be foundation in this evidence for holding that the railway company was not liable to plaintiff if, as appellant contends, the railway delivered the cotton upon the request and order of Ross. The facts would disclose that Ross was plaintiff's representative, or was treated by plaintiff as its representative, in the matter of these through shipments, in that his orders on the Cotton Belt Bank for the local bills were the equivalent of the surrender of the local bills. Therefore if Ross had been present at Timpson, and given such order in this instance, plaintiff may have been estopped to claim that the railway was liable. The facts, however, are that Ross was not there, as had formerly been the case, and did not give an order on the Timpson Bank for the bills. According to the agent's own testimony, Ross had telephoned him that he had been to the bank at Carthage and made ar-

rangements to send him the bills of lading on the afternoon train, and that the bank at Timpson would notify him. This was a different thing from a written order on the Timpson Bank, which the agent was in the habit of presenting in order to get the bills. He recognized this, for he told Vick that it was unusual and out of the way of handling this business, and, notwithstanding the message from Ross, he refused to let Vick have the cotton except upon his guarantee. It is observed that the telephone message from Ross, which the agent testifies to, informed him that the Timpson Bank would notify him, yet he let the cotton go without even consulting that bank. It is clear that the procedure in this instance was not in accordance with the custom claimed; that the agent so regarded it, and acted in the matter, not in reliance upon the custom, nor any order of Ross, but upon the guaranty.

The above conclusion disposes also of the fourth, fifth, and sixth assignments. The court, however, did submit the issue to the jury, and there are assignments which raise the questions relating to such charges. The fourth complains of a charge which was properly refused, because it would expressly have excluded consideration of the guaranty and would have assumed that the procedure in this instance was in pursuance of a course of dealing. The same in regard to the fifth and sixth assignments.

The eighth assignment of error complains of a clause in the fourth paragraph of the court's charge, without regard to the other clauses of said paragraph. The proposition under the assignment is "that it was error for the court to limit the right of the railway company to a verdict to express authority being given to W. E. Ross to receive the cotton, when there was testimony of an implied authority." A reading of the entire paragraph shows that the court did not so limit it.

The ninth assignment is "that it was error for the court in a certain instruction to place upon defendant the burden to show that the railway's agent believed Ross had authority to make the delivery, if the jury found that Ross had authority." We have read the instruction, which is set forth in the assignment of error, and it does not deal with the burden of proof.

The tenth assignment presents a proposition that there was no evidence that the railway's agent knew that W. E. Ross had no authority to deliver the cotton in question. We overrule this, as we think the evidence would support such a finding.

The eleventh complains of the following part of the charge: "It was the duty of the defendant, as a common carrier, when it received the several shipments of cotton in controversy for delivery at Timpson, Tex., to deliver the cotton so shipped at said place to the First National Bank of Carthage, or its order, as stipulated by its bill of lading."

Appellant's proposition is that "the action was for damages on negligence, and it was error to instruct that it was the duty of the railway company to make a delivery of the cotton whether negligence or not." The language occurs in the preliminary portion of the charge, and not in that part which submitted the case for findings of the jury. The manner in which the case was submitted precludes the idea that the jury may have been misled by anything stated in the language quoted.

The twelfth is that the court erred in refusing to permit Rembert (the agent) to testify as follows: Question: "Would you have delivered the cotton in question to the Geo. H. McFadden & Bros. Agency upon the guaranty of said agency, and after what Ross said to you over the telephone, if it had not been for the previous practice pertaining to the delivery of the cotton and the handling of cotton shipped from Carthage to Timpson, Tex., by W. E. Ross?" The answer would have been: "I would not have consented to make the delivery of this cotton, except for the previous practice pertaining to the transportation and delivery of the cotton; but I signed the through bill of lading covering this cotton to McFadden Bros. Agency by reason of the guaranty made by them." In our opinion there was no error in the ruling for the reason, already indicated, that the testimony which this agent gave shows conclusively that he was not willing, at the time and under the circumstances, to deliver the cotton by reason of any practice, and did so only because of the guaranty.

The seventh assignment complains of a portion of the charge, which it set forth, upon two grounds: (1) Because it assumed a matter of fact. We find that it did not assume it. (2) "Because the charge was upon the weight of the testimony, in that it in-

structed the jury that the railway company was liable for the 93 bales of cotton, when it was a controverted fact as to whether or not more than 84 bales had been delivered to the Geo. H. McFadden & Bros. Agency." The charge did assume that the defendant railway company received the several shipments of cotton aggregating 93 bales, but it did not assume that that amount of cotton was delivered to the McFadden Agency.

Under the thirteenth, fourteenth, and fifteenth assignments appellant advances the following proposition: "The testimony showing that no objection was ever made to the previous delivery of the cotton, the court should have restricted the recovery in this case to 84 bales delivered on January 23, 1905, and as the jury returned a verdict for more than that amount the court should have granted a new trial." It was undisputed that the local bills of lading showed 93 bales received by the railway company. There was evidence that plaintiff did not get any of the 93 bales, nor the proceeds thereof. A. M. West, a witness for McFadden & Bros. Agency, testified that the last turnout by Ross to the agency exceeded 84 bales. He testified to a statement rendered the agency by the Timpson Bank, referring to the bills of lading for 93 bales. There was, we think, evidence to sustain a finding that the 93 bales included in the local bill were delivered to McFadden & Bros. Agency.

The statement of facts in the record appears from the file mark to have been filed one day too late. But ample showing has been filed here that this occurred solely through the act of the judge, who labored under misapprehension of the date upon which the time limited expired. Consequently we have considered the statement.

Judgment affirmed.

LEWIS v. HOUSTON ELECTRIC CO.

(Court of Civil Appeals of Texas. June 2, 1905.)

**CARRIERS—INJURIES TO PASSENGERS—ACTIONS
—EVIDENCE—CONTRIBUTORY NEGLIGENCE—
INTOXICATION.**

Where, in an action by a passenger, the evidence was conflicting as to whether he was intoxicated when injured, he testifying that he had not been drunk for two years prior thereto, testimony was admissible that plaintiff had been intoxicated many times previous to the injury.

On motion for rehearing. Motion overruled.
For former opinion, see 88 S. W. 489.

PLEASANTS, J. We have carefully considered appellee's motion for rehearing, and have reached the conclusion that it should be overruled.

We deemed it unnecessary to add anything to what was said in our former opinion upon the questions there discussed; but, for the guidance of the court upon another trial of the case, we shall briefly discuss the questions presented by appellant's several assignments of error which complain of the action of the trial court in admitting testimony offered by defendant in support of its plea of contributory negligence, to the effect that on many occasions previous to the occurrence in which he was injured appellant was seen under the influence of intoxicating liquor. Independent of this testimony, there was evidence sufficient to sustain a finding that appellant was, as alleged by appellee, in an intoxicated condition at the time he was injured. The evidence upon this issue was contradictory; appellant testifying in his own behalf that he had not been drunk for two or three years

before the time of his injury. There is an apparent conflict of authorities upon the question presented by these assignments, but we are of opinion that the better reasoning is in favor of the admissibility of the evidence. While it is well settled that evidence that one has frequently been in a state of intoxication is not sufficient to raise the issue of whether such person was intoxicated at a particular time, when such issue has been raised by other competent evidence, we can see no reason why testimony as to the person's habits of intemperance or of sobriety should not be admitted as corroborative evidence tending to prove or disprove the alleged fact of intoxication on the particular occasion. Such evidence would certainly have a material effect upon ordinary minds in determining the issue of intoxication on the particular occasion, and should be allowed to go to the jury. If there is no evidence raising the issue of intoxication on the particular occasion under consideration, evidence as to the habits of the person in this regard would be immaterial and therefore inadmissible. We think the cases of *Railway Co. v. Kutac*, 76 Tex. 473, 13 S. W. 327, *De Walt v. Railway Co.*, 22 Tex. Civ. App. 403, 55 S. W. 534, *Railway Co. v. Anson* (Tex. Civ. App.) 82 S. W. 785, 11 Tex. Ct. Rep. 97, and *McKerley v. Railway Co.* (Tex. Civ. App.) 85 S. W. 499, 12 Tex. Ct. Rep. 336, by analogy at least sustain this conclusion. The Supreme Court in an opinion in the last named case reported in 12 Tex. Ct. Rep. 846, while expressly declining to decide the point, recognized the distinction between the question of the admissibility of testimony of this character as corroborative evidence and its competency as evidence when standing alone.

Overruled.

BLANTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. HOMICIDE—MURDER—EVIDENCE — SUFFICIENCY.

Where the testimony of the commonwealth, if true, justified a conviction of murder, a verdict of guilty was supported by the evidence, notwithstanding the conflicting evidence of accused.

2. SAME—EVIDENCE—INSTRUCTIONS.

Where the theory of the prosecution was that accused deliberately killed his wife, and accused showed that the shooting was accidental, and there was no proof that accused handled his pistol in a careless manner, and the jury had either to find him guilty or acquit him, an instruction that if accused had reasonable grounds to believe, and believed, that there was no danger in handling the pistol as he did, and the killing resulted from the careless use of the pistol, the jury should find him guilty of involuntary manslaughter, but that, if the killing was accidental and without carelessness, he should be acquitted, sufficiently presented the theory of accused, and he was not prejudiced by the failure to charge that, if the jury entertained a doubt as to the degree of guilt, they should find him guilty of involuntary manslaughter.

3. CRIMINAL LAW—APPEAL—REVERSIBLE ERROR.

A criminal case should not be reversed for trivial or harmless errors.

Appeal from Circuit Court, Harlan County.

"Not to be officially reported."

Elijah Blanton was convicted of murder, and he appeals. Affirmed.

See 103 S. W. 329.

W. F. Hall, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. This is the second appeal of this case. Appellant was indicted, tried, and convicted for the murder of his wife, and, upon appeal to this court, the case was reversed because the trial judge failed to give an instruction embodying appellant's theory of how the killing occurred, to wit, that it was an accidental shooting. The former opinion is found in 103 S. W. 329, 31 Ky. Law Rep. 800. Upon a retrial appellant was again found guilty, and his punishment fixed, as in the former trial, at confinement for life in the penitentiary. The facts as developed in this last trial, as shown by the record before us, are practically the same as those brought out on the first trial, which are fully set out in the former opinion. Three grounds are relied upon by appellant for reversal: First, that the verdict is not supported by the evidence; second, that in the involuntary manslaughter instruction the law is not correctly stated; and, third, that the court erred in failing to instruct the jury that if they believed appellant proven guilty beyond a reasonable doubt, but entertained a doubt as to the degree of his guilt, that they should convict him of the lower degree, to wit, involuntary manslaughter.

It is the theory of the commonwealth that appellant deliberately shot and killed his wife for the purpose of getting rid of her, and in support of this theory evidence was offered which tended to show that appellant was unduly intimate with another woman, and on several occasions was caught in a compromising position with her; that he had said to and in the presence of different persons that he wanted to get rid of his wife, and would do so, even if he had to blow her head off, and other similar expressions. The pistol with which the shooting was done was furnished by this "woman in the case." On the other hand appellant introduced evidence which tended to show that it was an accident; that he stayed at the house, and waited on her after she was shot; that she stated that it was an accident, and insisted upon having him wait upon her, and care for and minister to her, from the time she was shot until she died. It was peculiarly the province of the jury to weigh the evidence, and, considering it all, decide which theory was correct. They accepted the theory of the commonwealth, and rejected the contention of appellant that it was an accident. If the testimony offered for the commonwealth was true, as they must have believed it was, the proof amply supports their finding and verdict.

The instruction complained of by appellant is as follows: "If the jury believe from the evidence that the accused had reasonable grounds to believe and did believe there was no danger in handling the pistol as he did, and that it was done without any purpose of harm upon his part, and further believe from the evidence, to the exclusion of a reasonable doubt, that the killing resulted from the careless use of the weapon, they should find him guilty of involuntary manslaughter, and fix his punishment at a fine or imprisonment in the county jail, either or both, in your discretion; but if they believe the killing was accidental, and without carelessness, he should be acquitted." This is the instruction which this court upon the former appeal said appellant was entitled to have given. It is not subject to the criticism which appellant's counsel is disposed to make of it, but expresses fairly and fully appellant's legal right under his theory of how the killing occurred. It would have been the better practice for the trial judge to have given the jury an instruction telling them that, although they believed appellant guilty beyond a reasonable doubt, yet, if they entertained a doubt as to the degree of his guilt, they should find him guilty of involuntary manslaughter, as defined by instruction No. 2; but his failure to give this instruction did not prejudice appellant's right. The jury was not misled by such failure, for there was no proof offered which tended to show that appellant handled the pistol in a careless or reckless manner, unless such can be inferred from the facts to which he testi-

sed about the manner in which the shot was fired.

A case should not be reversed for trivial, immaterial, or unprejudicial errors. Two impartial juries have tried this case, and each rejected the theory of appellant as to how the killing occurred, and accepted the theory of the commonwealth that appellant had become enamored of the charms of another woman and killed his wife in order to get her out of his way. Under the proof the jury had either to find appellant guilty, as they did, or else acquit him; and, under the evidence in this case, the failure of the court to give the instruction which it is now contended he should have given furnishes appellant no ground for reversal.

The judgment is therefore affirmed.

LEACH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. HOMICIDE — MURDER — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 518-532.]

2. WITNESSES—BIAS—EVIDENCE.

In a murder trial, a witness could have been compelled to disclose the relations between herself and decedent, though improper, or they could have been shown by other witnesses if she was not questioned, or, if questioned, had denied improper relations, for the purpose of showing her bias or interest in the result of the trial so as to enable the jury to properly estimate the weight to be given her evidence.

3. SAME.

Though a witness may not be required to answer a question that would subject him to prosecution, the fact that the answer may degrade, disgrace, or humiliate him will not excuse him.

4. SAME.

Civ. Code Prac. § 597, providing that a witness may not be impeached by evidence of particular wrongful acts, cannot be invoked to avoid disclosures touching his relations with one in whose behalf he testifies, though such disclosures may develop particular acts that may tend to degrade or disgrace the witness.

5. CRIMINAL LAW — APPEAL — INSUFFICIENT RESERVATION OF GROUND FOR REVIEW.

The trial court's action in refusing to permit witnesses to answer questions is not reviewable, unless the record shows what the testimony would have been.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2932.]

6. HOMICIDE—APPEAL—BENEFICIAL ERROR.

In a murder trial, error in submitting an issue as to accused's sanity in the absence of evidence to sustain the instruction being beneficial to accused, he cannot complain thereof on appeal.

7. SAME—RIGHT TO KILL.

One has a right to kill a burglar or thief or one who is at the time committing a felony by attempting to break into his house, and, if necessary to protect himself or family from death or bodily harm, may shoot an assailant, but one has no legal or moral right to kill an-

other merely because in the nighttime he comes upon his premises or knocks at his door.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 182, 183.]

8. SAME—BURDEN OF PROOF.

An owner, controller, or occupant of premises who kills an intruder or trespasser cannot justify his conduct because the person killed was a burglar or thief and upon the premises for a purpose of committing a felony, or attacking with evil intent persons in possession of premises, in the absence of evidence tending to establish the defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 276-278.]

9. SAME—EVIDENCE—INSUFFICIENCY.

Evidence in a murder trial held insufficient to require an instruction as to accused's right to shoot if he believed decedent was at the time attempting to break into his house or commit a felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 634.]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Thomas Leach was convicted of murder, and he appeals. Affirmed.

Bradley & Bradley, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. Under an indictment charging him with the murder of C. W. Gayle, the appellant was convicted. The jury fixed his punishment at imprisonment for life in the state penitentiary. From a judgment entered on the verdict, he prosecutes this appeal.

The deceased and appellant were close neighbors; the houses they respectively lived in not being over 100 yards apart. There are many facts testified to showing that they were good friends, and a few hours before the killing they were together engaged in social conversation and arranging or settling some business matters between them. Yet, notwithstanding the outward and general appearance of friendliness and good feeling for Gayle on the part of appellant, there is evidence that to various persons at different times within a few weeks before he killed Gayle he made threatening remarks concerning him. To one person he said, in speaking of Gayle in connection with a woman named Rebecca Clark, who was visiting at his (appellant's) house, that, "if Gayle ever put his foot on his premises while she was there, he would kill him." To another, in speaking of trouble he had with Gayle about some flour, he said: "Those Gayles are going to keep a fooling with me until I kill some of them." To yet another he said, in talking about Gayle's hog getting into his garden, that, "if the hog got back in the garden, he intended to kill the hog, and, if Gayle said anything about it, he would kill him." And to others he made remarks of a less threatening nature about deceased tending to show a hostile feeling. The homicide occurred on Monday about midnight. On the Saturday previous the Clark woman went to

Leach's house to visit her son, who had been there since the May previous, and she remained until after Gayle was shot, and was in the house with her son, Leach, and his wife when the shooting was done. About 10 o'clock on Monday night Leach said to John L. Butler, as he, Leach, and the deceased and his brother Bob Gayle were on their way home from Butler's store, where Leach and the Gayles had been transacting some business: "You tell Gayle that he has got to take that woman away from here right now." This message Butler at once delivered to Gayle. Mrs. Clark testifies that, when Leach returned to his house from Butler's store, Gayle came with him, and said to her in the presence of Leach that he had come to take her away, and would be back after her in 15 or 20 minutes or as soon as he could hitch up his buggy; that then Gayle left, and in a short time came to the front door and knocked, when Leach said, "Who is there?" three separate times, and Gayle to each request replied: "Tom, it is 'Dutch' [Gayle's nickname]. Open the door." While this conversation between Leach and Gayle was going on, the witness testifies that Mrs. Leach and herself said to Leach, who had his gun in his hand, "Don't shoot; it is 'Dutch.'" But, notwithstanding this warning and information, he fired through the door, which was closed, the shot taking effect in the body of Gayle, who was standing immediately outside on the porch. Leach's version of the affair is: That Monday afternoon Gayle took Mrs. Clark out buggy riding, and that night, on their return from Butler's store, Gayle, who was drinking, came to his house and said, "I am going to take this woman away," when he replied, "It would not do to take her away at night." To this Gayle answered, "All right," and then left, saying that he would see him in the morning. That Gayle did not with his knowledge or consent come to his house again that night. That during the night some person walked upon the front porch and scratched on the door, when the dog growled, and he heard the person say, "I'll shoot your brains out if you bite me." That he then asked three times who it was, and, not receiving any reply, fired, but did not know that it was Gayle he had shot until after he fired. Leach further testified that he had about \$40 in his house, and that the night preceding the killing of Gayle a person unknown to him put paper in the door lock so as to prevent it from locking, and he felt some uneasiness about his money. From this brief history of the case it appears that there was ample evidence from which the jury might well conclude that Leach deliberately, willfully, and without excuse or provocation shot and killed deceased. It remains to be seen whether or not the trial court committed any prejudicial errors of law.

Three alleged errors are relied on by his counsel: First, the failure of the trial court to permit witnesses to testify as to the rela-

tions that existed between the deceased and the Clark woman; second, in giving to the jury an instruction upon the subject of the insanity of the appellant; and, third, in failing to properly instruct the jury as to the right of Leach to shoot if he believed the person he shot was at the time attempting to break into his house or commit a felony.

Rebecca Clark, who was the chief witness for the commonwealth, was not inquired of concerning her immoral intimacy with the deceased, but Bassitt and other witnesses introduced in behalf of the accused were asked if they knew what the relations between Mrs. Clark and Gayle were. The court refused to permit the witnesses to answer this question. What answer the witnesses would have made the record does not disclose, as no avowal was made. It would have been competent to have inquired of Mrs. Clark what the relations had been between herself and the deceased, and she might have been required by the court to disclose them, although improper; and this fact might have been shown independent of her by other witnesses if she was not questioned on the subject, or, if questioned, had denied the immoral relations. *Morrison v. Commonwealth*, 74 S. W. 277, 24 Ky. Law Rep. 2923. It is proper to permit, and, if necessary, to require, a witness to relate his or her relations with the parties to the litigation, and in commonwealth cases, with the accused or the prosecuting witness, or the deceased if the prosecution is for homicide, for the purpose of showing his bias or prejudice or interest in the result of the trial, so as to enable the jury to place a proper estimate upon the weight that should be given to his evidence. We do not mean to be understood as declaring that a witness may be required to answer a question that would subject him to a criminal or penal prosecution, but the fact that the answer may degrade, disgrace, or humiliate a witness will not excuse him. *Underhill on Criminal Evidence*, § 248; *Greenleaf on Evidence*, § 450. This rule does not conflict with section 597 of the Civil Code of Practice, providing, among other things, that a witness may not be impeached by evidence of particular wrongful acts. *Commonwealth v. Welch*, 111 Ky. 530, 63 S. W. 984; *Britton v. Commonwealth*, 96 S. W. 556, 29 Ky. Law Rep. 857. Under the Code, as construed in these and many other cases, a party cannot impeach the testimony of a witness by evidence of specific acts, with the exception mentioned in the section, *supra*. To ask a witness questions for the purpose of impeaching his credibility or morality is one thing, and to make inquiries that will show his interest, bias, or prejudice is another, although in some respects the end sought to be accomplished by each line of interrogation is the same. The impeachment of a witness is confined to his own life and character, without respect to his interest in the case or his relations to the parties to the con-

trovery. The attack is made upon the witness as an individual independent of his interest or bias or prejudice in the case upon trial. On the other hand, the reputation of the witness for truthfulness or morality is not necessarily involved in inquiries made for the purpose of showing his feelings of kindness or hostility towards the parties or his social or family or business or other relations with them, although in instances like the matter we are considering inquiries along this line would reflect upon the character of the witness. But the purpose of the examination is not particularly to discredit the reputation of the witness for truth or morality as it is when he is sought to be impeached; and the rule that protects a witness attempted to be impeached from investigation into specific or particular acts in his life cannot be invoked to save him from disclosures touching his relations with the party in whose behalf he is testifying, although such disclosures may develop particular acts that have a tendency to degrade or disgrace the witness. As the record fails to show what answer Bassitt and other witnesses would have made to the question, the assigned error in declining to permit them to answer the question cannot be considered by this court. *Nichols v. Commonwealth*, 11 Bush, 575; *L. C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. It may be remarked, however, that other evidence reasonably sufficient to convince the jury that immoral relations did exist between the Clark woman and the deceased was heard by the jury from other witnesses, so that the accused had before the jury substantially the same evidence that his counsel in their brief say would have been made by Bassitt and others.

Several witnesses were introduced by appellant who said that for a number of years he had been subject at intervals to epileptic fits, and that while under the influence of this disease he was prostrated mentally and physically, but when he recovered from the effects of the disorder, which only continued for a few hours, he was not legally incompetent to form a criminal intent or commit a crime. But, as no evidence was introduced affecting the mental capacity of the accused at the time he killed Gayle, his counsel argue that the evidence relating to epileptic fits was offered only to show his weak condition generally, and not for the purpose of resting upon it an instruction upon the subject of insanity; and the complaint is made that the court erred to the prejudice of appellant in giving to the jury an insanity instruction. It may be conceded that the evidence introduced in behalf of appellant did not authorize the court to submit to the jury an instruction upon the subject of his mental soundness at the time of the homicide, but we are unable to perceive in what respect the giving of this instruction could have been prejudicial to the accused. It gave to him the benefit of an instruction he was not en-

titled to, under which the jury might have acquitted him. The error of the court was prejudicial to the commonwealth, rather than the accused.

It is insisted that none of the instructions given to the jury presented the defense of appellant. His counsel contend that, as he believed at the time he fired the fatal shot that the person at whom it was fired was attempting to enter his house, he had the right to shoot to prevent such entry. A man has a right to kill a burglar or thief who is at the time committing a felony by attempting to break into his house. And so he may, if necessary to protect himself or family from death or bodily harm, shoot an assailant. But a person has no legal or moral right to kill another merely because in the nighttime he comes upon his premises or even knocks on the door of his house. The owner, controller, or occupant of premises who in the night or day time shoots and kills an intruder or trespasser cannot excuse or justify his conduct upon the ground that the person killed was a burglar or thief and upon the premises for the purpose of committing a felony, or attacking with evil intent the persons in possession of the premises, in the absence of some evidence conducing to establish this defense. *Kentucky Criminal Law & Procedure*, by Roberson, §§ 155-157; *Bishop's New Criminal Law*, § 858; *Chapman v. Commonwealth*, 15 S. W. 50, 12 Ky. Law Rep. 704; *Utterback v. Commonwealth*, 105 Ky. 723, 49 S. W. 479, 88 Am. St. Rep. 328; *Baker v. Commonwealth*, 93 Ky. 302, 19 S. W. 975; *Saylor v. Commonwealth*, 97 Ky. 184, 30 S. W. 390; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *Sparks v. Commonwealth*, 89 Ky. 644, 20 S. W. 167. If there was any evidence that Gayle at the time he was shot was forcibly and wrongfully attempting to enter or break into the house of Leach, or any evidence that Leach believed or had reasonable grounds to believe that the person on his porch was a burglar in the act of entering into his house, the court should have instructed the jury upon the law applicable to this state of facts. So that the question narrows down to the proposition whether or not the evidence of Leach was sufficient to warrant the court in giving an instruction that, if the jury believed from the evidence that Leach believed and had reasonable grounds to believe that some one was trying to break into his house to commit a felony, he had the right to take the life of the intruder, if necessary, or believed by him in the exercise of a reasonable judgment to be necessary, to prevent him from committing the contemplated crime. A careful consideration of Leach's evidence convinces us that it did not authorize an instruction upon this branch of the law. Leach did not testify that he believed or had any grounds to believe that the person on his front porch was a burglar or had come to his house for the purpose of doing him or any of his family any injury, or

for the purpose of committing any offense against his property. Hence there was no evidence to warrant the court in giving the instruction counsel insist their client was entitled to. Indeed it is very questionable if, under the evidence, the appellant was entitled to the instruction given by the court, or to any instruction that would authorize the jury to find him not guilty upon the ground that the shooting was either excusable or justifiable.

After a careful consideration of the entire record and the well-prepared argument of his counsel, we find no error that would authorize us in granting a new trial.

The judgment of the lower court must be affirmed.

MILLER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence held to sufficiently corroborate the testimony of an accomplice that accused was present, and aided in the killing of decedent, to justify a conviction.

2. CRIMINAL LAW—APPEAL—VERDICT—CONCLUSIVENESS.

Under the Code, the court on appeal has no right to reverse a criminal case where there is any evidence tending to show the guilt of accused.

3. HOMICIDE — EVIDENCE — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

Where, on a trial for murder, it appeared that accused and W. and B. were jointly indicted, but there was no testimony except that of W. that B. had anything to do with the killing, and the court charged that the jury could not convict accused unless there was evidence connecting him with the commission of the homicide, an instruction that if accused and W. and B. killed decedent by the one or the other shooting decedent, "the others, or the other, being present, aiding and abetting the same," they should find accused guilty of manslaughter, was not erroneous as authorizing the jury to convict accused, though he was not present, if W. and B. killed decedent; for the quoted phrase could not have been understood by the jury as referring to B.

Appeal from Circuit Court, Ballard County.
"Not to be officially reported."

George Miller was convicted of manslaughter, and he appeals. Affirmed.

J. B. Wickliffe and H. J. Moorman, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellant, Ben Walden, and Bud Miller were indicted in the Ballard circuit court for the murder of one Frank Price by shooting him with a pistol and striking him with a pistol or other deadly weapon, one of them doing the shooting and the other striking him, but which one did the shooting and which one did the striking was unknown to the grand jury, the others then and there being present, aiding and abetting in the shooting and striking. Appellant was given a separate trial, which resulted in his conviction

for manslaughter, and his punishment fixed at two years in the penitentiary.

A reversal is asked for two reasons: First. There was not any evidence presented upon the trial to sustain the charge. Second. The court erred in instruction No. 2. The first question raised necessitates a recital of the facts of the case. The killing occurred at a picnic and dance at the home of one De Kemper, who was a merchant and farmer. His store and dwelling were under the same roof, the store in front, facing the river. The dancing pavilion was back of the building about 70 feet, an eating stand a short distance from it, and a cold drink stand, where soft drinks were sold, about 20 feet from it, and a little farther from the pavilion than the eating stand. Price was killed when about between these two stands between the hours of 10 and 11 o'clock at night. The person who killed him shot about five times, and about the time he fell he was struck over the head with a stick or some other hard substance. There were two persons making the assault. One did the shooting, and the other used the stick. The commonwealth's theory is that appellant aided and abetted the shooting, and struck deceased as he fell. Some minutes before the killing of Price, one Sam Miller, a brother of appellant, was severely cut with a knife while in the dancing pavilion, and was carried and placed upon the porch of De Kemper. It appears that it was not known who cut Sam Miller. Several persons were in attendance caring for Sam Miller when the shooting of Price occurred. Several witnesses testified that Ben Walden did the shooting, but did not know the person that struck Price, but stated that he was not George Miller. George Miller testified that he was with his brother, Sam Miller, at the time Price was killed, and there was some evidence tending to corroborate him in this. The commonwealth used Ben Walden as a witness. He testified that he did not do the shooting, that Bud Miller fired the shots and George struck Price. The testimony shows that Bud and George Miller were the only relatives of Sam at the picnic, and that Ben Walden was a hired hand on the farm where or near where they lived; that Walden was a dangerous character, and had served a term in the penitentiary for kukluxing.

The commonwealth's theory is that the defendants killed Price under the belief that he was the person who stabbed Sam Miller. There was evidence that George Miller made some threats to the effect that he would avenge the injury to his brother. There was also proof that some boy in the crowd cried out, "There he goes now," and one of the two men following Price said to the other: "Pull the trigger, and keep pulling it as long as there is a load in the gun, and I will do the rest." De Kemper testified that he was standing near the pop stand, and saw a man in his shirt sleeves, and two men following close

behind him, coming from the lot at the back of the house; that they continued in this position until they had passed across the line between the two stands, and the shooting began. He stated that the man in front was Price, but he did not recognize the two men following him, as they passed down to the place of the shooting; but, as they passed back by him, he thought he recognized one of the men as appellant. Several witnesses testified that a few minutes before the shooting Ben Walden and appellant left the porch where Sam Miller was, and their dress suited the description of the two men following Price. Ben Walden testified that one George Spears said to appellant: "Don't hit the poor fellow again. He is killed now"—and appellant answered, with an oath: "If you say any more, I will blow your brains out." Some two or three hours after Price was killed several persons were near the dead body, and at least two witnesses testified that Bill Spears stated: "This poor fellow was innocent, and had nothing to do with it, and got killed"—and appellant, in reply, said: "Well, he had no business bullying." Appellant testified in chief, and in answer to questions put by his counsel upon these two matters, as follows: "Q. Did you say anything to Bill Spears immediately after the shooting about shooting him? A. No, sir. Q. Or that you would shoot him? A. No, sir; I never made any such threats at all. Q. Did Bill Spears come to you directly after the man was shot, and say, 'Don't hit him any more'? A. He was saying something there, but he was so drunk— Q. I mean immediately after the shooting there? A. No, sir; he didn't come up then. Q. Now, then, down at the place where the corpse was some considerable time afterwards, did Bill Spears say, 'This poor fellow was innocent, and had nothing to do with it, and got killed,' and in reply to that did you say, 'Well, he had no business bullying'? A. If I said it, I don't remember it. Q. Who was with you when you was down there? A. My daddy and De Kemper, and several going and coming all the time."

Without detailing the evidence, it is sufficient to say that it is reasonably certain that Bud Miller was not present at the time Price was killed; and it is reasonably certain that Ben Walden shot Price, and that some one other than Walden struck Price about the time he fell. The question is: Was there any evidence produced upon the trial tending to show that George Miller was present at the time of the killing; that he struck Price, and aided and abetted in the killing? Walden, his accomplice, testified that appellant was present and did the striking. As the jury was not authorized to convict appellant upon the testimony of Ben Walden, unless corroborated by other evidence tending to connect the defendant with the homicide, then the further question is: Was there any evidence tending to corroborate the statements of Walden? In our opinion there

was. The fact that his brother had been a few minutes before severely wounded, and that he had made threats to avenge his brother's injuries, and the further fact that Price was pointed out to two persons following him as the assailant of his brother, and the opinion of De Kemper that appellant was one of the persons following Price immediately before the shooting, and, lastly, the manner in which he answered the questions with reference to his threats to shoot Spears when requested to not hit Price any more, and his reply to Spears when he said that Price was innocent of any wrong, and ought not to have been killed, to wit, in effect excusing the killing by saying that Price ought not to have been "bullying around"—these facts and circumstances tend to corroborate the statements of Walden, and under the Code and the repeated decisions of this court construing it this court has no right to reverse a criminal case when there is any evidence tending to show the guilt of the accused.

The only other ground presented for reversal is error in instruction No. 2, which is as follows: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that in Ballard county, and before the finding of the indictment herein, that Ben Walden, George Miller, and Bud Miller did willfully, feloniously, unlawfully, and not with previous malice in sudden heat and passion, or in sudden affray, kill and slay Frank Price, by the one or the other, the said Ben Walden or George Miller or Bud Miller shooting the said Frank Price with a deadly weapon, to wit, a pistol loaded with powder, leaden balls, or some other hard substance, or striking and wounding the said Frank Price with a pistol, a deadly weapon, so that the said Frank Price did then and there die therefrom within a few minutes thereafter, the others or the other one, being then and there present, aiding and abetting the same, then you will find defendant, George Miller, guilty of voluntary manslaughter, and will fix his punishment at confinement in the state penitentiary at not less than two nor more than twenty-one years, within the sound discretion of the jury." Counsel's criticism of the instruction is correct. It authorized the jury, considering it technically, to convict appellant even if he was not present if Ben Walden and Bud Miller assaulted and killed Price. But, considering all the instructions together and the facts proven in the case, the jury could not have been misled by this error. There was not the slightest testimony by any witness in the case, except Walden, that Bud Miller had anything to do with the assaulting and killing of Price. So the words "the others or the other one, being then and there present, aiding and abetting the same," could not have been understood by the jury as referring to Bud Miller. Therefore it left the jury to consider the instruction with reference to only George Miller and the other person who did the shooting. In addition to

this, the court, by instruction No. 5, told the jury that they could not convict appellant unless there was evidence tending to connect him with the commission of the homicide charged in the indictment. So the jury could not have understood instruction No. 2 as authorizing them to convict appellant, although he was not present, and aiding and abetting in the killing.

For these reasons, the judgment of the lower court is affirmed.

WARD, Sheriff, et al. v. HALL.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

APPEAL AND ERROR—FINDINGS—CONCLUSIVE-NESS.

Where the evidence is so conflicting as to leave the mind in doubt, and the matters testified to occurred in the presence of the court, acquainted with the parties, its findings will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by W. F. Hall against M. S. Ward, sheriff, and others, to enjoin the collection of a judgment. From a judgment for plaintiff, defendants appeal. Affirmed.

H. G. Clay, H. L. Howard, and J. B. Carter, for appellants. Greene & Van Winkle, for appellee.

CLAY, C. Appellee, W. F. Hall, was on the bail bond of James Nichols for his appearance in the Harlan circuit court at the November term, 1905. Nichols failed to appear, and a formal order of forfeiture was taken and entered. At the February term, 1906, the proceeding was on the commonwealth's docket near its close. Prior thereto summons had been served on appellee. Judgment was taken against appellee, and he thereafter instituted this action against appellant to enjoin the collection of the judgment and execution issued thereon. The chancellor gave appellee the relief asked for, and M. S. Ward, the sheriff, appeals.

According to the testimony of appellee, he was present when the case was called, but understood that it was to be passed and called again before the expiration of the term, at which time he was to be given an opportunity to make a defense. The judgment contrary to such understanding was entered without any knowledge or notice on his part. It also appears that James Nichols, whose bondsman the plaintiff was, had been arrested and returned to the Harlan circuit court and the case against him filed away by the commonwealth. The testimony for appellants shows that the case was regularly called; that the appellee was in court when it was called, and, when the commonwealth's attorney asked judgment, no objection was made by appellee. The evidence being so conflicting as to leave the mind in doubt, the

matters testified to having occurred in the presence of the court, and he being acquainted with the parties, his judgment will not be disturbed.

Judgment affirmed.

REED et al. v. FORD.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

1. DAMAGES—FRIGHT.

A cause of action will not lie in favor of a woman for pain and suffering resulting solely from fright, unaccompanied by physical injury, superinduced by one who, without seeing her or knowing of her presence, and without trespassing on her premises, assaulted a third person who occupied a room in her house; the damages being too remote and speculative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

2. SAME.

No recovery can be had for injuries resulting from mere fright caused by the negligence of another, where no immediate personal injury is received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

3. NEGLIGENCE—UNFORESEEN CONSEQUENCES.

One assaulting another, without seeing a third person, and without knowing of her presence in an adjacent room, and without being seen by her, is not guilty of negligence toward the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 12.]

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by Nettle May Reed and another against Henry Ford. From a judgment of dismissal on sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

Duff & Hutchison, for appellants. Baird & Richardson, for appellee.

SETTLE, J. Appellants complain of a judgment of the Barren circuit court sustaining a demurrer to their petition, as amended, and dismissing the action. The appeal, therefore, presents for our consideration but one question, viz.: Do the facts alleged in the petition state a cause of action?

The original petition is as follows: "The plaintiffs, Nettle May Reed and her husband, I. W. Reed, state that during the month of September, 1907, the defendant, Harry Ford, came to their house in Glasgow, Ky., during the darkness of the night, in a drunken condition, and in front of the rooms in which they resided, and in the hearing of the plaintiffs, assaulted one Jas. D. McConnell, who occupied a room near them, and then and there in a loud and boisterous manner cursed and abused said McConnell and threatened to kill him; that the defendant remained in front of this said room for a half hour or longer, and continued to curse and abuse said McConnell, and to threaten to take his life, who was perfectly defenseless and unable to resist him. The plaintiffs state that

the plaintiff Nettle May Reed was at the time pregnant with child; that she was greatly alarmed and frightened at the action of the defendant as aforesaid, so much so that she was compelled to take her bed and remain there ten days; that her nervous system was greatly shocked; that she has since been threatened with a miscarriage in consequence of the fright received by her; that she has suffered great mental agony and physical pain from said fright; and that her health has been greatly, and as they fear and believe permanently, impaired as the result of the fright aforesaid."

The following are the averments of the amended petition: "Amending their petition herein, the plaintiffs state that the assault on Jas. D. McConnell took place in the hall immediately in front of the room occupied by the plaintiffs at the time, and within three or four feet from the plaintiff Nettle May Reed; that the plaintiff Nettle May was made violently sick by the fright which she received; that she was compelled to and did take her bed for at least ten days, as the result of said fright; and they state that her health has been greatly impaired, and they fear permanently destroyed, as the result of the fright aforesaid; and they further state she sustained physical injuries in consequence of the fright aforesaid, and has been and was damaged, as set out in the original petition herein, in the sum of \$500, which injuries are and were the direct and proximate result of the fright complained of by her in said original petition."

A careful analysis of the language of the petition and amendment will demonstrate that the sole ground of recovery alleged is that injury and damage resulted to the appellant Nettle May Reed from fright superinduced by the conduct of appellee in committing an assault upon, and using in her hearing and within a few feet of her profane and abusive language toward, a third person, one Jas. D. McConnell; that the fright given her by the misconduct of appellee toward McConnell caused her great physical and mental suffering, made her ill for ten days, nearly produced a miscarriage, and perhaps permanently impaired her health. While it is alleged in the petition that appellee's assault upon and abuse of McConnell occurred in her house at night, where he had gone in a drunken condition, these facts did not necessarily make him a trespasser as to the person or premises of Mrs. Reed. It is alleged that McConnell occupied a room in the same house near hers, and not alleged that appellee did not lawfully enter the house. He may have gone there upon McConnell's invitation, or to see him on a business matter, and for some reason, whether with or without provocation, became angry with and abusive toward him after entering the house.

It will be observed that neither the original nor amended petition alleges that appellee, at the time of his assault upon or abuse

of McConnell, was seen by Mrs. Reed; that he saw her, knew she was in hearing, or in a room near him, or that she was then an occupant of a room in the house; nor does either aver that the door to the room she was occupying was open, thereby affording appellee an opportunity to discover her presence therein. It is also true that the petition does not charge that appellee assaulted the appellant Nettle May Reed, that he knew she was pregnant, or that anything said or done by him was directed to or at her. On the contrary, its only averments on that point are to the effect that McConnell, who was not a member of her family or related to her, was alone the subject of appellee's wrath and abuse. It is patent from the averments of the petition, as amended, that appellee committed no assault upon or trespass against the appellant Nettle M. Reed. The pain and suffering alleged resulted solely from fright, and were unaccompanied by any physical injury. The damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated. As said by this court in *Reed v. Maley*, 115 Ky. 816, 74 S. W. 1079, 62 L. R. A. 900, a case in which the question here involved was considered: "The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer, the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain." *Railway Company v. Elliott*, 55 Fed. 950, 5 C. C. A. 347, 20 L. R. A. 582; *Keyes v. Railway Company*, 36 Minn. 290, 30 N. W. 888; *Morse v. C. & O. Railway Company*, 117 Ky. 11, 77 S. W. 361.

It is equally certain that no right of recovery can be asserted in this case upon the ground that appellee's assault upon or abuse of McConnell, occurring at the house of the appellant Nettle M. Reed and in her hearing, constituted negligence for which he should be made to respond in damages for the alleged injury resulting to her. It seems to be well settled that no recovery can be had for injuries resulting from mere fright, caused by the negligence of another, when no immediate personal injury is received. *Thompson on Negligence*, §§ 156, 157; *Mitchell v. Rochester Railway Co.*, 151 N. Y. 107, 45 N. E. 854, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Gulf, &c., Railway Co. v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 860. Moreover, under the facts alleged, negligence can in no event be imputed to appellee in this case, or regarded as the proximate cause of appellant's injuries; for, not seeing appellant, being unseen by her, and not knowing of her presence in the adjacent room, it cannot be claimed that he could have foreseen or reasonably anticipated that any injury would probably result to her

from his assault upon or abuse of McConnell.

Being of the opinion that the petition fails to state a cause of action, the judgment sustaining the demurrer thereto is affirmed.

HARGIS et al. v. BEGLEY, Clerk of Court, et al.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. BAIL—FORFEITURE—RELIEF.

It is a defense to recovery on a bail bond that the person under bond was prevented from attending court by reason of being accidentally shot, though he was at the time out of the state on a visit.

2. JUDGMENT—VACATION AFTER TERM—"CASUALTY."

That one was accidentally shot, preventing his appearing at court, is ground for setting aside judgment on his forfeited bail, within Civ. Code Prac. § 518, empowering the court rendering a judgment to vacate it, after the term, "for unavoidable casualty or misfortune, preventing the party from appearing or defending"; "casualty" being that which happens without design or without being foreseen.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1003-1004; vol. 8, p. 7597.]

Appeal from Circuit Court, Leslie County. "To be officially reported."

Action by James Hargis and others against W. G. Begley, clerk of court, and others, for injunction. Judgment for defendants. Plaintiffs appeal. Reversed, and remanded for new trial.

Cleon K. Calvert and J. J. C. Bach, for appellants. Ira Fields, Commonwealth Atty., and Jas. H. Jeffries, for appellees.

NUNN, J. Prior to October, 1906, one Doug Hays was indicted in the Leslie circuit court, charged with a felony, and his bail fixed at \$500. Appellants, James Hargis, Ed Callahan, and S. B. Stidham, executed the usual bond for the appearance of Doug Hays at the October term of the Leslie circuit court to answer the charge. He failed to attend, and there was an order made forfeiting his bail bond, and another bench warrant issued, and his bail fixed at \$1,000, and summons was awarded against his sureties, appellants. At the February term, 1907, of the court, appellants failed to answer, and a judgment was rendered against them for the amount of the bond. This action was instituted by appellants to enjoin the collection of this judgment.

As reasons why appellants should not be compelled to pay this judgment they presented the following: That they and Doug Hays resided in Breathitt county, about 45 miles from Hyden, in Leslie county, the place where the judgment was rendered; that shortly after the bail bond was executed Doug Hays went to the state of Minnesota on a visit to his brother, who resided there; that while there Doug Hays and his brother went

on a hunting trip, and Doug Hays accidentally shot and wounded himself, and it was impossible for him to appear at the Leslie circuit court in October in fulfillment of the bond; that after he became able to travel he returned to Breathitt county and executed another bail bond for the \$1,000. It is made to appear that they failed to attend the Leslie circuit court, which began on the first Monday in February, 1907, for the reason that they did not know that there was a February term of that court; that they believed that the term began on the third Monday in March, 1907; that they relied upon the "Bradley & Gilbert Company" court calendar for the year 1907, which fixed the term for the Leslie circuit court on the third Mondays in March, June, and November; that they did not know of the change fixing the terms of the Leslie circuit court to begin in February, May, and October. They filed with their pleadings the court calendar of Bradley & Gilbert Company for the year 1907, and it substantiates their claim. The lower court concluded that, notwithstanding these alleged facts, which were not disputed, appellants had no cause of action.

Appellee's counsel contends that appellants, the sureties of Doug Hays, acted at their peril when they permitted him to leave the state to visit his brother, and it was no defense to the action to recover the amount of the bond that Hays was accidentally shot and thereby prevented from appearing at the October term of the Leslie circuit court, and refers to the cases of *Starr v. Commonwealth*, 7 Dana, 243, *Alguire v. Commonwealth*, 3 B. Mon. 349, and *Withrow v. Commonwealth*, 1 Bush, 17, and other cases of similar import, as sustaining their position. These cases are unlike the case at bar. The case in 7 Dana, 243, was one where an infant was defendant in the indictment, and he failed to appear to answer it, and the sureties on the bail bond defended upon the ground that the infant's mother had taken him out of the state and kept him away until after the bond was forfeited. The court adjudged that this defense was insufficient. The case in 3 B. Mon. 349, was where the defendant had not appeared because he was imprisoned by the state authorities in the city of Louisville, Ky. This fact was pleaded as a defense to the forfeiture of the bail bond, and was held insufficient, because it was defectively pleaded. The case in 1 Bush, 17, was one where one Catlin, who was charged with murder in Marion county, Ky., was arrested and gave bond, and then went to the state of Indiana, where he was arrested and imprisoned for the violation of the law in that state. While thus imprisoned in the state of Indiana, his bail bond was forfeited for his nonappearance in the Marion circuit court, and the court held that his enforced absence in the state of Indiana at the time the forfeiture proceeding was had was not a defense to the

forfeiture. In the last two cases referred to the defendant was prevented from attending court in compliance with the bail bond on account of wrongful acts committed by them. They were imprisoned for committing other crimes. When the sureties executed bond in the first case referred to they knew that the infant was in the charge of his mother, and when they permitted her to take him from the state they took the risk of her permitting him to return, or of his returning of his own will in spite of her objections. If it had been made to appear in those cases that the defendants had been prevented from appearing in answer to their recognizance, not on account of any wrongful act or dereliction on their part, but on account of unavoidable accident or sickness, over which they had no control, the results would have been different. See *Commonwealth v. Terry*, 2 Duv. 383; *Bonner v. Commonwealth*, 85 S. W. 1196, 27 Ky. Law Rep. 652.

The second proposition presented by appellee's counsel is that the judgment was rendered in February, 1907, and this action was not instituted to set aside the judgment until the 31st day of May of that year, and that one court had passed between the date of the judgment and the institution of this action, and the court was without power to vacate or modify it, except upon the grounds set out in section 518 of the Civil Code of Practice, which it is claimed are not presented in this proceeding. This contention of appellee's counsel is correct, except the last proposition, to the effect that appellants present no grounds for vacating or modifying the judgment under section 518, Civ. Code Prac. The seventh subdivision of that section is as follows: "For unavoidable casualty or misfortune, preventing the party from appearing or defending." Casualty is that which happens without design or without being foreseen. If Hays was "accidentally shot," it was without design on his part; and if he was prevented from appearing at the Leslie circuit court by reason thereof it would be the same as if he had become seriously ill and was thereby prevented from attending court. If Hays had been at his home in Breathitt county, and had been sick, and thereby prevented from attending the Leslie circuit court, it would not be contended that his sureties could not have successfully defended for his not appearing; and there is no reason why that defense would not avail them if his sickness had occurred to him while on a visit to his brother. It is true appellants in their pleading did not use the words "that Hays was prevented from attending the Leslie circuit court by reason of an unavoidable casualty or misfortune"; but the fact stated by them, if true, show these facts.

We are of the opinion that the lower court erred in sustaining a demurrer to appellants' pleadings. The judgment is reversed and re-

manded for trial; and if appellants' contentions are found to be true the court will set aside the judgment and render judgment according to the justice of the case, as provided in section 98, Cr. Code Prac. which is as follows: "If, before judgment is entered against the bail the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond."

HAMILTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INTENT—EVIDENCE.

The intent in malicious cutting and wounding with intent to kill is gathered, not only from accused's declarations, but from the nature and extent of the wounds, the manner of their infliction, the acts of accused, and all the attending circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 543-552.]

2. SAME—EVIDENCE—SUFFICIENCY.

On a trial for malicious cutting and wounding with intent to kill, the evidence held to show defendant guilty of assault and battery only; the facts not establishing the intent to kill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 543-552.]

Carroll, J., dissenting.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

William Hamilton was convicted of malicious cutting and wounding with intent to kill, and he appeals. Reversed and remanded for new trial.

Campbell & Campbell, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. The appellant, William Hamilton, and Will Alexander, alias Coots Eggleston, were jointly indicted for the offense of malicious cutting and wounding with intent to kill; Hamilton being charged as principal and Eggleston as accessory. Appellant was tried and convicted, and his punishment fixed at five years in the penitentiary. A new trial was refused, and he appeals.

One of the principal grounds urged for reversal is that there was no evidence of an intent to kill. For the purpose of discussing this objection, it will be necessary to give a brief review of the evidence. According to the testimony for the commonwealth, appellant and Coots Eggleston, both negroes, met the prosecuting witness, Mat McKinney, another negro, near Roy Nelson's saloon on Third street, in the city of Paducah, at about 1 o'clock p. m. They were all drinking at the time, and appellant was trying to induce McKinney, the man whom he afterwards cut, to give him a dollar. After remaining at the saloon awhile, they left and went up Third street; appellant still insisting that McKin-

ney give him a dollar. After proceeding some distance, they separated; McKinney continuing up Third street until he came to the old iron furnace, and then passing along the railroad track until he came to the grounds of the Lack Singletree Company, which he entered for the purpose of seeing a man by the name of Hickory Jones. Not finding Jones there, McKinney came out of the alley leading from the Lack Singletree Company's grounds into Third street, near where it crosses the railroad track. There he met appellant and Eggleston at a point in the alley near a pile of lumber about 60 feet from Third street. Appellant proceeded to curse McKinney and demand of him a dollar. McKinney refused to give appellant the money. Appellant and Eggleston then pulled down McKinney's pants, and placed him on the pile of lumber, after which they cut a slit in McKinney's scrotum. This cut was large enough for one of the testicles to go through, but was not such as would of itself result in death. After thus wounding McKinney, appellant and Eggleston left him. The above facts are testified to by McKinney and Eggleston on cross-examination. According to the testimony for the defendants, Hamilton was not present when the cutting was done. When he heard he was charged with the offense, he immediately went to McKinney, and inquired what he meant by saying that he had cut him. Several witnesses testified that McKinney was crazy. Whether this be true or not, it is certain that he is a sexual pervert.

The court instructed the jury both as to malicious cutting and wounding with intent to kill and assault and battery. The jury concluded that appellant intended to kill McKinney. Was there any evidence authorizing this conclusion? The intent in a case of this kind is to be gathered, not alone from the defendant's declarations, but from the nature and extent of the wounds, the manner of their infliction, the acts and conduct of the defendant, and all the circumstances of the case. It cannot be doubted that, if appellant and Eggleston had intended to kill McKinney, they could have easily done so. He was completely at their mercy. The cutting was done with great deliberation. There was nothing to prevent appellant from plunging his knife into McKinney at any other point in his body, or from making the wound where McKinney was cut so severe that death would have probably ensued. Of course, there may be numerous instances where the use of a knife resulting in a slight cut will authorize a conviction for malicious cutting and wounding with intent to kill. If a defendant strike at another and wound him but slightly, the jury may conclude that the defendant intended to kill. Even in this case, if the appellant, instead of deliberately laying McKinney on his back and cutting him, had struck at him and produced the

same wound, the jury might have concluded from the manner of the infliction of the wound that appellant intended to kill McKinney. The facts as developed by the record, however, do not furnish any evidence in support of the charge that appellant intended to kill McKinney. Instead, they strengthen the view that he did not so intend. If guilty at all, he is guilty only of a malicious prank constituting the offense of assault and battery.

For the reasons given, the judgment is reversed and cause remanded, with directions for a new trial consistent with this opinion.

CARROLL, J. (dissenting). The court holds as a matter of law that the accused did not intend by the cruel and dangerous wound inflicted on McKinney to kill him, ruling that the question of his intent to kill should be taken from the jury, and that he could only be punished for a mere assault and battery. Under the facts stated in the opinion, I cannot agree to this conclusion. In my opinion whether the accused intended or not to kill McKinney was a question for the jury to determine under appropriate instructions. The mind or heart of the accused in cases of this character, or indeed in any case, cannot be looked into to ascertain his intention in doing a particular act. Whether his intention was innocent or malicious, or the deed committed with the purpose to kill, must of necessity be ascertained from the act done and the circumstances surrounding it. That fatal wounds are not inflicted when they might be, or that the person injured does not die as a result of the wounds, does not authorize the court to say as a matter of law that the assailant did not intend to kill. When the assault is deliberately and wantonly committed with an instrument that may produce death, and the wound is of such a nature that death may result from the injury inflicted, then in my opinion the question of intent should be left to the jury. It is for them to say from all the evidence and the fair and reasonable inferences that may be deduced therefrom whether the purpose of the defendant was to commit an ordinary assault and battery or the statutory crime; and, when the acts are such that it is difficult to conclude with accuracy what the purpose of the accused was, and, depending on inferences to be drawn from them, they might constitute either a simple assault and battery or an assault with intent to kill, the finding of a properly instructed jury should not be disturbed. The doing of the act does not raise the legal presumption that it was done with the intent to kill, nor the legal presumption that it was not the intention to kill. In other words, the law will not rest either a conviction or an acquittal upon the legal presumption that the accused is guilty or innocent. The presumption that every man intends the

natural and reasonable consequences of his acts is as far as the law will go. It is for the triers of the facts to say what the intention was. To hold that a person who with a knife or other sharp instrument intentionally, deliberately and wantonly cuts the legs or arms of another, or with a hammer beats and bruises his body, is only guilty of an assault because he did not kill him when he might have done so, does not strike me as being good law. The fact that the accused does not see proper to inflict a fatal wound when he has the means and opportunity to do so does not in and of itself create any presumption of law that he did not intend to kill. If the accused had stabbed McKinney, wounding him in such a way as to imperil his life, leaving the chances of recovery against him, and if the manner of their infliction and all the circumstances surrounding it showed that he intended to kill, it would nevertheless be improper for the court to instruct the jury that he intended to kill the person assaulted. The other side of the question should be ruled in the same way.

For these reasons, I dissent.

COMMONWEALTH v. BOYD.

(Court of Appeals of Kentucky. Sept. 25, 1908.)

HOMICIDE — "SELF-DEFENSE" — EVIDENCE — INSTRUCTIONS.

Where the killing was the culmination of decedent's hostile attitude towards accused, manifested by numerous insults and threats, which, in connection with the declarations and actions of decedent at the time of the killing, were reasonably calculated to induce accused to believe that he was in imminent danger, an instruction that if accused, in the exercise of a reasonable judgment, believed and had reasonable grounds to believe, from the facts proven, that decedent, just preceding the firing of the first shot by accused, was about to make an attack on him, and that by reason thereof he, in the exercise of reasonable judgment, believed and had grounds to believe that he was in danger of loss of life or great bodily harm, and that it was necessary, or believed by him in the exercise of reasonable judgment to be necessary, to kill decedent to avert such danger, accused should be acquitted on the ground of self-defense, was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

For other definitions, see Words and Phrases, vol. 7, pp. 6402-6405; vol. 8, p. 7797.]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Robert Boyd was acquitted of murder, and the commonwealth appeals to obtain a certification of law. Opinion certified to the lower court as the law of the case.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The commonwealth prosecutes this appeal to obtain a certification of the law as to certain alleged erroneous rulings of the circuit court made upon the trial of appellee under an indictment charging him

with the murder of James Sparks. The trial resulted in a verdict and judgment of acquittal.

Numerous errors were assigned in the motion and grounds for a new trial filed in the court below, but only one of them is discussed in the brief of counsel representing the Commonwealth in this court, and, as to it, he merely expresses a doubt, frankly admitting that in other respects the record seems substantially free from prejudicial error. We therefore deem it only necessary to consider this single complaint, which is as to the refusal of the trial court to give instruction No. 3, asked by counsel for the commonwealth. That instruction reads as follows: "If you shall believe from the evidence that at the time the defendant, R. Boyd, Jr., so shot at and wounded James Sparks as to cause or hasten his death within a year and a day thereafter (if you shall believe from the evidence beyond a reasonable doubt that he did so do), he believed, and had reasonable grounds to believe, that he was then and there in danger of immediate death, or the infliction of some great bodily harm, at the hands of the said James Sparks, and that it was necessary or was believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to so shoot at and kill deceased in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant, upon the grounds of self-defense or apparent necessity therefor." This instruction properly expresses the law of self-defense, but the giving of it was unnecessary as the court on its own motion had previously given the following instruction on that aspect of the case: "Although you may believe from the evidence beyond a reasonable doubt that the defendant, Robert Boyd, Jr., did, in Laurel county, Ky., and before the finding of the indictment against him willfully shoot and wound James Sparks, so as to cause or hasten his death within a year and a day thereafter, yet if you further believe from the evidence that the defendant, in the exercise of a reasonable judgment, believed, and had reasonable grounds to believe, from all the facts and circumstances proven in this case, that said James Sparks, just preceding the firing of the first shot by the defendant, was about to make an attack upon the defendant, and that by reason thereof the defendant, in the exercise of a reasonable judgment, believed, and had grounds to believe, that he was then and there in danger of suffering loss of life or great bodily harm at the hands of said James Sparks, and that it was necessary or believed by the defendant, in the exercise of a reasonable judgment, to be necessary to so shoot at and kill said James Sparks, in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant upon the grounds of self-defense or apparent necessity therefor." This instruction, though in some respects differing in language from instruc-

tion No. 3, is substantially like it and equally correct. Indeed, in view of the peculiar nature of the facts and circumstances leading to and attending the homicide, we incline to the opinion that it was more appropriate than the one refused. The killing was but the culmination of a hostile attitude maintained by deceased for a long time toward appellant, which seemed to have manifested itself in numerous insults, threats, and demonstrations, which in connection with the declaration and actions of deceased at the time of the killing were reasonably calculated to induce appellee to believe, and have reasonable grounds to believe that he was then in imminent danger of death or great bodily harm at the hands of the deceased. The law of self-defense has time and again been stated in the opinions of this court, but without always employing the identical words. While the instruction given by the court may not precisely conform in verblage to others that have received its approval, it is in language and meaning a correct exposition of the law of self-defense, as applied to the facts of this case.

It is therefore ordered that this opinion be certified to the lower court as the law of this case.

HOWERTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 20, 1908.)

1. INDICTMENT AND INFORMATION—STATUTORY OFFENSES—SUFFICIENCY.

An indictment alleging in the language of the statute the statutory offense of carnally knowing a female under the age of 16 years is sufficient without alleging a felonious intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 292; vol. 42, Rape, § 24.]

2. SAME—CHARGING FELONY AT COMMON LAW—SUFFICIENCY.

An indictment charging a felony under the common law must charge its commission feloniously or with a felonious intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 262.]

3. SAME—STATUTORY OFFENSES—SUFFICIENCY.

An indictment charging a statutory crime, defined by the statute itself, in the language of the statute, is sufficient without using the words "feloniously" or "with felonious intent."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 263, 292.]

4. CRIMINAL LAW—CONTINUANCE—GROUNDS.

The refusal to grant accused a continuance because of illness of counsel was not erroneous where it was not made to appear by his affidavit that the two attorneys who were present and conducted his defense were not equal to the task, especially where such attorneys in fact managed the case with skill and fidelity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1320.]

5. SAME—ADMISSIONS TO PREVENT CONTINUANCE—CONCLUSIVENESS—IMPROPER ARGUMENT OF COUNSEL.

Where the prosecution admitted, to avoid a continuance, that an absent witness, if present, would testify to facts averred in the affa-

vit for a continuance, it was reversible error for the prosecuting attorney to argue that the absent witness, if present, would not make the statement shown by the affidavit.

6. SAME.

Where the prosecution admitted, to avoid a continuance, that an absent witness would, if present, testify to the facts as averred in the affidavit for a continuance, the prosecution might contradict the affidavit by other testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1346.]

7. SAME.

Prosecuting attorneys should see that justice is fairly meted out, and that accused is fairly dealt with, and it is not a part of their duty to abuse accused in the hearing of the jury.

8. RAPE—EVIDENCE—ADMISSIBILITY.

Where, on a trial for carnally knowing a female under the age of 16 years, the evidence of the age of the prosecutrix was conflicting, evidence that the monthly sickness of prosecutrix had regularly occurred for five years preceding the offense was admissible to show that prosecutrix was over 16 years of age at the time of the commission of the offense.

Appeal from Circuit Court, Crittenden County.

"To be officially reported."

Percy Howerton was convicted of carnally knowing a female under 16 years of age, and he appeals. Reversed and remanded for new trial.

J. H. & John A. Moore and R. L. Moore, for appellant. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and John L. Graynott, for the Commonwealth.

SETTLE, J. Appellant was tried in the court below under an indictment charging him with the crime of carnally knowing a female under the age of 16 years. The jury by verdict returned found him guilty, and fixed his punishment at confinement in the penitentiary 10 years. Judgment was thereupon entered in accordance with the verdict, and from that judgment this appeal is prosecuted.

Numerous grounds were filed by appellant in the court below in support of his motion for a new trial. The evidence introduced by the commonwealth conduced to prove appellant's guilt of the crime charged. It was to the effect that he repeatedly and for a period of several months had carnal knowledge of the prosecutrix, an orphan 15 years of age, who had been received by his parents from a Louisville asylum to rear and support, and that the girl was made to yield to his lust through fear superinduced by force, and threats on his part to take her life if she told of his misconduct. This testimony came from the prosecutrix alone, who was contradicted by much of the evidence introduced in appellant's behalf, which tended to show that the charge against him was devised by her as a means of enabling her to leave the home of his parents of which she had apparently tired. It is not our province to pass upon the evidence. In view of our conclusion that appellant should have another trial, we refrain from any expression of opinion as to whether

or not it was sufficient to authorize his conviction, deeming it only necessary to say that it justified the submission of the case to the jury.

It is insisted for appellant that his demurrer to the indictment should have been sustained because of its failure to allege that the crime charged was committed feloniously or with a felonious intent. The objection is without merit. The crime charged is purely statutory, and being defined by the statute, and the language of the statute followed by the indictment, an allegation of felonious intent was not essential. In respect to crimes that are felonious under the common law, the indictment, to be sufficient, must charge their commission feloniously or with a felonious intent, but the rule is different where the crime is purely statutory, and is defined by the statute itself. In such case the indictment is sufficient if it follows the language of the statute without the use of the term "feloniously" or the words "felonious intent." *Higgins v. Commonwealth*, 94 Ky. 54, 21 S. W. 231; *Commonwealth v. Lemon*, 37 S. W. 61, 18 Ky. Law Rep. 480; *Roberson's Crim. Law*, § 392.

We cannot agree with appellant that it was error for the lower court to refuse him a continuance on account of the illness and absence of one of his counsel. It was not made to appear by his affidavit that the two attorneys who were present and conducted his defense were not equal to the task. Upon the contrary, the skill and fidelity with which they managed the case throughout the trial demonstrated their ability, and that appellant was not prejudiced by the absence of the third attorney.

We concur, however, in appellant's contention that the court should not have permitted the following language from the commonwealth's attorney, viz.: "That the affidavit as to Clyde Nations and what he would swear if present were untrue, and that he did not believe they were true; but that they [meaning the commonwealth] were forced to admit the affidavit to get a trial of this case, that they did not want it worn out by continuances, and that they had to admit the affidavit to get a trial, but did not believe Nations would swear it if he were here." The affidavit in question had been admitted by the commonwealth's attorney to be read as the deposition of Nations. He had the right to contradict it by other testimony, and thereby show its falsity; but, having admitted that Nations would make the statements attributed to him by the affidavit, if present, he had no right to argue that the witness would not make the statement if present. Such declarations by the commonwealth's attorney have repeatedly been declared by this court

highly improper and prejudicial to the defendant, and because of such conduct reversals have frequently been adjudged. *Martin v. Commonwealth*, 121 Ky. 332, 89 S. W. 226; *Darrell v. Commonwealth*, 88 S. W. 1060, 28 Ky. Law Rep. 27; *Redmond v. Commonwealth*, 51 S. W. 565, 21 Ky. Law Rep. 331; *Johnson v. Commonwealth*, 61 S. W. 1005, 22 Ky. Law Rep. 1885; *Shepherd v. Commonwealth*, 119 Ky. 931, 85 S. W. 191. Other declarations of a highly inflammatory and abusive character were made by both the commonwealth and county attorney in argument to the jury, to which appellant at the time also excepted. And, while we would not reverse the judgment for the latter alone, we cannot refrain from saying that the declarations were improper, and should not have been indulged in by counsel or allowed by the court. We do not mean to say that due allowance should not be made, for the indignation counsel for the commonwealth would naturally feel in conducting a prosecution for a crime as dastardly as that here charged; but they should not forget that it is not a part of their duty to inflict abuse upon a prisoner at the bar in the hearing of the jury, but to see that justice is fairly meted out, and the defendant fairly dealt with in calling him to account for his crime.

We also think it was error for the court to exclude, as incompetent, the testimony offered by appellant tending to show that the monthly sickness of the prosecutrix had regularly occurred and existed for a period of five years preceding his alleged abuse of her. We think it was competent on the question of her age; for, if it continued more than five years before the commission of the crime, it would tend to show that she was over 16 years of age at that time. While by no means convincing, it would in view of the conflicting evidence as to her age have been a circumstance to the benefit of which appellant was entitled, as it was important for him to show that at the time of his having carnal knowledge of her, if the jury believed he did so, the prosecutrix was over 16 years of age, and therefore of sufficient age to consent.

Other alleged errors are complained of in the briefs of counsel, but, as they seem to have been inadvertently committed, were not very material, and will likely not occur on the next trial, we deem it unnecessary to consider them.

But for the two errors indicated we feel it our duty to reverse the judgment appealed from. It is therefore reversed and remanded, with directions to the lower court to grant appellant a new trial, and for further proceedings consistent with this opinion.

NUNN, J., not sitting.

COLUMBIA BLDG. LOAN & SAVINGS ASS'N'S ASSIGNEE v. GREGORY et al.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. HUSBAND AND WIFE—WIFE AS HUSBAND'S SURETY—DISCHARGE.

That a married woman might have pleaded coverture to defeat judgment on a note signed by her as her husband's surety does not prevent her from moving, under Ky. St. 1903, § 2548, providing that a surety shall be discharged under any judgment after seven years unless execution issues thereon, to quash an execution issued on a judgment obtained against both of them; the statute applying to all sureties.

2. PRINCIPAL AND SURETY—JUDGMENT AGAINST SURETY—DISCHARGE.

Judgment having gone against a principal and his surety on a debt, it is immaterial to the surety's rights under Ky. St. 1903, § 2548, providing that a surety shall be discharged from a judgment after seven years unless execution issues thereon, that the record does not show that he was only a surety in the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 324.]

3. EXECUTION—RIGHT TO QUASH.

A court, having inherent power over its own process, may quash an execution where it is issued after the time has elapsed within which it may be lawfully issued or after the judgment is satisfied, or when for any other reason it may not be enforced.

4. SAME—FORM OF REMEDY.

The proper remedy to quash process improperly issued is by motion; an audita querela having been the ancient remedy.

5. SAME—VALIDITY—PROCEDURE.

Whether property levied upon is subject to execution must be determined by action; but questions simply going to the validity of the process may be determined summarily on motion.

Appeal from Circuit Court, Jefferson County; Chancery Branch, First Division.

"To be officially reported."

Action by the Columbia Building Loan & Savings Association against E. B. Gregory and another. From a judgment quashing an execution on a judgment for plaintiff, plaintiff's assignee appeals. Affirmed.

S. Oppenheimer and A. B. Bessinger, for appellant. Gregory & McHenry, for appellees.

HOBSON, J. A judgment was rendered on February 19, 1898, in Jefferson circuit court in favor of the Columbia Building Loan & Savings Association against C. R. Gregory and E. B. Gregory. No execution was issued on the judgment until July 12, 1907. An execution having been issued, E. B. Gregory entered a motion in the court to quash the

execution upon the ground that she was only a surety in the debt for which the judgment was rendered, and that no execution had issued upon the judgment within seven years. The court sustained the motion, and the association's assignee appeals.

Section 2548, Ky. St. 1903, is as follows: "A surety shall be discharged from all liability under any judgment or decree, after the lapse of seven years without any execution issued thereon, and prosecuted in good faith for the collection thereof." The record clearly shows that E. B. Gregory received no part of the consideration, and was only the surety of her husband on the note for which the judgment was rendered. It is true that she might have pleaded her coverture, and defeated a judgment on the note; but the fact that she did not make this plea does not deprive her of the rights which any other surety would have if execution is not issued within seven years. The statute applies to all sureties, and it is not material that the record does not show that the defendant is only a surety in the debt. It is the fact of suretyship that controls in the case of a judgment, just as the fact of suretyship controls in a suit on a note, although the note does not show that the person is surety. Day v. Billingsly, 3 Bush, 157.

The court has inherent power over its own process, and may quash it where it is issued after the time has elapsed within which it may be lawfully issued, or after the judgment is satisfied, or when for any other reason it may not be enforced. Woolley v. Louisville, 118 Ky. 897, 82 S. W. 608; 1 Freeman on Judgment, § 77; Garvin v. Neal, 13 B. Mon. 256. The proper remedy, where process has been improperly issued, is by motion to quash it. An audita querela was the ancient remedy, but the practice now is to grant summary relief upon motion in cases of this sort. The case of Hauns v. Central Kentucky Asylum, 103 Ky. 562, 45 S. W. 890, involved the question whether the property levied upon was subject to levy and sale. It did not involve the validity of the process. Whether the property levied upon is subject to the execution must be determined by action; but questions which simply go to the validity of the process may be determined summarily on motion. The process here, having been issued after the time allowed by law for that purpose, was properly quashed. 17 Cyc. 1154-1156; Noe v. Conyers, 6 J. J. Marsh. 514.

Judgment affirmed.

REAVES et al. v. BAKER et al.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. EVIDENCE—HEARSAY TESTIMONY.

Testimony that testator's widow said that he excluded a daughter as a devisee was incompetent as hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

2. EXECUTORS AND ADMINISTRATORS—SALE OF LAND TO PAY DEBTS—NECESSARY PARTIES.

If testatrix devised land to a daughter for life with remainder to the daughter's minor child, both were necessary parties to an action to sell the land to pay testatrix's debts.

3. SAME—JUDGMENT—PRESUMPTION AS TO REGULARITY.

A minor remainderman having been properly represented by guardian ad litem in an action to sell land to pay testatrix's debts, as to his interest the judgment ordering a sale is presumed to have been proper, in the absence of a showing to the contrary.

4. SAME—CREDITORS' RIGHT TO SELL LAND.

A devise cannot defeat testator's creditors' right to subject the land to their claims where there are no personal assets.

5. DEEDS—EXECUTION—EVIDENCE—WEIGHT.

Evidence in an action to recover land held to disprove plaintiff's claim that their grandmother executed a deed, under which they claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 614-624.]

Appeal from Circuit Court, Ballard County.
"Not to be officially reported."

Action by John Reaves and others against W. B. Baker and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

J. B. Wickliff, for appellants. Reeves & Sharp, for appellees.

SETTLE, J. This action was brought by the appellants in the court below to recover of appellees a 160-acre tract of land lying in Ballard county, and by this appeal they seek the reversal of the judgment rendered in that court, which dismissed the action at their cost. J. F. Grice, one of the appellees, died after the rendition of the judgment, and thereafter proper orders were entered reviving the action against his heirs at law. It appears from the answer of appellees that they claim the land in question, each being in possession of a part thereof, and asserting title respectively under deeds from W. T. Reaves, to whom it was conveyed by the master commissioner of the Ballard circuit court in an action brought by C. C. Reaves, as administrator with the will annexed of Patience Fondville, deceased, former owner of the land, to obtain a decree for its sale to pay certain debts of the latter; there being, as alleged, no personal estate left by her with which to pay them. The decree was granted as prayed, and the land sold at public outcry by the commissioner to C. C. Reaves as the highest and best bidder. C. C. Reaves later assigned his bid to W. T. Reaves, who paid for the land, and, upon confirmation of the sale, it was by order of the court conveyed him by commissioner's deed as stated. On the other hand, appellants, who are the chil-

dren and only heirs at law of Margaret Reaves, deceased, wife of C. C. Reaves, claim the land under an alleged deed which they contend was made by their grandmother, Patience Fondville, whereby it was conveyed their mother, Margaret Reaves, for life, with remainder to appellants.

Appellants admit that the alleged deed thus made by their grandmother to their mother, Margaret Reaves, and her children, has been lost or destroyed, but contend that it was duly acknowledged and recorded in the office of the clerk of the Ballard county court, and that the courthouse and records of the county clerk's office, including the deed in question, were destroyed by fire in 1880. It appears from the depositions of some of the appellants and two of their witnesses that Patience Fondville was twice married; that her first husband was John Stovall, who was a widower and the father of several children at the time of her marriage to him; that her daughter Margaret was born of this marriage, and, upon growing up, became the wife of C. C. Reaves and the mother of appellants; that Patience Fondville, who seemed to have purchased the land in controversy from one Jenkins, after the death of her first husband, Stovall, was by two of appellants' witnesses heard to say that, as John Stovall had not willed land to his daughter Margaret Reaves as he had to his other children, she (Patience Fondville) intended to buy the Jenkins land and deed it to her. These two witnesses and some of the appellants testified that this intention was carried into effect. The two witnesses referred to testified that they saw in Mrs. Fondville's possession, and one of them heard read, a deed from Mrs. Fondville to Margaret, but neither these witnesses nor such of the appellants as claimed to have seen the alleged deed are distinct in the recollection as to its form or phraseology. None of them had any personal knowledge of its having been recorded, or had seen a record of it in the county clerk's office. Some of the appellants claimed to have seen the original deed in the possession of their mother, Margaret Reaves, after the death of Mrs. Fondville and some years before her own death, but were unable to say what disposition was made of it, or to account for its loss. Although Patience Fondville and her first husband, John Stovall, each left a will, neither instrument appears to have been copied into the record, nor do we find in the record any testimony as to the contents of either will. The only proof as to John Stovall having excluded his daughter from sharing in the landed estate is furnished by the incompetent testimony of one or two witnesses that Mrs. Fondville had said so. Such testimony, being hearsay, cannot be accepted to prove the contents of the will.

Some of the papers of the action brought by the administrator with the will annexed

of Patience Fondville for the sale of the 160 acres of land constitute a part of the record before us. The record of that suit shows that Mrs. Fondville left a will, but is utterly silent as to its provisions. Whether it attempted to dispose of the land in controversy we cannot discover. In the action to obtain a sale of the land, Margaret Reaves, the appellant, Sidney Reaves, her eldest child, then an infant, were made defendants. According to appellees' testimony Sidney was the only child she then had, the other appellants having been born later, but from the record in that action we might, however, infer that the will devised the land to Margaret for life with remainder to the child Sidney, and if this were the case, or the other children were then unborn, the infant Sidney Reaves was a necessary party as well as the mother, and, having been properly represented by a guardian ad litem of the court's selection, whose answer in the infant's behalf and exceptions filed to the report of sale proved its efficiency, it is not to be presumed, in the absence of a showing to the contrary, that the judgment was erroneous. Whatever may have been the interest of the mother and child in the land under the will of Mrs. Fondville, the devise could not take effect so as to deprive the creditors of the testator the right to subject the land to the payment of their debts, as there were no personal assets to apply to their liquidation. The evidence furnished by the depositions taken in behalf of appellees presents many facts and circumstances strongly tending to overthrow appellants' claim as to the execution and delivery of the alleged deed upon which they rely. For example, it is difficult for a reflecting mind to understand why appellants, or some of them, upon first setting up claim to the land in controversy, which was before suit was brought, did so upon the ground that they were entitled to it under the will of Patience Fondville instead of under the alleged deed. (2) It is incredible that their father, C. C. Reaves, administrator with the will annexed to Patience Fondville, and plaintiff in the action brought to obtain a sale of the land, should have ignored the existence of a deed, conveying his wife a life estate and his children a vested remainder therein, the production and setting up of which by her would have prevented the sale. It is not less incredible that Margaret Reaves, mother of appellants, and a defendant duly summoned in that action, with knowledge of the existence of the alleged deed from her mother to herself and children, and then having it in her possession, should have failed to make defense by setting up her deed and claiming the land under it; and equally strange that from 1877, the year of the institution of the action, down to the date of her death in 1898, she was never heard to complain of the loss of the land or intimate that she had, or there had ever existed, a deed conveying it to her or her children.

These facts and circumstances, together with the apparent regularity of the proceedings in the former action to obtain the sale of the land, doubtless had great weight with the circuit judge, and caused him to discredit appellants' contention as to the execution and delivery of the deed.

Moreover, we must give weight to his acquaintance with the parties to the action and the witnesses introduced by them. This we have done, and upon the whole case can find no sufficient reason for disturbing the judgment, which is therefore affirmed.

WILLIAMS v. MURPHY.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

BOUNDARIES—ACQUIESCENCE—EVIDENCE.

An owner of a tract which included lands on both sides of a stream conveyed the land on one side thereof to a designated point beyond the head of the stream. A claimant under the grantee showed that the boundary line began at the designated point, and extended in a straight line to the head of the stream, and thence down the stream, that such line was established 30 years before, and that his predecessors in title had stated that they bought to such line and claimed to it while they owned the land, and that the owner of the adjacent land only claimed to such line. *Held*, that the court properly adjudged such line to be the true boundary line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184-194.]

Appeal from Circuit Court, Johnson County.

"Not to be officially reported."

Action between Thomas N. Williams and James C. Murphy. From a judgment for the latter, the former appeals. Affirmed.

C. B. Wheeler, for appellant. Vaughn, Howes & Howes, for appellee.

NUNN, J. One E. S. Turner prior to the year 1871 owned a tract of land in Leslie county, on Toms creek, including the land on both sides of "Bear Tree Branch," which flows into Toms creek. During the year 1871 he conveyed to his sister, Mrs. Stambough, the land on the east side of Bear Tree Branch for the consideration of something over \$1,200. She conveyed it to her sons. They conveyed it to one Daniels, and Daniels conveyed it to appellee. Some time after the year 1871 E. S. Turner conveyed the balance of the survey, which is on the west side of Bear Tree Branch, to one Smith Powers. He conveyed it to one Stafford, and Stafford conveyed it to appellant.

The issue between the parties to this action is as to the division line between their tracts of land. Appellant concedes that, as E. S. Turner conveyed to appellee's vendor first, he cannot go beyond the true line of appellee. The cause of the dispute is that Bear Tree Branch does not extend the full length of the division line. Their deeds call for top of the ridge, and Bear Tree Branch falls short of that point 200 or 300 yards.

Appellee contends that the true line from the head of Bear Tree Branch is a straight line from a beach and maple at that point to the top of the ridge to what is known as "High Knob." Appellant claims that the true line of appellee is farther east of the point named, which would include on his side of the line the timber trees which he cut, and for which alleged trespass this action was instituted. Each party had surveys made under their directions, and without any particular reference to their title papers, and for this reason the reports of the surveyor and the plats filed by him are of but little aid in arriving at the true line between the parties. Appellee proved by several witnesses that the line claimed by him began at a point on "High Knob," thence a straight line to the head of Bear Tree Branch; thence down Bear Tree Branch to the point where it flows into Toms creek, and was established 30 or more years ago; also, that Smith Powers and Stafford, through whom appellee's title came, had repeatedly stated that they bought to this line and only claimed to it while they owned the land. Appellee also proved by one or two witnesses that appellant up to within a short time before he cut the timber referred to only claimed to this line. Therefore we are of the opinion that the lower court did not err in adjudging this to be the true line between the parties.

For these reasons, the judgment of the lower court is affirmed.

JAMES, Auditor of Public Accounts, v. CROMWELL.

(Court of Appeals of Kentucky. Sept. 30, 1908.)
STATES—LEGISLATIVE EXPENSES—CONSTITUTIONAL PROVISIONS.

Const. § 249, provides that the Senate shall not employ or pay for exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant at arms, one doorkeeper, one janitor, one cloakroom keeper, and three pages. Ky. St. 1903, § 342, provides for the payment of the contingent expenses of the General Assembly on vouchers countersigned by the clerks of the respective houses. *Held* that, since the Constitution is a limitation on the right of the senate to hire employes, one employed by the chief clerk of the Senate to copy bills is not, on the production of a voucher countersigned by the chief clerk, entitled to payment out of the state treasury as a contingent expense, though the services rendered were necessary.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Mandamus by Emma Guy Cromwell against F. P. James, Auditor of Public Accounts, to compel the latter to issue a warrant on the State Treasurer. From a judgment awarding the writ, defendant appeals. Reversed and remanded, with instructions.

James Breathitt, Atty. Gen., and John F. Lockett, First Asst. Atty. Gen., for appellant. James T. Buford and Wm. Cromwell, for appellee.

LASSING, J. Appellee filed her suit in the Franklin circuit court, in which she alleged that during the 1908 session of the Legislature, at the instance and request of the chief clerk of the Senate, she performed services in copying bills, resolutions, and other papers necessary to be done as a contingent expense of the Senate, and which work it was impossible for the clerks of the Senate to do; that these services on her part were reasonably worth \$314.75; that the chief clerk of the Senate indorsed and countersigned her said claim for services as correct, and she thereafter presented same to the Auditor of Public Accounts, and requested that he issue his warrant on the Treasurer, directing him to pay same; that the said Auditor refused to issue his warrant for said sum or any part thereof. She asked that a mandamus be issued directing the Auditor to issue his warrant on the Treasurer for the payment of said claim. To this petition the Auditor of Public Accounts filed a general demurrer, and pending same filed his answer, in which he denied that the work which appellee alleged she had done was such as could be properly charged to the contingent expense of the Senate, under section 342, Ky. St. 1903, and denied the right and authority of the chief clerk to make such employment, or to indorse and countersign her said account, and pleaded affirmatively that the plaintiff was not employed by the joint action of the two houses of the General Assembly, and denied that the right existed in any one to employ plaintiff without such action on the part of the General Assembly. To this answer plaintiff filed a general demurrer, and pending same filed as part of her petition the certificate of William Cromwell, chief clerk of the Senate, to the effect that the itemized account of plaintiff, amounting to \$314.75, was just and correct as a contingent expense of the Senate. The court thereupon overruled the demurrer to the petition as amended, and sustained the demurrer to the answer, with leave to amend, and, the Auditor declining to amend, a judgment was entered directing him to draw his warrant upon the State Treasurer in favor of plaintiff for the amount of her claim, to wit, \$314.75. From this judgment the Auditor prosecutes an appeal.

For appellee it is admitted that the only authority for allowing this claim is that given by section 342, Ky. St. 1903, which is as follows: "The pay and mileage of the Lieutenant Governor, President pro tem of the Senate, and Speaker of the House of Representatives, and members of both houses of the General Assembly, the compensation to the officers of the two houses, except the chief clerks thereof, to be made on the certificate of the respective clerks of the amount due; the compensation of the chief clerks upon the order of each house, stating the amount due; all other contingent expenses of the General Assembly, upon the production

of the vouchers, counter-signed by the clerks of the respective houses." Section 249 of the Constitution provides: "The House of Representatives of the General Assembly shall not elect, appoint, employ, or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant at arms, one doorkeeper, one janitor, two cloakroom keepers, and four pages; and the Senate shall not elect, appoint, employ, or pay for, exceeding one chief clerk, one assistant clerk, one enrolling clerk, one sergeant at arms, one doorkeeper, one janitor, one cloakroom keeper, and three pages; and the General Assembly shall provide by general law for fixing the per diem or salary of all of said employes." This section of the Constitution is clearly a limitation upon the right or power of either the House or Senate to hire officers and employes. It was evidently passed for the purpose of preventing either body from creating needless offices at the expense of the state. The case of Walker v. Coulter, Auditor, 113 Ky. 814, 68 S. W. 1108, is very like the case at bar. In that case Walker was employed as a porter in the Senate at \$2.50 per day for 71 days. His employment covered the entire time that the Legislature was in session; whereas, in the case at bar the time during which appellee rendered services extended throughout the full legislative session. A distinction is attempted to be made between the two cases, in this: that in the case of the porter an attempt was made to charge the state for a fixed price per day during the legislative session, whereas, in the case at bar appellee has presented a claim for the sum which she says her services during the legislative session were reasonably worth. It is a distinction without a difference. The one is no more contingent than the other. It is evident that the makers of the Constitution intended that all the work of the legislative bodies should be performed by the officers and employes as defined by section 249, above referred to. And it may be presumed that in designating the names and numbers of such employes the Constitutional Convention was fully advised; for, in addition to having among its members men of broad experience in the conduct of the affairs of both House and Senate, it had access to the public records showing the number of employes that had theretofore been required. That they did so is made manifest by their express declaration that neither body should pay for the services of any employe other than those designated in section 249. It could hardly be contended that the chief clerk had authority to do that which the Senate itself is expressly prohibited from doing.

It is urged that work of the character which was performed by appellee was absolutely necessary in order that the business of the Senate might be expeditiously carried on. This argument would address itself most forcibly to the Legislature as a reason why

the Constitution should be amended so as to give to the respective legislative bodies more employes than those designated in section 249, if it should be found necessary to have such employes in order to properly conduct its business. Such an argument, however, has no place, and cannot be considered, here. Again, it is urged that these services should be paid for as a contingent expense of the Senate. We cannot agree with learned counsel that an employment of this character could be paid for as a contingent expense; for, if one copyist could be so employed and paid, the number could be multiplied ad libitum, and the very purpose and aim of the constitutional provision defeated. Counsel for appellee rely upon the case of McDonald v. Norman, Auditor, 95 Ky. 593, 28 S. W. 808, to support her contention, but in so doing they evidently overlooked the fact that in the more recent case of Walker v. Coulter, Auditor, this court said, in referring to the McDonald case: "That case can, therefore, not be considered authority upon the construction of this clause of the Constitution (section 249), and in the light of this clause was incorrectly decided, and would doubtless not have been so decided had the attention of the court been called to the constitutional provision." Again, on June 11, 1893, section 1992 of the Kentucky Statutes was enacted, which provides: "No other employes shall be elected, appointed, employed, or paid for, without the joint action of both houses." So that, even if it should become necessary for either house to have the services of additional employes, before they could be legally employed, a joint resolution to that effect would have to be passed, if section 1992 is constitutional, which is not now decided. With the case of McDonald v. Norman, Auditor, practically overruled in Walker v. Coulter, Auditor, and section 249 of the Constitution prohibiting the Senate from giving to appellee the employment for which she seeks compensation, we are of opinion that the trial court erred in overruling the demurrer to the petition, as amended.

The case is therefore reversed and remanded, with instructions to sustain the demurrer to the petition, as amended.

MITCHELL v. ODEWALT'S EX'R.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—EXCEPTIONS.

Though regularly exceptions should be filed to a report of sale, as a basis for motion to set aside the sale, yet, the affidavit in support of the motion being capable of being treated as an exception to the sale, there was no substantial error in the trial court so treating it.

2. EXECUTORS AND ADMINISTRATORS—SALE FOR DEBTS—SETTING ASIDE SALE.

Refusal to confirm, and setting aside, a sale, under an order, in a suit by a creditor to settle testator's estate, is proper, all the property, consisting of a small tract of land left to the widow, and occupied by her and the minor chil-

dren, being sold for less than testator's debts, and the widow, who obtained her means for buying subsequent to the sale, offering to pay enough to cover all debts and costs, and the home thus being saved for the widow and children; the rule as to setting aside a judicial sale for inadequacy of price not applying where a homestead or a home for infants is involved.

Appeal from Circuit Court, Green County.
"Not to be officially reported."

In a suit by a creditor to settle the estate of Jacob Odewalt, deceased, a sale was made to R. D. Mitchell, which the court refused to confirm, and set aside, and he appeals; Odewalt's executor being the appellee. Affirmed.

Noble & Graham, for appellant. J. A. Skaggs and Skaggs & Mills, for appellee.

HOBSON, J. Jacob Odewalt died a resident of Green county, leaving a will by which he devised his whole estate to his wife, subject to the payment of his debts and \$1 to each of his children. The widow qualified as executrix, the personal estate proved of little value, the insurance on his life was uncollectible, and the real estate was practically all that was available for the payment of his debts. This consisted of three acres of land on which he resided with his family. It was incumbered with lien debts amounting to about \$1,200, and there were about \$300 of unsecured debts. One of the creditors brought a suit to settle the estate, the debts were proved up, and an order was entered for the sale of the land. The sale was had. R. D. Mitchell became the purchaser for the sum of \$1,460. The sale was reported to the court. The widow, before it was confirmed, moved the court to set aside the sale, and offered to pay into court \$1,600, the amount necessary to pay all the debts and cost. Affidavits were filed on the motion; and, it appearing that the widow had paid all the debts and the cost of the action, the court refused to confirm the sale and entered an order setting it aside. From this judgment Mitchell appeals.

Regularly exceptions should have been filed to the report of sale, but the affidavit of the widow which was filed may be treated as her exception to the sale; and, the court having so treated it, there was no substantial error in the proceedings in this regard. The purpose of the proceeding was to secure the payment of the debts of the decedent; and the law requires this to be done by a proceeding in equity that the rights of his widow and heirs at law may be protected as far as possible. The chancellor's aim in all such cases is to secure the creditors without sacrifice of the rights of heirs and devisees, if this can be done. If the sale had been confirmed, a large part of the unsecured creditors would have lost their debts, and the widow and children would have lost their home. The unsecured creditors could not well buy at the sale because their debts were not large enough to justify them in so doing. The widow could not buy because she

had not yet gotten her pension. The chancellor will not in every case accept an advanced bid and set aside a sale, but he will do so upon slight circumstances when equity demands it. In view of the fact that by setting aside the sale he secured the debts of all the creditors and the costs of the action, and saved the home for the widow and children, and in view of her condition, the price the land brought, its value, and the situation of the creditors, he properly refused to confirm the sale, and set it aside. The chancellor will carefully protect the rights of the widow and the fatherless; and, where a homestead is involved or the home of infants will be taken from them, the rule ordinarily obtaining as to setting aside judicial sales for inadequacy of price does not apply.

Judgment affirmed.

COMMONWEALTH v. CINCINNATI, N. O. & T. P. R. CO.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. NUISANCE—CRIMINAL RESPONSIBILITY—INDICTMENT—SUFFICIENCY.

An indictment which charged defendant with conveying to its premises and permitting to assemble there large numbers of persons, who engaged in dancing, drinking, swearing, making loud noises, and otherwise misbehaving, and which alleged that such premises were on a public highway located in a village, near to divers dwelling houses of various persons and near the highway, and that the acts disturbed the peace and pleasure of persons residing in the village near the highway, sufficiently alleged that the acts took place within the sight or hearing of those passing the premises or living in the vicinity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 208.]

2. SAME — ACTS CONSTITUTING NUISANCE — "COMMON NUISANCE."

Dancing and drinking, accompanied by swearing, drunkenness, making loud noises, and otherwise misbehaving, constitute a "common nuisance," indictable as a public offense.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6. pp. 5799-5804.]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

The Cincinnati, New Orleans & Texas Pacific Railroad Company was indicted for maintaining a nuisance. From a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Reversed and remanded.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. N. L. Bronaugh, for appellee.

CLAY, C. The grand jury of Jessamine county, Ky., at the June term, 1907, of the Jessamine circuit court, returned the following indictment: "The grand jury of Jessamine county, in the name and by the authority of the commonwealth of Kentucky, accuse the Cincinnati, New Orleans & Texas Pacific Railroad Company of the offense of suffering

a nuisance, committed as follows, viz.: That said Cincinnati, New Orleans & Texas Pacific Railroad Company on the 5th day of June, 1907, in the county aforesaid, and on divers other days and times before the finding of this indictment, it, the said Cincinnati, New Orleans & Texas Pacific Railroad Company, being then the owner, occupying, and having control of a certain tract of land lying and being situate in and at a point in said county, known as 'High Bridge,' said tract of land being known as the 'Palisade' and right of way of said railroad company, did unlawfully and willfully suffer and permit divers persons, men as well as women, there to be and remain on said land, and cause same to be brought upon said lands, and there to be and remain and congregate in large numbers upon and about said premises on Sunday, and engage in dancing, drinking, tippling, cursing, swearing, being drunk, making loud noises, and otherwise misbehaving, the said ground being on and near a public highway, commonly known as the 'Shaker Ferry Road,' it, the said road, being then a public highway, it, the said grounds, being located in and near to a village known as 'High Bridge,' and at and near to divers dwelling houses of various persons residing in said village, and on and near said highway, thereby disturbing the peace, happiness, comfort, and pleasure of persons residing in said village, and at, on, and near said highway, to the common nuisance of all the citizens of the commonwealth of Kentucky, and especially those residing in said neighborhood and living in said village and along said highway, and passing and repassing along said highway; it, the said Cincinnati, New Orleans & Texas Pacific Railroad Company, being then a corporation duly incorporated under the laws of the state of Kentucky and some other state of the United States of America, the exact state being unknown to this grand jury, and owning and operating a railroad in and through said county, and owning lands and rights of way in and through the said village of High Bridge—against the peace and dignity of the commonwealth of Kentucky." The trial court sustained a demurrer to the indictment, and the commonwealth appeals.

Counsel for appellee insists that the allegations of the indictment are not sufficient, in that the acts complained of are not alleged to have taken place within the sight or hearing of those passing or repassing appellee's premises, or living in the vicinity thereof. In this connection we are cited to authority holding that an allegation in an indictment that certain facts were to the common nuisance of all good citizens of the state will not make it a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact. Wharton's Am. Crim. Law (4th Ed.) § 2362. Perhaps there would be some merit in counsel's contention, if the acts complained of were unaccompanied by any

other allegation than that they were to the common nuisance of all good citizens of the state, etc. The indictment under consideration, however, not only charged the appellee with conveying to its premises and permitting to assemble there large numbers of persons, who engaged in dancing, drinking, tippling, swearing, being drunk, making loud noises, and otherwise misbehaving, but also charged that the grounds were "on and near a public highway, commonly known as the 'Shaker Ferry Road,' * * * and being located in and near to a village known as 'High Bridge,' and at and near to divers dwelling houses of various persons residing in said village, and on and near said highway." It further charged that the acts complained of disturbed the "peace, happiness, comfort, and pleasure of persons residing in said village, and at, on, and near said highway." We think the latter allegation sufficient to overcome the failure to allege that the acts were committed in the presence or hearing of the various persons residing in or near said village.

While it is true that dancing is frequently an innocent amusement, and drinking may be engaged in without becoming a nuisance, yet if the dancing and drinking are accompanied by swearing and being drunk, making loud noises, and otherwise misbehaving, there can be no doubt that such acts will constitute a nuisance. In the case of *Rex v. Moore*, B. & Ad. 184, the defendant kept an inclosed lot near a highway for the purpose of allowing persons to practice at rifle shooting, by shooting at marks and at pigeons, and as a consequence large numbers of people frequented the place for those purposes, many of whom were idle and disorderly persons, armed with firearms, and by their noise and conduct disturbed the king's subjects and put them in peril. It was held that he was chargeable for a nuisance. In the case of *Inchbald v. Robinson*, L. R. 4 Ch. 338, it was held that a noise made by a disorderly crowd at a place of public amusement may be a nuisance. In 21 Am. & Eng. Ency. of Law, p. 698, it is said: "The noise arising from the exercise of lawful amusement may be a nuisance when it materially interferes with the comfort of those in the vicinity." And this court, in the case of *Jung Brewing Co. v. Commonwealth*, 96 S. W. 595, 29 Ky. Law Rep. 939, held that a corporation, though having a license to sell whisky by wholesale, or even by retail, in a small town, has no right to allow the assembling around its premises of noisy, drunken, boisterous crowds, whose insolence and profanity make the use of the highway in the neighborhood always unpleasant and sometimes dangerous, and may be indicted for maintaining a public nuisance on its premises. In our opinion, the indictment herein sufficiently states a public offense, and the trial court erred in sustaining a demurrer thereto.

For the reasons given, the judgment is re-

versed, and cause remanded, with directions to overrule appellee's demurrer to the indictment.

SMITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1908.)

1. LARCENY—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of horse stealing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164-169.]

2. SAME—QUESTION FOR JURY.

In a trial for horse stealing, held a question for the jury whether accused's hiring of the horses was a pretence for the fraudulent purpose of converting them to his own use, or a hiring in good faith, with intent to return them to the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 180.]

3. SAME — FACTS CONSTITUTING LARCENY — "HORSE STEALING."

If accused acquired possession of horses under a false and fraudulent pretense of hiring them, and with a felonious intent to convert them to his own use and to deprive the owner permanently of them, he was guilty of horse stealing within Ky. St. 1903, § 1195, without proof of a subsequent sale or other wrongful disposition by accused; but, if he hired the horses in good faith and was prevented from returning them by the owner's act in having him arrested, he was not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 184.]

4. CRIMINAL LAW—ACCUSED'S SANITY—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that accused was insane at the time of his conviction of larceny.

5. SAME—EVIDENCE.

An opinion as to accused's insanity is entitled to little weight where the witnesses are not experts, and do not testify to acts showing insanity.

Appeal from Circuit Court, Hardin County.
"To be officially reported."

Charles Smith was convicted of larceny, and he appeals. Affirmed.

Irwin & Irwin, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth.

SETTLE, J. By the verdict of a jury and judgment of the Hardin circuit court, appellant, following the return of an indictment against him for horse stealing, was convicted of that crime, and his punishment fixed at confinement in the penitentiary for a term of three years. He insists that the judgment of conviction should be reversed because (1) the verdict of the jury was contrary to law, and without support from the evidence; (2) that the court failed to properly instruct the jury, and should have peremptorily instructed them to find him not guilty; (3) that he did not receive a fair trial owing to his unsoundness of mind and consequent inability to understand the nature of the crime charged against him, or to inform his counsel of the facts upon which his defense should have

been predicated, and was without money to procure the attendance of witnesses or otherwise prepare for trial.

The salient facts furnished by the bill of evidence are, in substance, that appellant went to the livery stable of Harve Bland, at Glendale, Hardin county, and, representing himself to be in the employ of the Cumberland Telephone Company, hired of Bland a pair of horses with which to drive to Munfordville, 30 miles distant, for the purpose, as he said, of counting the poles supporting the wires of the telephone company between Glendale and Munfordville. Appellant agreed with Bland to pay for the use of the buggy and horses at the rate of \$3 per day, and return them on the following day. Upon these terms, he received the buggy and horses, and, leaving Glendale in the morning, reached Munfordville late in the afternoon of the same day. On the way he stopped at the village of Bonnieville at noon, and there got a meal for himself, but did not have the horses fed. Some hours after appellant's departure from Glendale, Bland learned that he did not pay his hotel bill at Glendale or for the noon meal he took at Bonnieville, and also ascertained from the manager of the telephone company owning the line in operation between Glendale and Munfordville that it belonged to the Home, and not the Cumberland Telephone Company, and, furthermore, that the manager was unacquainted with the appellant, and knew nothing of the alleged mission upon which he had gone to Munfordville. The foregoing facts excited the fears of Bland as to the safety of his buggy and horses, and led him to believe appellant an impostor, so he telephoned the sheriff of Hart county, at Munfordville, and directed him to arrest appellant upon his arrival there, which that officer did, at the same time taking in charge the buggy and horses. On the same day the property mentioned was delivered to Bland and appellant taken by rail to Elizabethtown and placed in jail, where he remained until indicted and tried.

It was admitted by appellant on the trial that he did not pay his hotel bill at Glendale, or for the meal at Bonnieville, but affirmed that he expected to pay both and for the hire of the buggy and horses upon his return to Glendale, and also admitted by him that he had no money when he left Glendale or upon reaching Munfordville. Indeed, the latter fact was established by the testimony of the sheriff of Hart county, who searched the person of appellant immediately following his arrest. Appellant further admitted that he did not count the telephone poles on the way to Munfordville, but claimed it was his purpose to do so in returning from that place to Glendale. On appellant's trial it was proved by the commonwealth that the telephone line, the poles of which appellant claimed to have been employed to count, belonged to the Home, and not the Cumberland Telephone Company, and the manager of

agent of the Home Telephone Company residing in Hardin county and its agent at Munfordville testified that the former was charged with the duty of keeping the poles and wires of the Home Telephone Company between Elizabethtown and Munfordville in repair, and neither knew appellant or of his alleged employment to count the telephone poles.

Although at the time of hiring the buggy and horses of Bland appellant represented that he had been employed by the Cumberland Telephone Company to count the telephone poles between Glendale and Munfordville, he declared upon his trial that he had been employed to do that work by one West, of Louisville, an agent of the Home Telephone Company under whom he claimed to have worked three months in Louisville before going to Glendale. He was, however, unable to state upon cross-examination the first name or initials of West, or what position he held in the service of the Home Telephone Company. Appellant was also unable to give the location of West's place of business, except to say that it was in the second story of a house somewhere on Chestnut street in the city of Louisville. No effort was made by appellant before trial to procure the attendance of any witness of the name of West, nor was there until his trial began any intimation from appellant that West had employed him to count the telephone poles between Glendale and Munfordville. The two telephone agents introduced by the commonwealth did not know and had never heard of West or of his connection with the Home or Cumberland Telephone Companies. The commonwealth introduced a witness who met appellant in the public road about three-quarters of a mile from Munfordville. According to the testimony of this witness, appellant asked him how far it was to Munfordville, whether there were any horse buyers in the town and their names, and how far it was from Munfordville to Rowlett's Station, from Rowlett's to Horse Cave, and from the latter place to Cave City. The places named are all situated upon the Louisville & Nashville Railroad in the order named, and that railroad is the one upon which appellant would travel in going from Munfordville to Tennessee, of which state he claimed to be a resident.

In view of the foregoing facts, we are unable to sustain appellant's contention that there was no evidence to support the verdict of the jury declaring him guilty of the crime charged. Obviously there was not such an absence of evidence as would have authorized a peremptory instruction, and it was for the jury to determine whether the hiring of the horses by appellant was a pretense and for the fraudulent and felonious purpose of converting them to his own use, or a hiring in good faith with the intent to return them to the owner. Section 1195, Ky. St. 1903, provides: "If any person shall steal a

horse, mare, jack, or jennet, he shall be confined in the penitentiary not less than two, nor more than ten years." If appellant got possession of Bland's horses under the false and fraudulent pretense of hiring them, but without intention of returning them to the owner, and with the felonious intention of converting them to his own use and depriving the owner permanently of them, this constitutes horse stealing in the meaning of the statute. And, if the possession of the horses was obtained by appellant as we have indicated, the mere removal of them by appellant from the owner's custody amounted to a conversion of them to his (appellant's) own use without proof of a subsequent sale or other wrongful disposition of them by him. On the other hand, if appellant hired the horses in good faith with the intention of returning them, and was prevented from doing so by the act of Bland in having him arrested, he was not guilty of the crime charged. The doctrine in question is thus stated in Roberson's Criminal Law, § 417: "But if a person with the intent to steal, obtains the actual possession of property, though by delivery of the owner, or an agent authorized to transfer the ownership therein, and the latter intends to part with the possession only, and not the right of property, the taking in this manner in pursuance of the felonious intent will constitute larceny. Thus, where one with the felonious intent to convert to his own use, borrows or hires a horse or carriage or obtains the possession of any other chattel under pretense of a loan, or receives an article of clothing to be delivered to another or a sum of money with which to pay a bill for the other, he commits larceny. In such cases even proof of a subsequent sale or conversion is not necessary." Roberson's Criminal Law, § 418; *Alexander v. Commonwealth*, 20 S. W. 254, 14 Ky. Law Rep. 290. Careful examination of the instructions given by the trial court convinces us that they substantially conform to the law as herein announced, and we have been unable to discover that any feature of the law applicable to the facts of the case was omitted from the instructions. Consequently the jury were not improperly instructed.

We do not think appellant should have been granted a new trial upon the ground that he is and was at the time of his conviction of unsound mind. The several affidavits filed in support of this ground are by no means convincing. None of the affiants knew appellant before his arrest. Consequently they are unacquainted with his past life or family history. Without being experts or testifying as to acts showing unsoundness of mind, they merely express the opinion that such was and is his condition. Such testimony is of little weight. If, as stated in the affidavit of one of his counsel, appellant's condition of mind during the trial was such as to prevent his giving assistance to counsel in the preparation of his defense,

that fact was known to counsel at the time of and during the trial, yet insanity or imbecility of mind was not relied on as a defense, nor was it then brought to the attention of the trial court, or a continuance asked in order to procure evidence to sustain such ground of defense. The testimony given by appellant upon the trial shows him to be a fairly intelligent person. Indeed, many of his statements proved him to be both plausible and resourceful in protecting himself. We find nothing in the record to convince us that appellant did not have a fair trial.

The judgment is therefore affirmed.

PARSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. CRIMINAL LAW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of testimony that a witness for accused, impeached by proof of his conviction of a felony, had been pardoned by the Governor, is not prejudicial to accused, in the absence of proof of what offense the witness was convicted and the grounds of the pardon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3145-3153.]

2. SAME—EVIDENCE—BEST EVIDENCE.

The pardon of one convicted of crime is the best evidence; and oral testimony thereof is properly excluded.

3. SAME—MISCONDUCT OF PROSECUTING ATTORNEY—ACTION OF COURT.

Where the court, on the prosecuting attorney stating, without evidence on which to base it, that a witness for accused had been sent to the penitentiary for burning his neighbor's house, told the jury not to consider the statement, and the prosecuting attorney admitted his error and withdrew it, the refusal to discharge the jury because of the misconduct of the prosecuting attorney was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1670.]

4. SAME.

It is sufficient to instruct the jury that an argument of the prosecuting attorney is improper, and to direct the jury not to consider it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1680.]

5. SAME.

Where a witness for the commonwealth appeared before the jury, who had the opportunity to hear his testimony and observe his deportment, the statement of the prosecuting attorney in his argument that the witness was as fine a man, with as fine a character as any man in the country, was not prejudicial to accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1670.]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

John Parson was convicted of crime, and he appeals. Affirmed.

Morrow & Morrow, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. Appellant John Parson was indicted by the grand jury of Pulaski coun-

ty, charged with willfully and maliciously shooting at and wounding Marshall Lewis with intent to kill him. A trial of the case resulted in appellant's being found guilty and his punishment fixed at confinement in the penitentiary for a term of five years. From the judgment based upon this verdict, he is here on appeal.

It is not questioned that the evidence for the commonwealth was sufficient to take the case to the jury, or claimed that any error of law was committed by the trial court in the written instructions given for their guidance in reaching a verdict. The defense of appellant was that he fired the shot which wounded Lewis in defense of his own life, and one of his witnesses on this plea was Kirk Shelton. The commonwealth sought to impeach the testimony of Shelton by asking him if he had not been convicted of a felony and sentenced to the penitentiary, which he answered in the affirmative, whereupon the defendant asked the witness if it was not true that he had been pardoned by the Governor and released from prison within three months from the time of his conviction. To this the commonwealth interposed an objection because of its incompetency, and the objection was sustained by the court. The defendant then avowed that the witness would answer in the affirmative. There was no evidence as to what offense the witness had committed which caused him to be convicted and sentenced to the penitentiary; nor was it offered to be shown upon what ground the Governor pardoned him. The pardon of the Governor did not restore the character of the witness in so far as it was besmirched by the commission of the felony of which he was convicted. The Code authorizes the impeachment of a witness' testimony by showing that he has been convicted of a felony, and we are unable to see how any substantial right of the defendant was injured by the exclusion of the testimony that he had been pardoned. Besides all this, the pardon itself was the best evidence of its being granted, and the court properly excluded oral testimony of its existence.

The commonwealth's attorney in arguing the case to the jury spoke of the witness Kirk Shelton, as follows: "Why, gentlemen of the jury, who would believe anything Kirk Shelton said? Think of it, the principal witness of this defendant who was sent to the penitentiary for the burning of his neighbor's house." Undoubtedly the commonwealth's attorney committed a gross error in stating to the jury that the witness had been sent to the penitentiary for burning his neighbor's house, there being no evidence in the case upon which to base this statement; but, upon motion of the appellant, the court excluded this statement from the jury by telling them that they should pay no attention to it, and the commonwealth's attorney himself before the jury admitted his error, withdrew his statement, and asked the

jury to give it no weight in considering the case. It must be presumed that the action of the court and of the commonwealth's attorney effaced from the minds of the jury any evil effect which might have followed from the unauthorized statement complained of, and there was no error on the part of the court in refusing to discharge the jury from further consideration of the case. It would seriously impair the administration of the criminal law, if, when a commonwealth's attorney is swept by the zeal of advocacy beyond the rules of fairness or propriety, it should be held necessary to discharge the jury from further consideration of the case. We do not believe that, when the court instructs the jury that the statement of the attorney for the commonwealth is improper and directs them not to consider it, justice to the defendant requires anything further to be done in the premises in order to secure a fair and impartial verdict.

Appellant also complains that the commonwealth's attorney spoke of one of the witnesses for the commonwealth as follows: "Jim Davis is as fine a man with as fine a character as any man in this country." The witness had been before the jury. They had seen him and heard his testimony. They had observed his deportment; and the employment by the state's attorney of this ordinary laudation indulged in by lawyers in describing their own witnesses did not injure the substantial rights of the defendant. It seems to us the matter is too trivial to be the subject of serious complaint.

On the whole case, we believe appellant obtained a fair and impartial trial, and that no injury was done him, either in the rulings of the court or the verdict of the jury.

Judgment affirmed.

POOR v. NEW SOUTH BREWERY & ICE CO.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. APPEAL AND ERROR—DECISIONS REVIEWABLE—APPEALABLE ORDERS.

An appeal from an order lies only when the order is final.

2. SAME.

An order refusing to permit the filing of an amended petition is not final, and is not appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 370.]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by H. M. Poor against the New South Brewery & Ice Company. From an order refusing to permit the filing of an amended petition, plaintiff appeals. Dismissed.

E. N. Ingram, for appellant.

CLAY, C. Appellant, H. M. Poor, instituted this action against the New South Brewing & Ice Company to recover damages for personal injury. Summons was served on

the New South Brewery & Ice Company. The latter afterwards filed a pleading, which it denominated a "plea in abatement," and in which it set forth that it and the New South Brewing & Ice Company were not the same corporation, and that it is in no wise liable for the acts of the former. Thereafter appellant tendered and made a motion to have filed an amended petition. In this amended petition appellant set forth the fact that the New South Brewery & Ice Company was the real defendant to the action, and that it was the only corporation in Bell county operating a brewery; that the New South Brewery & Ice Company is the successor to the New South Brewing & Ice Company, and is, in fact, the same company. The trial court at first permitted this amended petition to be filed. Afterwards, upon reconsideration, it refused to permit the filing of the amended petition. From this ruling appellant has prayed an appeal to this court. No order was entered dismissing appellant's action. An appeal lies only from a final order. An order refusing to permit the filing of an amended petition is not final. Therefore no appeal lies from it.

It follows that the appeal herein must be dismissed; and it is so ordered.

LOUISVILLE & N. R. CO. v. MELTON.

(Court of Appeals of Kentucky. Oct. 7, 1908.)

"To be officially reported."

Dissenting opinion.

For majority opinion, see 105 S. W. 366. See, also, 110 S. W. 233.

BARKER, J. I find myself unable to concur in the opinion affirming the judgment in this case, and the duty I owe myself, as well as that due the appellant, constrains me, much against my natural inclination, to state the reasons for dissenting from the conclusion reached by a majority of my Brethren.

On March 2, 1905, a carpenter's force of the Louisville & Nashville Railroad Company were constructing coal chutes near, but not upon, the tracks or roadway of the railroad company at the mines of the Ingle Coal Company, at or near Howell, Ind. The force consisted of seven laborers, including the foreman, one W. C. Shrode, and appellee, Melton. In raising, with an ordinary pulley, block, and tackle, a bent of timber weighing about 1,000 pounds from a partly horizontal to an upright position, the bent fell by reason of a latent defect in the welding of one of the links of a chain with which one of the pulley blocks was temporarily attached to the framework. In falling the bent fell upon Melton and produced a concussion of his spine, resulting in partial paralysis of his lower extremities. For this injury Melton brought his action against the railroad company in the Hopkins circuit court, and elected to proceed under the statute of the state of Indiana

commonly known as the "Employer's Liability Act." A trial of the action resulted in a verdict for compensatory damages in the sum of \$22,000.

As Melton's cause of action is rested upon the Indiana statute regulating the liability of corporations for injuries received by their employes, the first question with which we are confronted is whether or not that act, as construed by the majority opinion, is constitutional, or whether, on the contrary, it is inimical to that provision in the fourteenth amendment of the federal Constitution, which guarantees to all the equal protection of the law, or, as has been said, the protection of equal laws. As the act in question is fully set out in the opinion of the court, it is not necessary to incorporate any part of it here. It is deemed sufficient to say that it prescribes a different rule of liability for those employers who may be brought within its purview from that imposed by the laws of Indiana upon other employers for injuries occurring to their employes, and unless it can be differentiated by a reasonable classification from those laws it must be held violative of the federal Constitution.

It is earnestly contended by counsel for appellant that the Indiana court of last resort has construed this act to be applicable only to those employers operating railroads, and, further, that it has limited its application to injuries occurring to employes engaged in the hazard of the actual operation of the railroad at the time they were hurt. Whether this be so, or not, I shall not now investigate. This court has enforced the act as applying to injuries occurring to all railroad employes, whether they be at the time engaged in the active operation of the railroad as such, or whether they are engaged in what may be termed collateral occupations, among which may be included all those occupations which are merely auxiliary to the active operation of the railroad and not subject to the extreme hazard which exists in the active carrying forward of its operation. This conclusion makes it necessary to inquire whether the act, as construed, is or not inimical to the equality clause of the federal Constitution.

As said before, it is not permissible, under the federal Constitution, to impose arbitrarily upon one class burdens which are not imposed upon the community in general; nor may a Legislature arbitrarily impose a liability upon one class of employers which is not imposed upon others. Undoubtedly the state may regulate the liability of employers to their employes if the classification for regulation be based upon just and reasonable principles; but it may not arbitrarily select one class, whose liability is to be ascertained by rules more stringent than apply to employers generally doing a similar business. This principle has nowhere been more clearly and forcibly expressed than by the Supreme Court of the United States in *G.*

C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where the question we have in hand is discussed. In the opinion it is said: "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * *

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * *

It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a

classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained."

Upon the same subject the Supreme Court, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, said: "The difficulty is not met by saying that, generally speaking, the state, when enacting laws, may in its discretion make a classification of persons, firms, corporations, and associations in order to subserve public objects; for this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'" To the same effect are *Cotting v. Kansas City Stockyards Company*, etc., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, *Ballard v. Mississippi Cotton Oil Company*, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476, and *Cooley on Constitutional Limitations* (7th Ed.) pp. 560-563.

In view of the foregoing authority, the question recurs: Does the statute under discussion, as construed in this case, afford a reasonable or just classification when it establishes one rule of liability for injuries occurring to all railroad employes, without regard to whether they are engaged in the hazard of railroad operation, leaving the liability of all other employers subject to a less stringent rule of liability? It is a matter of common knowledge that only a small per cent. of a railroad corporation's employes are engaged in its active operation. Outside of the men operating the railroad, there is a very large class of employes who are engaged in mere clerical work, and who have no more to do with the actual operation of the railroad as such than the clerks and bookkeepers of any mercantile establishment. Railroads employ many lawyers, surgeons, and clerks. Some of them keep large forces of men engaged in cutting cross-ties in the forests, or in the breaking of stone for ballast, and in mining coal for the use of the engines. All are engaged in precisely similar business to that carried forward by other

employers, who are confessedly not within the purview of the act. The appellee himself, at the time he was hurt, was engaged as a carpenter in building a coal chute or tippie at the Ingle coal mines, near or on the railroad's right of way. It does not appear whether this chute was for the benefit of the railroad or the mining corporation; but I shall assume, in order to eliminate any question of fact, that the chute was being constructed for the purpose of coaling the railroad's engines. Now, let us suppose that the coal company had had a force of carpenters building coal chutes by the side of those being built by appellee, for the purpose of putting its coal on the cars for shipment, and that a similar accident had happened at the same time to one of its employes. The employe of the coal mining corporation, if he had sued, would have been forced to ground his action upon the common law prevailing in Indiana, while, if the majority opinion be sound, appellee could maintain his action under the statute. Assuming, for the purpose of the argument, that the two accidents were caused by identically the same mishap, we would have different rules regulating the remedy of the injured persons, although the occupation of each was precisely the same. Such illustrations could be multiplied indefinitely; but they would throw no additional light upon the discussion. The appellee, in building the chute by the side of the railroad, was subject to no more hazard than would have been the employes of the coal company, had they been engaged in building chutes for their employer. It seems to me utterly fallacious to say that the statute, when made to apply to the cases of those employes who are hurt in collateral occupations, does not prescribe an arbitrary rule of liability for railroad corporations for injuries to their employes, from which other employes doing identically the same business are exempt.

The view I have expressed above is supported by very high authority. In the case of *Kline v. Minnesota Iron Co.*, 93 Minn. 63, 66, 100 N. W. 681, the Supreme Court of Minnesota, in construing a statute of that state identical in principle with the one under discussion, said: "This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the Legislature to apply to 'railroad hazards,' and not to railroads as such; that the character of the employment was the test to be applied in determining its validity, and not the character of the employer. It was first construed in *Lavallee v. St. Paul*, etc., R. Co., 40 Minn. 249, 41 N. W. 974, where it was held that, if the statute be held to apply to railroad corporations as such, it would be invalid and unconstitutional as class legislation, for it is beyond the power of the Legislature to single out a particular class of employers and impose upon them a distinct rule of liability for personal injuries; but, if construed to apply to the character

of the employment, the legislation was valid. It was accordingly held in that case that the Legislature intended that it should apply to the hazards and dangers peculiar to the use and operations of railroads, and the decision there made has been followed in all subsequent cases." In the case of *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52, 55: "But if the statute be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way, where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a coemployé, and the employé of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional." To the same effect are *Jemming v. G. N. R. Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696; *R. Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739; *Johnson v. St. Paul & Duluth R. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Lavallee v. St. P., M. & M. R. Co.*, 40 Minn. 249, 41 N. W. 974; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476.

I cannot agree to the assumption that the Supreme Court of the United States, in *Tullis v. Lake Erie & Western Railroad*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, upheld the constitutionality of the act in question as construed in the opinion. An examination of the opinion in the case of *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, and the various opinions reviewed therein, will show that the Supreme Court of Indiana limited the application of the statute to the injuries of railroad employes engaged in the hazard of the active operation of the road; and it was this construction that was upheld by the Supreme Court in the case referred to above. The opinion of the Supreme Court of the United States and that of the Supreme Court of Indiana show that these courts both held

that the Indiana statute, as construed by the latter court, was practically the same as the statutes of Kansas and Iowa as construed by the Supreme Courts of those states. These statutes were construed without doubt to apply only to the hazard of railroading, and it was expressly said, if they had been intended to apply to all employes of railroads, they would be violative of the federal Constitution. *Deppe v. Chicago, etc., R. Co.*, supra; *Akeson v. Chicago, etc., R. Co.*, 106 Iowa, 54, 56, 75 N. W. 678; *Railroad Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739; *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

To show that the Supreme Court of Indiana was of opinion that the statute under discussion, as construed by it and sustained by the Supreme Court of the United States, is identical with the statutes of Kansas and Iowa, as construed by the Supreme Courts of those states, I copy the following excerpt from the opinion in *Bedford Quarries Co. v. Bough*, supra: "The employer's liability act of Kansas was the same as the Iowa act above set out (*Mo. Pac. R. Co. v. Haley*, Adm'r, 25 Kan. 35, 53), and the Supreme Court of that state, following the construction given by the Iowa Supreme Court, held in 25 Kan. 53, that it 'embraced only those persons exposed to the hazards of the business of railroading.' *Missouri, etc., R. Co. v. Medaris*, 60 Kan. 151, 154, 155, 55 Pac. 875; *Mo. Pac. R. Co. v. Mackey*, 33 Kan. 298, 302, 6 Pac. 291. It was held, in effect, by this court in *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1, 8-14, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 30, that the employer's liability act of this state was capable of severance, by putting railroads in a class by themselves, and that such classification was proper on account of the dangerous and hazardous business of the operation of railroads, and that, so construed, said act, as applied to railroads, was not in violation of either said section 23 of article 1 of the Constitution of this state, or of the fourteenth amendment of the Constitution of the United States, even if unconstitutional as to the other employers and employes mentioned. In *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, it was held that this court in the *Montgomery Case* treated the employer's liability act as practically the same as said statutes of Iowa and Kansas, and that, so construed, it did not arbitrarily classify railroads by name, but with regard to the business in which they were engaged, which was a proper classification, on account of the dangerous and hazardous business of operating railroads, citing *Mo. Pac. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, and *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109, which sustained the constitutional validity of a like statute. In *Pittsburg, etc., R. Co. v. Lightseier*, 168 Ind. 438, 78 N. E. 1033, 1041, 1043, this court ap-

proved the Montgomery Case, gave the employer's liability act, as applied to railroads, practically the same construction as had been given to the statutes of Iowa and Kansas on that subject, and held that putting railroads in a class by themselves was proper classification, on account of the dangerous and hazardous business of operating railroads, and that such classification is not based upon the difference in employers, but upon the difference in the nature of the employment."

Nor can I agree to the statement in the opinion that Melton was engaged in the hazard of the operation of the railroad because he was building a coal chute and coal is necessary to the operation of a railroad. The chute was entirely separated from the railroad's right of way, and the carpenters who were building it were in no danger from anything done in its operation. Railroads, in order to be operated, must have cross-ties and ballast, and must have clerks, book-keepers, and auditors to keep their accounts, lawyers to defend their suits, and telegraphers to dispatch their trains; but none of the men employed in these occupations can be said to be engaged in the hazard of the operation of the railroad.

Believing that the statute under which this suit was brought violates the equality clause of the federal Constitution, and is therefore void, I cannot concur in the opinion of the court.

I am authorized to say that Judge LAS-SING concurs in this dissent.

GOULD CONST. CO. v. CHILDERS' ADM'R. (Court of Appeals of Kentucky. Oct. 1, 1908.)

1. MASTER AND SERVANT—INJURY TO EMPLOYE—VICE PRINCIPALS.

Where the foreman of work goes away for a short time and puts another in charge in his place during his absence, such other person for the time being is a vice principal, for whose negligence in giving orders in the execution of the work, resulting in injury to a laborer on the work, the master is liable, as it would have been for such negligence of the regular foreman.

2. SAME.

Negligence of the foreman in charge of raising logs onto a bridge in course of construction, in giving a signal to the engineer to drop the log when it was suspended several feet above the truck on which it was to be placed, resulting in injury to a workman whose duty it was to take hold of and guide the logs to their position, was negligence of a vice principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 427.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

From a river, and between the two tracks of a bridge in course of construction, logs 12 feet long and 1 foot thick, were being raised, by an engine and a rope tied at the middle of the logs, and placed on a truck lengthwise thereof; a man being stationed at each end of the truck to take hold of the ends of the logs and guide them as they were lowered onto it. Held that, the end of a log suspended above the truck by the rope having swung off to the side, so that the man at the end of the truck could not reach it, it was not contributory negligence for him to go to the side of the truck to

pull it back in position; he not being bound to anticipate that the foreman would negligently give the engineer the signal to drop the log before it was in position, and while it was several feet above the truck, and that it would rebound and hit him, throwing him into the river.

4. DEATH—DAMAGES.

A verdict of \$4,000 for death of a healthy young man 24 years old is reasonable.

Appeal from Circuit Court, Rockcastle County.

"To be officially reported."

Action by Rufus Childers' administrator against the Gould Construction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. N. Sharp and M. S. Singleton, for appellant. C. C. Williams and Robert Harding, for appellee.

HOBSON, J. The Gould Construction Company was engaged in constructing a double-track railroad bridge across Rockcastle river. The tracks were some 8 or 10 feet apart, and the ends of the cross-ties were so far apart as to leave an opening of about 3 feet between them. Through this opening the construction company was drawing up logs from below, and placing them on trucks which were loaded on one of the railroad tracks. The logs were about 12 feet long and 12 inches in diameter. To get them up a rope attached to a derrick was let down and fastened to one log at a time, and this was then raised through the opening by machinery to a point above the bridge, and then lowered to the truck placed to receive it. One man was stationed at the engine and controlled it. Another was stationed at a pulley and guided the rope. Men under the bridge tied the rope to the log, and when it was ready the foreman, standing on the bridge, gave the signal to the engineer, who hoisted it up; and when it had reached the proper height he gave him the stop signal. In order to get the log placed on the truck properly, one man was placed at each end of the truck, and it was the duty of these two men, when the log had been raised to the proper height and was lowered, to take hold of the ends of the log and guide it to its proper position on the truck. The regular position of these two men was at the ends of the truck. The ties on which the truck rested extended out about 6 inches beyond the side of the truck. Childers and one James Nell were the men at the truck. The foreman had gone to the express office, and had put in his place a man named McEwan while he was gone. When the log was brought up the small end of the log was toward Childers, and, as the large end was the heavier, it hung lower down than the small end. The log, being tied in the middle by the rope, would not always swing parallel with the track, and the small end of this log swung out to the side, next to the opening between the two tracks. To pull it back to its position Childers stepped to the side of the truck, and, standing there, was push-

ing the log back to its position, when McEwan suddenly gave the signal to the engineer to let the log drop. The engineer obeyed the signal. The log dropped to the truck through a space of about 4 feet. The large end striking first, the smaller end was thrown around against Childers, striking him on the point of the chin and knocking him from the bridge. He fell to the river below, a distance of about 60 feet, and when rescued was dead. This suit was brought by his administrator to recover for his death, on the ground that there was negligence on the part of McEwan in giving the engineer the drop signal at the time he did, and that this was the cause of Childers' death. The answer controverted the allegations of the petition, and on a trial the jury found for the plaintiff, assessing the damages at \$4,000. The defendant appeals.

The first question to be considered on the appeal is whether the court should have instructed the jury peremptorily to find for the defendant. It is insisted that this should have been done for two reasons: First, because McEwan was a fellow servant of Childers; second, because Childers would not have been hurt if he had remained at the end of the truck, and it was negligence of him to go to the side of the truck. It is also insisted that, if there was any evidence to take the case to the jury, the verdict is palpably against the evidence, and should be set aside.

1. If the foreman had not gone to the express office, and had remained on the bridge continuing to give the signals as before, it would hardly be maintained that the company would not be responsible for his negligence. That there was negligence on the part of McEwan is manifest. The custom was to lower the log gradually until it reached the truck. Any one would know that as large an object as this, if dropped through a space of 4 feet suddenly, was liable to hurt the man at the truck, whose duty it was to guide it into position and load the truck. Instead of giving the drop signal, when McEwan saw the man take hold of the log to push it over to its proper place, he should have given the engineer the signal to let it down slowly; and, if this had been done, Childers would not have been hurt. The drop signal should not have been given until the log had reached the truck and been placed in its proper position. McEwan could see the log. He could see the men at the truck. He could not but know that Childers was at the side of the truck, and that the dropping of the log at the time it was dropped would imperil him. We do not think it is material that McEwan was not the regular boss. He was there at the time in the place of the boss. The gang of men had not been left without any head. McEwan for the time stood in the place of the boss, and the men were under the same obligation to obey his orders as the orders of the boss.

He was not at the time a fellow laborer. The other men could not control him, or exercise any supervision over him. His signals were his orders, and it was their duty to obey these orders. In giving these orders he represented the master, and they were not his equals, but his inferiors, for the time being. The case of *Dana v. Blackburn*, 90 S. W. 237, 28 Ky. Law Rep. 695, is not in point. There it was held that the engineer was a fellow servant of the men who loaded the coal at a coal elevator, and that one of the loaders was a fellow servant of the other loader. The same rule was in effect applied in *Cooper's Adm'r v. Oscar Daniels Co.*, 96 S. W. 1100, 29 Ky. Law Rep. 1172. There it was also held that the engineer in charge of the engine employed in lifting the girders in a building was a fellow servant of the other men employed in handling the girders. But this case does not turn on the negligence of the engineer. The engineer here simply obeyed the signal that was given him. The negligence was in the giving of the signals, and these signals were given by the man who was directing the work, and who for the time being was the foreman.

2. Every one knows that a log 1 foot thick and 12 feet long, tied in the center with a rope, when drawn up will not always stay in one position, and that when it got above the truck it might be at right angles to the track, or parallel with it, or in any position between the two, so that it must necessarily be that the men who had to handle the log would have to leave the ends of the truck at times and push the log at the side back to its position. The testimony for the plaintiff clearly shows that such was the case when Childers went to the side of the truck. He could not reach the log from the end of the truck, and he went to the side because that was the only practicable way of getting it into position. He was not, therefore, guilty of contributory negligence in taking this position. He was not required to anticipate that the log would be dropped before it reached the truck, or to anticipate, if it was dropped, which way it would jump when it rebounded on the truck. In cases of this sort the question of contributory negligence is ordinarily for the jury, and in this case there was no error in submitting the question of contributory negligence to the jury.

The weight of the evidence sustains the verdict of the jury. There was conflict in the testimony on several questions; but we think the facts as we have stated them are shown by the weight of the evidence. The instructions of the court submitted to the jury substantially the material questions in the case. There was no showing made which would warrant the court in continuing the case for the defendant after the plaintiff's proof was introduced on the trial. The decedent was a healthy young man 24 years of age. The verdict for \$4,000 is a reason-

able one, and on the whole record we see no reason for disturbing it.

Judgment affirmed.

ADAMS v. MINERAL DEVELOPMENT CO.
(Court of Appeals of Kentucky. Oct. 7, 1908.)

1. TRIAL—TIME FOR PREPARING CASE—SUFFICIENCY.

It was not improper to submit, over defendant's objections, a suit to enjoin him from destroying a boundary fence claimed by him to be on his land, where he had had a year in which to take his proof after plaintiff's was taken; defendant not being excused for not taking proof because no second survey had been made on the first being quashed and another ordered, since he could have required the surveyor to make the survey, having plenty of time for that purpose, and since there was one surveyor's report in the case, clearly showing the situation, and apparently sufficient for the intelligent taking of depositions.

2. APPEAL AND ERROR—REVIEW—SUFFICIENCY OF RECORD.

The Court of Appeals cannot revise the trial court's refusal to consolidate the case with another action, where the record of the other case is not before the court, and there is nothing to show that the consolidation of the two cases was necessary.

3. ACTION — CONSOLIDATION — DEFENDANT'S RIGHT.

Defendant could not delay trial by asking a consolidation with another case; plaintiff being entitled to trial when the case was ready.

Appeal from Circuit Court, Letcher County.
"Not to be officially reported."

Action by the Mineral Development Company against John W. Adams. From a judgment for plaintiff, defendant appeals. Affirmed.

R. O. Brashears, for appellant. D. D. Fields and Dishman & Dishman, for appellee.

HOBSON, J. The Mineral Development Company rented to Martha Fugate certain premises in Letcher county. While she was in possession of the premises John W. Adams entered against her will and tore down the fence, claiming that the fence was over on him. The company rebuilt the fence, and Adams was about to tear it down again, when it fled this suit against him, praying an injunction restraining him from further trespassing upon the property. The suit was filed in April, 1906, and a temporary injunction was then granted. Adams filed his answer on June 4th; the answer being a traverse of the petition. The plaintiff thereupon took depositions, and at the September term, its proof being all taken, moved to submit the case for judgment. Adams objected on the ground that he had not had reasonable time to take his proof, and filed affidavit for a continuance. The court continued the case for him, and also made an order of survey. Adams at that time filed an amended answer, in which he set up what land he owned and asserted title to the property in controversy. At the January term the plaintiff again moved to submit the case. The de-

fendant objected, on the ground that the reply to the amended answer had just been filed, and that the surveyor had filed no report of survey. The court required the surveyor to file his report of survey; and on motion of the defendant the report, when filed, was quashed, and the surveyor was required to make another survey. At the April term the plaintiff again moved the court to submit the case. Adams, who had not taken any depositions, again objected on the ground that his counsel had been busy and so engaged that he could not take the necessary proof. The court again continued the case for Adams. At the September term the case was submitted on the motion of the plaintiff, over the objections of Adams, who had failed to take any proof in the action; and judgment was entered as prayed in favor of the plaintiff. Adams appeals.

There was no error in the court in submitting the case at the September term, 1907. The plaintiff had taken all of its proof a year before, and the defendant had had a whole year to take his proof after the plaintiff's proof was taken. The fact that the surveyor had not made his second survey was no excuse for the defendant not taking his proof. He could have required the surveyor to make the survey, and had had plenty of time for this purpose, if he needed the report of survey before taking his evidence. There was one surveyor's report in the case, accompanied by a map, which clearly showed the situation, and so far as appears was all that was needed for the intelligent taking of depositions.

The defendant complains that the court refused to consolidate the case with another action which he had pending against the Mineral Development Company. But the record of that case is not before us, and there is nothing in this record to show that the consolidation of the two cases was necessary. The defendant could not delay the trial of this case by asking its consolidation with another case; for the plaintiff in this case was entitled to a trial, when it was ready for trial.

The proof in the action shows clearly that the title to the land was in the plaintiff, who made out its title from the commonwealth; and, there being no proof to sustain Adams' claim of title, the court properly granted the injunction as prayed.

Judgment affirmed.

BRECKENRIDGE COUNTY v. RHODES.
(Court of Appeals of Kentucky. Oct. 2, 1908.)

APPEAL AND ERROR—REVIEW—LAW OF THE CASE.

The decision on appeal that the circuit court has jurisdiction of a controversy is conclusive on a second appeal, not only as to the objections actually urged, but as to all objections that might have been interposed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4370-4379.]

Appeal from Circuit Court, Breckenridge County.

"Not to be officially reported."

Proceedings for the establishment of a county highway in Breckenridge county. There was a judgment awarding W. E. Rhodes a specific sum for damages, and the county, through its county attorney, appealed to the circuit court. From a judgment dismissing the appeal, the county appeals. Reversed and remanded.

Gus Brown, for appellant. Murray & Murray, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 105 S. W. 903, 32 Ky. Law Rep. 352.

Willis Green and others on the 30th day of April, 1907, filed in the Breckenridge county court their petition for the opening of a new road. Damages in the sum of \$850 were awarded appellee W. E. Rhodes. The county attorney of Breckenridge county, believing that the allowance of \$850 was excessive, appealed to the Breckenridge circuit court on his own motion and without an order from the county or fiscal court, from so much of the order as allowed appellee the sum mentioned. When the case came on for hearing before the circuit court appellee moved to dismiss the appeal on the ground that the county attorney was not authorized by any order of the county or fiscal court to prosecute the same. Thereupon the circuit court entered an order dismissing the appeal. From that order the county of Breckenridge prosecuted an appeal to this court, where it was held that the authority of the county attorney is implied to prosecute an appeal in all cases where an appeal is allowed below. The judgment of the Breckenridge circuit court was, therefore, reversed, and the cause remanded for proceedings consistent with the opinion rendered. Upon the returns of the case to the Breckenridge circuit court, counsel for appellee made a motion to dismiss the appeal of Breckenridge county to the circuit court, on the ground that the county had executed no appeal bond. This motion the circuit court sustained, and entered an order dismissing the appeal. From that order, the county of Breckenridge prosecutes this appeal.

When the case was before us on the former appeal, the question involved was the jurisdiction of the Breckenridge circuit court. It was the duty of the attorneys for the appellee to place before us all the grounds upon which the jurisdiction was attacked. Failing to do so, they will not now be permitted to show other reasons why the Breckenridge circuit court has no jurisdiction. Litigants will not be permitted to bring such questions before us by piecemeal. If the objections to the jurisdiction could be made upon one ground, and the jurisdiction, although sustained by this court, could then be

attacked upon another ground, such practice would prolong the cases almost indefinitely, and every trial would be accompanied by unnecessary delay. On the former appeal we held that the county attorney had the right to appeal and that the circuit court had jurisdiction. That opinion is conclusive, not only of the objections actually urged, but of all objections that might have been interposed. The circuit court, therefore, erred in dismissing the appeal.

For the reasons given, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

ROBERTS et al. v. CHENOWETH et al.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. WILLS—CONSTRUCTION—GIFTS OF RESIDUE.

In a will in which the words "devise" and "bequeath" were used indiscriminately many gifts were made, some of real estate and money, some of money and specific articles of personalty, and some of articles of personalty alone, no value being placed on the real estate or articles of personalty, some of the latter of which appeared to be given as mere mementos. *Held*, that only the gifts of money were to be considered in determining the rights under the clause directing the residue of the estate to be distributed among the legatees in "the proportion their respective legacies bear to the total of all said legacies."

2. SAME.

A will, after making 60 gifts, gave "the residue" of the estate "up to \$10,000" to a church, and in the next clause provided that the balance and residue of the estate should go to "all my legatees above named" ratably, and in proportion to their respective legacy. *Held*, that the church was entitled to share in the balance of the residue after the payment to it of the \$10,000.

3. SAME—"DEVISE"—"DEVISEE"—"LEGACY"—"LEGATEE"—"BEQUEST"—"BEQUEATH."

Although the words "devise" and "devisee" properly and technically apply only to real estate, and the words "legacy," "legatee," "bequest," and "bequeath" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467, which provides that "the words 'legatee' and 'devisee' shall each be held to convey the same idea; and the words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall each be held to mean the same thing and to embrace and include either real or personal property or both."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 935.

For other definitions, see Words and Phrases, vol. 1, pp. 757-758; vol. 8, p. 7589; vol. 3, pp. 2047-2049; vol. 8, p. 7636; vol. 5, pp. 4054-4057; vol. 8, p. 7703; vol. 5, pp. 4084-4086.]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Suit between Di Roberts and another and Scota T. Chenoweth and others. From an adverse judgment, Di Roberts and another appeal. Affirmed.

W. D. Nicholas, M. J. Hartley, and Shelby & Shelby, for appellants. Butler Southgate and E. S. Hutchison, for appellees.

CARROLL, J. This litigation involves the construction of certain clauses in the will of Mrs. Scota Inskew Chenoweth. Mrs. Chenoweth was a lady of large estate, and in her will there are numerous distinct items disposing of it. The fourth, sixty-first, and sixty-second clauses are the only ones particularly involved. They read as follows:

"(4) I bequeath and devise all the right, title and interest of which I may die seised in and to my grandfather Silas Robert's estate, also all my interest of which I may die seised in and to my uncle John Robert's estate and in addition thereto twenty thousand (\$20,000) dollars out of the balance of my estate, to my two beloved aunts, Miss Di Roberts and Mrs. Louisa R. Lackey, both of Xenia, Ohio, to be equally divided between them share and share alike."

"(61) I devise and bequeath the residue of my estate up to ten thousand (\$10,000) dollars unto the trustees of the Hill Street Methodist Episcopal Church, South, to be used by them in buying additional property adjoining said church building or in erecting a new stone church building in place of the present church, upon this condition, however; provided the congregation of said church, the church extension fund and conference will raise twenty-five thousand (\$25,000) dollars to complete and furnish said new building within two years after my death, and provided said new church when complete and furnished can be turned over to the congregation free from debt; otherwise this legacy shall fail and become null and void.

"(62) In the event any legatee herein mentioned dies before I die the legacy devised to such a one shall pass to my residuary estate and all the balance and residue of my estate I devise to all my legatees above named ratably and in proportion their respective legacies bear to the sum total of all said legacies."

In clauses 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 29, 30, 31, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60, she made bequests of money alone ranging from \$100 to \$7,000 to different persons, and to various charitable, educational, and benevolent institutions. In clauses 5, 6, 7, 14, 21, 24, 28, 33, and 35, she bequeathed to sundry individuals specified sums of money, and to each of them, in addition to the money, articles of jewelry, household furniture, tableware, and other personal property. In clauses 23, 32, 34, 36, 37, 38, 39, 40, and 41, she bequeathed to other persons specified articles of personal property. After all of the bequests of money, and the various articles of personal property had been given to the respective legatees, there remained of her estate a large sum of money, which passed under the sixty-second clause of her will.

The questions to be considered are whether or not the beneficiaries of this residue are

limited to the persons to whom specified sums of money were given; and whether the Hill Street Methodist Episcopal Church is entitled to receive any part of the residue upon the \$10,000 given to it in clause 61. To put it in a simpler form, Miss Di Roberts and Mrs. Louisa R. Lackey contend that they are entitled to receive a proportionate part of the residue, not only on the \$20,000 given to them, but also on the value of the land devised. This the other legatees deny, and insist that these ladies are only entitled to share in the residue to the extent of \$20,000. The Hill Street Methodist Episcopal Church contends that it is entitled to a proportionate part of the residue on the \$10,000 given to it; while the other legatees insist that it is not entitled to any part of the residue. The lower court adjudged that Miss Di Roberts and Mrs. Louisa R. Lackey were entitled to participate in the residue only in proportion to the pecuniary legacy of \$20,000 given to them, and that the value of the real estate devised to them was not to be considered in determining their proportion of the residuum; and further held that the trustees of the Hill Street Methodist Episcopal Church were entitled to participate in the residue in proportion to the amount bequeathed to them in clause 61.

In the briefs of counsel for appellants it is argued that the legatees to whom specified articles of personal property alone were given are entitled to participate in the distribution of the residue in proportion to the value of the respective articles received by them; but we do not understand from the record that these legatees are complaining of the judgment. The only persons who excepted to the judgment are Miss Di Roberts and Mrs. Louisa R. Lackey; and they are the only appellants as appears from the statement filed with the record. Doubtless counsel for appellants, in order to make their argument harmonious, were obliged to insist that the persons to whom articles of personal property had been given were entitled to share in the residue, as well as their clients to whom land was devised. Looking at the matter from their standpoint, if any of the persons except those who received specified sums of money are entitled to share in the residue, then there is no good reason for denying the right of the persons who received personal property alone to participate. If the testatrix intended that those who received land should share in the residue, and the will was so construed, there would be no escape from the conclusion that the persons who received gifts of personal property were equally entitled to share in it. And so, if it were held that the legatees of personal property were entitled to participate, no sound reason could be assigned for not allowing those to whom land was given to share in proportion to the value of the land. In our opinion the testatrix did not intend that either the persons to whom she gave

land or the persons to whom she gave articles of personal property should participate in the residue of her estate. Her purpose was that the residue should be distributed between the persons to whom specified sums of money were given. The testatrix did not fix any value in her will upon the land devised by the fourth clause, or any value upon any of the articles of jewelry or personal property given in other clauses. She directed that the residue of the testate be distributed among the legatees in "the proportion their respective legacies bear to the sum total of all said legacies," evidently having in mind in using the words "sum total" the amount of the money legacies that she disposed of. It seems clear that she did not intend that her cousin Miss Ewing, or her cousin Miss Kauffman, to whom she gave diamond rings, pictures, and other jewelry, should share in the residue of her estate upon the value that appraisers might place upon these articles, and equally plain that she did not contemplate that her cousin to whom she gave as an heirloom a flint lock shotgun, or the lady to whom she gave a sewing machine, bedroom set, and carpets, or the gentlemen to whom she gave machinery, tools, and harness, should receive any part of this residue. We rather conclude that these articles were given as mementos of her friendship and affection for the persons to whom she left them, and not with any intention that their value, whatever it might be, should be appraised in a business way and made the basis for other gifts to these friends and relatives. If the testatrix intended that Miss Di Roberts and Mrs. Louisa R. Lackey should share in the residue upon the value of the land received by them, or desired that the legatees of personal property should participate in proportion to the value that might be fixed on these articles, it is fair to conclude that she would have used some other language in designating the persons who were to be the beneficiaries of the residue of her estate, and would not have used the words "in proportion their respective legacies bear to the sum total of all said legacies." Judging by human experience, the testatrix did not, and could not, know the exact value of the estate she would leave at her death; but, desiring to dispose of the whole of her estate, and recognizing that the bequests and legacies might not exhaust it, she provided for the disposition of whatever residue might be left, and directed in language reasonably clear that this residue should be distributed between the legatees to whom she had given specific sums of money. This disposition of the residue made the matter of distribution and the share to which each was entitled a simple matter of calculation.

In the construction of this will, as well as all other wills, the intention of the testator or testatrix must control if it can be reasonably gathered from a reading of the entire paper, and in our opinion the conclusion

reached by the chancellor effectuates as nearly as may be the intention of Mrs. Chenoweth. We do not attach great importance to the use in the will of the words "legatee" or "legacies" or "devisee" or "devisea." It is apparent that they were interchangeably used, and not in any technical sense. To illustrate, in several clauses disposing of money, as well as in the clause disposing of land, the words "devise and bequeath" and "give and devise" and "bequeath and devise" are used. The word "devise" properly and technically applies only to real estate; and means a gift of real property by a person's last will and testament. A "devisee" is a person to whom a devise has been made, while a "legacy" is a gift of personal property by a last will and testament, and a "legatee" is a person to whom a legacy is given. "Bequest" is a gift by will of personal property, and "bequeath" means to give personal property by will to another. Bouvier's Law Dictionary. In Webster's Dictionary the same definition is given. In wills and other writings, and, indeed, often in legal papers, as well as the opinions of courts and statutory enactments, these words are used indiscriminately, interchangeably, and without regard to their strict legal signification. Recognizing the generally careless, inadvertent, and interchangeable use of these words, the General Assembly of the state provided in section 467 of the Kentucky Statutes of 1903, that "the words 'legatee' and 'devisee' shall each be held to convey the same idea; and the words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall each be held to mean the same thing and to embrace and include either real or personal property or both." Although this statute is more particularly applicable to questions involving the construction of statutes, yet in a will or writing, unless it was plain these words were not intended to mean the same thing, we should say it would be fair to apply in the construction of the document the rule laid down in the statute.

There is more room for difference of opinion about the correctness of the judgment below in holding that the Hill Street Methodist Episcopal Church was entitled to share in the residue of the estate than there is about the exclusion of appellants and the legatees of personal property from participation. It is argued that in the 60 clauses of her will preceding clause 61 the testatrix had disposed of the principal part of her estate without mentioning any residuum; and that she intended by the language "I devise and bequeath the residue of my estate up to \$10,000. unto the trustees of the Hill Street Methodist Episcopal Church, South," to give to the church this sum out of the residue of her estate left after the payment of the legacies mentioned in the preceding clauses, and that, as this \$10,000 is spoken of as a part of the residue of her estate, she did not intend that the church should participate in any residue

that might be left after it had received out of the residue the \$10,000 given to it. This argument is plausible, and there are some reasonable grounds upon which to rest it; but clause 62, which entirely disposes of any residue of the estate that might be left after paying all the legacies, including the \$10,000 given to the church, does not directly or by implication exclude the church from participation in the residue. The language without any qualification in a separate distinct clause of the will, immediately following the clause making the gift to the Methodist Church, is "all the balance and residue of my estate, I devise to all my legatees above named, ratably and in proportion their respective legacies bear to the sum total of all said legacies." The Methodist Church was one of the legatees above named, and, if the testatrix did not intend the church should share in the final residue, it seems singular that she did not exclude it. We think the fair meaning of the use of the phrase, "the residue of my estate up to \$10,000" in item 61, is that, when the testatrix came to make this gift, she did not know definitely what the residue of her estate, if any, would be, after the payment of the sums mentioned in the sixty preceding clauses, or whether or not there would be any residue left, and therefore used this language to indicate her purpose that if the remainder of her estate, after providing for the gifts and devises in the sixty preceding clauses of her will, was not sufficient to pay the \$10,000, the church could not require the other legatees to contribute any portion of their legacies to make it equal with them. In other words, if the language had been, "I devise and bequeath to the Methodist Church \$10,000," thereby placing the church upon the same footing as the other legatees, and in the settlement of the estate there was not sufficient to pay all the legacies in full, each legacy would be reduced so that all of them would receive the same proportionate part. To provide against a contingency of this kind, the words "residue of my estate" were used; the effect of these words being that if, after all the other legatees had received their legacies in full, there had been only \$5,000 left, this is all the Methodist Church would have received. We think this construction is more in harmony with the intention of the testatrix, as we gather it from the entire will, than the one insisted upon by appellants.

The judgment of the lower court is affirmed.

CITIZENS' SAVINGS BANK v. LEIGH et al.
(Court of Appeals of Kentucky. Sept. 30, 1908.)
MORTGAGES—PAYMENT — EVIDENCE — SUFFICIENCY.

In an action to set aside a note and mortgage, evidence held to justify a finding that the note and mortgage were paid by a substituted note and mortgage, authorizing the cancellation

of the same and a recovery of the sum paid in satisfaction of a judgment denying relief, which judgment was subsequently reversed.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Effie L. Leigh and others against the Citizens' Savings Bank. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. D. Mocquot, for appellant. D. G. Park, for appellees.

LASSING, J. This is the second appeal of this case. The former opinion is to be found in 31 Ky. Law Rep. 233, 102 S. W. 233. The facts out of which this litigation grew are fully set out in that opinion, and a repetition of them here is unnecessary. All questions were settled in that opinion save one, to wit, whether or not there was any consideration for the \$2,000 note in suit. The case was remanded to the circuit court, and the right given both parties to take further proof, and the court directed to determine from all of the proof whether or not the note of Leigh & Shinn, executed on September 14th, was simply given as an additional security for the \$2,000 note of Mrs. Shinn which was then held by the bank, or whether this note was executed for money which Leigh & Shinn then got from the bank, and whether there was any consideration for the note and mortgage of December 5th other than the debt represented by the \$2,000 note of Mrs. Shinn. Upon the filing of the mandate in the lower court, the plaintiff, Effie L. Leigh, tendered a supplemental petition, in which she prayed for a judgment in accordance with the mandate and opinion of this court. Over the objection of the defendant, this supplemental pleading was permitted to be filed. It appears that after the rendition of the judgment, and before the case was reversed in this court, the plaintiff had paid to the defendant bank the sum of \$2,200 in satisfaction of the judgment. In the supplemental petition she prayed for a judgment directing a return of this money, with 6 per cent. interest from the date of its payment, to her, and a cancellation of the lien which the bank held to secure same against her property. Thereafter the deposition of W. F. Paxton, cashier of the bank, was retaken, and plaintiff took the deposition of Willson Shinn. These two depositions, together with all of the evidence in the original record bearing upon the validity of the debt in question, were considered by the chancellor. Upon the whole record, he found in favor of plaintiff, and entered a judgment accordingly directing the said bank to cancel the lien of record, which it held against her property, and repay to her the money which it had received from her, with 6 per cent. interest from the date of its payment, and he also

dismissed the cross-petition of the bank against certain other parties, with judgment for costs. From that judgment, the bank appeals.

The question for our consideration upon this appeal is: Does the evidence support the finding of the chancellor? The only evidence on behalf of the bank which was before the chancellor upon this trial which was not considered at the time the former opinion was written is the testimony of the cashier, Paxton, and a careful consideration of his testimony shows no fact which was not brought out in his former deposition. It is true he states in his last deposition that on the 14th of September, 1892, he, as cashier, paid to Wilson Shinn, or some one, for his wife, \$2,600, that \$600 of this sum was placed to the credit of Mrs. Shinn in his bank, and he gives no satisfactory account of what was done with the remainder of this money. Wilson Shinn testifies that he received no money whatever at that time from the bank, nor at any time thereafter, either from the bank or from the firm, other than some small sums from the firm which were used in defraying the ordinary expenses of his household. He further testifies that he attended to all business for his wife, and that, if any such sum as \$2,000 had been paid to her, he would certainly have known of it. The bank was placed in the unfortunate position of not being able to produce the "Daily Statement," a book which should have shown this transaction more fully than did the "blotter."

For plaintiff it is insisted that \$2,000 of the \$2,600 was used by the bank in taking up the \$2,000 note of Mrs. Shinn which was surrendered to her husband on that date. This theory of the transaction is the only one which can be drawn from the testimony of the cashier, when read in connection with the entries on the "blotter" and the testimony of Wilson Shinn. Mrs. Shinn owed to the bank \$2,000. She received on that day a check for \$2,600. The bank canceled her note, and surrendered it to her, thus disposing of \$2,000 of the check, and placed the remaining \$600 to her credit in the bank, which was later withdrawn by her. Her husband received her note, but no money. We are unable to understand why the entire \$2,600 was not placed to the credit of Mrs. Shinn if no portion thereof was deducted to settle the note which was that day surrendered to her husband for her. Neither such books of the bank as were exhibited nor the cashier offer any satisfactory explanation of this transaction. In the former opinion it is said: "On the evidence now before us, Mrs. Leigh should not be required to pay the note in controversy." The additional testimony which has been taken by the bank in no wise strengthens its case, but, when the testimony of Wilson Shinn is taken into consideration, it is made clear that the chancellor was cor-

rect in his finding and judgment that the bank was not entitled to recover.

The judgment is therefore affirmed.

CLARK et al. v. NORTHERN COAL & COKE CO.

(Court of Appeals of Kentucky. Oct. 1, 1908.)

1. DEEDS—DESIGNATION OF PARTIES—SUFFICIENCY.

It is not necessary that a grantee in a deed be mentioned by name; and, where the designation is sufficient to identify the person intended, the deed is effectual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 63.]

2. SAME—CONSTRUCTION—INTENTION OF PARTIES.

A deed must be construed to effectuate the intention of the parties, and the proper construction of a deed depends on all its provisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 231, 236.]

3. SAME—GRANTEES.

The caption of a deed recited that it was made between persons named as heirs of a decedent of the first part, and two persons named, husband and wife, as heirs of the decedent, of the second part. In the body of the deed it was provided that the husband, an heir of the decedent, was to take care of his mother for life, and to have land described, and that he was to have all the personalty belonging to the decedent for taking care of his mother. *Held*, that no part of the property described vested in the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 281.]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Emma Clark and others against the Northern Coal & Coke Company. From a judgment sustaining a general demurrer to the petition, plaintiffs appeal. Affirmed.

P. B. Statton and C. M. Whitt, for appellants. York & Johnson, for appellee.

HOBSON, J. This appeal involves the proper construction of the following deed:

"This deed made this 9th day of February, 1876, between John King and Malissa King, of Pike county, and Ann Adams heirs of Henry Pinson, deceased, of the county of Pike and state of Kentucky of the first part, and Russell Pinson and wife, heirs of Henry Pinson, deceased, of the second part; that the said Russell Pinson is to take care of his mother during her natural life, and is to have the following described tract of land: [Here follows description.] And the said Russell Pinson is to have all the personal property belonging to said Henry Pinson, deceased, for taking care of Mary Pinson, his mother. I do hereby acknowledge my right of dower to the above tract of land.

"In testimony whereof the said John King and Malissa King, Henderson Adams and Ann Adams of the first part have hereunto subscribed their names the day and year first written herein. The parties of the first

part do hereby warrant generally the title to the property hereby conveyed.

"In testimony whereof, the parties of the first part have hereunto subscribed their names the day and year aforesaid.

"Ann Adams.

"John King.

her

"Malissa X King."

mark

About the year 1886 Russell Pinson's wife died; and in 1892 he conveyed the coal and other minerals on and under the land to the remote grantor of the Northern Coal & Coke Company. This action was brought by the children of Russell Pinson and wife against the coal and coke company, claiming that under the deed their mother took an undivided half interest in the land, and that this at her death descended to them. The circuit court sustained a general demurrer to the petition, and they appeal.

It is not necessary that a grantee in a deed be mentioned by name. If the designation or description is sufficient to identify the person intended, the deed is effectual. Thus a deed to a man and his wife or to a man and his children is good as to the wife or children, although their names are not given. A deed, like any other instrument, must be construed to effectuate the intention of the parties, and the proper construction of the deed must depend upon all its provisions. While Russell Pinson and wife are named in the caption of the deed in question as "of the second part," the wife is not named in any other part of the deed than in the caption; and in the body of the deed it is provided that Russell Pinson is to take care of his mother during her life, and is to have the tract of land. It is also provided that he is to have all of the personal property for taking care of Mary Pinson, his mother. While the instrument is awkwardly drawn, when taken as a whole, we think it was manifestly intended to vest the title to both the land and the personal property in Russell Pinson. The deed is made evidently between the heirs of Henry Pinson, deceased. Russell Pinson was an heir of Henry Pinson; his wife was not. The sum of the instrument is that the other heirs of Henry Pinson vest in Russell Pinson the title to the personal property and this piece of land, and that he is to take care of his mother during life. The consideration of the deed moved from him. It did not move from his wife so far as appears from the instrument. She was under the disability of coverture, and could make no contract. The deed does not show that any obligation was imposed upon her. Upon the whole instrument, we conclude that the word "wife" was used in the caption by inadvertence, or was left there by inadvertence; that the deed was intended to embody a family settlement between the Pinson heirs; that no obligation

was assumed by her; and no part of the property was vested in her.

Judgment affirmed.

ROGERS v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. Oct. 1, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE TOOLS—ASSURANCES AND DIRECTION OF MASTER.

Where an employé, being directed to do work with a wrench, an ordinary one with a piece of gas pipe attached to the handle to give it leverage, told the foreman that it was out of repair and unsafe, and the foreman, who had used it and knew of its tendency, told him that the wrench was all right, and to go ahead and do the work with it, and he, relying thereon, used it with the result that it slipped and threw him, the master is liable for the injury, unless the danger was so obvious that an ordinarily prudent man would have refused to do the work; and this though two or three times during the work, before his injury, the defects came near causing him to fall, and he made no complaint thereof to the foreman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 647.]

2. SAME—OBVIOUS DANGER—EVIDENCE.

That using a defective wrench, which the foreman told a complaining workman was all right, and that he should use, was not obviously dangerous, was indicated by the fact that, several times before it slipped and threw him, it slipped, and he saved himself from injury.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Frank Rogers against the South Covington & Cincinnati Street Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A. E. Stricklett, for appellant. Ernst & Cassatt, for appellee.

NUNN, J. This action was instituted in the court below by appellant to recover damages for a personal injury sustained by him while in the employ of appellee. It was charged substantially in the petition and amended petition that appellee furnished and required him to work with a wrench, in the performance of his duties as its servant, which was defective, unsafe, and dangerous and not fit to do the work which he was required to perform. On the day that he received his injury, he informed one Cox, appellee's foreman in charge of the work, of the unsafe and defective condition of the wrench, and that it was in need of repair; thereupon the foreman assured him that it was safe and sufficient to do the work. He relied upon the assurance of the foreman and began the work with the wrench, and because of its defective and worn condition the wrench slipped and turned on the nut he was tightening, precipitating him violently to the ground and across a rail, injuring him about the side and back in the region of the kidneys. Appellee answered and traversed

all the material allegations of the petition and amended petition, and charged contributory negligence on the part of appellant, to which a reply was filed, thus joining issue. From the evidence it appears that the wrench in question was an ordinary solid iron or steel wrench, with a piece of gas pipe attached to the handle to give it sufficient leverage to securely tighten the nuts. The nuts which they were engaged in tightening were those which held the joints of the steel rails together. They were square; being $1\frac{1}{2}$ inches across. Two wrenches were in use—one with a short handle was used to start the nuts on the bolts, and the other one was used by appellant to turn them farther up and tighten them securely. At the time of the injury, the foreman was hurrying his workmen to complete the work laid off for them before quitting time, which was about 15 minutes after the accident occurred. It was also proven that this long-handled wrench was furnished appellant with which to do the work, and it was the only wrench of that kind furnished for the work; that, when he was directed by the foreman to work with it, he told the foreman, Cox, that it was not safe; that it was out of repair, and Cox told him to go ahead and do the work the wrench was all right, to tighten the bolts up tight; and that he proceeded to do the work in a careful manner and received his injury as stated. It was also shown that the foreman knew, before that time, of the defective condition of the wrench, for he had used it himself in the morning before appellant's injury in the afternoon, and it had caused him to be nearly thrown by its defective condition.

In compliance with a peremptory instruction given by the court, after the introduction of appellant's testimony, the jury returned a verdict for appellee. Appellee's counsel contends that this action of the court was correct for the reason that the defective condition of the wrench was known to appellant, and he must be regarded as having voluntarily assumed the risk incident to the use of it. If a servant knows of a defect in a tool with which he is required to work and continues to use it, without complaining to his master, and is injured thereby, he cannot recover for such injury; but, when the servant objects to the continued use of a defective tool or calls the master's attention to a defective one, and the master, with information of such defects, insists that the servant proceed with his work or assures the servant that the tool is safe and adequate, the servant has the right to rely upon the master's presumed superior knowledge, and, if in the use of the defective tool the servant is injured, the master is liable, unless the danger or risk is so obvious that an ordinarily prudent person would have refused to do the work under the circumstances, in which event the servant acts at his own peril. Appellant began work with this tool

on the day he was injured about the noon hour, and used the wrench in tightening bolts most of the time that afternoon, and in two or three instances, before he received his injuries, the defects came near causing him to fall. Appellee's counsel contends that he made no complaint of this to the foreman, and for this reason he should not be allowed to recover in this action. The foreman was present with the crew, and, if he had called the foreman's attention to these slips of the wrench that occurred during the afternoon, it would only have been a repetition of what he had said to the foreman that noon with reference to the defective condition of the wrench. The fact that the wrench slipped two or three times during the afternoon and he saved himself from injury indicated that the use of the defective wrench was not an obviously dangerous undertaking. This was a question for the jury to determine. *Long's Adm'r v. Illinois Cent. R. Co.*, 113 Ky. 806, 68 S. W. 1095, 58 L. R. A. 237, 101 Am. St. Rep. 374; *Wake & Co. v. Price*, 58 S. W. 519, 22 Ky. Law Rep. 696; *I. C. R. R. Co. v. Keebler*, 84 S. W. 1167, 27 Ky. Law Rep. 305; *L. & N. R. R. Co. v. Richardson*, 66 S. W. 631, 23 Ky. Law Rep. 2090; *Pullman Co. v. Geller*, 107 S. W. 271, 32 Ky. Law Rep. 884.

Appellee's counsel also claims that the action of the lower court should be sustained, for the reason that appellant relied in his petition entirely upon the assurance of the foreman that the wrench was all right, and that it was not alleged that appellant was directed to tighten the nuts with the wrench referred to. Counsel overlook the fact that appellant alleged, in both his petition and amended petition, that appellee provided a dangerous, unsafe, and defective tool and required him to use it in the performance of his duties, by reason of which he was injured. In our opinion the court erred in giving a peremptory instruction.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

BROCKING v. O'BRYAN.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. TAXATION—SALE OF PROPERTY OF ONE FOR TAXES OF ANOTHER.

Taxes against a man not being a lien on his wife's property, sale of such property for such taxes is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1287.]

2. SAME — PURCHASE AT VOID TAX SALE — REMEDIES OF OWNER.

The purchaser of property at a void tax sale, who takes it and converts it to his own use, is liable to the owner for conversion, though the owner may, at his election, sue for the property.

3. ESTOPPEL.

If the owner of property stood by and without objection allowed it to be sold for taxes of another, this is matter of estoppel, which, to be available in an action by the owner against

the purchaser for conversion, must be pleaded by answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 300.]

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Action by Anna L. Brocking against P. D. O'Bryan. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

R. G. Hill, for appellant. La Vega Clements, for appellee.

HOBSON, J. Anna L. Brocking brought this suit in the Daviess circuit court, which sustained a demurrer to her petition, and she appeals.

The facts stated in the petition, as the case is presented, are these: J. C. O'Bryan in the year 1907 was tax collector for the city of Owensboro. As such he had in his hands for collection taxes against B. B. Brocking, the husband of Anna L. Brocking. He levied the taxes on a phaeton, which was the individual property of Anna L. Brocking, and sold it at public auction. The defendant, P. D. O'Bryan, became the purchaser at the sale, and took and carried away the phaeton, and appropriated it to his own use. The tax collector had no claim against her, and it is alleged in the petition that the sale was void, and that thereby she was damaged in the sum of \$200, for which she prayed judgment.

The taxes against B. B. Brocking were not a lien upon the property of the wife, Anna L. Brocking. The officer might legally sell the property of the husband for his taxes; but he was without authority to levy the taxes which he held against the husband upon the property of the wife. His levy upon the wife's property, and his sale of her property under the taxes which he held against her husband, were void. A void act is a nullity. It is as though it had never been done. It confers no rights. It protects no one. The sale of Mrs. Brocking's phaeton for the taxes of her husband being void, the purchaser, P. D. O'Bryan, stands as though the sale had never been made, so far as her right to compensation for the injury goes. He has taken and carried away and converted to his own use her phaeton, if the petition is true, without any right so to do. The rule is that the officer who sells the property of a stranger under a writ is liable to the owner for the damages that he sustains. *Christopher v. Covington*, 2 B. Mon. 357. The purchaser of personal property at a void tax sale, who takes it and converts it to his own use, is also liable for conversion, although he may have acted in good faith. There is no distinction in this regard between a purchaser at a private sale, which is void, and the purchaser at a void tax sale. 28 Am. & Eng. Cyc. of Law, 702.

The owner of the property may either bring an action to recover the property or its value, or he may sue in damages for its

conversion. The rule that he may waive the trespass and sue in trover was well settled at common law. 1 Chitty on Pleadings, 161. He is not compelled to sue for the property, but may sue to recover damages for the conversion, and even where he sues for the property, or its value, he may at his election take an execution for the assessed value of the thing, and not an execution commanding the officer to take the thing and deliver it to him. Ky. St. 1903, § 1665. In 21 Encyc. Pleading and Practice, 1025, the rule is thus stated: "Trover and detinue are concurrent remedies, either of which the plaintiff may pursue at his election; trover being an action for damages for the conversion of the property, and detinue being an action for the recovery of the property in specie, or for damages for its unlawful detention."

If it be true that the plaintiff stood by and allowed her property sold without making objection, when under the circumstances she was called upon to make known her rights, this is matter of estoppel, which, to be available, must be pleaded by answer.

Judgment reversed, and cause remanded, with directions to the circuit court to overrule the demurrer to the petition, and for further proceedings consistent herewith.

COMMONWEALTH v. STANDARD OIL CO. (Court of Appeals of Kentucky. Oct. 2, 1908.)

1. APPEAL AND ERROR—OBJECTIONS BELOW— MOTION FOR NEW TRIAL—NECESSITY.

Under Cr. Code Prac. § 11, providing that proceedings in penal actions are regulated by the Code of Practice in civil actions, the court, in the absence of a motion and grounds for a new trial in a penal action as well as in a civil action can only determine whether the pleadings are sufficient to support the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1650-1656.]

2. INSPECTION—STATUTES—CONSTRUCTION.

Ky. St. 1903, § 2209, prohibiting the sale or offering for sale of illuminating oil with an ignition point of less than 130 degrees Fahrenheit, or oil condemned by an authorized inspector and branded unsafe for illuminating purposes, does not prohibit the owner of oil that has been found below the test or that has been condemned from mixing it, before it is sold or offered for sale, with other oil, thereby bringing the entire quantity up to the standard test.

3. PENALTIES—ACTIONS—BURDEN OF PROOF.

In prosecutions, whether by indictment or penal action, the burden of proving every fact necessary to establish the guilt of accused is, as a general rule, on the commonwealth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, § 32.]

4. SAME—PLEADINGS—ISSUES.

In a penal action, a plea of not guilty is a traverse of every material averment of the petition, and a conviction cannot be had unless accused is proven guilty beyond a reasonable doubt of the offense charged.

5. SAME.

Where defendant in a penal action sets up in his answer an affirmative defense, the defense must be judged by the rules of practice applicable to pleadings in civil actions.

6. SAME—ISSUES—BURDEN OF PROOF.

Where, in a penal action for offering for sale illuminating oil below the test fixed by Ky. St. 1903, § 2209, the petition charged that defendant offered for sale 8,000 gallons of oil that had been condemned as unsafe because below the test, and defendant admitted that the oil had been condemned as below standard, and alleged that, to bring the oil up to the standard, he put the same in a tank containing oil above the standard, thereby raising the whole body of oil above the legal test, etc., the only issue was whether the mixture was up to the standard, and defendant had the burden to prove that it was.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, § 32.]

7. SAME.

Matters of defense in a penal action, consisting of facts either justifying or excusing or exempting from criminal liability, which are wholly disconnected from the particular offense charged, constitute affirmative matter, and the burden of proof is on defendant, unless the fact relied on otherwise appears in evidence to such an extent as to create a reasonable doubt of guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, § 32.]

8. SAME.

In many statutory misdemeanors, defendant may, by relying on a distinct affirmative defense, relieve the commonwealth of proving all the facts necessary to constitute his guilt, especially in penal actions where defendant may set up his defense in a written pleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Penalties, § 32.]

9. APPEAL AND ERROR—REVIEW.

Where defendant in a penal action for offering for sale illuminating oil below the test fixed by Ky. St. 1903, § 2209, presented a valid affirmative defense, and the evidence is not in the record, the court on appeal from a judgment for defendant after a peremptory instruction in his favor must presume that the proof offered by defendant sustained the affirmative defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

Appeal from Circuit Court, Christian County.

"To be officially reported."

Penal action by the commonwealth of Kentucky against the Standard Oil Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Denny P. Smith, N. B. Hays, C. H. Morris, Jas. Breathitt, Atty. Gen., and T. B. Blakey, for the Commonwealth. Humphrey & Humphrey and L. R. Yeaman, for appellee.

CARROLL, J. This penal action was instituted in the name of the commonwealth against the Standard Oil Company for a violation of section 2200 of the Kentucky Statutes of 1903, providing that: "If any person or persons in this state shall sell, or offer to sell, to be consumed or used in this state for illuminating purposes, any of the oils or fluids specified in section 2202, that will ignite or permanently burn at a temperature less than 130 degrees Fahrenheit, or shall sell or offer for sale, to be consumed in this state for illuminating purposes, any of the oils and fluids aforesaid, which have been

condemned by an authorized inspector of this state, and the barrels, casks or packages containing the same been branded or marked by him 'Unsafe for illuminating purposes', the person or persons so offending shall be guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding one hundred dollars, and the oils and fluids be forfeited and sold, and the proceeds go to the state." The petition charged, in substance, that the appellee company did offer for sale about 8,000 gallons of oil, a product of coal, petroleum, or other bituminous substance for illuminating purposes, which oil might be used for illuminating purposes; that the oil so offered for sale had then and there and previous to the offer for sale been tested, examined, and condemned as unsafe for illuminating purposes, and the cask or tank containing the oil had been marked or branded "Unsafe for illuminating purposes" by a duly appointed and authorized inspector, who found that it would and did ignite and permanently burn at 125 degrees Fahrenheit. The appellee in the first paragraph of its answer traversed all the material averments of the petition. In the second paragraph it set out the following facts: "Further answering, defendant states that the facts concerning the 8,000 gallons of oil referred to in the petition herein are as follows. Said oil was shipped and delivered to this defendant at Cadiz, Ky., and was there condemned and marked, 'Unsafe for illuminating purposes,' by John S. Lawrence, an inspector. Thereafter, at the request of the defendant, C. O. Prowse, an inspector located at Hopkinsville went to Cadiz, and, in conjunction with Lawrence, reinspected and retested said oil, and reported to this defendant that said oil would ignite and permanently burn at a temperature slightly less than 130 degrees Fahrenheit. Thereupon this defendant shipped said oil from Cadiz to Hopkinsville, where it caused said oil to be pumped into a large storage tank owned by this defendant, and containing a large quantity of oil which would not ignite or permanently burn at a less temperature than several degrees above 130 degrees Fahrenheit. After said 8,000 gallons of oil which had been condemned as aforesaid had been pumped into and mixed with this large quantity of oil in this large tank, the resultant mixture was inspected and tested by said C. O. Prowse, an authorized inspector of this state, and said Prowse found and notified this defendant, and it is true, that the oil composing said mixture would not ignite and permanently burn at a temperature less than 130 degrees Fahrenheit. Defendant further says that none of said 8,000 gallons of oil which had been condemned as aforesaid was sold or offered for sale by this defendant before it was pumped into said storage tank, and mixed with the oil contained therein, and became a component part of the resultant mixture." In a reply, the plaintiff denied that the resultant mixture in

the large tank in Hopkinsville would not ignite or permanently burn at less than 130 degrees Fahrenheit after the said 8,000 gallons of condemned oil was pumped into the said large tank, as alleged in defendant's answer. Upon the conclusion of the evidence for both parties, the court directed the jury to find the appellee not guilty. No motion of grounds for a new trial was made or entered. With the record in this condition, the point is made for appellee that we cannot consider the bill of evidence, and that the case must be determined on the sufficiency of the pleadings alone to support the judgment entered on the verdict. This question of practice under the decisions of this court must be ruled favorably to appellee's contention. Under section 11 of the Criminal Code of Practice, proceedings in penal actions are regulated by the Code of Practice in civil actions; so that the question must be adjudged as if this were a purely civil action. There is no statute treating particularly of this subject, but this court in more than one decision has held that in civil actions, in the absence of a motion and grounds for a new trial, there is nothing before this court except the question whether or not the pleadings are sufficient to support the judgment appealed from. *L. & N. R. R. Co. v. Commonwealth*, 92 Ky. 114, 17 S. W. 274; *Kistler v. Slaughter*, 50 S. W. 529, 20 Ky. Law Rep. 1937. There is an intimation to the contrary in *Meachem v. L. & N. R. R. Co.*, 45 S. W. 363, 20 Ky. Law Rep. 112, but this must be regarded in conflict with the better-considered opinions in the other cases. So that it may be regarded as the settled practice that in civil actions, where a verdict is returned in obedience to a peremptory instruction, there must be a motion and grounds for a new trial, if it is desired to have this court consider errors committed during the progress of the trial, or pass upon the correctness of the ruling of the lower court in taking the case from the jury.

This leaves to be considered only the question whether or not the pleadings alone supported the judgment. The petition stated a good cause of action for the commonwealth, and the second paragraph of the answer presented a good affirmative defense. The statute prohibits the selling or offering for sale oil that will ignite or permanently burn at a temperature less than 130 Fahrenheit, or oil that has been condemned by an authorized inspector and branded "Unsafe for illuminating purposes." But it does not prohibit the owner of oil that has been found to be below the test, or that has been condemned, from mixing it before it is sold or offered for sale with other oil, thereby bringing the entire quantity up to the statutory test. In this particular the appellee company, after the 8,000 gallons of oil had been condemned and branded "Unsafe for illuminating purposes," had the right to pump the condemned oil into a larger tank in which there was other oil,

and then sell and offer for sale the resultant mixture, provided the whole of it was up to the legal standard. But, when the appellee company in its answer admitted that it placed the condemned oil in a larger tank with other oil, and by failing to deny that it sold the resultant mixture admitted that it did so, it assumed the burden of proving that the oil in the large tank after the condemned oil had been pumped into it was up to the standard required by law, as this averment was denied by the reply. It is the general rule that in prosecutions, whether by indictment or penal actions, the burden of proving the guilt of the accused, and every fact necessary to establish it, is on the commonwealth; and this practice would be applicable to this case if the appellee had contented itself, as it might have done, with entering a plea of not guilty or standing on the first paragraph of its answer which was in effect a plea of not guilty. Under a plea of not guilty, which in law would amount to a traverse of every material averment of the petition, a conviction could not be had unless the appellee was proven to be guilty beyond a reasonable doubt of the offense charged. But it did not content itself with entering a plea of not guilty and resting its case upon this defense. It filed, as it had the right to do, an answer setting up an affirmative defense, and, having done so, its defense must be adjudged by the averments of the pleading and the rules of practice applicable to pleadings in civil actions. *L. & N. R. R. Co. v. Commonwealth*, 112 Ky. 635, 66 S. W. 505.

The answer set up a defense that was more than a traverse of the allegations of the petition and involved new matter entirely separate from and independent of the original transaction, upon which the commonwealth sought to recover. In the second paragraph the answer admitted that the oil mentioned in the petition was below the standard, and had been condemned as "Unsafe for illuminating purposes," and that for the purpose of bringing this oil up to the standard it put it in a tank in which there was other oil above the standard, the result being that the whole body of oil was above the legal test, and that, after mixing the oils, it sold the resultant mixture. This plea, although it denied the sale of any part of the 8,000 gallons before the mixture, was in the nature of a plea of confession and avoidance. It put into the case a distinct and affirmative defense upon which it rested its right to a verdict of acquittal. Under this defense, it was not necessary that the commonwealth should prove that the oil mentioned in the petition would ignite or permanently burn at a temperature less than 130 degrees Fahrenheit, or that it had been branded, "Unsafe for illuminating purposes," because these two material facts were admitted. Nor was it necessary that the commonwealth should prove that a part of the condemned oil had been sold or offered for sale, as the answer ad-

mitted that it had been after it was mixed with the other oil. So that there was only left open by the pleadings the single question of fact whether or not the oil in the large tank after the condemned oil had been mixed with it was up to the standard. The appellee affirmed that it was, and the commonwealth denied it. Therefore the burden of proving this fact was upon the appellee. If no evidence had been introduced and the case had been submitted on the pleadings alone, judgment should have gone for the commonwealth. There are exceptions to the general rule that places upon the commonwealth the burden of proof as to every element of the offense necessary to constitute the guilt of the accused. These exceptions are generally recognized, and are well stated in an article on criminal law, by authors of established reputation, in 12 Cyc. p. 380, where it is said: "Although the burden of proof is on the prosecution, even as to negative matters, such as the absence of self-defense, the want of sufficient provocation, and the like, yet by the weight of authority as to distinct and substantial matters of defense consisting of facts either of justification or excuse, or of exemption from criminal liability, which are wholly disconnected from the body of the particular offense charged, and constitute distinct affirmative matter, the burden of proof is on the defendant, unless the fact relied upon otherwise appears in evidence to such an extent as to create a reasonable doubt of guilt." *State of Kansas v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; *State of Connecticut v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125. The principle announced in these authorities is uniformly applied in this state in prosecutions against persons for selling liquor without license when the accused rests his defense upon the fact that he had a license. *Haskill v. Commonwealth*, 3 B. Mon. 342; *Orme v. Commonwealth*, 55 S. W. 195, 21 Ky. Law Rep. 1412, as well as in other like cases. And is well illustrated by the practice in prosecutions for murder, where the defendant relies upon the plea of insanity, thereby assuming the burden upon this issue. The defendant may in many statutory misdemeanors, by relying upon a distinct affirmative defense, relieve the commonwealth of the necessity of proving all the facts necessary to constitute his guilt. This is particularly true in prosecutions by penal actions where the defendant may set up his defense in a written pleading. In the case before us, when the defendant company admitted that the oil was below the statutory test, and placed its defense upon the ground that by mixing it with other oils it cured the quality, the burden of establishing this, the only issuable fact left open, was upon it. As the answer presented a good defense, and the evidence is not in the record, we must presume that the proof offered by defendant in

the lower court fully sustained its affirmative defense, and that the action of the trial judge in giving the peremptory instruction was proper. If the answer had not presented a good defense, then it would not support the judgment in favor of appellee, and on the pleadings alone a reversal would follow.

The judgment must be affirmed.

WESTBROOK et al. v. POTTER'S SONS' TRUSTEE.

(Court of Appeals of Kentucky. Oct. 1, 1908.)

1. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

Where the proof is conflicting, the findings of the chancellor will not be disturbed on appeal; but, where the findings are against the clear weight of the evidence, the court on appeal will set them aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3992.]

2. BILLS AND NOTES—PAYMENT—EVIDENCE.

Evidence held to show that a note was paid by the execution of a renewal note and its payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1849.]

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Action by J. J. Potter's Sons' trustee against James Westbrook and another. From a judgment for plaintiff, defendants appeal. Reversed, with directions.

J. M. Simmons and Wright & McElroy, for appellants. Basham & Basham, for appellee.

HOBSON, J. On May 20, 1901, Nancy Westbrook bought at commissioner's sale for \$1,335 a tract of land in Warren county belonging to her father, John B. Horton, containing about 100 acres. J. E. Potter signed the sale bond as her surety. Potter paid off the sale bond, and on November 12, 1901, Nancy Westbrook and her husband, James Westbrook, executed to Potter a note and mortgage to secure it for the sum of \$1,379.95, being the amount of the sale bond, with interest. This mortgage covered, not only the Horton land, but also a tract of land owned by James Westbrook. On June 26, 1903, Westbrook and wife executed to Potter a note for \$1,500 with interest from date and a mortgage on the same land to secure it. On November 9, 1903, Nancy Westbrook and her husband sold and conveyed the Horton land to J. S. Hunt for \$2,000, for which he executed notes. These notes went into the hands of Potter. Hunt failed to pay his notes, and sold the land on November 14, 1904, to Oscar Finney for \$2,500. Finney paid Potter the amount of the Hunt notes which he held. On September 28, 1906, Potter having become a bankrupt, this suit was brought by his assignee in bankruptcy against Westbrook and wife on the \$1,500 note and the mortgage securing it. Westbrook and wife filed an answer pleading that the note for \$1,500 and mortgage securing it were given in renewal

of the note for \$1,379.95, a small debt which John Allen Cherry had against James Westbrook being included in the note; and they pleaded that the debt had been satisfied in the sale of the Horton land, when Finney paid off the Hunt notes to Potter. On the other hand the plaintiff pleaded that at the time the \$1,500 note was executed the banking house of P. J. Potter & Sons of which J. E. Potter was a member, held 21 notes against James Westbrook aggregating \$1,500, and that the note for \$1,500 was given to take up these 21 small notes, and not in renewal of the note for \$1,379.95. Proof was taken on the issues thus made by the parties, and, on final hearing, the circuit court entered a judgment in favor of the plaintiff on the note, and subjected the land to its payment. From this judgment, Westbrook and wife appeal.

The question raised by the appeal is wholly one of fact. Nancy Westbrook and her husband, James Westbrook, by their testimony sustain the allegations of their answer. J. E. Potter by his testimony sustains the allegations of the plaintiff's reply, testifying positively that the \$1,500 note was given to take up the 21 small notes. J. M. Simmons, a member of the Warren county bar, testifies: That he was employed by J. E. Potter to draw the \$1,500 mortgage, and that Potter at that time had him to make an abstract of the title, telling him that he wanted the abstract with a view to a sale of the land. That, when Potter employed him, he told him that he had a note and mortgage for thirteen hundred and some odd dollars, and that he was going to pay a little remnant of a judgment in favor of John Allen Cherry, and that he wanted to get the thirteen hundred and some odd dollars mortgage and the remnant of that judgment together and get them all in one debt. That he prepared the abstract and prepared the mortgage and note. That the parties came to his office after the papers were prepared, and Mrs. Westbrook then said to him, in the presence of Mr. Potter: "When we execute this \$1,500 note and mortgage, why, of course, Mr. Potter will deliver to me the thirteen hundred and some odd dollars mortgage and note." That he said, "Of course," and turned to Mr. Potter, and Mr. Potter said, "Why, certainly." He also testified: That, after the papers were executed, he said to Potter: "I have not made any calculation of the interest on the mortgage and note, and I do not know how much the amount of the John Allen Cherry judgment is, and I do not know whether your \$1,500 note will cover the \$1,379.95 note and interest and the John Allen Cherry balance on the judgment, and you had better be sure about that, because I do not know." That Potter replied that he had been collecting some rents on what was known as the Horton tract of land, and that the \$1,500 mortgage and note was sufficient to pay the \$1,300 mortgage and interest and the balance on the John

Allen Cherry judgment, and that he was going to sell the Horton tract of land for Mrs. Westbrook to pay off the \$1,500 mortgage and note. Hunt, the purchaser of the land, testified to this statement made to him by Potter before his purchase: "He had told me before that he had a mortgage for \$1,500 on the two places, on the place that he got and on the home place; but, when he sold out to me for \$2,000, there would be something like \$600 coming to Mrs. Westbrook." He also testified that Potter at no time ever mentioned to him having any other mortgage on the land than the \$1,500 mortgage. Byron Rentrew, also a member of the Bowling Green bar, testified that he represented Hunt in his purchase of the property and Finney in his purchase from Hunt, that Finney paid to Potter \$2,120, and he then makes this statement: "My recollection is that Mr. Potter said that that wiped out the Westbrook debts, and that they would have to have a straightening out, as if there might be something coming back to the Westbrooks." The plaintiff introduced on his behalf John Allen Cherry, who testified that he signed, as surety for James Westbrook, a note to P. J. Potter & Co. for \$160, dated November 22, 1898, and due four months after date; also a note for \$70, dated April 10, 1899, and due four months after date; that on July 15, 1899, P. J. Potter & Co. executed to him a written release from the \$160 note by reason of an arrangement between them and James Westbrook, by which they were to look to Westbrook alone for the money; and that, when the \$70 note fell due, he received notice of it, and went to see Potter with Westbrook, and Potter said: "That note is settled and all other notes you are on." These two notes referred to by Cherry are among the 21 notes which Potter testifies were included in the \$1,500 note and mortgage; but it will be observed that Cherry was released on these notes in the year 1899, that Mrs. Westbrook did not buy the Horton land until two years after that, and that the \$1,500 note and mortgage was executed some four years afterward. There is no witness in the case but Potter who testifies that the \$1,500 note was given in renewal of the 21 small notes, and there are no facts in the evidence confirming his testimony. He does not deny that he employed Simmons. He does not deny that Simmons called his attention to the fact that he had made no calculation to see whether the \$1,500 note was large enough to cover the \$1,300 note and the Cherry judgment. He does not deny Simmons' statement that he then said that he had been collecting the rents; and that he had collected the rent is shown by other evidence. He does not testify that he named to Nancy Westbrook or to Simmons that the \$1,500 note was given to take up the 21 small notes. These 21 small notes were not delivered to the Westbrooks. They remained in the bank, and, when the bank failed, were included in its list of assets. No

reason is shown why Mrs. Westbrook should have mortgaged her land to secure the 21 small notes, nor is it shown that any one at any time ever proposed to her that she should do so. She shows by herself and by her daughter that she called on Potter to surrender to her the \$1,300 note and to release the mortgage, and that he said that he could not put his hand on the note, but would attend to it another day. A married woman may lawfully mortgage her land to secure her husband's debts; but she must make the mortgage freely and intelligently. She must not be led to believe that she is securing her own debt.

It is insisted that the \$1,379.95 note, with interest, and the balance of the Cherry judgment, amounts to much more than the \$1,500 note. Whether this is so or not we cannot tell from the record, but it does appear from the record that Potter had collected the rents on the Horton land; and that the balance would be over \$1,500, after subtracting the rents nowhere appears in the record. Our rule is not to disturb the chancellor's judgment on the facts in cases of this sort, where the proof is conflicting, and on the whole evidence the mind is left in doubt as to the truth; but this does not mean that the chancellor's judgment will be affirmed on a question of fact where it is against the clear weight of the evidence. When that is the case, we must assume either that the chancellor misunderstood the evidence, or that his judgment is based upon some view of the law not held by this court. On the whole case the clear weight of the evidence is with the defendant.

Judgment is therefore reversed, with directions to the circuit court to dismiss the petition.

SETTLE, J., not sitting.

SINGLETARY v. BOENER-MORRIS CANDY CO. et al.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. APPEAL AND ERROR—RIGHT TO APPEAL—AMOUNT IN CONTROVERSY.

Several creditors filed a joint petition against their common debtor and his transferees, asserting claims of less than \$200 each. The court approved the claims, found that a transfer of stock was fraudulent, and directed that the stock be subjected to the extent of \$1,000 to the payment of the claims. *Held*, that the amount involved, as affecting the transferees' right to appeal, was \$1,000.

2. SAME—REVIEW—SCOPE.

The chancellor, in a suit by several creditors against a common debtor and his transferees, not having found that a particular transfer was fraudulent as to the creditors, that branch of the case is not presented on appeal by another transferee from a judgment subjecting property transferred to him to payment of the claims.

3. PLEADING—ANSWER—SUFFICIENCY OF DEFENSE.

Under the rule that a pleading must be construed most strongly against the pleader,

creditors having alleged in a suit brought July 23d that their debtor transferred property April 27th, an answer denying that the transfer was made April 27th, or on any other date in April, did not put the date of the transfer in issue, as affected by the statute requiring suit to be brought within 90 days from that date, since under the answer, the transfer might have been made between May 1st and the bringing of suit.

4. FRAUDULENT CONVEYANCES—CONSTRUCTIVE FRAUD—CREDITORS' RIGHT TO RECOVERY.

Where creditors base their right to recover solely upon Acts 1904, p. 72, c. 22, protecting them against certain constructive fraudulent conveyances, but providing that no jobber, etc., shall have any lien on goods not sold by him, they must by pleading and proof bring themselves within the statute; and plaintiff creditors, having failed to show that goods sold by them formed a part of the stock transferred by their debtor to defendant, cannot subject the stock to their claims.

5. SAME.

In a suit to subject goods to the transferor's creditors' claims, it is improper to adjudge a sale for a sum exceeding the amount of the claims.

6. APPEAL AND ERROR—REVIEW—OBJECTIONS NOT RAISED BELOW.

No objection having been made in the trial court in a suit to subject goods to the transferor's creditors' claims to the court's jurisdiction, or to joinder of parties, and the transferor not appealing from the judgment, the Court of Appeals will not review such objections on the transferee's complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1168-1178, 1183.]

Appeal from Circuit Court, Hickman County.

"To be officially reported."

Action by the Boener-Morris Candy Company and others against Flint Singletary and others. From the judgment, defendant Singletary appeals. Reversed, and remanded for new trial.

Bennett, Robbins & Thomas, for appellant. J. H. Shelton and R. L. Smith, for appellees.

LASSING, J. Appellee and 15 other firms, claiming to be creditors of the firm of B. A. Boone & Son, filed their joint petition in the Hickman circuit court against Boone & Son and Flint Singletary, J. M. Ringo, and J. T. Hile. Eight of the plaintiffs were asserting claims of less than \$50 each, while the remaining 8 plaintiffs' claims were each more than \$50, but less than \$200. The petition, after asserting the claims in favor of each plaintiff, alleged that on the 27th day of April, 1906, B. A. Boone & Son, without notice to the plaintiffs, sold their stock of goods in bulk to the defendant Flint Singletary, in violation of the provisions of an act of the Legislature which became a law March 8, 1904. They claim that under this law the sale was void as to them. They prayed judgment against Boone & Son for their debts, and asked that the stock of goods and merchandise, which they alleged to be worth \$2,000, be subjected to the payment of their debts. The petition further alleged that Boone & Son had paid to J. M. Ringo the sum of \$1,000 in satisfaction of an old debt, for the purpose of preferring him to the ex-

clusion of other creditors, and that a note of \$950 had been fraudulently assigned and transferred by Boone & Son to J. M. Ringo and J. T. Hile for a similar purpose; that this latter transaction, to wit, the payment of the \$1,000 and the transfer of the \$950 note, was in violation of the act of 1856, and fraudulent in law. They prayed that the transactions between Boone & Son and Ringo and Hile be declared preferential, and that they be required to pay any money which they had received from Boone & Son, within the six months next preceding the institution of their suit, into court for the benefit of all of the creditors of Boone & Son. The defendants Boone & Son answered, admitting the indebtedness to most of the plaintiffs as alleged, and pleaded, further, that the payment to J. M. Ringo of \$1,000 was in satisfaction of a mortgage debt against the stock of goods which they sold to Flint Singletary; that this said mortgage had been made long before the purchases by them from the various plaintiffs, and was duly recorded. They further pleaded that the goods bought by them of the plaintiffs were not in the stock at the time of the sale to Flint Singletary, but had been sold in the usual course of business to the customers of Boone & Son before the sale to Flint Singletary. They denied that the payment of this mortgage debt was made for the purpose of defrauding any of their creditors, and especially the plaintiffs, or in contemplation of insolvency. They denied that any payment was made to J. T. Hile, and denied that the sale to Singletary was fraudulent or void, or in violation of the act of 1904.

In an amended petition the plaintiffs alleged that Boone & Son had transferred to J. M. Ringo a note, which they held against Flint Singletary and Don Singletary, as a part of the purchase price of said stock, for the purpose of cheating, delaying, and hindering them in the collection of their debts against Boone & Son. They asked that he be required to account to them and the creditors of Boone & Son for said \$950 note. The allegations of this amended petition were denied by Boone & Son in an amended answer. In a reply the plaintiffs denied that the defendant Ringo had a mortgage upon any of the property which was sold by Boone & Son to Singletary. The defendant Singletary, it seems, was not represented by counsel, but appeared in court and filed his answer, in which he denied that he had purchased the stock of goods of Boone & Son on the 27th day of April, 1906, or at any other time in April of that year, and denied that he was responsible for the debts of Boone & Son, and asked to be dismissed. The depositions of Flint Singletary, Don Singletary, and J. M. Ringo were taken, and the case, on the pleadings and these depositions, was submitted for judgment. The court adjudged to the plaintiffs their respective claims against Boone & Son, found that the sale of the stock

of goods, fixtures, etc., by Boone & Son to Flint Singletary, in gross, was fraudulent as to the plaintiffs and other creditors, and directed that said stock of goods be subjected, to the extent of \$1,000, to the payment of the claims of the creditors of Boone & Son. The stock of goods was ordered to be sold in satisfaction of the judgment. No relief was granted to the plaintiffs as against the defendants Hile and Ringo. From this judgment the defendant Singletary appeals.

The first question which presents itself is the right of appellant to prosecute this appeal. Each of the judgments in the lower court being for a sum less than \$200, it is insisted for appellees that no right of appeal lies; and the case of *Covington Bros. Co. v. Jordan* is cited as authority. In that case several creditors, each having a claim for less than \$200, instituted separate actions against the defendant Jordan, and garnisheed a fund in the hands of the railroad company, which they claimed was owing to him. There was no concerted action in that case on the part of the claimants. The defendant, Powell, intervened and claimed the fund in the hands of the railroad company, and upon final hearing he was adjudged to be the owner of it, and from that judgment each of the creditors appealed. So far as the appellants in that case were concerned, the amount in controversy was the value of their separate claims. Had the court decided against Powell, and adjudged that the fund which he was claiming was subject to the payment of the claims which were asserted against Covington Bros. Company, he would unquestionably, have had the right to appeal, for, so far as he was concerned, the amount in controversy was the sum total which he was claiming, and of which the court, by its judgment, was depriving him. We are of opinion that this case is not controlled by the authority cited by appellees, but that the amount involved, so far as the appellant in this case is concerned, is the sum for which the trial court ordered appellant's property sold, to wit, \$1,000. Appellees united in one action and sought a common relief against appellant. They succeeded in having appellant's property, to the extent of \$1,000, subjected to the satisfaction of their several claims. He owed them individually nothing. Their claims were against Boone & Son; but the court adjudged that to the extent of \$1,000 his property was subject to the debts of the creditors of Boone & Son. It would, indeed, be a strange, not to say harsh, rule that would permit appellee to recover in a joint action a judgment directing the sale of \$1,000 worth of appellant's property, and then deny to appellant the right of appeal because each of the claims of appellees was less than \$200. Appellees are in no position to raise such a question. However, we are of opinion that the amount in controversy in this case. So far as appellant is concern-

ed, is the amount for the payment of which his property was ordered to be sold.

We come next to the consideration of the main question in the case, to wit: Did the chancellor err in subjecting the property of appellant to the satisfaction of the debts of appellees? The proof taken in the case bears chiefly upon those allegations of the petition and its amendment which sought to have the transactions between Boone & Son and Ringo declared a fraudulent preference under the act of 1856; and, the chancellor not having so found, that branch of the litigation in the lower court is not now before us. In the pleadings it is not charged that the sale and transfer of the stock of goods of Boone & Son to Singletary was an actual fraud, but that it was a constructive fraud by reason of the operation of the statute of 1904. For appellant it is insisted that the allegations of the petition, as amended, did not support the charge, for the twofold reason that the suit was not instituted within the 90 days from the date of the transfer, as the statute provides, and, second, that it is not alleged that the goods, which the appellees sold to Boone & Son, were at the time of the sale included in and a part of the stock of goods so sold.

As to the first contention, the petition alleges that the sale was made on April 27, 1906. The suit was filed on July 23, 1906, which would bring it within the statutory requirement. The answer filed by the defendant Singletary attempted to put the date of sale in issue, and denied that it was made on the 27th of April, or any other date in April. This, however, under the well-recognized rule that a pleading must be construed most strongly against the pleader, is not a sufficient answer; for under it the sale could have been made at any time within the months of May, June, or July, up to the date of the filing of the petition, which would have brought it clearly within the provisions of the statute.

The last clause of Acts 1904, p. 74, c. 22, is as follows: "Nothing contained in this act shall apply to sales made under any order of a court, or to any sales made by executors, assignees, administrators, receivers, or any public officer in his official capacity, or by any officer of a court: Provided, that nothing in this act shall be so construed as to give any manufacturer, wholesale merchant or jobber any right or lien on any merchandise or article in any stock of goods, except goods sold and delivered by such manufacturer, wholesale merchant or jobber." Appellees' right of recovery being based solely upon the provisions of this statute, they must, by pleading and proof, bring themselves within the provisions of the statute. *Russell v. Muldraugh's Hill, Campbellsville, etc., Turnpike Co.*, 13 Bush, 307; *Smith v. Drew*, 5 Mass. 516.

In the case at bar appellees neither al-

leged nor proved that any part of the goods which were sold by them to Boone & Son constituted a part of the stock of goods which Boone & Son sold in bulk to appellant; whereas appellant in his deposition conclusively shows that at least a part of the fixtures was purchased by Boone & Son of parties other than appellees. The absence of such an allegation in the pleading, and proof in support thereof, is fatal to appellees' right of recovery, in so far as they sought to subject the stock of goods to the satisfaction of their judgment against Boone & Son. The aggregate of appellees' debts, for which they got judgment against Boone & Son, is \$728.54, and, if they were entitled to a judgment for any sum, it should not have been in excess of this amount; for certainly appellant's stock of goods, if liable at all to be subjected to the claims of appellees, would not be liable beyond the amount of those claims, and the court clearly erred in adjudging the sale thereof for a sum in excess of the sum total of said claims.

Appellant also complains that the circuit court had no jurisdiction over eight of the claims which were set up in this suit, and that there was a misjoinder of parties. No objection was made either to the jurisdiction of the court or the misjoinder in the circuit court, and the defendants Boone & Son, who alone could be affected by these questions, are not appealing; hence they are not passed upon.

The case is reversed, and remanded for a new trial, with the right given either party to file such additional pleadings, and take such proof, as they desire.

MOBILE & O. R. CO. v. MORROW'S ADM'R. (Court of Appeals of Kentucky. Oct. 2, 1908.)

APPEAL AND ERROR — REVIEW — VERDICTS — THIRD VERDICT — CONCLUSIVENESS.

Under Civ. Code Prac. § 341, providing that not more than two trials shall be granted to a party upon the ground that the verdict is not sustained by the evidence, where there have been three verdicts for plaintiff, and the judgments on the first and second verdicts were reversed on appeal because not supported by the evidence, the third verdict will not be disturbed on appeal on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3951-3954.]

Appeal from Circuit Court, Fulton County.
"Not to be officially reported."

Action by Wiley Morrow's administrator against the Mobile & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 97 S. W. 389.

Lansden & Leek and Bullock & Davis for appellant. Hershel T. Smith, for appellee.

LASSING, J. On the night of November 7, 1904, Wiley Morrow, who has since died, had two horses killed by the appellant com-

pany. Thereafter he sued to recover \$225, their alleged value. The petition states that they were killed by a fast passenger train going north, and that but for the gross carelessness and recklessness of the employes in charge of said train the stock would not have been killed. Appellant answered, admitting the killing, denied liability, and pleaded that it was the result of an unavoidable accident. The case was tried, and the jury returned a verdict in favor of plaintiff for \$200. Upon appeal to this court the case was reversed, because the verdict was flagrantly against the weight of the evidence. 97 S. W. 389, 30 Ky. Law Rep. 83. Upon a return of the case to the circuit court a second trial was had, which resulted in a verdict in favor of plaintiff for \$199. This verdict was set aside by the circuit judge and a new trial awarded the defendant. At the September term, 1907, of the Fulton circuit court, the case was tried again, and the jury returned a verdict in favor of plaintiff for \$225. This verdict the trial court refused to set aside, and again we are asked to reverse the judgment predicated upon the verdict of the jury because of certain errors occurring during the progress of the trial, and particularly because the verdict is against the weight of the evidence; it being the contention of appellant that the evidence upon which the jury predicated its verdict on the last trial was not as strong as that offered upon the first trial, and which this court said would not support the verdict.

Section 341 of the Civil Code of Practice provides that: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, or in any other action in which the damages equal the pecuniary injury sustained; nor shall more than two trials be granted to a party upon the ground that the verdict is not sustained by the evidence." The latter part of the above section of the Code controls the case at bar. There have been three jury trials of this case, and each has resulted in a verdict in favor of the plaintiff. The case was once reversed here because the evidence offered did not support the verdict. The trial judge set aside the second verdict of the jury, presumably upon the same ground, and we are now asked to set aside the third and last verdict. It has been repeatedly held that, where there have been as many as three verdicts in favor of the same party, this court will not disturb the third verdict on the ground that it is not sustained by the evidence. *Board of Int. Imp. for Lincoln County v. Moore's Adm'r*, 74 S. W. 683, 25 Ky. Law Rep. 74; *Supreme Lodge K. of H. v. Lapp's Adm'r*, 74 S. W. 656, 25 Ky. Law Rep. 15; *L. & N. R. R. Co. v. Ballard*, 88 Ky. 150, 10 S. W. 429, 2 L. R. A. 694.

On the authority of these opinions, which are in harmony with the statute above stated, the judgment is affirmed.

ARNDELL v. MALUSKY et ux.

SAME v. DEPOYSTER et al.

(Court of Appeals of Kentucky. Oct. 7, 1908.)

1. BOUNDARIES—SUFFICIENCY OF EVIDENCE.

In an action involving title to two parcels of land, evidence held sufficient to sustain a finding as to the location of the boundary line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184-184.]

2. APPEAL AND ERROR—EQUITY CASES—FINDINGS OF FACTS.

In an equity case, the appellate court will not disturb the chancellor's conclusion on a question of fact, where the evidence is conflicting and the court is in doubt as to the truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3972, 3973.]

3. SAME—ACTION AT LAW.

Where trial by jury is waived, and the facts are decided by the court, its judgment will be given on appeal the weight that would be given the verdict of a properly instructed jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3955.]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Actions by J. C. Arndell against Joseph Malusky and wife and by said Arndell against C. P. Depoyster and others. From a judgment dismissing the actions, plaintiff appeals. Affirmed.

R. Hardison, Jr., for appellant. Johnson, Wickliffe & Johnson, for appellees.

SETTLE, J. These two actions involve the title to two parcels of land, aggregating about 11 acres, of which appellant claims to be the owner and entitled to the possession. A part of it is in the possession and claimed to be owned by appellees Malusky and wife, and the remainder in the possession and claimed to be owned by appellees the Depoysters. The cases by agreement of the parties were tried together in the court below without the intervention of a jury. The trial resulted in a judgment dismissing the appellant's actions at his cost, and he has appealed.

The actual contest in the cases is as to the location of the original division line between the land of appellant and those of appellees. It seems to be conceded by appellant that the McLaughlin patent, under which appellees held their lands, is an older title than his, and if appellees' lands, including the parcels in controversy, are covered by the McLaughlin patent, it would follow that their superior title would prevail, although the lands in question may also be covered by appellant's title papers, unless the latter has proved actual adverse possession on his part within the lap, covering continuously a period of 15 years. This he does not seem to have done. Upon the other hand, if the land in controversy lies out of the McLaughlin patent, it is not denied by appellees that it would be covered by appellant's title papers, and, if so, appellees, in order to succeed,

would have to prove actual adverse possession in the lap, continuing for 15 years. So, as already suggested, the sole question is as to the location of the McLaughlin patent line, beyond which it is admitted appellant's boundary does not go. The testimony as to its location is voluminous and conflicting. It would be inexpedient to analyze or attempt to discuss it. There is, however, one feature of it to which we will refer because of its significance and weight.

It appears that, following an attempted agreement between appellant and appellee Joseph Malusky, fixing the line separating their lands, an application was made by some one in the county court to establish a road upon or along the line dividing appellant's lands from those of appellees. This revived a controversy between them as to the true location of the line. To end the controversy the county court directed the county surveyor, Humphrey, to ascertain by survey its location. This he attempted to do, and established the line as appellees located it. He first ran appellant's lines by his title papers, but failed to reach the point claimed by him; then went to corners recognized by him, and ran the several courses called for in appellant's deed to the point of intersection, and, assuming that point to be the correct place for the corner, from it then ran the course called for in appellant's deed, allowing proper variation, and found an old marked line, which he reported to the county court to be the true line dividing appellant's land from appellees. It was adopted by the court, and the opening of the road upon it soon followed. Others testified to the existence of this old line. We, however, attach much importance to this work of the county surveyor, who must be supposed to have been unbiased and impartial.

The survey made by Gillman is practically in accord with that of Humphrey, and shows that appellant's line cannot be run by the courses and distances called for so as to reach the point claimed by him to be the corner of the McLaughlin patent. The testimony of Humphrey is also to the effect that he knew, while the bark and top were on it, the swamp black oak snag claimed by appellant as a corner, and was then unable to find any evidence of marks upon it, and the testimony of both Humphrey and Gillman is to the effect that the stumps of the two white oak trees once marked and recognized as corners stood in the middle of the new road, which, if true, conduces to prove that the new road runs upon the true line dividing appellant's land from those of appellees. The maps referred to in the briefs of counsel are not to be found in the record, and, while the conclusions we have expressed as to the location of the line in controversy are not free from doubt, we are unable to say that the matter was not properly decided by the lower court.

Our rule as applied to appeal in an equity
112 S.W.—41

case is not to disturb the chancellor's conclusion on a question of fact, where the evidence is conflicting and we are left in doubt as to the truth. On the other hand, if we were to treat these two cases as actions in ejectment, a trial by jury having been waived and the facts decided by the court, it is our duty to give his judgment the weight that we would give the verdict of a properly instructed jury, which will not be disturbed when there is any evidence to support it. So, in any view of the matter, we do not feel that a reversal of these cases would be proper.

Wherefore the judgments dismissing appellant's actions are affirmed.

RAY v. JAMES, Auditor of Public Accounts.
(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. ATTORNEY GENERAL—SPECIAL ASSISTANCE
—EFFECT OF STATUTE.

Under Ky. St. 1903, § 114, authorizing the Auditor of Public Accounts to employ assistance to aid the Attorney General in collecting claims due the commonwealth, and providing that fees for such assistance shall be agreed upon by the Governor and the Auditor, one is not entitled to payment of a fee until it has been so agreed upon; that the Attorney General and the Auditor consent to the employment and agree upon the fee not supplying the necessity for the Governor's approval, but failure to agree as to the fee at time of employment will not defeat a claim subsequently approved by the Governor and Auditor.

2. SAME—"ASSISTANCE."

The word "assistance," as used in Ky. St. 1903, § 114, authorizing employment of special assistance to the Attorney General in collecting claims due the commonwealth, means "assistants."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 583.]

Appeal from Circuit Court, Franklin County.
"Not to be officially reported."

Action by John W. Ray against F. P. James, Auditor of Public Accounts. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Ira Julian and J. S. Luscher, for appellant. Jas. Breathitt, Atty. Gen., and Jno F. Lockett, Asst. Atty. Gen., for appellee.

CARROLL, J. The appellant brought this action for a mandamus against the Auditor of Public Accounts. A demurrer was sustained to the petition, and we are asked by this appeal to reverse the judgment dismissing it.

It is averred in the petition: That during the time R. J. Breckinridge was the Attorney General of the state he employed appellant to represent the state in the United States Circuit Court in certain actions brought by the Adams and American Express Companies seeking to enjoin the collection of taxes due the state, the compensation provided by law to be fixed by the Auditor and Governor at a per centum of the amount realized and covered into the treasury, not exceeding 30

per cent. That, after the litigation in these cases was terminated, other suits were brought by the same companies to enjoin the state board of valuation and assessment from assessing them. That at the time these last actions were instituted S. W. Hager was the Auditor and N. B. Hays the Attorney General. That, upon the personal request of the Attorney General, the Auditor employed the appellant to attend to the litigation in the United States courts, the employment to be under the same terms as the employment with the former Attorney General Breckinridge, and the compensation to be a per centum on the amount of taxes collected and covered into the treasury as a result of the adjudications in these cases. That appellant accepted the employment and attended to the cases, and, as a result of his efforts in this litigation, there was recovered from the companies and paid into the state treasury the sum of \$4,786.97. That under his contract with the Auditor, made with the consent and at the instance and request of the Attorney General, he is entitled to be paid a fee of a per centum on the sums covered into the treasury, and that a reasonable fee for the services is 30 per cent. That he was the sole attorney representing the state in these cases. It is further stated that, after the taxes collected had been paid into the treasury, the Governor and Auditor met and agreed that the fee to be paid for such services was 30 per cent. on the amount paid into the treasury, and, by oversight, mistake, and a failure to understand the fact that plaintiff was the only attorney employed in these cases, approved the account of other attorneys for the fee he was entitled to, and refused to pay him anything, although the fee presented by him was approved by the Attorney General.

Section 114 of the Kentucky Statutes of 1903, controlling the disposition of this case, reads as follows: "He [the Attorney General], with the assistance of the Auditor of Public Accounts, shall investigate the condition of all unsatisfied claims, demands and judgments in favor of the commonwealth, and take all necessary steps by motion, action or otherwise to collect, or cause the same to be collected, and paid into the treasury; and to this end the Auditor of Public Accounts may employ such assistance and attorneys in the various counties as may be necessary to aid the Attorney General in such investigation or collection. The fees of such assistance as he may have shall be fixed and agreed upon by the Auditor and Governor, be paid out of the state treasury and shall in no case exceed thirty per cent. of the amount recovered and paid into the treasury; and provided, the thirty per cent. shall not amount to three thousand dollars and more; the fee shall be limited to three thousand dollars; and no fee shall in any case be allowed or paid out of the amount recovered and paid into the treasury unless

that portion belonging to the commonwealth is remitted by the Governor." It will be observed that, under this section, the Auditor may employ such assistance and attorneys as may be necessary to aid the Attorney General, and that the fees of such assistance shall be fixed and agreed upon by the Governor and Auditor. It is a condition precedent to the payment of the fees that they shall have been fixed and agreed upon by the Auditor and Governor. This agreement is indispensably necessary, to authorize a proceeding to require the Auditor by mandamus to issue his warrant for the amount of the fee. When the fee has been agreed upon by the Auditor and Governor, and the attorney to whom it is payable designated, it becomes the duty of the Auditor to issue his warrant for the amount, but not until then. It is also our construction of the statute that the fee should be agreed upon at the time the employment is made, although we would not hold that the failure to make the agreement then would defeat a claim approved by the Auditor and Governor pending the litigation or after it was concluded. The petition does not aver that appellant's claim was ever agreed upon by the Auditor and Governor, and hence it was fatally defective. The fact that the Attorney General and the Auditor may have consented to the employment and agreed upon the fee does not supply the necessity of having it approved by the Governor. It appears from the petition that the claim of appellant is meritorious, but this fact did not authorize the Auditor to pay it. The Auditor had no right to pay the claim, however just and reasonable it might be, unless it came to him approved by the only persons who had the authority to vouch for its correctness. We do not attach any importance to the use of the word "assistance" in the statute. It was evidently intended to, and in fact does, mean the same thing as "assistants."

The demurrer to the petition admits that there was a contract between appellant on the one side and the Auditor and Attorney General on the other, that the service was rendered, and that the Governor and Auditor "met and determined that the fee to be paid for such service in collecting these sums of money was thirty per centum on the amount paid into the treasury." But it does not admit the essential thing that appellant's fee was agreed upon by the Auditor and the Governor, because no such averment is made in the petition. On the contrary, it is expressly stated that the Auditor and Governor approved the claim of other attorneys for the services alleged to have been rendered by the appellant. The facts of this case illustrate the necessity and importance of so construing the statute that the fee authorized to be paid by the Auditor must be agreed upon by the attorney rendering the service and the Auditor and Governor; so that the Auditor, before he issues his warrant, may

know certainly to whom the fee is payable. The state upon the approval by the Governor and Auditor of a claim for services that the demurrer concedes were rendered by appellant has paid the same and is now asked to pay it again, and might be required to do so if the claim presented by the appellant had the approval of the only persons upon whose authority the Auditor is directed to pay. That the Auditor and Governor approved the fee of other attorneys, who under the allegations of the petition were not entitled to it, does not help appellant, as he does not show himself, for the reasons stated, entitled under the statute to demand the relief sought.

Wherefore the judgment is affirmed.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. BARRETT.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. NUISANCE—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY.

Evidence in an action for injury caused by permitting filth to accumulate on premises near plaintiff's residence *held* sufficient to raise the jury question whether defendant caused the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 129.]

2. APPEAL AND ERROR—HARMLESS ERROR—LEAVE TO AMEND REFUSED.

Any error in refusing to allow defendant to amend by pleading one year limitation was harmless where the jury were instructed to allow no damages accruing more than one year before the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4108.]

3. NUISANCE—ACTION FOR DAMAGES—EVIDENCE.

Evidence in an action for permitting filth to accumulate on premises near plaintiff's home *held* sufficient to take the case to the jury on the question of damages to the use of her property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 129.]

4. SAME—DAMAGES—MEASURE.

The measure of plaintiff's damages in an action for permitting filth to accumulate on premises near her residence was the decrease in value of the use of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 119.]

5. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

In an action for permitting filth to accumulate on premises near plaintiff's residence, error in instructing that the measure of damages was "the diminution in value of the use and enjoyment of her property as a home during the time the condition" existed was not prejudicial error, where the jury only allowed \$100 for damages, which was as little as they could have found under a proper instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4228.]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Martha Barrett against the Kentucky Distilleries & Warehouse Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Ellis and William Marshall Bullitt, for appellant. Wilfred Carico and Watkins & Birkhead, for appellee.

HOBSON, J. Martha Barrett owns a house and lot in the city of Owensboro, on which she has resided for many years. Near her house is a distillery known as the "John Hanning Branch," and cattle yards, containing four or five acres, used in connection with the distillery for the feeding of cattle on the slops produced in the manufacture of whisky. The filth from the cattle and the slops was permitted to accumulate on this ground, and to run down on Margaret Barrett's ground. There were also sickening odors and quantities of flies which also settled upon her place. The noise of the cattle and the stench rendered her place less enjoyable, and she brought this suit against the Kentucky Distilleries & Warehouse Company charging that her property had been damaged and that her health had been impaired. The jury found a verdict for her in the sum of \$100 for the injury to her property, and \$200 for the injury to her health, making in all \$300, for which the court entered judgment. The defendant ap-

peals. It is insisted that there was no evidence that the defendant operated the distillery. The answer of the defendant was sworn to by W. E. Overstreet as its superintendent; and he testified that he was the general overseer and manager of the distillery, that it was leased by the defendant to the Sour Mash Distilling Company. He then was asked and answered the following questions: "Q. Who is the Sour Mash Distilling Company? A. I could not tell you. Q. Don't you know who you are the superintendent for? A. For the Kentucky Distilleries & Warehouse Company. Q. What are your duties there? A. General overseer and manager. Q. You oversaw and managed the distillery and everything in connection with it for the Kentucky Distilleries & Warehouse Company? A. Yes, sir. Q. You are operating it this past season for the Kentucky Distilleries & Warehouse Company? A. For the Sour Mash Distilling Company. Q. How are you doing that when you are the superintendent for the Kentucky Distilleries & Warehouse Company? A. Well, they run as the Sour Mash Distilling Company." This testimony was sufficient to submit the case to the jury on the question as to whether the Kentucky Distilleries & Warehouse Company was liable for the wrongs complained of. The defendant offered an amended answer, pleading the one-year statute of limitation as to the personal injury sued for. The court refused to allow it to be filed and of this it complains; but, when the court came to instruct the jury, it instructed them that they could allow no damages on this account, which accrued more than one year before the filing of the suit, thus treating the amended an-

answer as filed. The defendant was therefore not prejudiced by the ruling of the court in refusing the amended answer to be filed; for the situation of the defendant is just the same as it would be if the court had set aside the order complained of and made a subsequent order allowing the answer to be filed.

There was abundant evidence to submit the case to the jury on the damages to the use of the plaintiff's property by the things complained of. Among other things, the plaintiff testified as follows: "When the cattle is there, the mud is up to the belly, if I have to say so, right there right by the side of me, and I am smelling that. You know in the winter time sometimes it is so cold that you cannot smell anything like you would if it is kinder warm; but when the weather changes, and it gets kinder warm, I couldn't smell nothing but cattle. Sometime I would be eating. I would have to stop eating. Nobody there but me. I had to keep my door shut up many time when the weather get warm so I could get a bite to eat. In the winter time I don't work. In the summer I works around. In the winter I go home, but, as soon as they commence to feed these cattle there in the winter, I tell you what I suffer mighty then. Q. How is it in the spring and summer after they have taken the cattle away, what condition do they leave it in? A. Just leave it there. The green flies is all at the side of my house. You can take your hand and rake them down on that side where the cattle is, just rake them down, green flies. After while, they come along and cultivate that. After awhile, for two or three weeks, the smell then is badder than it was before. Q. For the last five years has it been that way? For the last five years before you brought this suit? A. Yes, sir; every time they feed the cattle. Some years they didn't feed the cattle there. When they didn't feed cattle there, I rest tolerably well, but, when they feed cattle, every time they feed cattle I gets sick, get weak just from the feeding the cattle. I am a woman, if I have to say it myself, in good health, but since they have been feeding cattle, when cattle feeding time comes, I commence smelling that. Of course, I get sick, have sick convulsions. I know it is nothing but smelling the cattle and the way I rest." While there was conflict in the evidence, we cannot say that the verdict is palpably against the evidence. The court instructed the jury that the measure of damages was "the diminution of the value and use and enjoyment of her property as a home during the time the condition supposed in the first instruction existed." The court should have instructed the jury that the measure of damages was the diminution in value of the use of the property. *Pickrell v. Louisville, 100 S. W. 873, 30 Ky. Law Rep. 1239; Long v. L. & N. R. Co., 107 S. W. 203, 32 Ky. Law Rep. 774, 13 L. R. A. (N. S.) 1063.* This is

probably what he meant by the instruction he gave. However this may be, we do not think the defendant was substantially injured by the instruction, as the jury only allowed \$100 for damages to the property for the whole time sued for, which is as small amount as they could well have found for the plaintiff for the injury to her property under the proper instruction, if they found for her at all. Upon the whole case, we are satisfied that the defendant's substantial rights were not prejudiced by the instruction, and that a new trial should not for this reason be given.

Judgment affirmed.

JONES v. DRAKE, Judge.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. MANDAMUS—WHEN PROPER—RE-ENTRY OF JUDGMENT.

Under Ky. St. 1903, § 3991, providing that, upon "satisfactory proof" that an unexecuted judgment has been entered and the record thereof destroyed, the court must re-enter the judgment, mandamus will not lie to compel re-entry since the court acts judicially in determining whether the proof is satisfactory; the remedy being by appeal from the order refusing to re-enter the judgment.

2. SAME.

Mandamus lies to compel performance of a mandatory duty, or to compel exercise of a judicial function, where there is no other legal remedy, but the exercise of discretion cannot be controlled in a particular direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 64.]

Appeal from Circuit Court, McLean County.

"To be officially reported."

Action by T. C. Jones against B. J. Drake, judge. From a judgment dismissing the petition and the amended petition, plaintiff appeals. Affirmed.

Taylor & Clark, for appellant. Joe H. Miller, for appellee.

CLAY, C. Appellant, T. C. Jones, seeks in this action a mandamus against B. J. Drake, county judge of McLean county, to compel him to re-enter upon the record of his court a judgment that had been destroyed. It appears from appellant's petition that one W. G. Gibson instituted in the quarterly court of McLean county an action against him on a note for \$115. The appellant, who was defendant in that action, pleaded non est factum. The case was heard, and the jury returned a verdict in favor of appellant. Judgment upon this verdict was first improperly entered. Thereafter a judgment dismissing Gibson's petition was entered. In the year 1908 the courthouse of McLean county was destroyed by fire, and all the records of the county judge's office, including the records of the case referred to, were burned. Appellant, after giving notice to Gibson, moved the court to restore the judgment. This the court refused to do. Thereafter appellant

filed an amended petition to the effect that the appellee, as judge of the McLean county quarterly court, well knew that the judgment sought to be re-entered had been formerly entered in that court, and that he knew and admitted the judgment had been destroyed by fire. Appellee's demurrer to the petition and amended petition was sustained, and they were dismissed, of which ruling of the court appellant complains.

Appellant contends that this action is authorized by section 3901 of the Kentucky Statutes of 1903. That section is as follows: "When any judgment or final order of any court of record of this state remains unexecuted, and the record thereof has been lost, mutilated, defaced or destroyed, it shall be lawful for any person interested therein, upon ten days' notice, in writing, to the adverse party, to move the court in which such judgment was rendered or final order was made to re-enter the same of record; and, upon satisfactory proof that such judgment or final order had been theretofore entered of record, that the same had been mutilated, defaced or destroyed, and the purport thereof, it shall be the duty of the court to re-enter the same of record; which judgment or final order so entered shall have the same effect as the original to all intents and purposes, and official copies thereof shall be received as evidence for all purposes for which like copies of the original, if in existence, would be competent. No judgment for costs shall be rendered against the defendant in such motion, unless he shall controvert the plaintiff's right, and fail in his defense." The appellant relies particularly upon the language, "it shall be the duty of the court to re-enter the same of record," claiming that, wherever a mandatory duty is thus imposed, its performance may be compelled by mandamus. It will be observed, however, that the duty is only imposed "upon satisfactory proof that such judgment or final order had been theretofore entered of record." In determining whether or not the proof so offered is satisfactory, the court acts in a judicial capacity. That being the case, his discretion cannot be controlled by mandamus. The law is well settled in this and every other jurisdiction that, if an inferior tribunal has a discretion and proceeds to exercise it, then its discretion should not be controlled by mandamus, but, if the subordinate public agent, whether it be invested with both judicial and ministerial functions or only with the former, refused to act in any way or entertain a question as to which he has a discretion, and which the law has enjoined upon its consideration, then obedience to the law should be enforced by mandamus, and the agent compelled to act if there is no other legal remedy; but in such case its discretion or judgment must be left free to act and cannot be controlled in a particular direction. The performance of a plain, positive duty may be compelled by a

mandamus, but, where there is a discretion as to the result that may be arrived at, it cannot be controlled. *Cassidy, etc., v. Young*, County Judge, 92 Ky. 227, 17 S. W. 485.

So, too, it has been held that where an inferior tribunal is invested with both judicial and ministerial functions or only the former, but refuses to act or entertain a question as to which it has discretion, it may be compelled by mandamus to act; but, if it acts, although it may be mistaken in its judgment, it cannot be compelled by mandamus to act differently. *Commonwealth, for, etc., v. Boone County Court*, 82 Ky. 632. In this case it does not appear that appellee refused to act. On the contrary, the petition alleges that appellee refused to re-enter the judgment. If he had refused to act at all, he might have been compelled to do so, but the manner of his acting would not have been subject to control by mandamus. Appellant's remedy is by appeal from the order of the county court refusing to re-enter the judgment. In this manner the propriety of appellee's action may be called in question.

Judgment affirmed.

NIXON v. OSSENBECK et al.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—ENFORCEMENT—PROSECUTION OF APPEAL—ATTORNEY.

The attorney of a judgment creditor cannot appeal from an order sustaining exceptions to the title of land sold on execution under the judgment in the name of the client at the client's expense, and against his consent, because of the attorney's lien on the judgment for fees.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by James Nixon against August Ossenbeck and others. From an order sustaining a purchaser's exceptions to the title to certain real estate sold on execution under plaintiff's judgment, he appeals. Plaintiff applied for leave to dismiss the appeal, while his attorney claimed the right to prosecute the appeal in plaintiff's name, because of his lien on the judgment for fees. Appeal dismissed.

Chas. H. Fisk, for appellant. Herbert Jackson, for appellees.

BARKER, J. The appellant, James Nixon, recovered a personal judgment against the appellee August Ossenbeck, in the Kenton circuit court, upon which an execution issued which was levied upon a house and lot in Kenton county as the property of Ossenbeck. The property was sold under this execution and purchased by the plaintiff, Nixon, at execution sale for \$100. The execution was returned "No property found" as to the balance of the judgment, and thereafter this action was instituted in equity to enforce the payment of the remainder. Attachment issued and was levied upon the same land sold

under the execution. There was a mortgage claim upon the land, and the defendant Ossenbeck had a right of homestead therein. Such proceedings were had thereafter that a judgment was rendered by the chancellor sustaining the attachment for the sum of \$363.50, with interest at the rate of 6 per cent. per annum from June 1, 1887, until paid, and \$136.45 costs, subject to a credit of \$100 as of April 28, 1890, enforcing the lien upon the land for the amount stated, and ordering a sale by the master commissioner. Afterwards a sale of the property was made by the commissioner under the foregoing decree, and appellee A. V. C. Grant purchased it for the sum of \$1,875. The sale was reported by the commissioner to the court, and thereafter the purchaser filed exceptions to it on the ground that the defendant Ossenbeck's wife had not been made a party to the action and had an inchoate right of dower in the property, and that he, therefore, could not obtain a good title thereto. This exception was sustained by the court, the sale set aside, and the purchaser released from his purchase bonds. From this order this appeal is prosecuted.

After the record was lodged in this court, the appellees filed the affidavit of the appellant, James Nixon, in which he sets forth that the appeal from the order setting aside the sale was prosecuted in his name without any right or authority so to do, and that he does not wish to prosecute the appeal further, but directs that it be dismissed. He further says that the purchaser, Grant, bid in the property at his (Nixon's) request, and in order that his (Nixon's) interest might be protected, and that he does not desire his friend to be entangled in any litigation on his account. The attorney for appellant insists that he has a right to prosecute this appeal in the name of James Nixon because he has a lien upon the judgment for the fees due him. It seems to us clear that the attorney cannot prosecute this appeal in the name of his client at the client's expense and against his consent. It is not necessary to decide now what remedy the attorney may have as to his fees; but Nixon is the only person who appears upon the record as appellant, and he has a right to decide whether or not the appeal shall be prosecuted in his name and at his expense.

For these reasons, the motion to dismiss the appeal must be sustained, and it is so ordered.

HILL et al. v. PETTITT et al.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

APPEAL AND ERROR—AMOUNT IN CONTROVERSY—DETERMINATION.

Where, in drainage proceedings, petitioners' attorney claimed \$250 for fees, and petitioners appealed from an order allowing only \$100 and overruling their objection to the manner of assessing costs, to appellees' benefit, but failing to show how much costs appellees should be required

to pay, the amount in controversy, as shown by the record, was but \$150, and insufficient to sustain the appeal.

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Drainage proceedings on petition of Thomas Hill and others, in which Thomas Pettitt and others filed objections. From an order of the circuit court allowing R. G. Hill but \$100 on his claim for \$250 as attorney for petitioners, and overruling petitioners' objections to the manner of assessing the costs, petitioners appeal. Dismissed.

R. G. Hill, for appellants. J. R. Hays, for appellees.

OARROLL, J. This was a proceeding under the drainage law of the state found in Ky. St. 1903, § 2380. The appellants here first appealed from the county court to the circuit court. The order of the county court appealed from sets out that R. G. Hill moved the court to allow him an attorney's fee of \$250 as attorney for the petitioners, to be taxed as costs and apportioned among the parties. This motion was objected to, and, upon hearing the matter, the county court allowed Hill \$100, and further adjudged that this sum, together with the remainder of the costs in the action, be apportioned among the parties. Then follow the names of the parties and the respective amount that each is directed to pay; the judgment further providing that, if the amounts charged to each party were not paid by a designated day, they should be placed in the hands of the sheriff of Daviess county for collection. To so much of this order as fixed his fee at \$100, in place of \$250, R. G. Hill appealed to the circuit court. In the circuit court the following judgment, which is the basis of the appeal to this court, was rendered: "This action coming on to be heard upon the pleadings and proof, and the court, after hearing argument and being fully advised, adjudges that R. G. Hill, as attorney for the petitioners herein, be and he is allowed a fee of \$100; and the court further adjudges that the costs of the action was properly assessed; and overrules the objection to the manner of assessing the same, to all of which the petitioners object and except and pray on appeal to the Court of Appeals, which is granted." Unless there is something in the record aside from the question concerning the attorney's fee, this court has no jurisdiction of the appeal. Jurisdiction is denied where the amount in controversy in cases for the recovery of money or personal property is less than \$200. As the attorney's fee sought to be recovered was only \$250, and the lower court allowed \$100, it is clear that the amount in controversy as to appellant is only \$150. Therefore this court would have no jurisdiction.

Appellants complain of the manner in which the costs in the action were apportioned between the parties. The record discloses

the amount of costs each party is adjudged to pay, but we are not informed as to what each should pay if the contention of appellant was sustained. To put it in another way, appellant complains that the appellees are credited by amounts to which they are not entitled, the result being that they are not required to pay such costs as they should be; but how much costs they should be required to pay is not stated. Therefore we are unable to determine whether or not the judgment of the lower court is correct. Nor can we tell what the amount, if any, in controversy is outside of the attorney's fee.

It results from these conclusions that this court has no jurisdiction of the appeal, and it must be dismissed, and it is so ordered.

ASHER v. McKNIGHT et al.

(Court of Appeals of Kentucky. Oct. 7, 1908.)
NAVIGABLE WATERS—RIGHT TO FLOAT LUMBER.

A stream across which one can step in its ordinary stages, 10 or 12 feet wide at the top of the banks, about 4 feet deep when the banks are full, with bushes growing on the sides and meeting in the middle of the stream, with water gates across it, incapable of use for floating staves at any stage unless men walk along the banks with poles to push the staves from the banks and around the shoals, is not a navigable stream, and cannot be used for the purpose of floating out staves, against the wishes of the owners of the land through which the stream flows, without compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 50.]

Appeal from Circuit Court, Harlan County.
"To be officially reported."

Action by A. J. Asher against James S. McKnight and others. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Hazlrigg, Chenault & Hazlrigg, for appellant. J. G. & J. S. Forester, for appellees.

HOBSON, J. A. J. Asher owns more than 100,000 staves on the headwaters of Straight creek, in Bell county. James S. McKnight and Della Shell own a tract of land through which Straight creek runs for 1½ miles below the land of Asher. Asher proposed to float out his staves down Straight creek, and they objected, refusing to allow him to go through their land with the staves. He then brought this suit, alleging that Straight creek is a navigable stream generally used by the public for more than 20 years past in floating staves and timber to market; that there was no other way to get out his staves, but to float them down Straight creek; and that irreparable injury would be done him if he was prevented by the defendants from floating them out. He sued out a temporary injunction, which was granted by the clerk. The defendants filed answer, denying the allegations of the petition as to the stream being navigable, or as to Asher's having any

right to use it; and on a hearing before the circuit court on motion the injunction granted by the clerk was dissolved. The case was then prepared for trial, and on final hearing the circuit court dismissed the petition; and from this judgment Asher appeals.

The proof shows that Straight creek is from 22 to 25 miles long, but that the farm of James S. McKnight and Della Shell is on the upper part of the creek. The creek forks on their land. One prong heads about 1½ miles from the fork, and the other about 2 or 2½ miles above the fork. At ordinary stages of the water a man can step across either of these forks. They are no larger than streams ordinarily known as "branches." From the fork, down through their land, the bed of the stream is 10 or 12 feet wide at the top of the banks, and when the banks are full the water is about 4 feet deep. The bushes growing on the banks on either side touch in the middle of the stream. James McKnight and Della Shell have their land inclosed and water gates across the creek. It is impossible to float any staves down the stream at any stages of the water, unless men walk along the banks with poles and push them from the banks and around the shoals. The stream, so far as the proof shows, has never been used for any practical purposes for floating out timber, except when there were splash dams. Some years ago Asher put in three splash dams, and with the aid of these he floated out a large number of logs; but the splash dams went down a number of years ago, and after this he sold the land which McKnight and Della Shell now own. The case presented is substantially on all fours with *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232. In that case we held that a stream essentially the same as this was not a navigable stream, and could not be used for the purpose of floating out staves, against the wishes of the owner of the land, without compensation. The authorities are collected in that opinion, which is conclusive here.

It may be true that Asher must get his staves out down Straight creek or they must rot; but it does not follow that he can take the private property of the defendants for his private use without compensation. The statute provides how a right of way may be obtained, and he must obtain a right of way to get out his staves, either by contract or by some legal proceeding. See *Kirk-Christy Co. v. American Association*, 108 S. W. 232, 32 Ky. Law Rep. 1177.

Judgment affirmed.

LOWE et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. CRIMINAL LAW—BREACH OF THE PEACE—JURISDICTION—HARMLESS ERROR.

Accused cannot complain because, when arrested on a magistrate's warrant charging threats to do violence, they were taken before the cir-

cult judge rather than before the magistrate, since, under Cr. Code Prac. §§ 385-387, the magistrate could not have tried the case further than to ascertain whether accused should be held to the circuit court, which had jurisdiction to try the charge and determine whether accused should be put under bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3085-3089.]

2. BREACH OF THE PEACE—BONDS PROPERLY REQUIRED.

Bonds to keep the peace were properly required, where the evidence tended to show that defendants were active in a labor strike, and had been guilty of acts tending to precipitate serious difficulties and endanger life and property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of the Peace, § 2.]

3. CRIMINAL LAW—RIGHT TO APPEAL.

An order requiring a bond to keep the peace is not appealable: Cr. Code Prac. § 347, allowing appeals from certain judgments adjudging fines or imprisonment being inapplicable, and the order not being final, since the judge has control over it while the bond has to run.

Appeal from Circuit Court, Bell County.

"To be officially reported."

Richard Lowe and others, having been required to give peace bonds, appeal. Appeal dismissed.

Weller & Points, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Appellant and nine others were arrested on a warrant, which was issued by a justice of the peace of Bell county, charged with having threatened to do violence to certain persons in the employ of the Wallsend Coal & Coke Company and to destroy the property of said company. Circuit court being in session, the officer making the arrest, instead of returning the warrant to the magistrate who issued it, delivered it and the prisoners to the judge of the circuit court. Appellant and his associates objected to the jurisdiction of the court, and moved to dismiss the warrant on that ground. This motion was overruled. They then filed a demurrer to the warrant and the affidavit upon which it was based. This was likewise overruled. They each thereupon demanded a separate trial, which was also overruled.

It appears that a strike had been on at the mines of the Wallsend Coal & Coke Company from some time in May until September, the date of the issuing of this warrant, in which some 125 miners were involved. The evidence brought out during the hearing before the circuit judge showed that much lawlessness had existed in and around the camp during the time covered by this strike; that the union men had done all that they could to induce other miners to cease work at the mines, and to prevent new-comers from entering the mines. Much shooting was done at night, property of the company along the railroad lines was patrolled by union men, houses belonging to the company were burned under suspicious circumstances, foreign miners were at times driven from their homes and terrified by shots fired, and threats

were shown to have been made against the lives of several persons who were opposed to and not in sympathy with the union miners. After hearing all of the evidence for and against those charged in the warrant, the judge dismissed all of them save appellants Richard Lowe, Robert France, Harve McDonald, and Ed Jaggars, whom it appears were the principal offenders, according to the proof offered. He fixed the bond of each of these at \$1,000 each, save Robert France, whose bond was fixed at \$2,500, conditioned that they each should keep the peace for a period of 12 months, and directed that the bonds be executed forthwith, or the defendants placed in jail in the custody of the jailer. Thereupon Robert France, J. H. McDonald, and Richard Lowe executed bond and were released from custody. The defendant Ed Jaggars was committed to jail for three months, or until he executed bond.

They each thereupon filed a motion for a new trial upon the following grounds: First, because the finding of the court is not sustained by the evidence, and is not supported by any evidence; second, because the finding of the court is contrary to law; and, third, because the court erred in refusing to quash the warrant and affidavit upon which the prosecution was based. The court, upon considering the motion, overruled same, and refused to grant the defendants, or either of them, a new trial, and they prosecute this appeal. The bond of Ed Jaggars was reduced to \$500, and he executed same on the 14th of September, the same day upon which the motion for a new trial was overruled.

The circumstances and conditions under which peace bonds may be required in this state are regulated by sections 382 to 393, inclusive, of the Criminal Code of Practice. Section 382 makes it the duty of the magistrate to issue a warrant for the arrest of the offending person when an affidavit is filed to the effect that another person has threatened to commit an offense against his person or property, or where the conduct of the accused in the presence of the court is such as to lead him to believe that one person is about to commit an offense against the person or property of another; and in the latter case the court may verbally order the arrest of the person so offending. Section 383. Upon being taken into custody, either under oral direction or on warrant, section 384 makes it the duty of the magistrate or court to "hear the evidence which may be produced on either side; and if satisfied that there are reasonable grounds for apprehending that the defendant will commit an offense against the person or property of another, or will commit violence endangering human life, or an offense amounting to felony, may require of him surety to keep the peace, or for his good behavior, in a sum not exceeding five thousand dollars, if human life be endangered, or one thousand dollars in other cases; and in default of giving such surety, may commit

the defendant to jail, for a period not exceeding three months, unless he shall, in the meantime, give such surety." By section 385 it is made the duty of the magistrate, if in his opinion the evidence justifies holding the accused, to take a bond for his good behavior, until the defendant shall appear before the circuit court of the county on the first day of its next term; and the bond so taken shall be returned to the circuit court of the county. Section 386. Section 387 directs how the trial shall be conducted in the circuit court.

Appellants' principal complaint is that when arrested they were taken before a circuit judge (the circuit court then being in session), rather than before the magistrate who issued the warrant. Had they been taken before the magistrate, he could not have tried the case further than to ascertain whether or not the accused should be held over to the circuit court, and if, in his judgment, they should, he would have required bond for their appearance in the circuit court on the first day of its next term for trial. Had he been of the opinion that the charge in the affidavit had not been substantially sustained, he would, of course, have discharged them from custody. The circuit court being in session, we are of opinion that no substantial rights of the accused were violated by having them surrendered up to the custody of the circuit court upon being arrested. It was within the power of the circuit court to try the charge against them, and, from the evidence offered by the complainant and such as accused had to offer in their behalf, determine whether or not they should be put under bond to keep the peace. Appellants do not complain that they were not given ample opportunity to procure their witnesses and present their defense, but there was no evidence which warranted the judge in holding them. The conclusion which we have reached in the case renders it unnecessary to go into the merits of the case, but in justice to the circuit judge it may be said that, while there is a sharp conflict between the testimony offered by the complainant and that introduced by appellants, still there was evidence which tended to show that appellants were very active in promoting the interest of the union men in the prosecution of their strike, and had at times been guilty of acts calculated to precipitate serious difficulties and endanger both life and property. Under such circumstances the judge was entirely justified in requiring of them a bond to keep the peace.

The real question in this case is: Have appellants any right of appeal? In the sections of the Code regulating proceedings of this character no provision is made for an appeal from the finding and judgment of the circuit judge, and, if an appeal lies, the authority therefor must be found in those provisions of the Code regulating appeals in civil or criminal cases. Clearly such a right

does not fall within the provisions of the Code regulating appeals in civil cases. The provision regulating appeals in criminal cases of the class under which this case must fall, to wit, section 347, is as follows: "The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors, in the following cases only, viz.: If the judgment should be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days; or, if the judgment be for the defendant, in cases in which a fine exceeding fifty dollars or confinement exceeding thirty days, might have been inflicted." The order of the circuit judge is not that appellants pay a fine, nor is it for imprisonment, nor fine and imprisonment, but it is simply to the effect that they shall give bond, conditioned for their good behavior in general and toward the complainant witness and his company in particular during a stated time, named in the order, and not exceeding one year.

This exact question has not heretofore been before us, although in the case of *Commonwealth v. Oldham*, 31 Ky. 466, it was held that, where a party had been arrested on a bench warrant and improperly discharged, the commonwealth had no right of appeal; and in the case of *State v. Long*, 18 Ind. 438, the same doctrine was announced. In the case of *State v. Lyon*, 93 N. C. 576, it was held that there was no appeal from the action of the officer requiring a party to give security to keep the peace, "for," says the court, "the nature of the purpose to be subserved suggests and requires that the action of the officer requiring such security of a party must be conclusive, and not subject to the right of appeal ordinarily. An appeal, in the absence of any statutory regulation to the contrary, would vacate the order requiring security to keep the peace, and the persons from whom danger is apprehended might, without such restraint, commit the offense pending the appeal." And in the case of *State v. Locust*, 63 N. C. 574, it was held that generally there was no appeal from the action of the justice of the peace in requiring a bond to keep the peace. There is much good sense and reason for such a rule. Proceedings of this character are instituted for the purpose of preventing crimes or violations of the law of a serious nature, and by requiring the one who is threatening to violate the law to give security to the effect that he will behave himself and not do so the good of society is promoted, and the peace and quiet of the neighborhood is in a measure assured, so far as the parties complainant and accused are concerned. Nothing is exacted of the one required to give bond, further than what the law expects every good citizen to do without being coerced. The code provisions undertake to deal with the subject in detail, defining the mode of procedure with much particularity, and yet no provision is made therein for an appeal from

the finding of the circuit judge. Whether the lawmakers failed to make such a provision because they intended that ultimate power should be rested with the circuit judge, or whether they regarded any order which he might make as an interlocutory one, and not a final order, and therefore not subject to appeal, we do not know; but certain it is that there is no statutory authority in this state authorizing an appeal. The order of the court is not final, for the judge has control over it during its legal existence, to wit, the time the bond has to run.

For the reasons given, the appeal is dismissed.

JONES' ADM'R v. JONES' ADM'X et al.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. SALES—ABSOLUTE SALES—MORTGAGE BACK.

A contract for the sale of a stock of goods for a certain sum, to be paid in monthly installments, and providing that in case of default in any payment the whole purchase price should become due, and that the vendor might resume possession and treat any installments already paid as rent, it being further provided that the stock should remain in the seller's possession until the purchase price was paid, was an absolute sale with a mortgage back, and the vendor's remedy on default in payment was a suit in equity to enforce the mortgage.

2. CHATTEL MORTGAGES—FORECLOSURE.

A contract for the sale of a stock of goods for a certain sum, to be paid in monthly installments, provided that in case of default in any payment the whole purchase price should become due, that the seller might resume possession and treat installments already paid as rent, and that the stock should remain in the seller's possession until the purchase price was paid. *Held*, that a petition in an action by the administrator of the seller, alleging default in the payment of monthly installments, that defendant had taken the property and converted it to her own use and praying judgment for the balance of the debt, stated a good cause of action as against a demurrer.

Appeal from Circuit Court, Lincoln County.
"Not to be officially reported."

Action by L. R. Jones' administrator against J. T. Jones' administratrix and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. B. Paxton, for appellant. P. M. McRoberts, for appellees.

LASSING, J. In June, 1905, L. R. Jones sold to his son, J. T. Jones, a stock of goods and fixtures used in operating a restaurant and soda fountain for \$800, to be paid in monthly installments of \$20 per month. The contract of sale provided that in the event of default of any monthly payment the whole purchase price was to become due, and L. R. Jones thereupon had the right to resume possession and treat any installment that might have been paid as rent. It further provided that the entire stock was to remain in the possession of L. R. Jones until the purchase price was paid, and when so paid it was then to become the property of J. T. Jones. It further provided that J. T. Jones

should keep and maintain the stock of goods up to or above its standard of excellence at the date of sale. Both contracting parties died before the institution of this suit. Appellant was appointed administrator of L. R. Jones, and Woodie S. Jones, wife of J. T. Jones, was appointed administratrix of his estate. The administrator of L. R. Jones filed suit to recover of Mrs. Woodie S. Jones, individually and in her capacity as administratrix, the purchase price of the stock of goods, to wit, \$800, less \$480.65, alleged to have been previously paid.

In the first paragraph of the petition it is alleged that the sale was conditional; that the covenants thereof had been broken, in that the decedent, J. T. Jones, had failed to pay any installment as it fell due; and that the defendant, Mrs. Woodie S. Jones, had wrongfully converted all of the articles named in the contract to her own use; and he prayed judgment against her for the purchase price, less the credit to which the same was entitled, as above indicated. In the second paragraph plaintiff charged that the administratrix, Mrs. Woodie S. Jones, had committed waste, and converted the property to her own use, and failed to account for it as administratrix, and he asked that, in the event the court should construe the contract to be an absolute sale, with mortgage back, he should be given judgment against administratrix and her bondsman for the amount due. To each paragraph of the petition a demurrer was sustained, and, plaintiff declining to plead further, his petition was dismissed, and he appeals.

The contract, which is the basis of this litigation, is as follows: "This contract of agreement, made and entered into this 6th day of June, 1905, by and between L. R. Jones, party of the first part, and J. T. Jones, party of the second part, both parties of Lincoln county, Kentucky, witnesseth: Whereas, the party of the first part has this day sold to J. T. Jones, party of the second part, all his right, title, and interest in and to a restaurant, stock of goods, furniture, and fixtures, soda fountain, showcases, and all other property contained in storeroom on the south side of Main street, in Stanford, Kentucky, for the sum of \$800. Said sum is to be paid as follows: \$20 to be paid on the 15th day of October, 1905, from this date, and \$20 on the 15th day of each month thereafter, and in addition thereto the said second party is to pay the interest on all sums remaining unpaid on the 6th day of each month, at the rate of 6 per cent. per annum, or $1\frac{1}{2}\%$ interest per month, on all sums remaining unpaid. In the event the second party should default on any monthly installment, with the accumulated interest, then in that event the entire sums remaining unpaid shall become due and payable, and the first party may at once assume charge and resume possession of the entire stock of goods. The monthly payments herein are only to be in the way of

rental, and the entire stock, etc., aforesaid are to remain in the possession of the first party, until the entire \$800, with interest, is paid, and when so paid the second party becomes the owner thereof, and not till then. The second party agrees to keep up the stock in as good or better condition as when bought. Shall he fail in this particular, then the entire sum becomes due and payable. It is the distinct understanding that the business is to be run in the name of J. T. Jones, the second party thereto, and in no event and in no way is the first party hereto, L. R. Jones, to be liable for any indebtedness that first party may in any way incur."

Similar contracts have frequently been before this court, and the rule announced by Justice Story has been followed, to wit: "Wherever a conveyance, assignment, or other instrument transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether the intention appear from the same instrument or from any other, it is always considered, in equity, a mortgage." In the case of *Baldwin & Co. v. Crow*, 86 Ky. 679, 7 S. W. 146, *Baldwin & Co.* had sold to a man named Dennis a piano, for which Dennis had executed to them three notes, for \$150 each, payable in 6, 12, and 18 months. Each of said notes contained the following provision: "This note is of a series given for the purchase of the instrument mentioned below, the conditions of which purchase are that said instrument remains the property of D. H. Baldwin & Co. until all notes given for the instrument are paid, and in default of payment of any of said notes at maturity, or at any time after such default, before accepting payment of amount thus due, or in case said instrument, before payment in full, is removed from Nicholasville, Kentucky, without written consent of D. H. Baldwin & Co., they may receive possession of said instrument without any liability on their part to refund any money previously paid on account of said purchase. Loss in case of fire to be borne by me. A. J. Dennis." It will be observed that the contract in that case was very much like the one in the case at bar, and the court there said: "It is manifest the object of the contract under consideration was to secure payment of the agreed purchase price, and it should, therefore, be regarded as an absolute sale and mortgage back, and such has been the uniform ruling of this court in similar cases." No contrary rule has ever been announced by this court. Applying this rule to the case at bar, the contract must be considered to be an absolute sale with mortgage back. Hence appellant's remedy was a suit in equity to enforce his mortgage lien and have the property subjected to the payment of the balance of the purchase price due thereon.

The first paragraph of the petition alleged a default on the part of the purchaser in the

payment of the monthly installments, which default, according to the terms of the contract, precipitated the maturity of the entire debt. It also alleged that the defendant, Mrs. Woodie S. Jones, had taken all of said property, every article thereof, and converted it to her own use, and he asked that he be given judgment against her for the balance of the debt due his intestate. This paragraph of the petition stated a good cause of action against the defendant; for the demurrer admits that she was wrongfully in the possession of the mortgaged property, viz., not an innocent purchaser for value, and hence she was answerable for the return of the property or the value thereof at the election of the plaintiff. The suit should have been upon the equity side of the docket, and, in the absence of a motion to transfer it, the court should have done so on its own motion. Upon its return the case should be transferred to the equity docket, and either party permitted to amend his pleading, and appellant permitted to subject the property covered by the mortgage to the satisfaction of the balance, if anything, due upon the purchase price thereof.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

WESTERN UNION TELEGRAPH CO. v. WILLIAMS.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. DISCOVERY—RIGHT OF DEFENDANT TO TAKE PLAINTIFF'S DEPOSITION.

Plaintiff's residence being more than 20 miles from the place of trial, and he being a practicing physician, so that were he not the plaintiff his deposition could be taken, defendant has an unrestricted right to take his deposition under Civ. Code Prac. § 606, subsec. 8, providing that a party may be examined as if under cross-examination by the adverse party, either orally or by deposition as any other witness; and it is not enough that plaintiff appears at the trial, testifies, and subjects himself to cross-examination.

2. CONTINUANCE—TAKING DEPOSITIONS.

The right being given defendant, by Civ. Code Prac. § 537, to begin taking depositions immediately after filing his answer, his motion for continuance till such time as he could take plaintiff's deposition (which he had a right to take, but which plaintiff had refused to give), and the deposition of witnesses to rebut his testimony, should have been granted; the answer having then been filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 38, 39.]

3. DAMAGES—EVIDENCE—MENTAL ANGUISH.

The right to recover for mental anguish being limited to cases of the nearest relationship, plaintiff may merely show such relationship, and the anguish is inferred; and, where by delay in delivering a telegram he reached his mother after her death, while, had the telegram been delivered promptly, he would have arrived two hours before the time she died, he may not, as bearing on his anguish, show that he, with another doctor, who attended her at the time of her death, had treated her frequently before, and that she had yielded to such treatment, and quickly recovered, or that she was depressed when she heard he had not ar-

rived, and that this had a tendency to hasten her death.

Appeal from Circuit Court, Rockcastle County.

"To be officially reported."

Action by J. M. Williams against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Richards & Ronalds, Geo. H. Fearons, J. W. Brown, and J. W. Alcorn, for appellant Bethurum & Bethurum, for appellee.

CLAY, C. On February 1, 1906, about 9 o'clock in the evening, W. J. Sparks sent the following message from Mt. Vernon to appellant, J. M. Williams, 654 Fourth street, Louisville, Ky.: "Lovell says you had better come. Mamma no better. [Signed] W. J. Sparks." This telegram reached the Western Union office in Louisville at 10:56 p. m. It was not delivered until shortly after 8 o'clock the next morning—too late for appellee to take the morning train for his mother's home. Had he taken this train, he would have reached Mt. Vernon at 1:24 p. m. His mother died at 3:20 p. m. Appellee instituted this action to recover damages for his mental anguish resulting from the failure of appellant to deliver the telegram to him in time to enable him to reach his mother's bedside before her death. Appellant answered, denying negligence on its part, and pleading contributory negligence on the part of appellee. According to the testimony for appellant, its night delivery clerk made an effort to call appellee over both telephones immediately upon receiving the telegram. Being unable to reach him, a messenger boy proceeded to 654 Fourth street. After considerable search, he found appellee's office. There was no one there, and he left a note stating that the Western Union had a telegram for Dr. J. M. Williams. According to the testimony for appellee, he had a telephone connection in his sleeping apartments, which were immediately over his office, which rang whenever his office was called. He was in his apartments at the time it is alleged the boy attempted to deliver the message, and also at the time appellant claims to have called him over the phone, and he heard no call of any kind. When he received the message the next morning a little after 8 o'clock, it was then too late for him to take the 8:10 train for the home of his mother. The jury awarded appellee damages in the sum of \$750. A new trial was refused, and the telegraph company prosecutes this appeal.

The case was assigned to the 27th day of September, 1907, for trial. On the 24th day of September the defendant tendered a motion for an order to require the plaintiff to give his deposition, as provided by subsection 8 of section 606 of the Code of Practice, and to continue the case until such time as appellant could take the deposition of plaintiff, and summon or take the deposition of wit-

nesses to rebut such portions of his testimony as it should desire. In support of said motion, appellant filed the following affidavit, which was sworn to by its attorney, A. G. Ronald: "Affiant, A. G. Ronald, says that he is one of the attorneys for the defendant herein; that on the 19th day of September, 1907, plaintiff, Dr. J. M. Williams, and his attorney, Mr. Herman Nettleroth, were present at the office of the clerk of the District Court of the United States for the Western District of Kentucky for the purpose of taking the deposition of certain witnesses on behalf of the defendant herein; that, while plaintiff and his counsel were thus present, the defendant, as its attorney, called the plaintiff as a witness for the purpose of examining said plaintiff, as provided under subsection 8 of section 606 of the Kentucky Code of Practice; that the plaintiff declined and refused to testify or to answer any questions that might have been put to him by this affiant as attorney aforesaid, and on advice of his counsel left the room. Affiant says that he thereafter, on said day, caused a subpoena to be issued by an officer duly authorized to issue same, summoning plaintiff to appear as a witness to testify in this cause, as provided in subsection 8 of section 606 of the Kentucky Code of Practice at the office of Clarence E. Walker, Louisville Trust Building, Louisville, Ky., on the 21st day of September, 1907 at 3 o'clock in the afternoon, and that said subpoena was duly served upon said plaintiff and also a notice that his deposition would be taken as aforesaid; that the plaintiff and his counsel did appear at the office of said Clarence E. Walker notary public, at the time and place named in said subpoena, but that this plaintiff declined and refused to give his deposition, and, upon the advice of his counsel, declined and refused to answer any questions which might have been put to him by affiant as attorney aforesaid. Affiant says that this action has been instituted in a court which sits more than 100 miles distant from the place where the occurrences which are made the basis of the suit transpired; that the only way to rebut any claim or statement that may be made by the plaintiff is to bring its witnesses to the place where the court is held or to take their depositions; that neither the defendant nor affiant nor any of its counsel have any knowledge or information as to what statement or claims will be made by the plaintiff, and do not know the witnesses whose depositions it will be necessary or take or to have present as witnesses. Affiant says that defendant cannot properly prepare this case for trial or cannot properly prepare its defense without taking the deposition of plaintiff, as provided for in the section of the Code of Practice above referred to; that, under said section, it has the right to take the deposition of plaintiff in order that it may know what evidence it has to rebut, and what witnesses to call; that, after plaintiff gives his testi-

mony on the witness stand at the trial of this cause, there will not be sufficient time for it to secure the attendance of the witnesses who would rebut same, or take their depositions. Affiant says that this motion is not made for the purpose of delay, but only that it may be placed in a position where it can properly prepare its defense; that, unless it is given an opportunity to examine plaintiff and he is required to submit to said examination, this defendant will be deprived of a substantial right; that it cannot safely go to trial without the exercise of the right of examination of plaintiff granted to it by the Code of Practice, and without the opportunity of procuring witnesses to rebut the testimony if it should so desire. Affiant says that, had said plaintiff submitted to an examination or given his testimony upon either of the occasions upon which he was called as a witness by the defendant, it would have had sufficient time to rebut his testimony if it so desired, and would have been ready to go to trial."

The court refused to allow either the motion or the affidavit to be filed, but passed the matter to the day upon which the case was set for trial. On said day the court allowed the motion and affidavit to be filed, but overruled the motion, to which ruling the defendant excepted. The case then proceeded to trial. At the conclusion of the testimony of appellee in chief as a witness in his own behalf, appellant avowed that it was taken by surprise by the testimony of appellee to the effect that the telephone in his office was at all times connected by wire with the telephone in his sleeping apartments, and that, when the telephone in his office was rung, the telephone in his sleeping apartments was also rung for the same call; also, by the statement that the rule of the railroad company was that it would not postpone the departure of its trains except to await the coming in of a connecting train. Appellant further avowed that it could introduce testimony to rebut the statements made by appellee, but was then unable to do so because the witnesses it required for that purpose lived so far away that their presence could not be obtained or their depositions taken. Appellant thereupon moved the court to set aside the swearing of the jury, and continue the case or postpone the trial until such reasonable time as would give appellant an opportunity to take the depositions of said witnesses, all of whom it alleged resided in the city of Louisville. This motion the court overruled, and appellant excepted.

In support of its contention that the trial court erred in failing to grant it a continuance when it was made known to the court that appellee had declined to give his deposition, appellant relies upon subsection 8 of section 606 of the Civil Code of Practice. This section is as follows: "A party may be examined as if under cross-examination at the instance of the adverse party, either orally

or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony." It is insisted by counsel for appellee that the only purpose of this provision is to enable one party to get the benefit of the testimony of the adverse party at the trial; that, therefore, if the adverse party whose deposition the other party sought to take actually appears at the trial and testifies, and subjects himself to cross-examination, the party seeking his deposition cannot complain because he failed to take it. While this view appears plausible, the Code itself does not place any such restriction upon the right of one taking the deposition of the adverse party. It gives to one party the absolute right to take the deposition of the adverse party as that of any other witness. It appears that appellee, whose deposition it was sought to take, lived more than 20 miles from the county seat where the trial was to take place, and, in addition to this, he was a practicing physician. If, then, he were a witness other than the plaintiff in the case, appellant would have had the right to take his deposition. That being the case, it necessarily follows that under subsection 8 of section 606 appellant had the right to take his deposition. It is earnestly insisted that the right given by subsection 8 of section 606, if interpreted according to the contention of appellant, is liable to great abuse; that it will enable the party to find out his opponent's evidence in advance of the trial. As, however, the right is given to each party, they will both be upon terms of equality; and, as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced. By section 537 of the Code the right is given to a defendant to begin taking depositions immediately after filing his answer. Appellant's answer had been filed when it made the motion for a continuance on the ground that appellee had declined to give his deposition. Appellant had the right to take appellee's deposition. This right was denied to it. We therefore think the court should, under the circumstances, have continued the case, and its failure so to do was prejudicial error.

Appellant also insists that the trial court erred in permitting appellee to testify to the fact that he, in conjunction with Dr. Lovell, a physician who attended his mother at the time of her death, had treated his mother frequently before, and that she yielded to such treatment and speedily recovered; also, that the court erred in permitting Dr. Lovell to testify to the fact that appellee's mother was disappointed and depressed when she heard that her son had not arrived on the train, and that this disappointment and consequent depression had a tendency to hasten her death. Counsel for appellee insist that such evidence was admissible as bearing upon appellee's mental anguish, for his grief would

be all the greater because of his inability to give his mother the treatment that had previously brought about her recovery, and because of the fact that she was depressed by reason of his failure to arrive in time to see her. In our opinion, however, the effect of appellee's testimony would be to lead the jury to the conclusion that the telegraph company was in a sense responsible for the death of appellee's mother because of his failure to get there and give her the treatment that had formerly resulted in her recovery, while to admit the testimony of Dr. Lovell would, in effect, permit a recovery for the mother's anguish, instead of the son's. This is one of the few courts giving the right of recovery in cases of mental anguish. We have restricted this to cases of the nearest degree of relationship. The ground of this restriction is that there is a natural mental anguish resulting from a failure to arrive at the bedside of a dying relative or the failure to attend the funeral of such relative. The law naturally concludes that mental anguish in case of such relationship will necessarily follow. If testimony of the kind given above were admissible, there would be no reason for restricting a recovery to cases of the nearest degree of relationship, for friends could frequently prove greater mental anguish than could a parent or son. Again, if such testimony were admissible, a son might prove that the relationship between him and his mother was more tender than that which usually exists between mother and son. He might go into matters of sentiment and love which it would be impossible for the defendant in any way to rebut. We think that in cases of this kind the party suing should be confined to a statement of the mere facts of mental anguish, and should not be permitted to introduce testimony of the nature referred to for the mere purpose of harrowing the feelings of the jury, and increasing the size of the verdict. Upon the next trial the court will exclude such testimony.

For the reasons given, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

CORNELISON v. MILLION.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

JUDGES—GUARDIAN AND WARD—SETTLEMENTS—LIABILITY OF COUNTY JUDGE.

Ky. St. 1903, §§ 1065, 1068, providing that a county judge shall every two years require fiduciaries to settle their accounts, and at least once in each year inquire into the solvency of the sureties of each fiduciary, etc., are mandatory; and a county judge, acting as such from December, 1899, until January, 1902, cannot excuse nonperformance of such duties on the ground that the last settlement made by a guardian was in 1889, for, when the record showed the appointment of a guardian and his settlement, showing that he had in his hands money due the ward, it became the duty of the county judge to perform the statutory duties.

Appeal from Circuit Court, Madison County. "To be officially reported."

Action by Pal Cornelison against E. C. Million. From a judgment of dismissal, plaintiff appeals. Reversed.

Grant E. Lilly, for appellant. W. S. Moberly, for appellee.

CARROLL, J. In 1887 J. W. Bales was appointed by the Madison county court as guardian of the appellant, and executed a bond, with Socrates Maupin as his surety. In February, 1889, Bales made a settlement of his accounts as guardian, which was put to record in the proper office. Again in January, 1902, he made a settlement, showing a balance of some \$400 due his ward. Afterwards Cornelison brought suit against his guardian on the bond to recover the amount due him on the settlement, and obtained judgment, upon which execution issued and was returned "No property found." Thereupon Cornelison brought this action against Chenault, Burnam, Sullivan, Turpin, and appellee, Million, who were judges of the Madison county court at different times from 1887 to 1905. The action was dismissed or filed away, with leave, as to all of the defendants except the appellee, Million. So that the only questions before us are whether or not the petition stated a cause of action as against appellee, Million, and whether or not his answer presented a defense.

It is in effect alleged that Million was elected county judge, and acted as such from December, 1899, until January, 1902; that he did not during that time make any inquiry into the solvency of Bales or his surety, and that if he had made reasonable inquiry as to their solvency he would have discovered that they were in failing circumstances and in debt in excess of the reasonable value of their property; and if he had required the guardian to make a settlement, or had inquired into the solvency of the surety, the condition of their affairs would have been disclosed, and the rights of the ward protected, and his estate saved from loss; but by reason of the negligence of Million in failing to inquire into the solvency of the guardian and his surety, and in failing to require the guardian to make a settlement, the whole of the amount due the ward has been lost. In his answer Million admitted that during the time he was judge he did not make any inquiry into the solvency of the guardian, Bales, or his surety, or require any settlement, and attempts to excuse himself from discharging this duty upon the ground that the only settlement Bales made as guardian previous to his assuming the office of county judge in 1899 was made in 1889; that he had no knowledge or information that Cornelison had a guardian, or that Bales had ever qualified as his guardian; that when he became county judge he examined the guardian settlement books in the clerk's office of his court, for the purpose

of ascertaining what guardians had made settlements within the two years preceding his induction into office; that, not finding any settlement made by Bales, or any record in the settlement book concerning his guardianship within the two years, he had no notice that Bales was then or had ever been a guardian. It is admitted in the record that the last settlement, and, indeed, the only one prior to the time Millon became county judge, made by Bales, was in 1889. If Judge Millon had examined the records of the county court as far back as 1889, he would have discovered that Bales made a settlement showing a balance of some \$400 in his hands.

The argument of counsel for appellee is that, as the statute requires county judges to make settlements with guardians every two years, which are recorded, each county judge may presume that his predecessors have performed their duties under the statute, and is not required to examine the records further back than two years preceding his induction into office for the purpose of ascertaining what guardians are delinquent. We cannot agree in this construction of the statutory duties of a county judge in respect to guardians. Section 1065 provides that the county judge "shall when called on by a fiduciary settle his accounts, and shall once in each two years, require all fiduciaries to settle their accounts, unless there is an action pending in the circuit court for such settlement." And section 1068 provides that "It shall be the duty of the county judge at least once in each year to carefully inquire into the solvency of all the sureties upon the bond of each fiduciary; and if upon such inquiry there is reasonable grounds to believe that any bond is not amply sufficient to protect from all loss to those interested, he shall at once give notice to such fiduciary that a new bond or additional surety on the old one is required, and upon the failure of the fiduciary to give said bond or surety within a reasonable time to be fixed by the court, he shall be removed." These statutes are mandatory. They impose unconditionally upon the county judge certain duties that he must perform. He cannot excuse a performance upon the ground that he presumed his predecessors in office did their duty. Each county judge must do his duty as pointed out in the statute, without reference to what his predecessor did, or whether he was punctual or careless in discharging the duties of his office. Judge Millon was county judge of Madison county for two years. It was his peremptory duty to at least once in each of those years carefully inquire into the solvency of the sureties upon the bond of Bales and all other fiduciaries who had executed bond in the county court, and to require settlements to be made in accordance with the statute. If by his failure to perform this duty the ward's estate, or any part of it, was lost, the ward may recover upon the bond of the county judge the amount of the loss so sustained.

It is not material when Bales was appointed, or whether he made any settlement within the two years preceding the induction into office of Judge Millon. The record showed that he was appointed guardian, and in the settlement of 1889 that he had in his hand money due his ward. These two facts made it the duty of Judge Millon to comply with the statute.

As suggested by counsel, these statutes impose upon the county judge duties that may, unless great care and diligence is exercised, involve them in serious loss. But the law is so written, and it has been so construed, and we are not disposed at this day to impair the useful purpose of the statute by getting away from the opinions that seem to us do no more than give them the effect intended by their enactment. The law applicable to cases of this character is so fully and clearly settled in *Cosby v. Commonwealth*, 91 Ky. 235, 15 S. W. 514, and *Commonwealth v. Lee*, 120 Ky. 433, 86 S. W. 990, 89 S. W. 731, that it is unnecessary to further elaborate it in this opinion. As the case went off on the pleadings, we express no opinion whatever as to the liability of Millon. Whether he is liable or not will depend upon the facts developed when the case is prepared for trial.

The judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

STEELY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. INDICTMENT AND INFORMATION—PARTIES TO OFFENSES—PRINCIPALS—AIDERS AND ABETTORS.

One indicted as principal may be convicted on a showing that he was present at the time of the commission of the offense, counseling, aiding, or assisting the perpetrator thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 540-542.]

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

No instruction based on any theory not supported by the evidence, or on a theory opposed to the evidence, should be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

3. SAME.

Where accused was charged with killing decedent by cutting him, and the proof showed that the cutting was done by her son, instructions based on the idea that she did the cutting should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

4. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

Where decedent struck accused, knocking her down, and she called to her son to cut decedent, exclaiming that she was killed, and the son did so, the court should have instructed that if the son cut decedent, from which wound he died, and accused, his mother, was advising the said son so to do, yet if at the time either the accused or her son had reasonable grounds to believe, and in good faith did believe, that decedent was then and there about to take her life, or inflict great bodily harm, the son had the right to use any means at his command

that were necessary, or to him apparently necessary to protect the accused, and the accused under such circumstances had the right to advise her son so to do, and was not guilty on the ground of self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-632.]

5. SAME—EVIDENCE—DEGREES OF HOMICIDE.

Where the jury believe beyond a reasonable doubt that accused has been proven guilty of a homicide, and they entertain a doubt as to the degree of guilt, they must give her the benefit of the doubt, and find her guilty of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 517.]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Sarah Steely was convicted of manslaughter, and she appeals. Reversed and remanded for new trial.

R. S. Rose and J. K. Watkins, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Appellant and her son, Granville Steely, were indicted for the murder of Martin B. Snyder. She demanded and was given a separate trial. The jury having found her guilty and fixed her punishment at five years' confinement in the penitentiary, she appeals, and seeks to reverse the judgment predicated on that verdict on several grounds, the principal of which, however, is that the court did not properly instruct the jury.

The facts in the case, as developed by the testimony of both the commonwealth and the accused, show that on the night of the 3d of July, 1908, appellant was living with her husband and two sons, about 12 and 16 years of age, respectively, in a small cottage on the bank of the river in the town of Williamsburg. Her husband was not at home on that night, and a short time before midnight the deceased, accompanied by some six or eight of his gentlemen friends, took a 16-gallon keg of beer to the home of appellant for the purpose of drinking it. The keg was placed in the middle room on the floor, and tapped. Deceased and his friends and appellant and her son Granville all engaged in drinking. While the drinking was in progress, the deceased, Granville Steely, and others of the men assembled were shooting dice on the floor by the light of a small lamp. Later in the night, sometime between 1 and 2 o'clock, the crowd had become somewhat boisterous, and appellant ordered them from the house. Deceased took offense at being ordered from the house, and threatened to take the lamp, which was the only light, away with him. This threat on his part brought on a wordy war between himself and appellant, in which she several times ordered him from the house. The lamp was taken from the floor by some one, and, in being lifted up, went out. In the meantime appellant had gotten possession

of an ax, and was approaching deceased in a threatening manner with it, when one of her guests caught hold of the ax so as to prevent her from using it, and, while he was so holding the ax, deceased struck appellant over the shoulder and neck with the lamp. This blow at least staggered appellant, and, according to the weight of the testimony, which supports her contention, knocked her down. She immediately exclaimed that she was killed, and called to her son to cut deceased, and he was stabbed twice. Just when this cutting was done, or whether in the house or outside, is not clear, for it was dark in the house at the time, and no witness saw deceased cut, though Granville Steely testified that he cut him when deceased attacked his mother. From the effects of these wounds there inflicted upon deceased he died two days later.

For appellant it is urged that, as the commonwealth utterly failed to show that she cut or stabbed deceased, the jury should have been peremptorily instructed to find for her at the conclusion of the commonwealth's testimony, and certainly it should have been so instructed at the conclusion of all of the testimony when it had been clearly established that the cutting was done by Granville Steely. This contention is without merit, however, for it has been expressly decided that, although one is indicted as a principal, he may be convicted on the showing that he was present at the time the crime was committed, counseling, aiding, advising, or assisting the real perpetrator thereof. In the case of *Evans v. Commonwealth*, 12 S. W. 768, 769, 11 Ky. Law Rep. 573, the appellant was jointly indicted with others charged with the crime of house burning. The lower court instructed the jury that if the burning was done by either of the persons indicted with appellant, and he was present, aiding or abetting, they should convict him, and in passing upon the correctness of this instruction upon review here this court said: "The indictment charges the accused with the burning. It does not speak of aiding or abetting. If, however, the torch was applied by a codefendant of the accused, and he was then present, aiding and abetting, he was under our law a principal, and the indictment, therefore, authorized such an instruction." And in the more recent case of *Reed v. Commonwealth*, 100 S. W. 856, 30 Ky. Law Rep. 1212, the same principle was approved in a most elaborate and exhaustive opinion by Judge Settle.

The objection to the instructions given is well taken. The instructions in every case should present the law of the case as warranted by the particular facts proven. No instruction should be given based upon any theory which is not supported by some evidence, and certainly an instruction should not be given upon any theory where all of the evidence in the case tends to show that the converse is true. In the case at bar appellant

was charged with having cut and stabbed deceased, from the effects of which he died. There was not a particle of proof offered which tended to show that she did so; on the contrary, there was positive proof offered which tended to show that the cutting was done by her son. No instruction, therefore, should have been given based upon the idea that she herself did the cutting; hence instructions 1 and 3 are superfluous.

The instruction on self-defense is also objectionable, in that it falls to submit to the jury the idea that if at the time he did the cutting Granville Steely believed, and had reasonable grounds to believe, that either he or his mother were in danger of suffering death or some great bodily harm at the hands of deceased, then he had the right to use such means as seemed necessary under the circumstances, as they appeared to him, to repel such threatened bodily harm or danger to himself or his mother. Certainly, if the conduct of deceased at that time was such as to justify Granville Steely in the belief that deceased was then about to inflict upon his mother or himself great bodily harm, he should go acquit on the ground of self-defense, and, if Granville Steely is justified and excused for cutting deceased, appellant should likewise be excused for having been present urging and advising him to do so. Upon a retrial of the case, if the evidence introduced is substantially the same as that offered upon the last trial, the court will give the following instructions:

"(1) If you believe from the evidence beyond a reasonable doubt that Granville Steely, in Whitley county, Ky., before the finding of the indictment herein, willfully, feloniously, and with malice aforethought, and not in the necessary, or to him apparently necessary, defense of himself or his mother, with a knife or dirk, a deadly weapon, cut, stabbed, and wounded one Martin B. Snyder, from the effects of which cutting, stabbing, and wounding the said Snyder then and there presently died, and if you further believe from the evidence beyond a reasonable doubt that at the time he did so the defendant Sarah Steely was then and there present, willfully, feloniously, and with malice aforethought, and not in her necessary or to her apparently necessary, self-defense, counseling and advising the said Granville Steely to do said cutting, stabbing, and wounding, or aiding or assisting the said Granville Steely in doing said cutting, stabbing, and wounding, then, in that event, you should find the said Sarah Steely guilty, as charged in the indictment, and fix her punishment at confinement in the state penitentiary for life, or at death, in your discretion.

"(2) If you believe from the evidence in this case beyond a reasonable doubt that Granville Steely, in Whitley county, Ky., and before the finding of the indictment herein, did unlawfully, willfully, feloniously in sudden affray, or in sudden heat of passion,

without previous malice, and not in the necessary, or to him apparently necessary, defense of himself or his mother, cut, stabbed, and wounded Martin B. Snyder with a dirk or knife, a deadly weapon, from which cutting, stabbing, and wounding the said Snyder then and there presently died, and if you shall further believe from the evidence beyond a reasonable doubt that at the time the said Granville Steely so cut, stabbed, and wounded the said Martin B. Snyder the said Sarah Steely was then and there present, unlawfully, willfully, feloniously in sudden affray, or in sudden heat of passion, and not in her necessary, or to her apparently necessary, self-defense, counseling and advising the said Granville Steely to do the said cutting, stabbing, and wounding, or aiding or assisting the said Granville Steely in doing said cutting, stabbing, and wounding, then you should find the said Sarah Steely guilty of voluntary manslaughter, and fix her punishment at confinement in the state penitentiary for any length of time not less than two years nor more than twenty-one years, in your discretion.

"(3) Although you may believe from the evidence beyond a reasonable doubt that the defendant Sarah Steely has been proven guilty, yet, if you entertain a doubt as to the degree of her guilt, you should give her the benefit of the doubt, and find her guilty of voluntary manslaughter, as defined in instruction No. 2.

"(4) Although you may believe from the evidence beyond a reasonable doubt that Granville Steely cut, stabbed, and wounded Martin B. Snyder, from which cutting, stabbing, and wounding he then and there presently died, and that the defendant Sarah Steely was then and there present, aiding, advising, and counseling the said Granville Steely to cut, stab, and wound the said Snyder, yet, if you shall further believe from the evidence that at the time the said Granville Steely so cut, stabbed, and wounded the said Snyder, either the defendant, Sarah Steely, or her son, Granville Steely, had reasonable grounds to believe, and in good faith did believe, that the said Snyder was then and there about to take her life or inflict upon her some great bodily harm, then the said Granville Steely had the right to use any means at his command that were necessary, or to him apparently necessary, to protect the life of defendant Sarah Steely, or to ward off the then impending, or to him apparently impending, danger, then the defendant, Sarah Steely, under such circumstances, had the right to advise and counsel her son Granville Steely to do so, and you should find the defendant Sarah Steely 'not guilty' on the ground of self-defense and apparent necessity.

"(5) If, upon the whole case, you entertain a reasonable doubt as to whether or not the defendant has been proven guilty, you should find her 'not guilty.'"

Certain other objections are made by counsel for appellant in their brief; but, as these questions cannot arise on another trial, we deem it unnecessary to consider them.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

COMBS et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. INDICTMENT AND INFORMATION—VARIANCE—PRINCIPALS—AIDERS AND ABETTERS.

One charged as aider and abettor to a murder may be convicted as a principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 540-543.]

2. CRIMINAL LAW—PRINCIPALS—INSTRUCTIONS.

The court on the trial on an indictment charging that the act of killing was committed by defendant, who was aided and abetted by a codefendant, need not designate either of them as principal, or aider and abettor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1818-1820.]

3. HOMICIDE—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that, when decedent was shot, he was pursuing a sister of defendants, whom he had previously attempted to force to yield to his desires, an instruction authorizing an acquittal if defendants believed, or had reasonable ground to believe, that at the time of the killing accused was attempting to commit an assault on their sister, and they believed, and had reasonable grounds to believe, that the assault could only be prevented by taking his life, was necessary to properly submit the issue of self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 633.]

4. SAME—"MURDER."

Where the act of killing another is done willfully, feloniously, and with malice aforethought, accused is guilty of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 12.]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726-7727.]

5. SAME—"MANSLAUGHTER."

Where the act of killing another is done in sudden heat and passion, or sudden affray, and without previous malice and not in necessary self-defense, accused is guilty of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 59.]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

6. SAME—DEGREE OF HOMICIDE.

Where the jury believe beyond a reasonable doubt that accused has been proven guilty, but have a reasonable doubt whether he has been proven guilty of murder or manslaughter, they should find him guilty of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 517.]

7. SAME—"WILLFUL."

The word "willful" in an instruction declaring that, where the act of killing another is done willfully, feloniously, and with malice aforethought, accused is guilty of murder, means intentional, not accidental.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835-7836.]

8. SAME—"MALICE AFORETHOUGHT."

The phrase "malice aforethought" in an instruction declaring that, where the act of kill-

ing is done willfully, feloniously, and with malice aforethought, accused is guilty of murder, means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4304-4306; vol. 8, p. 7715.]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

John Combs and another were convicted of manslaughter, and they appeal. Reversed and remanded for new trial.

Thos. T. Cope and Hazelrigg, Chenault & Hazelrigg, for appellants. Jas. Breathitt, Atty. Gen., and Theo. B. Blakey, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. This appeal is prosecuted from a judgment of the Breathitt circuit court sentencing each of the appellants to confinement in the state penitentiary for 21 years. The conviction was had under an indictment charging them with the murder of Thomas Combs. Three grounds for reversal are relied on: First, that the verdict is not sustained by the evidence; second, that the court misinstructed the jury, and failed to give the whole law of the case; and, third, because of misconduct on the part of one of the jurors during the trial. The indictment averred that the act of killing was committed by John Combs, who was aided, abetted, and encouraged by Henry Combs. There is some conflict in the evidence as to whether the shot that killed Thomas Combs was fired by Henry or John Combs. There is, however, no dispute that it was fired by one of them. A witness for the commonwealth testifies that John Combs did the shooting; while both Henry and John say that Henry fired the shot. Each of them at the time was armed with a gun, and there is some evidence conducing to show that the appellants said they would kill Thomas Combs if they found him at their father's house. Appellant Henry Combs, who admits the shooting, claims that he fired to prevent Thomas Combs from killing his brother John and to protect his sister.

The facts leading up to the homicide, as related by appellants and witnesses in their behalf, are substantially as follows: On Sunday afternoon the deceased, who was drunk and also had a jug of whisky, went in company with Frank Clemmons to the house of his cousin Jerry Combs, the father of appellants, and remained there until he was killed the following afternoon. During the time the deceased, who bore the reputation of being a quarrelsome and dangerous man when drinking, was noisy and troublesome, and created considerable disturbance in the little house where Jerry Combs with a large family lived. He made several indecent proposals to Mary, the daughter of Jerry Combs, and sought on more than one occasion to com-

pel her to submit to his desire. There is also evidence that on Monday morning he forcibly required a son of John Combs, who was at the house, to drink such a quantity of whisky that it made the little boy deathly sick. When this happened, Henry Combs left his father's house and went to the home of his brother, the appellant John Combs, who lived about four miles distant, arriving there at noon on Monday. After relating to John the conduct of the deceased, they each procured a gun and went to the house of Jerry Combs, where the deceased was. They each testify that as they approached the house, and when within a few steps of the front porch, they saw Mary Combs running out of the front door, closely followed by the deceased, who had a large pistol in his hand; that, when he saw them, he stopped, and, pointing his pistol at John Combs, endeavored to shoot him, but the pistol failed to fire; that, while he was in the act of trying to shoot John, Henry, who was standing back of the deceased, shot him in the head, killing him instantly.

The first ground of reversal urged is that Henry could not be convicted as principal because he was not indicted as such, but as an alder and abettor, and that John could not be convicted as an alder and abettor because Henry was not indicted as principal. Neither of these contentions is good. Under the indictment, although it charges John as the perpetrator of the act and Henry as alder and abettor, both were equally and alike guilty as principals, and either or both of them might be convicted as such, and it was not necessary that the court in the instructions should designate either of them as principal or alder and abettor. This question is fully considered in *Reed v. Commonwealth*, 100 S. W. 856, 30 Ky. Law Rep. 1212, and *Sarah Steely v. Commonwealth* (decided September 30, 1908) 112 S. W. 655, and it is not necessary to devote further attention to it here.

A technical error was committed in instruction No. 4, but the serious error is found in the failure of the court to instruct the jury as to the right of appellants to shoot and kill deceased if they believed, or had reasonable grounds to believe, that at the time he was attempting to commit an assault upon the person of their sister, and they believed, and had reasonable grounds to believe, that the contemplated assault could only be prevented by taking his life. There is evidence tending to show that, when the deceased was shot, he was pursuing Mary Combs, whom he had previously attempted to force to yield to his lust, and this evidence authorized an instruction submitting this feature of the case to the jury. The appellants had the same right to shoot and kill deceased to prevent him from committing an assault upon the person of their sister as they did to prevent him from doing them some great bodily harm. Upon another trial of the case, if the evidence is similar to that upon the

trial from which this appeal is prosecuted, the court should give to the jury the following instructions:

"(1) If the jury believe from the evidence beyond a reasonable doubt that the defendants, John Combs and Henry Combs, or either of them, both of them being present, aiding, abetting, and assisting each other, in Breathitt county, Ky., before the finding of the indictment, willfully and feloniously did then and there kill Thomas Combs by shooting him with a gun loaded with powder and ball or other hard and explosive substances, when it was not necessary or apparently necessary, as defined in instruction No. 4, to protect them or either of them or their sister Mary Combs from immediate danger of death or great bodily harm, or the person of Mary Combs from attempted rape by deceased, they will find each of the defendants guilty. Guilty of murder if the act was done willfully, feloniously, and with malice aforethought; guilty of manslaughter if the act was done in sudden heat and passion or sudden affray, and without previous malice, and not in the defense of their persons or the person of their sister, as defined in instruction No. 4. If the jury find the defendants guilty of murder, they will fix their punishment at death or confinement in the penitentiary for life, in their discretion. If the jury find the defendants guilty of manslaughter, they will fix their punishment at confinement in the penitentiary for not less than two nor more than twenty-one years.

"(2) If the jury believe that the defendants have been proven guilty by the evidence beyond a reasonable doubt, but have a reasonable doubt whether they have been proven guilty of murder or manslaughter, they should find them guilty of manslaughter, and fix their punishment as described in instruction No. 1. If the jury have a reasonable ground of the defendants having been proven guilty, they should find them not guilty.

"(3) The jury may find either of the defendants guilty and the other not guilty; or they may find both of them guilty or both of them not guilty.

"(4) If the jury believe from the evidence that the defendants or either of them believed, and had reasonable grounds for believing, that at the time the deceased was shot and killed he was then and there about to take the life or inflict upon them or either of them some great bodily harm, or was about to take the life or inflict some great bodily harm upon their sister, or take forcibly possession of her person for the purpose of having carnal knowledge of her, and there appeared to the defendants or either of them, in the exercise of a reasonable judgment, no other safe way to avert the then impending danger, or to the defendants or either of them apparent danger to themselves or either of them or Mary Combs, but to shoot and kill deceased, then they, or either of them, had

the right to shoot and kill him, and the jury should acquit them.

"(5) The word 'willful' as used in these instructions means intentional, not accidental. The phrase 'malice aforethought' means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed."

The judgment is reversed, with directions for a new trial in conformity with this opinion.

WEISINGER et al. v. SOUTHERN RY. CO. IN KENTUCKY.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. CARRIERS—TRANSPORTATION OF LIVE STOCK —DESIGNATION OF CARS.

A carrier's duty to designate the car in which hogs offered for shipment shall be loaded is not sufficiently performed by the exercise of ordinary care.

2. SAME—MISDIRECTION.

Where a shipper is directed by a carrier's agent to load hogs in the wrong car, the carrier is responsible for such damages as naturally result from removal of the hogs required by the carrier; but if the shipper loads the hogs in the wrong car, without inquiry from the carrier's agent, he assumes the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 924.]

3. SAME—PROXIMATE CAUSE—INSTRUCTIONS.

Where plaintiffs' hog, intended for shipment, was loaded in the wrong car, as plaintiffs alleged by misdirection of defendant's agent, and the hog died as the alleged result of plaintiffs being compelled to transfer him to another car, the court, in an action for the death of the hog, should have charged that if he was in such condition that he would have died, notwithstanding the removal, or if defendant's agent offered to let the hog remain until he could be safely removed, or if plaintiffs were themselves negligent in not loading him into the car designated, or if his death resulted from the careless manner in which he was removed and thereafter handled, plaintiffs could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 924.]

4. SAME—EVIDENCE—IDENTITY.

In an action against a carrier for death of a hog alleged to have been caused by defendant's agent in requiring his removal from one car to another, evidence that on the night in question, when several hogs were driven to the station with others, witness heard a hog squealing, was inadmissible to support defendant's claim that the hog was very hot and would probably have died, notwithstanding his removal, unless the hog that squealed was identified as that in question.

Appeal from Circuit Court, Shelby County.
"To be officially reported."

Action by Harry Weisinger and another against the Southern Railway Company in Kentucky. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Beard & Marshall and Muir Weisinger, for appellants. Willis & Todd, for appellee.

CLAY, C. Appellants, Harry Weisinger and son, are engaged in the business of farming and stock-raising, and live about two

miles from Shelbyville, Ky. On August 7, 1907, they contracted with appellee to furnish them a car suitable for shipping fine hogs from Shelbyville to Lexington, Ky., where they were to be exhibited at the Blue Grass Fair. Appellants had six hogs which they desired to ship, and arrangements were made by which these hogs were to be placed in the same car in which one Frank Smith proposed to ship his hogs; appellants to have the use of one half of the car, and Smith the use of the other half. On August 10, 1907, about 8:30 p. m., appellants' six hogs were brought to appellee's depot in Shelbyville for the purpose of being loaded for shipment to Lexington. Smith, who was to use the other half of the car, reached the depot shortly before the employees of appellants. The latter, upon arriving at the depot, went immediately to appellee's agent for the purpose of obtaining directions as to which car the hogs should be loaded in. According to the testimony for appellants, appellee's agent designated as the car in which the former's hogs were to be shipped the car that was by Henry Moxley's car, and in which Smith had already loaded his hogs. The testimony of appellee is to the effect that its agent stated to appellants' employees that their car was next to Moxley's car, that he had shown it to Smith's son, and that they would probably find him at that car. Appellants' employees then went to the car in which Smith had been loading his hogs, and proceeded to load their hogs in the same car. Shortly thereafter appellee's agent came to the car and notified appellants' employees that they had loaded their hogs in the wrong car; that it would be necessary for them to unload the hogs and place them in the car which had been ordered for that purpose. Appellants' employees stated that it would be dangerous to remove the hogs at that time, and that they would only do so at the risk of the company. Appellee's agent says that he gave them the privilege of letting the hogs remain in the car in which they had been placed. This is denied by appellants' employees, who assert that they were required to remove them at the time. Among the six hogs which appellants' employees brought to the station for shipment was one fine, large boar weighing 600 or 700 pounds, and it is claimed the agent was notified that the removal of this boar would in all probability result in his death. The hogs were then unloaded and moved into another car. Soon thereafter the boar died.

Appellants instituted this action for the value of the hog, which the petition alleges was \$1,500, claiming that its death was due to the negligence and carelessness of appellee, its servants, agents, and employees. Appellee denied any negligence on its part, and also pleaded contributory negligence on the part of appellants. The jury returned a verdict in favor of appellee. From the judgment based upon that verdict the appellants ap-

peal. Appellants ask a reversal upon three grounds: First, the verdict was contrary to the evidence; second, errors in instructions; third, the admission of incompetent testimony.

First. In view of the fact that the court has determined to reverse the judgment on other grounds, it will be unnecessary to set forth the evidence at length for the purpose of determining whether or not there is any merit in appellants' first contention.

Second. Appellants asked an instruction to the effect that it was the duty of the defendant to designate the car in which the stock was to be shipped, and if, by reason of the negligence of the defendant, the stock was loaded in the wrong car and had to be unloaded, and that such unloading and reloading caused the death of the hog, the jury should find for the plaintiffs the reasonable, vendible value of the hog. This instruction was refused. The court thereupon instructed the jury that it was the duty of the defendant and its agents to exercise ordinary and reasonable care under all the facts and circumstances of the case to properly indicate to the plaintiffs, or their agents, the car in which the hogs were to be loaded for transportation to Lexington; that it was also the duty of plaintiffs, or their agents, on the same occasion, to exercise ordinary and reasonable care under all the facts and circumstances of the case to ascertain, before proceeding to load their hogs, the proper car in which the same should be loaded for transportation to Lexington, and to exercise ordinary and reasonable care to avoid loading their hogs in the wrong car; that if the jury should believe from the evidence that the defendant negligently failed to discharge the duties required of it in the instructions, and if by reason of any such negligence on its part the hogs of plaintiffs were loaded in the wrong car, so that the removal of them from the wrong car became or was necessary, and should further believe that the defendant, or its agent, negligently ordered the removal of the hogs, at a time or in a manner which, in view of the condition of plaintiffs' hog in question in this case, would naturally or reasonably result in the death of said hog, the jury should find for plaintiffs, unless they believed from the evidence that the plaintiffs, or their agents, were themselves guilty of contributory negligence. Other instructions were given, which are not complained of.

We are of opinion that the above instruction does not present the law of the case. When a shipper appears at the station of a railroad company with live stock, which he intends to load and ship in the latter's cars, it is the duty of the railroad company to designate the car in which the stock should be loaded. It does not perform its full duty merely by using ordinary care. If the shipper, without first having made inquiry as to the car in which his stock is to be loaded, should load it in the wrong car, he would do

so, of course, entirely at his own risk; but if he first inquires of the railroad company, and asks that the proper car be designated, and the latter designates the wrong car, it is liable for such damages as naturally result from the removal made necessary by the improper directions, where such removal is required by the company. Upon the next trial, the court will instruct the jury as follows:

"No. 1. If you believe from the evidence that the defendant, or its agent, designated the car in which Frank Smith's hogs were loaded as the car in which plaintiffs should load their hogs, and that plaintiffs did load their hogs in said car, and that the defendant, or its agent, required plaintiffs to unload the hog in question and load him in another car at a time when it was not reasonably safe to do so, and that plaintiffs' hog died as a result of such removal, you will find for plaintiffs the reasonable market value of the hog at said time, unless you believe that plaintiffs failed to use ordinary care in removing and handling said hog, and that by reason thereof the death of the hog resulted.

"No. 2. If, however, you believe that plaintiffs' hog was in such condition that he would have died notwithstanding such removal, or that defendant's agent gave plaintiffs the privilege of letting the hog remain in the car in which it was first loaded until it could be safely removed, or that the defendant did designate the proper car for plaintiffs to load their hog in, and that the plaintiffs were themselves negligent in not loading their hog in the car so designated, or that the hog's death resulted from the careless and negligent manner in which it was removed and thereafter handled, then, in any one of these events, you will find for the defendant."

Third. Appellants insist that the court erred in permitting one J. M. Logan to testify that he heard a hog squealing as it passed his house on the night in question. The purpose of offering this testimony was to show that the hog was very hot at the time, and would have probably died, even though it had not been loaded in one car and subsequently removed to another. On the next trial this evidence should not be admitted, unless the hog that squealed is sufficiently identified as that belonging to appellants.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

BURROW v. MAXON.

(Court of Appeals of Kentucky. Oct. 2, 1908.)

1. APPEAL AND ERROR—MATTERS OPEN FOR REVIEW.

There being no motion for new trial, no separate findings of law and fact, and no bill of exceptions, the only question open for review is whether the pleadings warrant the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867-2872.]

2. HOMESTEAD—EXEMPTIONS—PURCHASE AFTER DEBT.

One does not purchase land, within Ky. St. 1903, § 1702, providing the homestead exemption shall not obtain as against a debt existing prior to purchase of the land, where it is given him in settlement of his contest of a will, which, if successfully prosecuted, would have given him, as heir of testator, a greater share of his estate.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by D. E. Burrow against O. W. Maxon. Judgment for defendant. Plaintiff appeals. Affirmed.

Jas. R. Grogan, for appellant. Campbell & Campbell, for appellee.

HOBSON, J. D. E. Burrow had a debt against O. W. Maxon, which was created between the years 1896 and 1902. He sued Maxon upon the debt, and recovered judgment. Execution was issued upon the judgment and levied upon a tract of land, the property of Maxon. The land was sold, and was purchased by Burrow. It was not redeemed, and Burrow instituted this proceeding by motion in the McCracken circuit court for a writ of possession. By his answer Maxon set up that the land was a homestead, and as such exempt from execution sale. The case was heard by the court, and judgment entered in favor of Maxon, from which Burrow appeals.

There was no motion for a new trial in the circuit court, no separate finding of law and facts, and no bill of exceptions was filed. So the only question before us is: Do the pleadings warrant the judgment? Maxon alleged in his answer that the tract of land was of value less than \$1,000; that it was the homestead of himself and family; that he was a bona fide housekeeper, with a family, consisting of his wife and four infant children, actually residing on the land before the creation of the debt and continuously to that time; that his father, M. Maxon, had, many years before the creation of the debt, made him a parol gift of the land, and that he had then settled on it; that after his father's death his sisters by way of compromise had made him a conveyance of the land. The deed from his sisters was filed by him with his answer. It was executed on October 3, 1905, which was before the execution was levied on the land, and after the plaintiff's debt was created. The deed shows on its face that M. Maxon left a will, which was probated in the county court; that O. W. Maxon took an appeal from the order of the county court admitting the will to probate; and while the appeal was pending, and in compromise of the litigation, his sisters, who were the other children of M. Maxon, made him a deed to this tract of land and paid him \$1,000, in consideration of which he dismissed the suit and paid the cost. The statute provides that the exemption shall

not apply "if the debt or liability existed prior to the purchase of the land." Ky. St. 1903, § 1702. The question then arises: Did O. W. Maxon purchase this land after the creation of the debt to Burrow?

In *Jewell v. Clark's Ex'r*, 78 Ky. 398, the court, construing the statute, said: "The object of this provision was to prevent debtors from purchasing homesteads after creating debts or liabilities, and then claiming the exemption against such debts. The means with which a homestead was purchased might be the very means to which the creditor looked for payment, and gave the debtor the credit which enabled him to create the debt; and it would be unjust to the creditor to allow the debtor, by thus investing in a homestead, the means on the faith of which he obtained credit to defeat the collection of the debt. But, when the debtor derives title to the homestead by descent, no injury is done to the creditor in exempting the homestead so acquired. The means upon the faith of which he gave credit have not been diverted, and the case does not, therefore, come within the reason of the statute, and the rule that a case not coming within the reason of a remedial statute is not affected by it applies." This was followed in *Meador v. Meador*, 88 Ky. 217, 10 S. W. 651, and in *Spratt v. Allen*, 106 Ky. 275, 50 S. W. 270.

Under these cases it is plain that if M. Maxon had left no will, and the land had been set apart to O. W. Maxon in the division of the estate between him and his sisters, it would have been exempt as a homestead, and could not have been subjected to the Burrow debt. Whether M. Maxon left a will or not was a question at issue in the litigation that was settled by the compromise in which his sisters conveyed to O. W. Maxon the land. Every reason that would exempt a tract of land received by descent would apply to property given in a compromise of a case of that sort. The consideration of the settlement was that O. W. Maxon was one of the heirs at law of M. Maxon, and his sisters conveyed to him this part of the estate, rather than risk his getting more if the will was set aside. If he would have been entitled to the homestead, where his father had settled him on the land and then died intestate, it is hard to see why he should not be equally entitled to it where it was in dispute whether or not his father had left a will, and in settlement of the dispute the property was conveyed to him by the other heirs. He is no worse off as to the homestead, after the compromise was made in the will litigation, than he would have been if he had been successful in the will litigation, and in the division of the estate the property had fallen to him; for the sum of the matter is that what he got was given to him in a compromise as his part of his father's estate. It cannot be maintained that Maxon put into the land in any way means to which the creditor might have look-

ed for the payment of his debt; for he got in the settlement not only the land, but in addition to it \$1,000 in money. The case, therefore, falls as clearly within the rule laid down heretofore as any of the cases in which it was applied. See *Turner v. Brownings Adm'r*, 107 S. W. 318, 32 Ky. Law Rep. 891.

Judgment affirmed.

ADAMS v. DE DOMINGUEZ.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. PARTITION—SALE—ESTATE IN POSSESSION.

Civ. Code Prac. § 490, subsec. 2, authorizing a sale of a vested estate jointly owned by two or more persons, by order of a court of equity in an action by either of them, if the estate be in possession and the property cannot be divided without materially impairing its value, does not require the joint owners to be in actual possession, but only that the estate be a present and not a future one.

2. INFANTS—ACTION AGAINST—GUARDIAN AD LITEM—PROPRIETY OF APPOINTMENT IN PARTITION SUITS.

Civ. Code Prac. § 38, subsec. 2, provides that a guardian ad litem may be appointed for an infant defendant, whether his guardian appears or not. By section 36, subsec. 3, no judgment can be rendered against an infant until the regular guardian or a guardian ad litem files an answer or a report as therein provided. Section 499 provides that the statutory guardian may defend for an infant, and if he fails to do so the court shall appoint a person for that purpose. *Held*, in partition, where the guardian of an infant defendant was a plaintiff, that the court, upon affidavit filed, properly appointed a guardian ad litem for such infant; the appointment of a guardian in such case being within the court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 198–200.]

3. SAME—FILING OF REPORT OF GUARDIAN AD LITEM.

Under Civ. Code Prac. § 36, subsec. 3, providing that no judgment may be rendered against an infant until the regular guardian or a guardian ad litem files answer or a report that he is unable to defend, judgment may be rendered when a proper report is made by the guardian ad litem.

4. PARTITION—ACTION AGAINST NONRESIDENTS—NECESSITY OF REFUNDING BOND.

In partition between heirs, etc., to sell land, no bond to nonresident defendants was necessary before judgment under Civ. Code Prac. § 410, providing that before judgment is rendered against a defendant constructively summoned, and who has not appeared, a refunding bond shall be executed to such defendant, as plaintiffs have no interest in such defendant's share; allegations in the petition that an heir's interest was subject to her debts being only to enable the claims of all the parties against the land to be settled in one suit.

5. SAME—PARTIES DEFENDANT—CROSS-PETITION—NONJOINDER—EFFECT ON SALE.

Civ. Code Prac. § 411, provides that, if a bond is not given to nonresident defendants constructively summoned, but who do not appear, before judgment, as provided by section 410, the court may enter judgment ascertaining the rights of the parties, but shall retain control over the property or its proceeds until the expiration of the time allowed defendant to appear and defend, but it shall be delivered according to the judgment. In partition by heirs, etc., some of defendants constructively summoned were not before the court on a cross-petition of

a mortgagee of the property. *Held*, that the fact that such defendants were not before the court on the cross-petition did not invalidate the partition sale; the court having required the mortgagee to execute a bond before the proceeds were paid out.

6. WILLS—PROBATE—CONCLUSIVENESS—COLLATERAL ATTACK.

It will be conclusively presumed that the county court had proper evidence before it when it probated a will, and the probate is conclusive unless legally vacated; and hence the probated will of an ancestor was properly admitted in partition proceedings, though not properly authenticated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 904.]

7. PARTITION—CONSTRUCTION OF ANCESTOR'S WILL—EFFECT ON PURCHASERS' TITLE.

In partition by heirs for the sale of land, that the circuit court did not properly construe the will of an ancestor of one of the parties did not affect the title of the purchaser on partition sale; the heirs being before the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 392.]

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action by Ross A. Adams against Helen M. De Dominguez. On exceptions to confirmation of a partition sale. From a judgment overruling the exceptions, plaintiff appeals. Affirmed.

Forman & Forman, for appellant. Falconer & Falconer and Rives & Shannon, for appellee.

HOBSON, J. Elizabeth Geohegan, who died about the year 1850, owning certain lots in Lexington, Ky., devised the property to four of her daughters and one son. The son conveyed his interest to the four daughters. One of the daughters died, and devised her fourth interest to Ellen White, one of the other three daughters, thus vesting in Ellen White one-half of the property and one-fourth each in her two sisters, Anna Murphy and Margaret Caulfield. Margaret Caulfield died about the year 1896, Anna Murphy died in the year 1901, and Ellen White died in June, 1907. After Ellen White's death this suit was brought, by some of the devisees of Anna Murphy and some of the heirs at law of Ellen White against the heirs at law of Margaret Caulfield and the other devisees and heirs at law of the other two sisters, asking a sale of the property upon the ground that it was indivisible. It was also shown in the petition that the personal estate of Ellen White was insufficient to pay her debts and that she had executed a mortgage on her interest in the property for \$4,000. The case was prepared for trial, and, being submitted, a judgment was entered for a sale of the property. The sale was had, and Ross Adams became the purchaser for the sum of \$7,400. He filed exceptions to the confirmation of the sale. The court overruled the exceptions, and he appeals. The following grounds are relied on for reversal:

(1) Neither the title nor possession of the

property sought to be sold was sufficiently alleged in the petition.

It is averred in the petition that Elizabeth Geohegan owned the property at her death. Her will is set out, and the various transfers; and it is alleged that each of her four daughters owned one-fourth of the property. The names of the heirs and devisees of the daughters are given, and, while it is not in words stated in the pleadings that the plaintiffs and defendants are in possession of the property, this fact is apparent from the allegations of the pleadings. Subsection 2 of section 490 of the Civil Code of Practice authorizes a sale of a vested estate in real property jointly owned by two or more persons, if the estate be in possession and the property cannot be divided without materially impairing its value or the value of the plaintiff's interest therein. Under this section it is unnecessary for the petition to show that the property is in the possession of the plaintiffs. The Code requires that the sale may be made if the estate be in possession; that is, if the estate is not a reversion, or remainder, or the like. *Ward v. Edge*, 100 Ky. 771, 39 S. W. 440.

(2) Nellie Parker, one of the plaintiffs, was the statutory guardian for Louise Parkers, one of the infant defendants. The court, upon affidavit filed, appointed a guardian ad litem for Louise Parker, and he filed his report in the regular form. It is insisted that there was no necessity for the appointment of a guardian ad litem.

By subsection 2 of section 38 of the Civil Code of Practice a guardian ad litem may be appointed by the court, whether the guardian appear for the defendant or not. The appointment of a guardian ad litem is a matter within the discretion of the court in such cases, where the guardian's interest may be adverse to his ward's; and it was eminently proper that the court should appoint a guardian ad litem in a case like this, where the infant's guardian was one of the plaintiffs in the suit. That this is the meaning of the Code is shown by subsection 2 of section 499; for there is the same necessity for the appointment of a guardian in actions for the sale of land as in actions for its division. By subsection 3 of section 36 no judgment may be rendered against the infant until the regular guardian or the guardian ad litem file answer or a report as therein provided. But there may be a judgment when the proper report is made by the guardian ad litem. See *Gardner v. Letcher*, 29 S. W. 868, 16 Ky. Law Rep. 778. A contrary rule was not laid down in *Walker v. Smyser's Ex'rs*, 80 Ky. 633, or in *Miller v. Cabell*, 81 Ky. 178. The guardian was a plaintiff in the action, representing her own interest, and her own interest might not be in accord with the interest of her ward, who was one of the defendants to the action; and when she failed to

make a defense for her ward the court very properly appointed a guardian ad litem that the interest of the infant might in no case suffer.

(3) No bond was executed to the nonresident defendants.

This was a proceeding to sell land for the division of the proceeds among the owners of the land. In such a proceeding it is unnecessary that a bond should be executed, under section 410 of the Civil Code of Practice, to the nonresident defendants. *Hogue v. Yeager*, 107 Ky. 582, 54 S. W. 961. So much of the petition as set out that Ellen White's interest was subject to her debts was only in aid of the main object of the suit, that the claims of all parties against the land might be settled in one action. These matters did not change the essential nature of the case in any way.

(4) Some of the parties were not before the court on the cross-petition.

If any of the defendants are not before the court on the cross-petition of the mortgagee, they must be brought before the court before any part of the proceeds are paid out; but the fact that they were not before the court on the cross-petition of the mortgagee in no wise affects the validity of the sale. The sale was made on the plaintiff's petition and amended petition. Were the rule otherwise, the plaintiffs, in a case like this, might be indefinitely delayed by the failure of the cross-plaintiffs, who had claims against other owners, to prepare their case. The court, under section 411, required the mortgagee to execute bond before any part of the proceeds were paid over to it. This was proper.

(5) Some of the heirs were not before the court.

The heirs of Sam Murphy are properly before the court; and, as shown by the proof, the parties before the court are the only ones who have any interest in the land.

(6) The will of Mrs. Murphy was not properly authenticated.

The will of Mrs. Murphy, which was probated originally in California, and then probated in Kentucky, in the Fayette county court, was properly admitted in evidence. It must be conclusively presumed that the Fayette county court had proper evidence before it when it admitted the paper to probate. The action of the Fayette county court is conclusive, unless vacated as provided by law. *Morrison v. Fletcher*, 119 Ky. 488, 84 S. W. 548.

(7) Her will was not properly construed.

Whether the circuit court decided correctly in determining that the daughters of Anna Murphy took a fee under her will does not concern the purchaser of the land. All the parties were before the court, and if the grandchildren are not satisfied with the judgment of the circuit court they can take an appeal; but the purchaser of the land will

be protected in his title, although the court may err in its distribution of the proceeds.

Judgment affirmed.

COMMONWEALTH v. CATLIN et al.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

PARTITION—SALE—DISPOSITION OF INFANT'S SHARE OF PROCEEDS.

Under Civ. Code Prac. § 497, providing that, in an action for sale and division of the proceeds of real estate owned by several and incapable of division without materially impairing its value, the share of an infant shall not be paid by the purchaser, but shall remain a lien on the land till the infant becomes of age, or till his guardian execute a bond to account to the infant for all money belonging to the infant, the proceeds of the sale, including the share of an infant, having been paid into court, when the infant had no statutory guardian, and the commissioner having squandered the infant's share, a guardian, being afterwards appointed and giving bond, may maintain an action to enforce the statutory lien on the land for the infant's share; but he has no right of action against the commissioner and his surety, the payment into court being without right, notwithstanding any order of the court with respect to it.

Appeal from Circuit Court, Marion County.
"To be officially reported."

Action by the Commonwealth, for use, etc., against P. D. Catlin and others. From an adverse judgment, plaintiff appeals. Reversed in part.

Finley Shuck, for the Commonwealth.
John McChord, for appellee United States Fidelity & Guaranty Co.

BARKER, J. In 1892 W. D. Catlin died, intestate, domiciled in Marion county, Ky., leaving a wife and seven children, two of whom were infants of tender years. His son, P. D. Catlin, was appointed and qualified as administrator of the estate. The personal property was sufficient to pay off all the indebtedness left by the decedent, and, his real property being indivisible without material impairment of its value, the administrator instituted an action in the Marion circuit court, under subsection 2 of section 490 of the Civil Code of Practice, for a sale and division of the proceeds among the heirs. All of the children, and the widow of W. D. Catlin were made parties to this action, it being No. 2,129 in the Marion circuit court. In this action such proceedings were taken and had that judgment was rendered ordering a sale of the real property left by the decedent for division among his children as prayed in the petition. The property, consisting of about 157 acres, which is described by metes and bounds in the petition, was sold by the commissioner of the Marion circuit court in pursuance of the judgment above referred to, and purchased by the appellant, P. D. Catlin, who executed purchase bonds payable to the commissioner, E. L. England. Afterwards the purchaser paid

into court all his purchase money, including the shares of the two infants, W. T. Catlin and Nanie M. McCallip, although the infants had no statutory guardian to execute bond in accordance with the provisions of section 497 of the Civil Code of Practice. The shares of the infants, amounting to \$519.50, were received by the commissioner, and, upon the order of the court, loaned out at interest, but afterwards the order loaning it out was set aside and the money collected back by the commissioner, who, it is alleged, has squandered it and left the state, becoming a nonresident. Thereafter the appellant, J. B. Hundley, was appointed and qualified as the guardian of W. T. Catlin and Nanie M. McCallip, executed the bond required by sections 497 and 493 of the Code, and then instituted this action, setting forth in his petition the facts recited in this opinion, seeking to enforce the statutory lien given by section 497 of the Code to his wards to secure their part of the purchase money due for the sale of the land involved in this action. He also made E. L. England the commissioner, and the United States Fidelity & Guaranty Company, surety on his bond, parties defendant, and prayed judgment against them. All of the defendants (appellees) filed general demurrers to the petition, which were sustained by the court, and, the plaintiff (appellant) declining to amend, the petition was dismissed.

Section 497 of the Code, in so far as applicable to the case in hand, is as follows: "In the action mentioned in subsection 2 of section 490, the share of an infant, or of a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest until the infant become of age, or the person of unsound mind become of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as required by section 493." The infants having no guardian to whom their respective shares of the purchase money could be paid, by the express terms of the Code these remain a lien upon the land, bearing interest, and the purchaser was prohibited from paying the money over to any one prior to the time they became of age, except to their statutory guardian after the execution of the bond required by section 493. The court would have had no authority to direct payment except in accordance with the letter of the statute, and the payment by the purchaser on his own motion was unauthorized and void so far as the interests of the infants are concerned. The rights of the infants are fixed and secured by the provisions of the Code cited, and the lien on the land could not be lifted or discharged, except in the manner pointed out by the letter of the law. No order of the court made concerning the money wrongfully paid to the commissioner by the purchaser could

affect the rights of the infants; and when the appellant qualified as their guardian, and executed the proper bond in accordance with the provisions of the Code, supra, he had a right to demand and receive the purchase money belonging to them, and to enforce the statutory lien which secured it.

The provisions of the Code herein referred to were enacted for the express purpose of securing the interests of infants in their patrimonial estates, and to protect them from the very calamity which has occurred in this case. It would practically abrogate the law, enacted for the benefit of infants, to allow a purchaser to violate its provisions as is detailed in the petition in this case. This court has uniformly enforced the requirements of the Code for the protection of the interests of infants, and we see nothing in the case under consideration which warrants us in relaxing so salutary a rule. It follows, from the conclusion herein set forth, that the court correctly sustained the demurrers of the commissioner, England, and his surety, the guaranty company, but erred in sustaining that of the purchaser of the land at the judicial sale and his subsequent vendees.

Judgment affirmed as to England and the guaranty company, and reversed, for further proceedings consistent herewith, as to the other appellees.

GUILFOYLE'S EX'R v. CITY OF MAYSVILLE.

(Court of Appeals of Kentucky. Sept. 30, 1908.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—"ORIGINAL CONSTRUCTION."

Until property once bears specifically the cost of building a pavement abutting it done on the order of the council of the city, or by the city's express permission, indicated by act of its legislative body, there has not been an original construction of such improvement within a statute allowing the city to order the original construction of such improvement at the cost of the abutting owners.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 3056.]

2. SAME.

The time and manner for improving a city's streets are matters exclusively for the legislative department of the city, and, until that body acts, the city has not acted; and the fact that the abutting owners constructed a sidewalk does not prevent a city from ordering the construction of a sidewalk under a statute allowing it to order the original construction of a street improvement at the cost of the abutting owners, though it had knowledge that the owners were making the improvement.

3. ESTOPPEL—EQUITABLE ESTOPPEL — ESTOPPEL AGAINST THE PUBLIC.

Generally the public is not estopped by the mere nonaction of the public officials.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 153.]

4. SAME—"MUNICIPAL INDEBTEDNESS."

An indebtedness created by bonds for a street improvement as authorized by statute, allowing a city to order the original construction of a city improvement at the cost of abutting

owners, and to issue 10-year bonds against the property not paying in cash, is not a municipal indebtedness within the Constitution, limiting municipal indebtedness.

5. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—STREET IMPROVEMENTS.

A city order for the original construction of a city improvement at the cost of abutting owners is not invalid as depriving such owners of their property without due process of law, where they have notice by publication of the ordinance for the improvement, as required by the statute.

Action by Thomas Gullfoyle's executor against the city of Maysville. Heard on motion to dissolve an injunction. Order granting injunction dissolved.

Allen D. Cole, for plaintiff. J. M. Collins, for defendant.

O'REAR, C. J. The city of Maysville proposing to improve certain of its streets at the exclusive cost of the abutting lot owners under the provisions of the act of March 24, 1908, passed an ordinance requiring the construction of cement sidewalks along Bridge street and abutting plaintiff's property. Many years ago a pavement of brick, with stone curbing, had been built along and in front of plaintiff's property, which it is alleged is yet "in a fairly serviceable condition." The act of 1908 allows the city to order the original construction of such improvements at the exclusive cost of the abutting owners, and to issue 10-year bonds against the property which does not pay in cash, as its owner may do. The ordinance appears to have been regularly adopted in this instance, so as to bring the provisions of the statute into play, if the statute is constitutional, and if the work is original construction within the meaning of the statute. Plaintiff filed this suit to obtain an injunction against the city, restraining it and its contractors from undertaking the work under this statute, mainly on the ground that the work was not original construction. The injunction was granted by the circuit judge. This is a motion before the undersigned judge of the Court of Appeals to dissolve the injunction. I have taken the matter before all the judges in consultation, except Judge Barker, who was absent. The following is the conclusion at which we arrived: Until property once bears specifically the cost of building a pavement abutting it, done upon the order of the city council, or done by its express permission, indicated by order or resolution of its legislative body, there has not been an original construction of such improvement. The time when and the manner in which a city's highways shall be improved are matters peculiarly and exclusively within the discretion of the city's legislative department. Until that body acts in the matter, the city has not acted. It frequently happens that citizens owning property upon remote or sparsely settled streets for their own convenience and in advance of any ac-

tion by the city council put down pavements, which may be durable and serviceable. The lot owner selects, however, his own material, grade, and place of doing the work. If he could thus exhaust the power of the city to order the work done under the statute, he could deprive the municipality of its lawful discretion in those matters, substituting his own therefor, working an inharmonious system, without uniformity; for what one could do others could do in the same or different ways. Nor is a city bound by mere knowledge that the property owners are taking such steps. Generally the public is not estopped by the mere nonaction of the public officials. There should be some positive, overt official act of the legislative body in a matter within the legislative discretion before it will be said to have acted on the matter. The record here does not disclose when or at whose cost or instance plaintiff's sidewalk was built. There is no material difference between the roadway and the pavements of a street as respects the city's power and duty to construct and keep same in repair for proper use of the public, nor is there a perceptible ground for distinction in the application of the power over each part of the highway or street by the town council in ordering its improvement.

In *Helm v. Figg*, 89 S. W. 301, 28 Ky. Law Rep. 396, *Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064, *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645, and *Wymond v. Barber Asphalt Pav. Co.*, 77 S. W. 203, 25 Ky. Law Rep. 1135, the Court of Appeals has held that construction by the owner without the direction of the city council, or construction by the city out of its general revenues, or a road already macadamized before it was taken into the city limits, did not prevent the city's ordering a radically different construction, of a permanent nature, of the same highway at the sole expense of the abutting lot owners, under the power to so require as for the original construction of such highway. The case of *Mackin v. Wilson*, 45 S. W. 663, 20 Ky. Law Rep. 218, seems to be in conflict with the foregoing authorities and principles. In the latter case a distinction was made between the construction of a pavement and of other parts of the street. We find ourselves unable to adhere to that doctrine, and that case must not be regarded as authority on that point.

The indebtedness created by the issuing of the bonds is not a municipal indebtedness within the meaning of the Constitution limiting municipal indebtedness. The liability is solely against the property. *Self v. Catlettsburg*, *supra*. Nor is a lot owner being deprived of his property without due process of law. He has notice by the publication of the ordinance required by the statute. *C. & O. Ry. Co. v. Mullins*, 94 Ky. 357, 22 S. W. 558.

The order granting the injunction is therefore dissolved.

EVANS v. DOBBS et al.

(Court of Appeals of Kentucky. Sept. 29, 1908.)

1. LOGS AND LOGGING — SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

A contract for the sale of standing timber which recites that the owner of land has "this day sold, and does hereby convey to," the purchaser "all the white oak timber suitable for the manufacture of staves now growing on" the land described, conveys to the purchaser only such timber as is then suitable for the manufacture of staves.

2. SAME.

Where a contract for the sale of standing timber fixes no time in which it is to be executed, the law implies that it is to be carried into effect within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 9.]

3. SAME.

A contract for the sale of such standing timber as was suitable at the time of execution for a specified purpose fixed no time for its execution. The purchaser cut of the trees continuously for three years. Further cutting was then abandoned for four years. There was evidence that all of the timber suitable for the specified purpose had been cut. *Held*, that an assignee of the contract acquired no rights under it, and he was a mere trespasser on entering the land to cut timber.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 9.]

Appeal from Circuit Court, Wayne County. "Not to be officially reported."

Action by H. O. Dobbs and others against Jesse W. Evans. From a judgment for plaintiffs, defendant appeals. Affirmed.

Joe Bertram and Stone & Stone, for appellant. J. N. Sharp and T. A. Wallace, for appellees.

BARKER, J. This action was instituted by the appellees, claiming to be the owners of the fee-simple title of a tract of land situated in Wayne county, Ky., and which is described in the petition against the appellant, alleging that he was trespassing upon the land, cutting down timber and manufacturing staves therefrom, and committing irreparable injury to them. Appellant answered, setting up title to all of the white oak timber upon the land in question and the right to cut the same and manufacture it into staves under a certain contract made by his grantor, D. Hungerford, with William Dobbs, Sr., the grantor of appellees, and who at the time of the contract owned the land. The merits of this case turn upon a proper construction of this contract, which is as follows:

"This indenture made this 11th day of September A. D. 1899, between William Dobbs, of Wayne county, Kentucky, party of the first part, and D. Hungerford, of Nashville, Tennessee, party of the second part.

"Witnesseth: That said party of the first part has this day sold and does hereby convey to said second party all the white oak timber suitable for the manufacture of staves, now growing on the hereinafter described

land, at the following prices per thousand staves in the tree, to wit:

Staves 60 inches in length, 5 inches, 1½ inches thick, at.....	\$8 00
" 60 " " 4 to 5 inches wide, 1½ inches thick	7 00
" 60 " " known as merchantable culls,	5 00
" 44 " " 4½ inches wide, 1½ in. thick.....	5 00
" 44 " " 4½ inches wide, 1½ in. thick.....	5 00
" 44 " " known as merchantable culls,	5 00
" 34 " " 4½ inches wide, 1½ in. thick.....	4 00
" 34 " " known as merchantable culls,	4 00

"Merchantable culls are such as do not fill the specifications for the grade which they are made, but may be cut down so as to fill the requirements of a shorter or smaller stave.

"The timber is to be paid for on the following terms, to wit:

"Eight hundred (800) dollars cash in hand on delivery of this indenture, receipt of which is hereby acknowledged, and the balance of purchase price in advancements as follows: When a sufficient number of staves shall have been made and delivered on the banks of the creeks to amount to the eight hundred dollars first paid on purchase price, one-half of the balance of purchase price, as near as can be estimated, shall become due and payable, and when a sufficient number of staves shall be delivered on the banks of the creeks to balance the payment thus made, one-half of the then remaining purchase price shall become due and payable, and further payments shall be made in like manner, until the balance of purchase price, as estimated, shall not exceed two hundred (200) dollars, in which case the last payment shall not become due and payable until the balance of the timber is manufactured into staves and delivered on the banks of the creeks.

"It is understood that second party has this day let the contract to manufacture said timber, and deliver the staves on the banks of the creeks to John Dobbs, John C. Hurst, William Dobbs, Jr., and Jesse W. Evans, and that said parties have agreed to pay a certain bonus to said first party as a part of the consideration for which this timber is sold.

"It is also understood and agreed that in case of the death of any of said parties, or for any other cause the manufacture and delivery of said staves shall pass into the hands of any other party or parties, said D. Hungerford or his assigns or legal representatives, shall be bound as a part of the consideration for which this instrument is given to see to it that the said William Dobbs, Sr., gets promptly at the date of the other payments of the purchase price the amounts of the bonus due as per the contract with said parties, Messrs. Dobbs, Hurst and Evans, above mentioned.

"The boundaries of the lands on which the said timber stands are as follows, to-wit:

"First tract known as the 'Flint Fork Tract', bounded on the east, south and west by what is known as the 'Washington Young Ten Thousand Acre Tract', and on the north by State line between Kentucky and Tennessee, and situated in Pickett county, Tennessee, containing 500 acres, more or less.

"Second tract, known as the 'Stepp Tract', entered by Eli Phipps, containing 50 acres, situate in Wayne county, Kentucky.

"Third tract, known as a part of the 'Consolidated Survey', bounded on the east by the lands of Diancess Blevins, on the south by the state line between Kentucky and Tennessee, on the west by the lands of Cooper Burnett and F. B. Dobbs, the Gobson lands, the lands of J. L. Smith, and the lands of Wm. Dobbs, Jr., and on the north by the lands of F. B. Dobbs and William Dobbs, Jr., and the big road, containing eleven hundred acres, more or less, situate in Wayne county, Kentucky.

"In witness whereof the parties hereto have subscribed their names this day and year above written.

"[Signed]

Williams Dobbs, Sr.

"D. Hungerford."

It will greatly simplify the issues in this case to say in advance that the record shows that the appellant acquired and now owns all of the rights which his remote grantor, D. Hungerford, had under the foregoing contract, and that it is also true that the appellees have acquired by regular conveyance the fee-simple title to the land in question, which was formerly owned by William Dobbs, Sr., but that they took it with full knowledge of Hungerford's contract, and therefore subject to his rights thereunder. As we understand it, appellant advances two theories: First, that by the terms of the contract William Dobbs, Sr., sold to D. Hungerford all of the white oak timber growing upon the land covered by the contract; and, second, that if this be not true, and it should be held that under the terms of the contract Hungerford only acquired such white oak timber as was suitable at the time to be manufactured into staves, then it is true that neither his grantor nor he has cut all such timber, and he is entitled to finish up the contract, and now cut whatever remains standing upon the land. The theory of the appellees is that, under the terms of the contract, Hungerford only acquired such white oak timber as was then suitable for the manufacture of staves, and that he at once proceeded to cut, and did cut and manufacture into staves and remove from the land, all of the trees which were then suitable for that purpose, and therefore the contract is now exhausted and was exhausted at the time it was assigned to appellant.

A reference to the contract above set forth shows the class of timber conveyed to Hungerford by its terms. Its language on the

subject is as follows: "That said party of the first part has this day sold and does hereby convey to said second party all the white oak timber suitable for the manufacture of staves, now growing on the hereinafter described land," etc. It is clear from this that Hungerford only acquired by the terms of the contract such timber as was then suitable for the manufacture of staves, and did not acquire any right or title to trees which at that time were not suitable for the manufacture of staves. On the same day that the contract between William Dobbs, Sr., and D. Hungerford was entered into, Hungerford entered into a contract in writing with William Dobbs, Jr., John Dobbs, and Jesse W. Evans to cut the timber he had purchased from William Dobbs, Sr., and manufacture it into staves. This contract throws a strong cross-light on the contract between William Dobbs, Sr., and Hungerford as to the character of timber that Hungerford acquired and the time when it was to be removed from the land. The contract contains the following provisions: "Said second parties also agree to work out all timber closely that is suitable for the manufacture of rived staves. * * * Said second parties expressly agree to work said timber with the least possible waste, and to manufacture not less than 25,000 staves per year until the timber is exhausted." We think these stipulations show that it was the intention of the parties to the contract for the sale of the timber that only such timber as was suitable for the manufacture of rived staves were sold; and, also, that the timber was to be cut and removed as soon as this could reasonably be done, the work to be commenced at once. The evidence for the appellees is to the effect that Hungerford proceeded to cut and manufacture the timber he had purchased from William Dobbs, Sr., into staves, and that this work progressed from 1899 until 1901, at which time all of the timber purchased had been manufactured into staves and the parties had abandoned the field; that Hungerford, by agents, pointed out the timber which he considered suitable for the manufacture of staves, and all of this was cut and manufactured. On the other hand, the evidence for the appellant tends to show that, while a part of the timber purchased was cut and manufactured between 1899 and 1901, all of it was not cut, and there remains upon the land a large number of trees which were suitable to be manufactured into rived staves at the time the contract was made. This, of course, is a question of fact, but we think the preponderance of the evidence is with the appellees. As the contract between William Dobbs, Sr., and D. Hungerford fixed no time in which it was to be executed, the law implies that it was to be carried into effect within a reasonable time; and this seems to have been the contemporaneous construction given it by the parties themselves, because it is undisputed that Hungerford

proceeded at once with the cutting of the trees and their manufacture into staves, that this was carried forward continuously for three years, and then the further cutting was abandoned until 1905, a period of four years.

We think the undisputed acts of Hungerford with reference to the execution of the contract between him and William Dobbs, Sr., and the positive testimony of the appellees and their witnesses that they cut for Hungerford all of the timber suitable for the manufacture of staves and exhausted the contract, fully sustains the chancellor's judgment in the conclusion that he evidently reached, that the contract between Hungerford and William Dobbs, Sr., had been exhausted before it was assigned to appellant; and, Hungerford having no further rights thereunder, appellant acquired none, and therefore he was a mere trespasser, and the appellees, being the owners of the land trespassed upon, were entitled to an injunction against appellant as a wrongdoer.

For these reasons, the judgment is affirmed.

MILLER v. CENTRAL UNIVERSITY.

CENTRAL UNIVERSITY v. MILLER.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. BILLS AND NOTES—CONSIDERATION.

The consideration of a note given to a university, reciting that the maker promised to pay to the university a specified sum at her death, with interest, for scholarship and benefit of a granddaughter, did not fail by reason of the consolidation of the university with a college and the exclusion of women from the consolidated university, where the granddaughter had enjoyed the benefits of the university for six years, and where the officers of the consolidated university offered to the granddaughter a scholarship in the university, and where the agreement for the consolidation provided that property dedicated to either of the constituent corporations for any specific purpose should be held by the consolidated university, and used for the specific purpose.

2. SAME.

The validity of a note given to a university for the erection on the grounds of the university of a gymnasium for the use of the students thereof is not destroyed by reason of the consolidation of the university with a college, and the removal of the seat of the university to the seat of the college in another town; the removal being a lawful exercise of the power of the authorities of the university.

Appeals from Circuit Court, Madison County.

"Not to be officially reported."

Action by Sallie A. Miller against the Central University of Kentucky. From a judgment granting insufficient relief, both parties appeal. Affirmed in part, reversed in part.

W. R. Shackelford, for Miller. John T. Shelby, for Central University.

CARROLL, J. In June, 1898, Mrs. Sallie A. Miller executed and delivered to the Cen-

tral University of Kentucky the two following papers:

"Richmond, Ky., June 1st, 1898. At my death, I promise to pay to the order of the Central University of Kentucky one thousand dollars, value received, with annual interest at the rate of five per cent. per annum from date until paid. Negotiable and payable at the Richmond National Bank. For scholarship for benefit of Van Greenleaf. Mrs. S. A. Miller."

"Richmond, Ky., June 1st., 1898. Feeling a deep interest in Christian education, and especially the success and enlarged usefulness of the Central University of Kentucky, and realizing the pressing need of its better equipment, and knowing that the board of curators has determined to make an earnest effort to raise funds for this object during the present year, I hereby promise to pay to Central University of Kentucky the sum of two thousand dollars to be paid at my death, for the purpose of erecting on the grounds of said university a suitable gymnasium for the use of the students of the institution. And I further promise to pay interest on said sum of two thousand dollars at the rate of five per cent. per annum, payable semi-annually, on the first days of December and June of each year, until my death and the full payment of the said two thousand dollars. Mrs. S. A. Miller."

In 1904 Mrs. Miller brought suit in the Madison circuit court for the purpose of having these two papers canceled. From a judgment entered in the action canceling the \$1,000 obligation, the Central University of Kentucky appeals; and from a judgment refusing to cancel the \$2,000 obligation Mrs. Miller appeals.

Mrs. Miller at the time this action was instituted was a widow about 79 years of age, and had been all her life a resident of Madison county, and for many years an active and faithful communicant of the Southern Presbyterian Church. The members of this religious denomination, desiring to have an institution of learning in the state under the influence and control of the church, established at Richmond, Ky., Central University, and in 1874 opened the doors of the institution. The university continued to be conducted under the control of the Southern Presbyterian Church until 1901, when it was consolidated with Centre College, conducted under the auspices of the Northern Presbyterian Church, at Danville, Ky. The combined institutions took the name of Central University of Kentucky, but were not under the control of the Southern Presbyterian Church. When this consolidation took place, Central University at Richmond was abandoned by the Southern Presbyterian Church, and its equipment of every character, except the buildings, were transferred to Danville. Mrs. Miller in her petition, after setting out the facts heretofore mentioned, further averred

that the removal of the university to Danville and its consolidation with the institution of learning at that place was made and done over her protest; that she executed the papers under the belief induced by statements made to her by the chancellor of Central University that it would remain at Richmond, and except for this belief and the representations so made she would not have signed or delivered the obligations; that she would not have contributed anything or executed any writings agreeing to pay any sum to the university if she had known that it was going to be removed, nor would she have contributed anything to an institution of learning not under the control of the Southern Presbyterian Church; that the consideration for the execution of the \$1,000 note was the establishment and permanent operation of Central University at Richmond, under the management and control of the Southern Presbyterian Church, and the further consideration that she should have the privilege of maintaining and educating in it free of charge Van Greenleaf, for whose benefit the note was executed; that the only consideration for the execution of the \$2,000 note was the statements, promises, and representations made to her by the chief officers and agents of Central University that the gymnasium to which the contribution was made should be erected on the grounds of Central University for its better equipment and the benefit of its students, and especially the young men of Richmond and Madison counties. She admitted that the gymnasium was by the aid of her generous contribution and that of other friends erected, but, upon the removal of the student body and educators to Danville, was abandoned as a part of the university.

In *Central University of Kentucky v. Walter's Ex'rs*, 90 S. W. 1066, 28 Ky. Law Rep. 1041, the questions presented by this appeal were fully and carefully considered. There the obligation sought to be canceled by Mrs. Walter read as follows: "Richmond, Ky., March 29, 1886. Feeling especially interested in Christian education and especially in the education of the young men for the gospel ministry, I promise to pay to the order of the Board of Curators of Central University of Kentucky the sum of four thousand dollars to be paid at my death. The said Curators binding themselves to add this amount to the sum of \$26,000 contributed by my late husband, S. P. Walter, for the endowment of the Henry Bell Walter professorship of mathematics in said university." In her petition, filed after the consolidation of the two schools, Mrs. Walter alleged that the consideration for which the note had been executed had failed; that the Central University of Kentucky had voluntarily surrendered its charter, abandoned its purpose of conducting a school therein, and was therefore unable to maintain the chair for

which this subscription had been made. In the course of the opinion, holding that the removal of Central University from Richmond and its consolidation with Centre College at Danville did not operate to relieve Mrs. Walter from the payment of the note, the court said, among other things, that: "The subscription to this college, in the absence of some limitation in the agreement, must be conclusively deemed to have been in accord with the general purpose of the educational movement then undertaken by the body of the church, and necessarily subject to the power of the governing constituency of the institution to conform its course and adopt such means to the accomplishment of its great purpose as are not inconsistent with its object, or with the charter granted by the state. So, when the governing body, and all the constituents of the corporation, have decided to change the location of the university; to include a broader field of work, to add new forces, and bring to its aid additional endowment, all tending to the same end contemplated in its establishment, the enterprise is not abandoned, but is continued; and subscriptions made to it are enforceable, whether their consideration is the maintenance of the original institution or particular chairs therein, if such chairs are in fact maintained by the new institution. While Mrs. Walter might have conditioned her promise that the college seat should be at Richmond, she did not. That she supposed it would be continued there, because it was there at the time the note was executed, did not at all affect the title of the promisee, nor the obligatory force of the note upon her, in the absence of such condition assented to by both parties when the note was executed. As there is nothing in the note, or in the contemporaneous transaction, binding the payee to apply the money otherwise than in the maintenance of a chair of mathematics in its university, being conducted for Christian education, there was no limitation upon the power of the payee to change the location of its school or schools, or to change the manner of their government, or the adoption of particular means of effectuating the general purpose for which the institution was founded." A careful consideration and comparison of this record with the Walter Case satisfies us that there is in principle no substantial difference between them, and that the ground upon which the Walter opinion rests is conclusive of the proposition that Mrs. Miller cannot obtain the relief sought if that opinion is adhered to. But, as counsel for Mrs. Miller earnestly argue that questions raised here were not disposed of in the Walter Case, and there are material points of difference between the two, we will notice the distinctions pointed out by counsel.

In reference to the \$1,000 note, it is said that the consideration expressed in the face

of the writing is a scholarship for the benefit of Van Greenleaf, a young lady; that, as ladies are not admitted to the Danville institution, therefore the consideration has failed. In response to this, it may be said that in the answer of the university in reference to the \$1,000 note, to which a demurrer was sustained, thereby admitting its averments, we find the following: "Defendants say that under said agreement the said granddaughter, Van Greenleaf, was admitted to said Central University, and did enjoy its benefits for a period of six years, and that the defendant now offers and tenders to plaintiff or her granddaughter a scholarship in the university established at Centre College and known as Central University of Kentucky, and it is prepared permanently to fulfill the obligation by giving to any student who may be named by the plaintiff the advantage of said scholarship, and that it will perpetually use the income of said fund for the purpose for which it was dedicated." Although, in view of the ruling of the lower court in sustaining a demurrer to the answer of the university in so far as it sought to present a defense against the effort to cancel the \$1,000 note, and, in rendering a judgment upon the pleadings canceling this obligation, it is not necessary to notice the evidence that was not taken with reference to this note or considered by the lower court in disposing of the question, yet it may not be amiss to say that the evidence supports the averments of the answer, as does the agreement entered into for the consolidation of the two schools, which provides in article 7 that: "All property and funds which have been dedicated or contributed to either of said constituent corporations for the support or maintenance of special chairs or schools or for any specific purpose shall be held by said Central University of Kentucky and dedicated to and used for such specific purpose in accordance with the terms of the gift or contract under which the same shall have been received." So that the right to the scholarship exists in Central University of Kentucky as fully as it would if the consolidation had not taken place; the only difference being that the college is located at Danville in place of Richmond.

As to the gymnasium note, it is argued that, as the note itself stipulates that the building is to be erected on the grounds of Central University for the use of the students of the institution, when the university was removed, the gymnasium was necessarily abandoned, and its use for the purpose intended destroyed. Hence there was a total failure of consideration. True, the removal of the university destroyed the usefulness of the gymnasium as a part of the institution at Richmond; but, as the removal of the student body, the educational force, and equipment was a lawful exercise of power on the part of the constituted authorities of the university, it would seem to follow that the fact that

the removal destroyed the use of the gymnasium as an adjunct of the institution cannot affect the question, or render invalid the note. *Bryan v. Board of Education*, 90 Ky. 322, 13 S. W. 276. In this connection it may be remarked that there is no condition in the note obliging the payee to perpetually maintain the gymnasium at Richmond as a part of the college located there, or to continue to conduct its school at that place. Nor do we find anything in the record that would justify us in holding that the notes, or either of them, were procured by fraud or misrepresentation. We have no doubt that, when they were executed, not only Mrs. Miller but the officers and agents of the university who obtained them, believed in good faith that the university was permanently established at Richmond. At that time its removal or consolidation was not seriously contemplated if it indeed had ever been considered. No misrepresentations were made, no fraud was practiced. All the parties to the transaction acted in good faith. The gymnasium is at Richmond, the place where the money was contributed to erect it. There it will remain. When the college was removed to Danville, this act in and of itself necessarily terminated the gymnasium building erected on the grounds at Richmond as a part of the college equipment, but it being conclusively settled in the *Walter and Bryan Cases*, especially the former, that the act of removal was a legitimate exercise of power, there is in our judgment no escape from the conclusion that its removal did not affect the obligatory force of the obligation given for the purpose of erecting the gymnasium.

Wherefore the judgment of the lower court canceling the \$1,000 note is reversed, and the judgment refusing to cancel the \$2,000 obligation is affirmed.

WILSON v. HARDMAN et al.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

A finding will not be disturbed on appeal where the evidence is conflicting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. FRAUDULENT CONVEYANCES—HOMESTEAD—RIGHT TO DISPOSE OF.

A homestead not being subject to the owner's debts, no fraud was committed in conveying it to an adopted daughter in consideration of affection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 118.]

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Action by Mary H. Wilson against Kate Hardman and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Applegate & Clarke and Jno. H. Barker, for appellant. Rardin & Rardin, for appellees.

CLAY, C. Appellees, Kate and Henry Hardman, who are husband and wife, owned what is known as the "Commercial Hotel property," in Falmouth, Ky. They had lived in and occupied that property for more than 12 years as their homestead. In the fall of 1903 they exchanged this property in part payment for a farm owned by one Barney Hetterman. After crediting the value of the hotel property, there was a balance due on the farm of about \$800. In the year 1905 Mrs. Hardman bought from appellant a piece of property in Falmouth. The purchase price was \$1,800, for which sum Mrs. Hardman executed her notes. The notes provided that, in the event any of them was unpaid at maturity, the whole indebtedness should become due and payable. When the first note fell due, Mrs. Hardman was unable to meet it. Appellant immediately filed suit against her, and obtained a judgment and order of sale of the property. The property was bid in by appellant for the sum of \$1,100, leaving a balance due on the debt of about \$700. There lived with Mrs. Hardman a girl by the name of Della Sipes, who was Mrs. Hardman's adopted daughter, and to whom she deeded this farm. The consideration was love and affection. Appellant instituted this action to recover the balance of her judgment debt, charging that the deed from Mrs. Hardman and husband to Della Sipes was fraudulent, and asking that it be set aside. Mrs. Hardman and her husband defended on the ground that the property in question was their homestead, and that they had the right to do with it as they wished. Appellant denied that appellees had a homestead in the property. The chancellor decided in favor of appellees, and the appellant prosecutes this appeal.

It is the contention of appellant that appellees abandoned their homestead in the farm. The evidence shows that at the time of the purchase of the town property of Mrs. Wilson Mrs. Hardman and her husband were occupying the Hetterman farm as their homestead. The only real question in the case is: Did they abandon their homestead in said farm? The proof for appellant is to the effect that Mrs. Hardman stated that she was dissatisfied with the country; that she was anxious to return to town; that she had purchased the town property as her home, and intended to occupy it as such. The testimony for appellees is to the effect that Mrs. Hardman brought only a portion of her furniture from the farm into town, that she claimed the farm as her home and intended to make her home in town only in the event she could pay for the property. The evidence being very conflicting and such as to leave the mind in doubt, the judgment of the chancellor, holding that appellees did not abandon their homestead in the farm, will not be disturbed. If they did not abandon it, they had the right to dispose of it as they saw fit. It not being subject to their

debts, no fraud was committed by appellees in conveying the property to Della Sipes. *Rothwell v. Rothwell*, 104 S. W. 276, 31 Ky. Law Rep. 851; *Kuevan, etc., v. Specker, etc.*, 11 Bush, 1; *Dowd and Wife v. Hurley, etc.*, 78 Ky. 260; *Allen's Son v. Dillingham's Assignee, etc.*, 104 Ky. 801, 47 S. W. 1076; *Lishy, etc., v. Perry, etc.*, 6 Bush, 515; *Deweese v. Dewees*, 121 Ky. 747, 90 S. W. 258.

Judgment affirmed.

MAYES et al. v. KUYKENDALL et al.

(Court of Appeals of Kentucky. Oct. 6, 1908.)

1. DEEDS—CONSTRUCTION—STATUTES.

The common-law rule that, where one conveys a life estate to another with remainder to the heirs of the grantor, they take as reversioners, and the grantor, being himself the reversioner, after such limitation may grant the reversion, is not affected by Ky. St. 1903, § 2345, providing that, by a deed conveying property to a person for his life and after his death to his heirs, the grantee shall take an estate for life only, with remainder in fee to his heirs.

2. SAME.

A conveyance by a husband to his wife for life, or, in case she should become a widow, during her widowhood, and thereafter to the lawful heirs of the grantor, vests in the wife an estate for life or during widowhood, with reversion to the husband.

3. WILLS—CONSTRUCTION—ESTATES ACQUIRED.

A husband after conveying land to his wife for life, with reversion to his heirs, executed a will, leaving his whole estate to his wife for life or during widowhood, with remainder to his four children, and giving to two grandchildren by a deceased daughter a specified sum. *Held*, that the reversionary interest in the land passed to his four children, to the exclusion of the grandchildren.

Appeal from Circuit Court, Fulton County.
"Not to be officially reported."

Action by B. R. Kuykendall and others against John D. Mayes and others. From a judgment for plaintiffs, defendants appeal. Reversed, with directions to dismiss petition.

Moorman & Warren, for appellants. Robins, Thomas & Tyler, for appellees.

BARKER, J. On the 15th day of December, 1868, J. W. Mayes conveyed to his wife, Virginia F. Mayes, an estate in 160 acres of land in Fulton county, Ky.; the consideration being \$1,150 which the wife had inherited from her father, and turned over to her husband. So much of the deed as is material to be set forth with particularity is as follows: "J. W. Mayes has this day given, granted, bargained, sold and conveyed unto the said V. F. Mayes, of the second part, her heirs and assigns, a certain tract or parcel of land lying and being the county of Fulton and state of Kentucky, and described as follows: [description omitted] * * * To have and to hold the same during her natural life or in case she should become a widow, then during her widowhood; at the expiration of the aforesaid times, then to my lawful heirs and assigns forever." In 1905 J. W. Mayes died, testate, leaving four chil-

dren and two grandchildren, Ben and Lena Kuykendall, who are the children of a daughter who died before her father. By the terms of his will, he left his whole estate, both real and personal, to his wife, Virginia F. Mayes, for her life or widowhood, with remainder after her death to his four children. To his two grandchildren, Ben and Lena Kuykendall, he left \$200 each, to be paid out of his personal estate as their portion of his estate. Prior to the institution of this action, the widow, Virginia F. Mayes, died, and the bequests to the grandchildren were paid over to them. Appellees, the grandchildren, after the death of their grandmother, instituted this action against the appellants, their uncles and aunts, to recover one-fifth of the land which had been conveyed by their grandfather to their grandmother, claiming that, under the terms of the deed, they were remaindermen with their uncles and aunts after the life estate of their grandmother had terminated. The petition sets out the conveyance and the fact that the grandfather and grandmother are both dead, and charges that their uncles and aunts are wrongfully withholding the property from them. The answer denies the claim of the plaintiffs, and then pleads the will of J. W. Mayes, by which it is claimed that he devised the reversion in the land to his children, the defendants in the case below. They also pleaded that the plaintiffs were estopped from setting up any claim to the land, because they had accepted the bequest of \$200 each, made to them in the will of their grandfather.

The first question with which we are confronted is the effect of the deed from J. W. Mayes to his wife. At common law, the rule is that, where one conveys a life estate to another with remainder to the heirs of the grantor, they take, not as remaindermen, but as reversioners, and the grantor being himself the reversioner after such limitation he may grant away the reversion. The rule is stated in 2 Washburn on Real Property, § 1525, as follows: "At common law, if a man seised of an estate limited it to one for life, remainder to his own right heirs, they would take, not as remaindermen, but as reversioners; and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion." The case of *Pryor v. Castleman, etc.*, 7 S. W. 892, 9 Ky. Law Rep. 967, is in principle identical with that at bar. In the deed involved in the case cited the habendum clause was as follows: "To have and hold the land unto said Jas. Crutcher in trust for the use and benefit of the said Frances Crutcher and any children which may be lawfully born of her body during the natural life of the said James Crutcher and Frances Crutcher, his wife. But it is distinctly understood that at the death of the said Crutcher and wife said trust shall cease, and the fee-simple title shall vest absolutely in the children of said Frances, born

in lawful wedlock, and if no children, then to my legal heirs." It was there held that the reversion was in the grantor upon the death of Frances Crutcher without children, and he could convey this reversion by deed. See, also, *Coots v. Yewell*, etc., 95 Ky. 367, 25 S. W. 597, 26 S. W. 179; *Alexander*, etc., v. *De Kermel*, 81 Ky. 345.

Section 2345, Ky. St. 1903, has no application to the case at bar. The heirs or descendants therein spoken of are the heirs and descendants of the grantee, and not those of the grantor, as in the case before us.

It is clear from the foregoing authority that, by the language quoted from the deed from J. W. Mayes to his wife, she took a life estate with reversion in her husband, and this reversion he could convey, either by will or deed. It follows, therefore, that by his will the reversion in the land passed by devise to his children, the appellants, to the exclusion of his grandchildren, the appellees.

The judgment, holding that by the deed the grandchildren took any interest in the land conveyed by their grandfather, must be reversed, and it is so ordered, with directions to dismiss the petition.

PENDLETON v. PENDLETON.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. HUSBAND AND WIFE—ACTION FOR MAINTENANCE—DEFENSES—INFANCY.

A wife's suit to compel her husband to contribute to the support of herself and child cannot be defeated by a plea of infancy, where he was old enough to contract marriage.

2. JUDGMENT—PROCESS TO SUSTAIN—CONSTRUCTIVE SERVICE—PERSONAL JUDGMENT.

In a wife's suit to compel her husband to support her and their child, in which, the husband being out of the state, only constructive service on him was had, a personal judgment against him violates Civ. Code Prac. § 419, forbidding a personal judgment where defendant is only constructively served.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 26.]

3. HUSBAND AND WIFE—SEPARATE MAINTENANCE—ATTACHMENT—EVIDENCE.

Where a husband, having an interest in real estate, left the state and remained away for about a year, and during that time failed to contribute to the support of his wife and infant child, though the wife was destitute, the court properly sustained an attachment against his property to compel him to contribute to the support of the wife and child.

4. APPEARANCE—PROCEEDINGS CONSTITUTING APPEARANCE.

A prosecution by a defendant constructively served of an appeal from an adverse judgment of the circuit court brings him before the circuit court on the return of the case as though he had entered his appearance when the mandate is filed, though no judgment can be taken against him at the term at which the mandate is filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 52.]

Appeal from Circuit Court, Johnson County.
"Not to be officially reported."

Action by Amanda Pendleton against Grover Pendleton. From a judgment for

plaintiff, defendant appeals. Reversed and remanded.

D. J. Wheeler, for appellant. Vaughn, Howes & Howes, for appellee.

LASSING, J. Appellant and Amanda Brown were married in June, 1904. They lived together for about three months, when he left her at the home of his relatives in Johnson county, Ky., and went to the state of West Virginia. He remained away for a year or more, during which time a child was born to them, and, when it was some four or five months old, appellee filed a suit against her husband, wherein she sought to compel him to contribute to the support and maintenance of herself and their infant child, and asked for an attachment against an undivided interest in certain real estate which was owned by her husband. The proper affidavit was made for a warning order, and in due time an attorney was appointed to correspond with and defend for him. It was made to appear that appellant was under age, and the court thereupon appointed a guardian ad litem for him, who filed an answer traversing the allegations of the petition. Proof was taken showing the marriage of appellant and appellee, his subsequent abandonment of her, and her destitute and dependent condition. The chancellor, on final hearing, entered a judgment directing appellant to pay to the attorneys for appellee \$10 per month alimony for the support of his wife and child, and \$25 fee to her attorneys. He sustained the attachment, but made no disposition of the attached property. From that judgment, this appeal is prosecuted.

Appellant complains of the judgment in two particulars: First, because the personal judgment was rendered against him when he was an infant and only constructively served; and, second, because the court sustained the attachment, when there was no proof to support the allegations of the petition in regard thereto, and upon which the order of attachment issued.

The first objection as to the personal judgment is well taken. By section 419 of the Civil Code of Practice a personal judgment is expressly forbidden in any case where the defendant is only constructively served. His plea of infancy can avail him nothing, for he is liable for the support of his wife and child, even though he be an infant. He was old enough to contract marriage with the one, and beget the other, and, having done so, the law imposes upon him the burden of their support. Section 2124 of the Kentucky Statutes of 1903 authorizes the issuing of an attachment in a case like this, and no bond is required.

Appellant complains that the proof offered did not justify or support the judgment of the chancellor sustaining the attachment. Appellant left the state and remained away

for about a year, during all of which time he paid no attention to the wants and necessities of his wife and infant child. This conduct on his part was such as to justify the conclusion of the wife that, if an opportunity presented itself, he would dispose of his property in order to prevent the law from doing that which he himself had so far failed and refused to do. We are of opinion that under the showing made the court was justified in sustaining the attachment, and compelling the husband to contribute to the support and maintenance of his destitute wife and child. This case must be reversed because of the error in entering the personal judgment. Upon its return the chancellor may direct a sale of the attached property, or enough thereof to satisfy the sum to which he has found appellee and her child are reasonably entitled, together with the costs of the action, including the attorney's fee, which is properly taxed as a part of the costs. The prosecution of this appeal by appellant brings him before the circuit court on the return of this case for all purposes, as though he had entered his appearance when the mandate is filed, though no judgment can be taken against him at the term in which the mandate is filed. *Beazley v. Maret*, 1 Bush, 466.

This case is reversed and remanded, with instructions to the trial court to permit either party to file such pleadings as may be necessary to complete the issue, and take proof, if desired, in support thereof, and for further proceedings consistent with this opinion.

HIGHTOWER v. BORDEN et al.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Where, in ejectment, plaintiff gave no evidence in support of his claim of adverse possession, it was error to submit to the jury his right to recover under title acquired by adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 598-612.]

2. EJECTMENT—INSTRUCTIONS.

In an ejectment the only issue was the location of the original bed of a creek forming a boundary. Defendant claimed a different location of the original bed of the creek than that alleged by plaintiff and also adverse possession. *Held*, the court should instruct that, if the land was as claimed by plaintiff, plaintiff was entitled to recover, unless defendant had been in the adverse possession thereof for 15 years.

3. BOUNDARIES—COURSES AND DISTANCES—NATURAL OBJECTS.

Courses and distances called for in deeds must give way to natural objects called for when there is a conflict between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 12.]

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Action by P. C. Borden and another against F. G. Hightower. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Jno. B. Grider, for appellant. Sims, Dr. Bose & Rodas and W. E. Garth, for appellees.

PARKER, J. The parties to this action are neighbors owning adjoining farms in Warren county, Ky. There is between the undisputed parts of the respective farms a bottom containing about four or five acres of land. Through this bottom runs Cedar creek, which, without dispute, originally constituted the dividing line between the farms. The appellees, Clem Borden and his wife, Mrs. P. C. Borden, instituted this action in ejectment against the appellant, F. G. Hightower, alleging that Mrs. P. C. Borden was the owner of the bottom in controversy, and that she had owned it and been in the actual possession by herself and vendors for more than 15 years next before the institution of the action; that the appellant, F. G. Hightower, had wrongfully entered upon the land and ousted appellees therefrom unlawfully, and is wrongfully withholding the same from them. The appellant, Hightower, denied all of the affirmative allegations of the petition, and pleaded title in himself, both by deed and prescription. There was an amended petition filed by plaintiffs (appellees); but this did not materially change the issue already formed between the parties. It was controverted of record, and a reply by the plaintiffs, denying the affirmative allegations of the answer, completed the issues. A trial before a jury resulted in a verdict in favor of the plaintiffs (appellees) for the land in controversy, and the sum of \$125 damages. Appellant filed motion and grounds for a new trial, which, being overruled, he prosecuted this appeal from the judgment based upon the foregoing verdict of the jury.

The plaintiffs (appellees) introduced no evidence whatever in support of their claim to own the land in question by prescription, and the court erred in submitting to the jury their right to recover it under a title acquired by adverse possession. In so far as the paper title of the parties to the land is concerned, the real and only issue is the original bed of Cedar creek; it being conceded that the creek, as it originally ran, was the dividing line between the farms, but it is claimed by the appellees (plaintiffs) that the creek originally ran along the bluff on the north side of the bottom, and that two or three years prior to the institution of this action the appellant, Hightower, wrongfully changed the course of the stream by ditching it so as to make it run along the south edge of the bottom. In addition to his claim to own the property by conveyance, the appellant, Hightower, himself testified that he had been in the actual, continuous, adverse possession of it for more than 15 years next before the institution of the action, that there was a division fence between his property, and that of the appellees along the south edge of the bottom, and he had cul-

tivated a part of the land in controversy constantly for more than 15 years last past, and that he and his vendors had been in the actual, continuous, adverse possession of it for more than 30 years next before the institution of this action. He introduced several witnesses who corroborated him as to this, and there was no evidence on the part of appellees which even tended to contradict it. The appellant was clearly entitled to an instruction based upon this evidence of his title by prescription, and doubtless, if it had been asked for, the court below would have granted it.

Upon another trial of this case, if the evidence is practically the same as contained in the bill of exceptions before us, the court should instruct the jury substantially: (1) That Cedar creek is the real dividing line between the farms of the parties, and that, if the land in controversy lies on the south side of Cedar creek as it ran at the date of plaintiffs' deed, then the plaintiffs are entitled to recover the land, with such damages as they have sustained, unless they shall further believe from the evidence that the land has been in the actual, continuous, adverse possession of the appellant for 15 years or more next before the institution of the action, in which latter event the appellant is entitled to a verdict in his favor. (2) That, if the land in controversy lies on the north side of Cedar creek as it ran at the date of plaintiffs' deed, then the defendant is entitled to a verdict. (3) That courses and distances called for in the deeds must give way to natural objects, also called for in the deeds, when there is a conflict between the courses and distances, and the natural objects found on the land.

For the foregoing reasons, the judgment is reversed for a new trial by procedure consistent with this opinion.

ROSE v. STEPHENS et al.

(Court of Appeals of Kentucky. Oct. 8. 1908.)

1. HIGHWAYS—EXISTENCE—PLEADINGS—LIMITATIONS.

Where, in a suit to recover a strip of land used as a road between the lands of plaintiff and defendants, defendants after pleading a parol agreement between prior owners for the straightening of the line providing that the strip in controversy should be thereafter used as a road for themselves and the owners of more remote land, alleged that for more than 15 years before suit was brought defendants had occupied the strip in controversy as a public road as a matter of right, such plea was a plea of limitations, and was not demurrable as a plea of acquisition of title to land by parol.

2. ESTOPPEL—GROUNDS—ACCEPTANCE OF DEED—KNOWLEDGE OF ADVERSE CLAIM.

Where, in a suit to recover a strip of land between that of plaintiff and defendants, plaintiff testified how the division line originally ran, and how for convenience his father, who was the common grantor of the parties, changed the roads then existing, and opened a single road over the land in controversy, but that the use of such road thereafter was wholly permis-

sive, he was not estopped by the fact that, when he purchased his land, he knew defendants were using the road, from claiming title thereto, and denying their right to use it.

3. HIGHWAYS—PRIMA FACIE CASE—BURDEN OF PROOF.

Where plaintiff sued for certain land included in a deed from his father, which land defendants claimed the prescriptive right to use as a road, plaintiff's evidence of title and that defendants' use of the road had been permissive only established a prima facie case, and placed the burden on defendants to prove their adverse holding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 24.]

Appeal from Circuit Court, Whitley County.
"Not to be officially reported."

Action by J. P. Rose against Jas. Stephens and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

H. H. Tye and R. S. Rose, for appellant.

LASSING, J. Appellant filed suit in the Whitley circuit court against appellees, alleging that he was the owner of and in possession of a certain strip of land described in the petition; that appellees were committing trespass upon said property by tearing down his fences and passing over his ground, and thereby damaging him in the sum of \$100. Appellees answered in two paragraphs. The second paragraph was a general denial, and in the first paragraph they pleaded that prior to the 15th of November, 1894, the land described in plaintiff's petition was owned and possessed by W. J. Rose and J. A. West, and that Clay Lick Branch was the dividing line between them; that this was a very crooked branch, and the said W. J. Rose and J. A. West, desiring to straighten their line and to have a passway between their said lands for the benefit of themselves and other persons who lived above them on said branch, and who had no passway by which they could travel from their homes to the county road, agreed to, and did, change the line between them by taking it out of the said branch in many places and making it straighter, and making and creating a passway 20 feet wide, and each one erected a fence on his side, leaving a lane between them 20 feet in width; that the said line was agreed upon by the said W. J. Rose and J. A. West, and the lane fenced and used more than 15 years before the institution of this action, and that since that time it had been used by the parties and the public who desired to use same for more than 15 years; that on the 15th of November, 1894, which was several years after said road had been established by W. J. Rose and J. A. West aforesaid, that the said W. J. Rose sold and conveyed a boundary of said land to the plaintiff, J. P. Rose; that at the time he did so the road in question was open, being used by the public and claimed by W. J. Rose and J. A. West as the line between them; that, knowing said road had been created and agreed upon as the true line and that same was being

used as a public road, the plaintiff, J. P. Rose, accepted a deed to the land from W. J. Rose, and held same, and that thereafter he and West recognized said road as the line between them, and kept said line fences in repair until in September, 1899, when W. J. Rose purchased from J. A. West a boundary of land on the side of said road opposite that owned by J. P. Rose; that at the date upon which W. J. Rose purchased the said land from West he knew that the road was the line between said West and J. P. Rose, and it was continued to be used and recognized by every one who desired to use it at all times, and kept up and worked until within less than six months before the institution of this suit, when appellant, without right, tore down the fence from one side of the road and erected same in and across said road, and stopped it up and prevented public travel over same. Plaintiff demurred to this paragraph of the answer, and the demurrer was overruled. He then moved to strike out same, and this motion was likewise overruled. Thereupon, by agreement of parties, the affirmative matter in this paragraph was traversed of record. Upon the issue thus joined, the parties went to trial. Plaintiff was sworn and testified in his own behalf, and before he had completed his testimony, or introduced any evidence in support thereof, the court of his own motion peremptorily instructed the jury to return a verdict for the defendants, which was done, and, the motion and grounds for a new trial being overruled, plaintiff prosecutes this appeal.

For him it is insisted, first, that the demurrer to the first paragraph of the answer should have been sustained because in said paragraph an attempt is made by the defendants to show in themselves title to the real estate in question acquired by parol. It is insisted that this is against the statute of frauds, and of no binding force and effect. We are of opinion, however, that this objection to paragraph 1 is not well taken, for the reason that in this same paragraph appellees plead that for more than 15 years before the institution of this suit they have occupied, used, and enjoyed the strip of land in controversy as a public road, as a matter of right, and that the part of paragraph 1, to which appellant so strongly urges objection is merely descriptive of the manner in which they originally acquired the right to use the road in question. This paragraph is, in fact, a plea of the statute of limitation in bar of plaintiff's right to recover, and, being such, the trial court properly overruled the demurrer thereto.

Appellant's second ground for reversal is that the court erred in refusing to permit him to complete his own testimony, and to introduce witnesses who were there ready and willing to testify in his behalf. Two questions are raised by the pleading. First. Appellant alleges that he was the owner of

the land in controversy and in possession thereof. This was denied in paragraph 2. Appellees alleged in their answer substantially that they had been in the open, adverse, and notorious use and enjoyment of the land in question as a roadway for more than 15 years next before the institution of this suit, claiming the use of same as a matter of right. By this plea they sought to avoid appellant's right of recovery. Appellant, testifying in his own behalf, described how the line originally ran between the Rose and West farms, and how, for convenience, his father and Mr. West had changed the road and fenced in the lane; that prior to that time his father had a roadway running along his side of the creek, and Mr. West had a roadway running along his side of the creek; that by this arrangement they avoided maintaining two roads, although the new road, as laid out by them, was placed almost entirely upon the land of Rose; that, when he bought the land in question from his father, he bought to the branch, which had always been recognized as the line between them; that at the time he bought he knew that the lane was there, knew that it was running over the land which he was buying, but that he did not know or recognize that it was claimed by any one, but understood that it was used with his father's permission, and that it had been used with his permission, after he bought the land which was formerly owned by his father.

The bill of evidence recites that at this point the court asked the witness if he knew that the road was a passway, being used by the defendants, at the time he purchased the land over which it ran from his father, and being told by the witness that he did, thereupon, over the protest and objection of the attorneys for appellant, who asked that appellant be permitted to complete his own testimony and to introduce witnesses who were present in court for the purpose of testifying, instructed the jury to find for the defendants, which was done. The court was evidently of opinion that because appellant knew at the date of his purchase that appellees were using the roadway in question that he was estopped from claiming same or denying to appellees the right to continue to so use it. To this conclusion we cannot agree. For appellant had testified that the use of the road, from the time it was laid out, was wholly permissive, and hence the lapse of any number of years would not deprive appellant of his right to withdraw such permission and close up the lane. Appellant having testified that the land in question was covered by and included in his father's deed, and by his deed from his father, as well, and that the use of the roadway in question, while his father held the land, had been with his father's consent and permission, and after he purchased it with his consent and permission, had made out a prima facie case at least, and, in the absence of any proof on the

part of appellees, a judgment should have been entered in favor of appellant. The burden was upon appellees to establish their adverse holding, and their claim to the pass-way, upon this ground, was in no wise made out by the admission of appellant that he knew they were traveling the road when he bought the land from his father.

The court erred in taking the case from the jury, as he did, and for this reason the judgment is reversed and remanded, with instructions to the trial court to permit the appellant to present his entire case, and for further proceedings consistent with this opinion.

STATE NAT. BANK v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. DEPOSITORYS—STATES—PUBLIC FUNDS—CONTRACT—TERMINATION.

Under Ky. St. 1903, § 4692, prescribing the manner of designating a state depository, but silent as to how long the depository shall act as such, in the absence of an agreement specifically fixing the time, the relation continues during the mutual will of the State Treasurer and the depository designated.

2. SAME—NOTICE.

Where an agreement appointing a bank a state depository contained no provision for its termination, it was terminable only by notice, on the part of the Treasurer, that he elected to withdraw the deposit, or by the bank that it desired to be relieved from its responsibility and tender of the existing deposit.

3. SAME—BONDS TO SECURE DEPOSITS—RENEWAL.

Where a bank's bond to secure state deposits covered any delinquency of the bank, during such time as it should act, and contained the bank's agreement to pay $2\frac{1}{2}$ per cent. interest on daily balances, a renewal bond in the succeeding year did not relieve the obligors in the first bond from liability to the commonwealth, as Ky. St. 1903, § 4693, providing for renewal bond, was only to protect the state's interest.

4. SAME—LIABILITY FOR INTEREST.

Where, when a bank refused to execute a renewal bond as state depository because of a contest for the office of State Treasurer, it was acting under a subsisting bond calling for $2\frac{1}{2}$ per cent. interest on daily balances and no new bond was required, the bank having continued to act as state depository during such contest was liable for the agreed interest on the deposits during such period, notwithstanding it deemed it unsafe to use the deposits during such time.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by the commonwealth against State National Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

T. L. Edelen, for appellant. James Breathitt, Atty. Gen., Hazelrigg, Chenault & Hazelrigg, and Clem F. Whittemore, for the Commonwealth.

CLAY, C. This is an action by the commonwealth of Kentucky against the State National Bank, as one of the state depositories, to recover of it the sum of \$3,096 alleged to be due the commonwealth for inter-

est at the rate of $2\frac{1}{2}$ per cent. per annum upon the daily balances on deposit during the first six months of the year 1900. In the year 1897 the Treasurer of the State of Kentucky designated appellant bank as one of the state depositories, and entered into an agreement with it whereby the bank promised to pay $2\frac{1}{2}$ per cent. per annum on the daily balances on deposit. This agreement as to interest was inserted in the bond required by section 4693, Ky. St. 1903. On the 16th day of December, 1898, appellant renewed its bond, and continued thereafter to operate under the agreement to pay $2\frac{1}{2}$ per cent. per annum on the daily balance. The bank continued to act as a depository during the first six months of the year 1900. These facts appear in plaintiff's petition. Appellant in its answer admits the execution of the two bonds referred to and the making of the contract in regard to interest. It also admits that up to January 1, 1900, it did pay to the commonwealth of Kentucky interest at the agreed rate of $2\frac{1}{2}$ per cent. per annum upon the daily balances in its hands. It then alleges that on the ——— day of January, 1900, that Walter R. Day, who had been elected and qualified and was then the acting Treasurer of Kentucky, requested appellant to renew its bond and continue to pay $2\frac{1}{2}$ per cent. on the daily balance; that at the time of the request made by the said Day there was impending a contest over the office of Treasurer of the commonwealth, which contest threatened to make the affairs connected with the treasury of the commonwealth, and especially the relation of appellant to the commonwealth, so indefinite and uncertain as to make it of no benefit or advantage for appellant to act as depository, and that thereupon, and for that reason, appellant declined to renew said bond, and declined to extend further its agreement with the Treasurer to pay interest upon the state's deposits until the then impending contest should be finally settled and determined; that during the pendency of said contest, the duration of which was then wholly uncertain and indeterminate, it was compelled to keep, and did keep, in its vaults, practically without profit, the entire deposit of the commonwealth with it, and during said time there was no agreement between itself and the Treasurer of the commonwealth whereby it was to pay any interest upon the state deposits until the termination of said contest, and during said time it had no contract, understanding, or agreement with the Treasurer of appellee other than that written in the last dated bond filed with the petition. The affirmative allegations of the answer were controverted by reply. By agreement the action was transferred to the equity docket. Proof was then taken and the case submitted. The trial court rendered judgment in favor of the commonwealth, and the State National Bank appeals.

Mr. Walter R. Day, the former Treasurer,

testified that he acted as Treasurer from January 1, 1900, to February 23, 1900; that he called on Mr. Hoge to renew his bond to the state; that at the time he requested him to renew the bond Mr. Hoge inquired if the old bond he had with Mr. Long would not be good until June or July. Witness told him he did not know, but would advise him later. Thereafter he consulted his attorney, and was informed that it would be good. He was of the opinion that he afterward told Mr. Hoge that the bond was all right until June or July of the year 1900. He did not recollect that Mr. Hoge told him he had terminated his contract with the state as a depository. The State National Bank continued to act as depository after January 1st. The funds were deposited with it and checked out. Did not remember that Mr. Hoge or any one else for the bank told him that the bank did not want to handle the state's money any longer.

Mr. George W. Long testified that he was Treasurer of the commonwealth of Kentucky from 1896 to 1900. As Treasurer, he entered into a contract with the State National Bank to act as the state depository. He had no recollection of any notice having been served on him by the State National Bank that it did not longer want the deposit of the state. The bank did not refuse to accept any money that was offered for deposit. He did not remember having made out a bond for the State National Bank to send up to Mr. Hoge for execution after Mr. Day's election as Treasurer. It was possible he may have done so.

O. W. Long testified that he was Assistant Treasurer of the commonwealth of Kentucky from 1898 to 1900. During that time neither the president of the State National Bank, nor any other officer of that bank notified him that the contract entered into with his father (George W. Long) as state depository was terminated; nor had the bank notified him that it would no longer receive deposits. He did not remember taking a blank bond, at the request of the Treasurer, to the State National Bank or any of its officers for the purpose of having it executed for the term beginning with the election of 1899.

S. W. Hager testified that he formerly held the office of State Treasurer. He assumed the duties on February 23, 1900. There were two depositories in the city of Frankfort—the State National Bank and the Farmers' Bank. Had a conversation with Col. Hoge, cashier, and Gen. Hewitt, president, of the State National Bank. Some money had been paid into his hands as Treasurer, and he wanted to deposit it as the law provided it should be deposited. He went to the officers of the State National Bank, as well as the officers of other banks in the city, with a view of making an agreement or having an understanding with them that he as Treasurer might withdraw from the bank any amount of money that might be deposit-

ed by him as Treasurer, and this agreement they declined to enter into, for the reason, as stated by them, that they were responsible to the state for any money that the bank as a depository might receive from any state officer, and that there was a controversy over the title to the office, and that they could not honor any check signed by him (Hager) as Treasurer. The conversation he had was in regard to money which he, as Treasurer, might deposit in the bank, and not in regard to the money which had been deposited by his predecessors. In the conversation had with the officers of the State National Bank not one of them indicated that the bank did not want to act as state depository any longer. The letter filed with Col. Hoge's deposition (which will be hereafter set out) referred only to such deposits that he, as Treasurer, might make.

For appellant, Mr. Charles E. Hoge, cashier, testified that the first contract made between the bank and the state for state deposits was during Mr. Henry S. Hale's term. Under that contract the bank was to pay $2\frac{1}{2}$ per cent. maybe 2 per cent. on the average daily balance. This contract continued during Mr. Hale's term. Thereafter the bank made a contract with Mr. Long. The latter contract was to pay $2\frac{1}{2}$ per cent. on the daily balance. Mr. Long's term of office ended on the 1st day of January, 1900. Before Mr. Long went out of office, he said he wanted the bank to renew the bond and have it ready for the new Treasurer when he came in. The bank declined to do that on account of the agitation and contest being up. Did not know who was going to be Treasurer. Mr. Hager was the Democratic candidate in 1899. Mr. Hager came to see him in February, and wanted Gen. Hewitt and him to give a bond and make a contract with him as State Treasurer. This the bank declined to do. Wrote him a letter to that effect on February 27, 1900. After Mr. Hager was declared the regular Treasurer, the bank renewed its bond and agreed to pay $2\frac{1}{2}$ per cent. on the daily balance thereafter during his term of office. The reason of the bank's rejecting the state deposit was that the contest going on made the deposits, so far as the bank used them, absolutely worthless. They never used the money at all, because they were afraid to use it, as they did not know when they would be called upon for it. They kept more money than was due the state all the time from January until June, when Mr. Hager qualified, in order to pay any checks that they might make. Their books would show that state of facts. When Mr. Day called on him for renewal bond, he refused to execute any. After his conversation with Mr. Day, the bank continued to do the regular business as a state depository. The bank did not tender any resignation as state depository. They declined to make a new contract. They declined positively to renew the bond on account of not being able

to use the money. The letter written by Gen. Hewitt and the witness to S. W. Hager is as follows: "February 27th, 1900. Hon. S. W. Hager, Frankfort, Ky.—Dear Sir: We have referred to our attorney the matter of your proposition to make the State National Bank a depository for the commonwealth's funds upon condition that the bank will recognize you as Treasurer. We call your attention to the fact that these state depositories are required to execute bond to the commonwealth, conditioned that the obligor would pay out the funds upon the check of the Treasurer. Any deposit you might make of the state's funds would, of course, be subject to this bond, no matter in what form or under whose name the deposit might be made. As long as it remains a matter of litigation who is legally entitled to the office of Treasurer, we deem it unwise for this bank to execute a bond for the payment of the State's money upon the check of any Treasurer, the title to whose office is in litigation. We trust you will appreciate that it is a matter of regret on the part of this bank and its directory that it is unable to accept your proposition. You will permit us to add that we hope when the title to the office shall have been finally adjudicated it will still be possible for us to reopen negotiations looking to the end proposed. Very respectfully, Fayette Hewitt, President. Chas. E. Hoge, Cashier."

The provisions of the Kentucky Statutes of 1903 with reference to depositories are as follows:

"Sec. 4692. The Treasurer shall designate in writing to the Governor, to be entered on the Executive Journal, not less than three nor more than five solvent banks, each having a paid-up capital of not less than one hundred thousand dollars, as state depositories; and all public money of the state now in or hereafter received into the treasury shall be deposited in said depositories in amounts as nearly equal to the capital stock of the bank as convenience will permit; and the Governor or the Treasurer may from time to time, as may seem necessary, examine into the condition of the state depositories and the manner in which the state's account is therein kept; and if it shall at any time appear that the capital of any depository has become impaired, the Treasurer shall have power to cause the state's deposit to be withdrawn therefrom, and shall in like manner name another depository, which, when so named, shall, with its president and cashier, be subject to the provisions of this law. For services rendered by said depositories, there shall be no charges made of any character or description. The depositories selected shall each pay to the commonwealth, in proportion to the deposits received, interest at such rate per annum as may be agreed upon between the Treasurer and the depositories upon the average daily deposits on hand at the close of banking hours, the same to be

paid to the Treasurer at the end of each six months, commencing with the date of the deposit.

"Sec. 4693. Before any bank shall be named as depository, or permitted to receive the public funds, said bank shall execute to the commonwealth of Kentucky a bond, with good sureties, worth, severally or jointly, not less than one hundred thousand dollars, to be approved by the Treasurer, conditioned that said bank will pay over, when demanded, all money deposited with it by the Treasurer, and otherwise faithfully comply with the requirements of the law relating to it as a depository. The bond shall be filed with and be recorded by the Secretary of State, and shall be renewed at least once in every two years, and oftener if required by the Treasurer. The execution of this bond, or the deposit of the public funds in banks named as depositories, shall not in any wise diminish the liability of the Treasury or his sureties upon his bond, or impair or delay the right of the commonwealth to recover thereon for any loss or misapplication of the public funds, or other delinquency in office, nor shall the execution of the bond by the bank impair or delay in any way the right of the commonwealth to recover from any delinquent or defaulting bank, or the officers or stockholders thereof, in the same manner as other depositors."

It will be observed that section 4692 prescribes how a state depository shall be designated. The statute, however, is absolutely silent upon the question of how long such depository shall continue to act as such. We therefore conclude that, in the absence of an agreement specifically fixing the time, the relation continues during the mutual will of the State Treasurer and the bank designated as depository. In order to discontinue the relation, it is necessary that it should be done by some certain, unequivocal act denoting a positive intention to do so. In case the Treasurer elects to withdraw the deposit, he should notify the bank to that effect. In the event the bank desires to be relieved of its responsibility as state depository, it should notify the Treasurer accordingly, and at the same time turn over or tender the state deposit. Under this view of the case, did the State National Bank take the necessary steps to be relieved of its responsibility? The testimony for the commonwealth is to the effect that the bond was not renewed because such renewal was regarded as unnecessary. Mr. Hoge, cashier of appellant bank, contends that the bond was not renewed because the bank did not wish at that time to assume the responsibility of paying interest on deposits from which the bank could derive little or no profit. We will discuss this question from the standpoint of the bank entirely, and assume that its purpose in refusing to renew the bond is as claimed by its cashier, Mr. Hoge. In this connection, we must remember that the bond

executed in the year 1897 was sufficient to cover any delinquency on the part of the bank during such time as it might act as depository. In that bond the bank contracted to pay interest at the rate of $2\frac{1}{2}$ per cent. per annum, and this fact is not denied by the bank. The renewal bond executed in 1898 did not in any way relieve the obligors in the bond of 1897 from liability to the commonwealth. The statute provides for a renewal bond merely for the purpose of protecting the interests of the state. Sureties may die or become insolvent. For that reason it is provided that the bond shall be renewed every two years or oftener, if required by the Treasurer. That being the case, a renewal bond by the bank at the time requested by Treasurer Day was not even required by the statute. How, then, could the bank discontinue its relation as state depository by merely declining to execute a bond, which, at that time, was not absolutely necessary? Furthermore, the bank continued to act as depository from January 1, 1900, until July 1st of the same year, the time during which it is sought in this action to charge it with interest. As a matter of fact, therefore, it was a state depository during that time. Its continuing to act as depository absolutely refutes the idea that it intended to discontinue its relation with the state by refusing to execute the renewal bond in question. If, then, the bank continued to act as depository, what was the effect of its refusal to execute the bond upon its contract to pay interest? The statute provides that: "The depositories selected shall each pay to the commonwealth, in proportion to the deposits received, interest at such rate per annum as may be agreed upon between the Treasurer and the depositories upon the average daily deposits on hand at the close of banking hours, the same to be paid to the Treasurer at the end of each six months, commencing with the date of the deposit." Thus it will be seen that each depository must pay interest. A depository cannot act as such without obligating itself to pay some rate of interest. There is no escape from this proposition. It is not contended by the officials of the bank that the contract is for a different rate than $2\frac{1}{2}$ per cent. So far as the record shows, the question of interest was never mentioned after the execution of the bond in 1898. Of course, the Treasurer and the bank might have agreed upon a certain rate of interest for a specified length of time, and another rate for another period of time during which the bank continued to act as depository. This, however, was not done. We think, therefore, the contract to pay interest at the rate of $2\frac{1}{2}$ per cent. per annum, in the absence of any agreement to the contrary, continued so long as the bank maintained its relation as depository.

Some point is made of the fact that there

were two claimants of the office of Treasurer, and that the bank did not know how to relieve itself of its obligation to pay interest otherwise than by refusing to execute renewal bond. Several methods, however, might have been adopted. The bank might have notified the de facto Treasurer, and asked that the state deposit be withdrawn; or it might have notified both claimants of the office of State Treasurer, then paid the money into court, and asked the court to adjudge to whom it should be delivered. Such action would have manifested a purpose on the part of the bank that could not have been misconstrued. It may be that the officials of the bank assumed that, by refusing to execute the bond offered to them for renewal, they absolved the bank from its contract to pay interest on the deposit, and that they did all that they believed the law required of them for the purpose of getting such relief; but the fact remains that they utterly failed to take the steps necessary for that purpose. A bank that has been designated as a state depository cannot relieve itself of its liability to pay interest by refusing to execute a renewal bond, if, as a matter of fact, it continues to act as such depository.

For the reasons given, the judgment is affirmed.

NEW ENGLAND MUT. LIFE INS. CO. v. SPRINGGATE.

(Court of Appeals of Kentucky. Oct. 7, 1908.)

1. INSURANCE—FORFEITURES—WAIVER.

Forfeitures are not favored in law, and, when once waived, cannot be afterwards insisted upon.

2. SAME.

A life policy provided that it should be void if any premium note was not paid when due. After a note became due, defendant's agents wrote insured that, unless the note was paid at once, they would be compelled to return the note, which would cancel the insurance. When the letter reached insured's home, he was unconscious and died the next day, but, after his death, the widow remitted to defendant the amount of the note. *Held*, that defendant had waived the forfeiture, and was liable on the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1056-1070.]

3. SAME—POWERS OF AGENTS.

A provision in a life policy that no alteration or waiver of any of the conditions of the policy shall be valid, unless made in writing and signed by an officer of the company, may be waived by a general agent of the company for the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 952, 953.]

Appeal from Circuit Court, Meade County.

"To be officially reported."

Action by Annie Springgate against the New England Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Marshall Bullitt and Thos. W. Bullitt, for appellant. Claude Mercer, for appellee.

HOBSON, J. On April 7, 1905, the New England Life Insurance Company issued to John C. Springgate a policy insuring his life in the sum of \$1,000, payable to his wife, Annie Springgate, the annual premium being \$37.70, due on April 15th of each year. The first annual premium was paid. When the second premium fell due on April 15, 1906, the insured paid \$10.70 in cash and executed three notes for \$9 each, due in three, six, and nine months. He paid the first two of the notes, but failed to pay the third note due January 15th. The policy contained this provision: "In case any of said premiums or any premium note or notes given for the said premiums are not paid when due and payable, this policy and all payments made thereon shall thereupon become forfeited and void except as provided by the Statutes of the commonwealth of Massachusetts." The note also contained these words: "But this note, if not paid at maturity, is not to be considered as payment of said premium, and said policy will thereupon without notice become forfeited and void, except as provided by the Statutes of Massachusetts." On March 4, 1907, Thomas & Kaye, the state agents of the insurance company at Louisville, mailed to the insured the following letter: "Mr. John C. Springgate, Guston, Ky.—My Dear Mr. Springgate: The thirty days' grace on your note expired February 15. This matter must receive your immediate attention; otherwise we will be compelled to return your note which will cancel your insurance. Kindly remit to us by return mail the amount due, \$9.50. Yours very truly, Thomas & Kaye, General Agents." The letter reached Springgate's home on March 5th, but he was then unconscious, and died the next day without ever knowing of the existence of the letter. After his death, Annie Springgate, the widow, remitted to the company the \$9.50, as requested in the letter, but it returned the money to her with a denial of any liability upon the policy. She then brought this suit against the company to recover on the policy. The circuit court having entered judgment in her favor, the company appeals, asking a reversal on the following grounds: "(1) The letter of the insurance agents was not an unconditional demand for payment of the past due premium note, and therefore was not a waiver of the forfeiture which had already lapsed the policy. (2) The letter was not received until after Springgate's death, and therefore could not have been a waiver. (3) The policy itself expressly prohibited the agents from making such a waiver." These objections will be considered in the order stated.

1. In *Moreland v. Union Central Life Insurance Co.*, 104 Ky. 131, 46 S. W. 516, the insured gave a note for a premium which ma-

tured on January 29th. He failed to pay the note, and in March the company, still retaining the note, demanded payment of it from him, and then sent it to its attorney for collection by suit. After this the insured died in July, and suit was brought upon the policy. After stating the facts, the court thus expressed the question before it: "And the question is: Can the company insist on payment of the note, and at the same time consistently say that the policy, having been forfeited by its nonpayment, remains forfeited? Or will not the real intention of the parties be effected by holding that, although the policy was forfeited by this nonpayment, yet, as the retention of the note and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture, therefore the forfeiture is to be deemed waived?" In determining the question, the court, holding the company liable, quoted with approval the following from 2 *Joyce on Insurance*, § 1379: "As a general rule, if the company has treated the policy as valid, and has sought to enforce payment of the premium, or has, otherwise, with knowledge, recognized, by its acts or declarations or those of its agents, the policy as still subsisting, it waives thereby prior forfeitures." In *Moore v. Continental Life Insurance Co.*, 107 Ky. 273, 53 S. W. 652, the facts were substantially the same as in the *Moreland Case*; the only difference being that a longer time had elapsed, and that the insured had promised the attorneys to pay the note. The same result was reached as in the former case. The question came up again in *Walls v. Home Insurance Company*, 114 Ky. 611, 71 S. W. 650, 102 Am. St. Rep. 298, and in *Union Central Life Insurance Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264, and on facts much the same as in the two preceding cases. In the latter case the court said: "It is the well-settled law of this state that, if an insurer desires to avail itself of conditions in its policy to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed, though, to claim both that it is not bound on the policy, but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note as evidence of its nonpayment, it must not retain it or treat it as an evidence of that much indebtedness." It is insisted that these cases are to be distinguished from that before us because there the company made an effort to collect the notes through an attorney, a bank, or an agent; while here nothing was done but to write the letter quoted. But this difference does not go to the root of the matter, or affect the principle upon which the decisions rest. This principle is that the company must stand on the forfeiture if it wishes to have the benefit of it. It cannot claim the forfeiture, and

insist on the payment of the note. Its assertion of a claim on the note is inconsistent with a claim that the policy is forfeited; for, if the policy is forfeited, there is nothing to be paid on it. To allow the company to treat the policy as valid after the right to forfeit it has accrued, and insist on the note being paid as long as it deems this to its interest, and then, when it learns that the assured is sick or dead, to rely on the past forfeiture, which, at the time it elected to waive, would be to allow it to take inconsistent positions. So the question comes to this: Did the company, when the right to forfeit the policy accrued, elect to forfeit it or to treat it as a subsisting obligation? If it elected then to treat the policy as a subsisting obligation, it cannot, when subsequent events make it to its interest to do so, withdraw the election it then made, and say the policy was forfeited. It is not a question of misleading the insured, to his prejudice. It is not material whether the note was sent to an attorney, a bank, or an agent for collection. These things may be evidence of the company's intention; but the intention may be shown otherwise. Forfeitures are not favored in law. When once waived, they cannot be afterwards insisted on. So in each case the question is: On all the facts did the company forfeit the policy when the right to do so accrued? The letter in question plainly told the assured that the note must be paid at once; "otherwise, we will be compelled to return your note which will cancel your insurance." This was in effect an unequivocal statement that the policy was not then canceled, and would not be if the note was paid. If the assured had remained in good health and had sent the money to the company when his wife sent it a few days later, manifestly there could have been no forfeiture of the policy. The company was insisting on the payment of the note. It treated the policy as in force, and took the risk of the assured being in good health. It cannot be allowed to withdraw the election it thus made when it subsequently ascertained that the assured was then sick, and afterwards died. The letter shows an unequivocal election to treat the policy as a subsisting obligation. The wife, when she opened and read it, had the right to assume that, if she paid the note in a day or so, it would be all right.

2. It is not material that the letter was not received or read by the assured. The case does not turn on his conduct, but on the election of the company not to treat the policy as forfeited. This precise question was presented in *Union Central Life Insurance Company v. Duvall*, 20 Ky. Law Rep. 441, 46 S. W. 518. In that case, after the note was due, the company wrote the assured a letter similar to that in this case. The letter was directed to Walton, Ky. He had left Walton, and gone to Gum Sulphur. It was forwarded to him at Gum Sulphur; but

did not reach there until after his death. The widow sent the money, and the company returned it and denied liability. After copying at considerable length from the opinion in the *Moreland Case*, the court said: "It seems to us upon principle, as well as authority, that the appellant in the case at bar had elected to waive the forfeiture, and insist upon the payment in full of the note. Moreover, it is by no means certain that appellant did not at first elect to accept the payment sent to it by appellee, and only returned same because it had heard of the death or sickness of the insured. It can hardly be doubted that if appellant, at the time of receiving the inclosure from appellee, had not been advised of the death or sickness of the insured, that it would have proceeded to collect the check and have retained the money." The insurance company loses no right if it simply remains silent and retains the note in such cases as this (*Manhattan Life Ins. Co. v. Pentecost*, 105 Ky. 647, 49 S. W. 425), or if it accompanies its request for the payment of the note with a demand of a health certificate (*Fidelity Mutual Life Ins. Co. v. Price*, 117 Ky. 25, 77 S. W. 384), or if its conduct or notice is not such as to evince a waiver of the forfeiture of the policy; but the company cannot be permitted to waive the forfeiture when it supposes the insured is in good health, and to retract the waiver when it learns the fact is otherwise.

3. The policy provided: "No alteration or waiver of any of the conditions of this policy shall be valid unless made in writing and signed by an officer of the company." The general agent for the state was an officer of the company as to insurance policies, for he had power to make contracts of insurance, and this clause of the policy, like any other clause in it, may be waived by any agent authorized to make contracts of insurance. *Mudd v. German Ins. Co.*, 56 S. W. 977, 22 Ky. Law Rep. 308; *Insurance Co. v. Lumber Co.*, 27 Ky. Law Rep. 106, 84 S. W. 551; *Insurance Co. v. Thomason*, 27 Ky. Law Rep. 160, 84 S. W. 546.

Judgment affirmed.

COMMONWEALTH v. ROE.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. ATTORNEY AND CLIENT—DISBARMENT—PROCEEDINGS—STATUTES.

Ky. St. 1903, § 104, providing that any attorney wrongfully refusing to pay over money collected for his client may be suspended from practice by the circuit court for a specified time, and until the money shall be paid, affords the client a speedy remedy, but does not prevent proceedings in the name of the commonwealth for the disbarment of the attorney.

2. SAME.

Ky. St. 1903, § 97, providing that no person convicted of treason or felony shall be permitted to practice as an attorney, while it points out two causes that peremptorily warrant disbarment, does not limit the right to disbar to the causes mentioned.

3. SAME—POWER OF COURTS.

Courts, independent of statute, may, on the motion of the commonwealth by its attorney, after due notice to accused and fair opportunity for hearing, disbar an attorney guilty of such personal or professional conduct as proves him to be unworthy to have his name on the rolls.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 49.]

4. SAME.

The power inherent in courts to disbar attorneys for cause should be exercised with moderation and judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 49.]

5. SAME—PROFESSIONAL MISCONDUCT.

An attorney who intentionally and wrongfully withholds after demand money collected for his client is guilty of misconduct warranting his disbarment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 56.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Proceedings by the commonwealth for the disbarment of C. C. Roe, a practicing attorney. From a judgment of dismissal, the commonwealth appeals. Reversed, with directions.

James Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., J. M. Huffaker, W. O. Harris, A. Scott Bullitt, and Alex P. Humphrey, Jr., for the Commonwealth. Austin E. Walsh, Coruth, Chatterson & Blitz, and Walsh & Walsh, for appellee.

CARROLL, J. The purpose of this proceeding was to disbar the appellee, a practicing attorney at law in the city of Louisville. The information filed against him by the commonwealth's attorney of the district, in the name of the commonwealth, was as follows: "Commonwealth of Kentucky, v. C. C. Roe. Joseph M. Huffaker, commonwealth's attorney of the Thirteenth judicial district of the commonwealth of Kentucky, who, in the name of and by the authority of the commonwealth of Kentucky, prosecutes in its behalf, in his own person comes into the Jefferson circuit court, common pleas, First division, and tenders the affidavits of Charles L. Gray and Charles Peebles, and makes the same a part of this information, and informs the court that C. C. Roe, of the county of Jefferson and commonwealth of Kentucky, a member of the bar of said court, while a member of said bar and in his capacity as a practicing attorney at law, within the jurisdiction of said court, committed the following acts of unprofessional misconduct and was guilty of the following immoral and illegal practices, to-wit: [Then follows in detail the charge that Roe collected for one Gray the sum of \$150, one-half of which he was entitled to retain as a fee; that, although payment was frequently demanded, he failed and refused to pay to Gray the amount to which he was entitled.] Wherefore, the said commonwealth's attorney

charges that, by the commission of the acts aforesaid, the said C. C. Roe has shown himself to be a person devoid of honesty, probity, and good demeanor, and is totally unfit to be an attorney at law and a member of the bar of said court." In another paragraph, containing the same technical averments, it was charged that as the attorney for one Mary Glover he collected \$250, and failed to pay any part thereof until long after the same was due, although payment was frequently demanded. Upon the filing of this information, accompanied by affidavits made by the persons for whom the money was collected, a rule was issued against Roe to show cause why his authority as an attorney to practice and be an officer of the court should not be revoked.

Upon hearing the proceeding, the court dismissed it upon the face of the papers, upon the ground that it should have been instituted and prosecuted in the name of the persons for whom it was charged Roe had collected the money, and not in the name of the commonwealth. In reaching this conclusion the lower court followed the opinion of this court in *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859. In that case there was a motion in the name of Popham against H. T. Wilson, an attorney, to show cause, if any he had, why he should not pay over to him by certain day money he had collected as his attorney. The proceeding was instituted under section 104 of the Kentucky Statutes of 1903 reading as follows: "If any attorney at law shall collect the money of his client, and, on demand, wrongfully neglect or refuse to pay over the same, the circuit court of the county in which the money may be collected shall, after notifying the attorney to show cause against the same, suspend him from practicing in any court for twelve months, and until the money shall be paid. Before any such motion shall be entertained, a demand of the money shall be made of such attorney in the county of his residence, and no such proceeding shall take place unless it is commenced within two years next after the collection of the money." Wilson moved the court to quash the rule, because the proceeding against him should have been in the name of the commonwealth in place of Popham. In answer to this objection, the court said: "This proceeding is, however, under a statute which relates to but one act of an attorney. It embraces a single act of misconduct, and that is one where there is always a person immediately and directly interested. It is true the public are incidentally interested, and, therefore, the Legislature, upon the idea likely that otherwise it may not be properly prosecuted, has provided that the attorney for the commonwealth shall attend to the proceeding. The statute does not say in whose name it shall be carried on, and, in view of the fact that there is always a person directly interested in the proceeding, it

seems to us it should be prosecuted in his or her name. Under the statute, this person must take the preliminary steps necessary to its institution. He only can demand payment of the money, and as he is immediately interested, and knows whether there is ground for the proceeding, he should, in case it be unfounded, be responsible for the costs to the attorney. He is therefore the proper party to the proceeding, because, if he can, without proper ground, act in the name of the commonwealth, then there can be no judgment for costs to the attorney, and he is remediless, although another was immediately interested and directly instrumental in putting the proceeding upon foot. The motion to quash the proceeding was therefore properly overruled." The radical difference between the procedure in the Wilson Case and in this one is that there the proceeding was instituted by the individual wronged, and it was sought to punish Wilson under and by virtue of the statute, while here the proceeding is not by the injured client or under the statute, but is in the name of the commonwealth for an offense that shows the attorney unfit to practice his profession. It is true the offense committed by Wilson and Roe was the same, but it does not follow from this that there is only one method by which the offender may be punished, and that the one adopted in the Wilson Case. The statute in question only describes one offense for which an attorney may be suspended from practicing law. It does not point out the other causes for which he may be disbarred.

As further illustrating the fact that the statute in respect to the causes for which an attorney may be disbarred or the method of procedure is not exclusive, we may call attention to section 97 of the Kentucky Statutes of 1903, providing that: "No person convicted of treason or felony shall be permitted to practice in any court as counsel or attorney at law." But this does not mean that only those who have been convicted of felony or treason may be disbarred. It would be doing a serious injustice to the intelligence of the lawmaking department of the state to hold that such was their intention, or to conclude that, by the enactment of this statute, they meant to declare that, however flagrant the misconduct of an attorney, if it was less than a felony, the courts were powerless to protect themselves, the profession, and the public. The statute points out two of the causes that peremptorily warrant disbarment proceedings, but it does not, and was not designed to, limit the right to the causes mentioned. An attorney may be guilty of many offenses, evidencing a want of honesty, probity, and good moral character, that would authorize the court to disbar him independent of the statute. When the client for whom an attorney has collected money and failed upon demand to pay it over desires to proceed against the attorney, the statute

directs the method of procedure; and, as held in the Wilson Case, it is exclusive, and must be followed. It would seem that the purpose of this statute was to afford the client a speedy and effectual remedy for the collection of his money wrongfully withheld, and that it was intended more for the benefit of the client than to purify and elevate the profession by removing from its ranks one who had shown himself unworthy to be a member of it. But, when an attorney collects the money of his client and fails upon demand to pay it over, he commits an offense greater and broader than a mere injury to his client, and may be proceeded against in the name of the commonwealth for the security of the public, the protection of the courts, and the benefit of the profession. It is certainly a breach of integrity and a manifestation of a lack of probity in an attorney to wrongfully withhold the money of his client. For this offense, although it evinces the unfitness of the attorney to be a member of the legal profession, his client might not desire to proceed against him, and therefore, if the ruling of the lower court was correct, the attorney could not be punished at all for his delinquency. Thus we would have the anomalous state of affairs presented that a practicing attorney who was guilty of conduct that brought censure and reproach upon the profession and the courts could not be punished because the particular individual whom he had wronged did not wish to institute proceedings against him. This construction is too narrow. It takes from the court the right to discipline its officers, and denies it the power to take such action as may be necessary to punish an offender who is bringing the administration of justice into disrepute. The failure to pay over money collected in a professional capacity is perhaps more frequently committed by attorneys than any other act of misconduct, yet, if the argument of counsel for appellee was sound, the court would be powerless to correct it, unless the consent of the client could be obtained. When an attorney collects the money of his client and fails to pay it over, he may be proceeded against by the client under the statute and in the manner therein provided; and he may also be proceeded against by the commonwealth for the commission of an offense involving a lack of honesty, as well as probity and good character. The statute provides that a person who desires to obtain license to practice law in this commonwealth must first procure from the county judge of the county of his residence a certificate that he is a person of honesty, probity, and good moral character, and, to enable him to continue in the practice of his chosen profession, it is essential that he should maintain these attributes. It is not enough that he possesses them when he enters the profession. Indeed, it is more important that they be preserved throughout his professional career than that he have them in its beginning, although we would not

underestimate their importance at any time. Courts independent of statutes have at all times possessed the inherent right to control and regulate the official conduct of their officers, and to inflict upon them punishment for official misconduct. Attorneys at law are officers of the court, and it has always been the rule in this state that, when the attention of the court in which they practice was called to acts of professional misconduct, it had the right to disbar them if the facts of the case justified the infliction of this punishment. Thus, in *Rice v. Commonwealth*, 18 B. Mon. 472, the court in speaking of the right to disbar an attorney said: "If a court have knowledge of the existence of such official misconduct on the part of any of its officers, it not only has the power, but it is its duty, to institute an appropriate proceeding against the offender, and to bring him, if guilty, to condign punishment. Attorneys at law are officers of the court. The official misconduct of an attorney at law may be inquired into in a summary manner by the court, and, if guilty of such misconduct, his name may be stricken from the roll of attorneys admitted to the practice of law at the bar of the court." In *Baker v. Commonwealth*, 10 Bush, 592, the court said: "When an attorney commits an act, whether in the discharge of his duties as an attorney or not, showing such a want of personal or professional honesty as renders him unworthy of public confidence, it is not only the province, but the duty, of the court upon an appropriate and legitimate presentation of the case to strike his name from the roll of attorneys. Nor is it necessary, as contended by counsel for appellant, that the offense should be of such a nature as would subject him to an indictment. * * * The question of the power of the court to strike the name of an attorney from the roll in a proceeding like this, for such a cause, has been recognized and maintained by so many adjudications that it cannot at this time be considered an open question." To the same effect is *Walker v. Commonwealth*, 8 Bush, 86; *Commonwealth v. Richie*, 114 Ky. 366, 70 S. W. 1054; *Underwood v. Commonwealth*, 105 S. W. 151, 32 Ky. Law Rep. 32; *Nelson v. Commonwealth*, 109 S. W. 337, 33 Ky. Law Rep. 143. In *Bradley v. Fisher*, 80 U. S. 335, 20 L. Ed. 646, the court said: "The power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with the proper respect of the court for itself, or a proper regard for the integrity of the profession."

While this right of disbarment for proper cause is universally upheld as a legislative exercise of power inherent in courts, it ought to be, as well expressed by Chief Justice Marshall in *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152, exercised with great moderation

and judgment. Nor do we wish to be understood as holding that it is only for professional or official misconduct in the capacity of an attorney that a licensed lawyer may be disbarred. Aside from his professional or official behavior, an attorney may be personally so disreputable a character, or be guilty of such gross misconduct outside of his professional duties and employment as to render him unworthy of public confidence, and incapable of discharging in the proper manner his obligations as an officer of the court; or, to put it in another and perhaps better way, evince by his acts a lack of good moral character, and thus bring upon himself the punishment of disbarment. Our opinion, in harmony with all the cases both in and out of this state, is that independent of any statute the court may upon the motion of the commonwealth by its attorney, after due notice to the accused, and fair opportunity for hearing, disbar an attorney who has been guilty of such personal or professional conduct as proves him to be unworthy to have his name upon the rolls. As honesty, probity, and good moral character are necessary qualifications for admission to the bar, and their existence is essential to the continuance of the relation, therefore, when an attorney ceases to possess these traits of character in whatever mode or manner the want of them is exhibited, he may be removed. We do not, of course, undertake to prescribe any rule of conduct that attorneys must follow to avoid committing acts of disbarment, or to set down the specific acts of personal or professional misconduct that will subject him to this punishment. Want of honesty, probity, and good moral character may be manifested in various ways, and each case must be adjudged as seems right upon the facts presented in its investigation. But, with reference to the particular matter before us, we have no hesitation in saying that an attorney who intentionally and wrongfully withholds after demand money he has collected for his client is guilty of such misconduct as shows him to be unworthy to be a member of the legal profession or an officer of the court, and authorizes in a proper proceeding his disbarment.

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

FLEXNER UNIVERSITY SCHOOL v. STRASSEL GANS PAINT CO.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. MECHANICS' LIENS—ENFORCEMENT—DEFENSES—PAYMENT—BURDEN OF PROOF.

A defendant, in a suit to enforce a materialman's lien, who pleads payment, has the burden of proof on the issue raised by the reply controverting the plea.

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to enforce a materialman's lien, evidence held not to show payment of the claim.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the Strassel Gans Paint Company against the Flexner University School. From a judgment for plaintiff, defendant appeals. Affirmed.

D. Moxley, for appellant. Gifford & Steinfeld, for appellee.

CLAY, C. Appellant, Flexner University School, had a contract with the Central Planing Mill & Lumber Company, owned by Gnau & Alt, as general contractors, for certain improvements on its property. Thomas G. Searce, under contract with the Central Planing Mill & Lumber Company, did the painting as subcontractor. He bought the paint from the appellee, Strassel Gans Paint Company, with whom he ran a general account. The material furnished by appellee amounted to \$99.42. Appellee filed a lien statement in the county clerk's office of Jefferson county within the time required by the statute, and afterwards instituted this action for the purpose of enforcing its lien on the property of appellant. Appellant's defense was a plea of payment. This plea was controverted by reply. The chancellor gave judgment in favor of appellee, and the Flexner University School is here on appeal.

Thomas G. Searce, the witness for appellant and the subcontractor who purchased the paint from appellee, testified that Mr. Gnau, of the Central Planing Mill & Lumber Company, gave him a check on September 7th for the sum of \$125. He cashed the check at the time, and then went to Strassel Gans Paint Company. Mr. Gans said: "How are you getting along with the Flexner University?" He replied: "We are practically done." He then asked Mr. Gans, "How much is that bill?" and was told about \$100. Witness then handed Mr. Gans \$100, accepting a receipt therefor, and at the same time telling him positively, as he testifies, that the money was from Mr. Gnau; had a running account with appellee of as much as \$600; he stated positively that the payment was on the school. John W. Gans, a witness for appellee, testified that he was secretary

and treasurer of the appellee company. He recalled the time that Mr. Searce paid him \$100 on September 8, 1906. Searce did not say anything to him about the Flexner University School. The material for that school had only been bought a week previous, while there were other accounts that were six weeks older. Searce's custom was to pay on account, the money to be paid on the oldest account; credited the payment to the general account, prorating it among the different properties. At the time Searce paid the \$100 he was indebted to appellee company in the sum of \$300. Searce made purchases for the Flexner University after the payment of the \$100. Not until the lien was filed was notice received from Searce to the effect that the payment was on the Flexner University School work. Prof. Thorp did not notify appellee, nor did Gnau & Alt; on the contrary, appellee company was unable to get any information whatever from Gnau & Alt.

It is the contention of appellant that appellee actually received its money, and cannot now assert a lien on its property, and thereby secure payment from appellant the second time; that the ordinary rule of application of payments does not apply in this case, for the reason that the rights of third parties intervened. There is no proof in the record to the effect that the Flexner University School paid any money to the Central Planing Mill & Lumber Company, or Gnau & Alt, with directions that it be paid to appellee. In other words, it does not appear that appellant's money was actually paid to appellee. There is certainly nothing except the testimony of Searce showing that the money paid by the latter came from the Flexner University School. The testimony of Searce is unequivocally denied by Gans. If, instead of cashing the check, Searce had indorsed it to appellee, this would have been some notice of where the money had come from. As appellant made the plea of payment, the burden of proof was upon it.

Upon the real question at issue, there was in fact but one witness on each side. The chancellor held that appellant failed to prove his case. After a careful reading of the record, we are unable to say that his conclusion was erroneous; and the judgment is therefore affirmed.

GOODE et ux. v. PIERCE.

(Court of Civil Appeals of Texas. June 25, 1908. Rehearing Denied Oct. 8, 1908.)

1. MORTGAGES—FORECLOSURE—MORTGAGEE IN GOOD FAITH OF WIFE'S SEPARATE PROPERTY.

In an action to foreclose a mortgage, a finding that the mortgaged property was either the mortgagor's property or community property, and that the title was in him, and that, if it was in fact his wife's separate property, plaintiff did not know this when taking the mortgage, authorized judgment for plaintiff.

2. APPEAL AND ERROR—PROCEEDINGS NOT IN RECORD—STATEMENT OF FACTS.

In absence of statement of facts, it will be assumed on appeal that the evidence authorized the findings of fact.

Error from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by Nettie H. Pierce against Elisha Goode and wife. From a judgment for plaintiff, defendants bring error. Affirmed.

Tom J. Russell, for plaintiffs in error. Greers & Nall, for defendant in error.

REESE, J. This is a suit by Nettie H. Pierce against Elisha Goode and his wife, Sallie Goode, to recover the amount due upon a promissory note for \$600, executed to plaintiff by Elisha Goode, and to foreclose a mortgage lien upon certain lands given by Elisha Goode to secure the same. Defendants pleaded general denial, that the property on which the foreclosure is sought is the separate property of Mrs. Goode, and that it was at the time the deed of trust was executed the homestead of Goode and wife, of all of which appellee had notice. By supplemental petition, these defenses were denied by plaintiff, and she further pleaded that the title to the property was in Elisha Goode, and that she had no notice or knowledge of any interest therein in Mrs. Goode as her separate estate. The cause was tried by the court without a jury, resulting in a judgment for plaintiff against Elisha Goode for the amount due on the note, principal, interest, and attorney's fees, and against both defendants for foreclosure as prayed for. From the judgment, defendants appeal.

On a former day of the term the paper filed in the cause as a statement of facts, or stenographer's report of the evidence, was, on motion of appellee, stricken from the record; the same not being signed or approved by counsel for appellee or by the judge of the trial court. So there is neither statement of facts nor bills of exception in the record. Conclusions of fact and law prepared by the trial court at the request of appellants are in the record.

The first three assignments of error attack the judgment of the court on the grounds that the evidence showed that the property was the homestead of appellants at the time the deed of trust was executed, and that it was the separate property of Mrs. Goode, of all of which appellee had notice at the time of and before taking the

deed of trust. The court in its conclusions of fact expressly finds against all of these contentions. It is expressly found that the property was not the homestead of appellants, and that it was not the separate property of Mrs. Goode, but either the separate property of Elisha Goode or community, and that the title was in Elisha Goode, and, if it was in fact the separate property of Mrs. Goode by reason of the purchase money having been paid by her out of her separate estate, appellee had no notice or knowledge of that fact at the time she lent the money and took the deed of trust. The conclusions of fact fully authorize and support the judgment. In the absence of a statement of facts, we must assume that the evidence authorized and supported the findings of fact. The assignments do not, in fact, attack the conclusions of fact as not supported by the evidence, but only the judgment. The assignments and the various propositions thereunder are overruled.

The fourth assignment questions the correctness of the judgment for attorney's fees, on the ground that such claim cannot be made a lien on the homestead. What has been said disposes of this assignment.

There is no error in the record, and the judgment is affirmed.

Affirmed.

SLAUGHTER v. WESTERN UNION TELEGRAPH CO.

(Court of Civil Appeals of Texas. June 29, 1908. Rehearing Denied Oct. 8, 1908.)

1. TELEGRAPHS AND TELEPHONES—NONDELIVERY OF MESSAGE—LIABILITY—ELEMENTS.

It is essential to a recovery for the failure of a telegraph company to deliver a message announcing the illness of the sender's son and requesting the sendee, a physician, to come at once, to prove that the failure to deliver the message promptly was the cause of the failure of the sender to procure the services of the sendee; the damage to plaintiff being an essential part of plaintiff's case.

2. SAME—EVIDENCE—SUFFICIENCY.

In an action against a telegraph company for failing to deliver a message to a physician announcing the illness of the sender's son and requesting the physician to come at once, evidence held not to show that the physician would have come in response had the telegram been promptly delivered.

3. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error, if any, in excluding a letter written by witness, which letter states a fact testified to by the witness, is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

4. TELEGRAPHS AND TELEPHONES—NONDELIVERY OF MESSAGE—ACTIONS—EVIDENCE.

Where, in an action against a telegraph company for failing to deliver a message to a physician announcing the illness of the sender's son, and requesting the physician to come at once, the evidence showed that, as the physician did not come on the day the telegram was sent, plaintiff procured another physician on the morning of the following day, it was immaterial where the physician was on such following day, and the refusal of the court to allow the physi-

cian to read a letter to refresh his memory as to where he was on such following day was proper.

Error from District Court, San Jacinto County; L. B. Hightower, Judge.

Action by J. P. Slaughter against the Western Union Telegraph Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

P. E. McMahon and A. T. McKinney, for plaintiff in error. Hume, Robinson & Hume, for defendant in error.

McMEANS, J. This is a suit by J. P. Slaughter against the Western Union Telegraph Company for damages in the sum of \$1,975 for failure to transmit and deliver to R. B. Love, a physician, living at Livingston, Tex., a telegram which reads as follows: "Roy is not doing well. Come at once." Plaintiff, who lived near Shepherd, alleged that his son was suffering with jaundice, and had been under the care of Dr. Love; that on or about the 20th of September, 1905, his said son grew worse, and greatly needed the advice and attention of said physician, whereupon on said date said message was tendered to and received by the agent of defendant at Shepherd, and the charge for transmission thereof was paid to said agent, and thereupon the defendant agreed and contracted to transmit and deliver the message with reasonable despatch, but failed to do so, in consequence whereof plaintiff was deprived of the assistance and advice of said physician in properly attending to and nursing his son, who afterwards died of said disease, and was subjected to great inconvenience and suffered great mental anguish on account of the pain and suffering which his said son endured for the want of the presence and services of said physician. He further alleged that, if said message had been promptly delivered on the day it was filed, Dr. Love could and would have visited his son on that day, and could and would have treated him, and could and would have relieved him of his intense pain and suffering, and that, if he could not have restored his health, could have, in any event, increased his chances of recovery. Defendant pleaded general demurrer, special exception, general denial, and a sworn denial of the contract alleged in plaintiff's petition. Upon the conclusion of the testimony the court directed the jury to return a verdict for defendant, which was done, and judgment was entered for defendant thereon. Plaintiff's motion for a new trial having been overruled, he brings this case before us on writ of error.

Appellant by his third assignment of error complains that the court erred in instructing a verdict for defendant, because that it appeared from the testimony that the telegram had been sent by plaintiff over defendant's line, and that defendant had failed to deliver the same to the addressee, notwithstanding defendant had full knowl-

edge of the terms and importance of the message, and that plaintiff had been damaged by reason of defendant's failure to make prompt delivery. The testimony shows that there is a railroad running between Shepherd and Livingston, the two places being about 16 miles apart; that between 10 and 11 o'clock on the morning of September 22, 1905, plaintiff filed the telegram with defendant's agent at Shepherd, paid the charges therefor, and that the message was immediately transmitted to Livingston, but never delivered to the addressee, Dr. Love. Being sworn as a witness for plaintiff, Dr. Love testified that, if the telegram had been delivered to him promptly, he could have gotten to Shepherd on the 4 o'clock train; that he had plenty of time if he was in Livingston that day; that he did not know whether he was in Livingston on the 22d, and did not know what his engagements might have been; that it was a sickly season, and he was out of town a good deal of the time, and sometimes all day; that he could not say whether, if the telegram had been delivered, he was in position to have responded. This testimony was uncontroverted. To entitle plaintiff to recover, the burden was upon him to show the breach of the contract for the carriage and delivery of the telegram, and to show further, that he was damaged by such breach. Under the allegations of the petition, this could be done only by proving that the failure to deliver the telegram promptly was the cause of the failure of plaintiff to procure the services of Dr. Love in behalf of his son. In other words, it was incumbent upon plaintiff to prove that, had the telegram been promptly delivered, the physician would have visited plaintiff's son in response thereto, and this he wholly failed to prove. *Telegraph Co. v. Bell* (Tex. Civ. App.) 92 S. W. 1036. The witness stated that, had the telegram been promptly delivered to him, he could have gone to Shepherd on the 4 o'clock train; and, if this statement stood alone, it might reasonably be inferred from it that he would have gone; but this inference cannot be indulged in view of his further statement that he might not have been in town on that day, and that, even if he had been, he could not say that his professional engagements would have admitted of his going to Shepherd had the telegram been received by him. It follows, therefore, that plaintiff has not shown himself entitled to recover, and there was no error in instructing a verdict for defendant.

Plaintiff offered in evidence the following letter written to him by Dr. Love, dated September 23d, which upon objection of defendant was rejected: "I heard to-day that I had a telegram come, but it was not delivered to me as it was collect, and they do not deliver them when it was collect; and I suppose it must have been from you, as I have not heard anything from Roy. Please write

me if he is not getting along all right, or if you sent the telegram." The action of the court in sustaining objection to the admission of this letter in evidence is made the basis of appellant's first and second assignments. The letter did not tend to prove any issue involved in the suit other than the fact that Dr. Love did not receive the telegram, and this fact the physician testified to upon the witness stand, and its rejection, if error, was harmless. Nor is there merit in the contention that the court refused to allow the witness to read the letter in order to refresh his memory as to where he was on September 23d. The evidence shows that the telegram was forwarded on the 22d, and that, as Dr. Love did not respond on that day, plaintiff procured the services of another physician on the morning of the 23d, and it was immaterial where Dr. Love was on that date.

There being no error presented by the record, the judgment of the court below must be affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. COLEMAN.†

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 8, 1908.)

1. RAILROADS—INJURY TO PEDESTRIANS—EVIDENCE—SUFFICIENCY.

Evidence held to sustain findings that trainmen were negligent in failing to discover a child's presence on a track in time to avoid his injury, which was caused by being struck by detached cars approaching from the rear, after an engine and other cars had passed, and that such negligence proximately caused the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1359.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.

The rule of contributory negligence applicable to adults cannot be applied to young children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 121-123.]

3. SAME—JURY QUESTION.

Whether a seven year old child had sufficient intelligence and discretion to be chargeable with negligence contributing to his injury caused by being struck by detached railway cars approaching from the rear, after an engine and other cars had passed, held under the evidence a jury question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 347-349.]

4. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

It was not prejudicial error, in an action against a railway company for injury to a child struck by detached cars approaching from the rear, after an engine and other cars had passed, to instruct that, if he failed to stop, look, and listen for approaching cars, and such failure was contributory negligence, etc., he could not recover, though it was undisputed that he went upon the track without looking for approaching cars, the instruction thus submitting as an issue a question upon which the evidence raised no issue; it being unreasonable to believe that, in view of the evidence, the court could have had any doubt on this question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

† Writ of error refused by Supreme Court.

5. DAMAGES—PERSONAL INJURIES—PHYSICAL AND MENTAL SUFFERING—EVIDENCE—SUFFICIENCY.

Plaintiff's evidence in a personal injury action, "It did not hurt me much when they cut my leg off, and nothing hurt me about it afterwards. When the doctor had me, it did not hurt until when he went to pull those clothes off. It hurt me then"—authorized the jury to consider mental and physical pain suffered by him, in fixing his damages.

6. RAILROADS—DUTY TO PEDESTRIANS.

A railroad company must use ordinary care in running its trains across and along places commonly used by the public, where the trainmen know thereof, to prevent injuring any one who may be so using the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1235-1239.]

7. TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.

An instruction, in an action against a railroad company for injuring a pedestrian, that a railroad company must use ordinary care in running its trains across and along places on its track commonly used by the public as a passageway, where the trainmen know thereof, to prevent injuring any one who may be so using the track, was not objectionable as instructing upon the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

8. SAME—REFUSAL OF INSTRUCTIONS—MATTER COVERED.

It is not error to refuse instructions covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from District Court, Burleson County; E. R. Sinks, Judge.

Personal injury action by Willie Coleman against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant. Mathis, Buchanan & Rasberry, for appellee.

PLEASANTS, C. J. The appellee, Willie Coleman, by his next friend brought this suit against appellant, to recover damages for personal injuries alleged to have been caused by the negligence of appellant's servants. The cause of action alleged in the petition is, in substance, that appellee, a child of seven years of age, was run over and injured by a train of cars on appellant's railroad; that at the time the injury occurred he was walking upon appellant's track, at a place where said track was commonly used by the public as a passageway, and appellant's agents and servants operating said train knew that it was so used. The only ground of negligence alleged which was submitted to the jury was the failure of the operatives of said train to discover appellee's presence upon the track in time to prevent injuring him. Appellant answered by general demurrer and general denial, and pleaded specially that appellee was a trespasser upon appellant's track at the time he was injured; that he took no precaution for his own safety, and did not stop to look or listen for the approaching train before he placed himself in a position of

peril, and his injury was due to his own negligence in this regard. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff in the sum of \$750.

The evidence shows that the accident in which appellee received his injury occurred at a switch station on appellant's road known as "Clay switch." This switch is near a rock quarry and sandpit, from which appellant transports rock and sand, and there are several switch tracks used in handling the cars engaged in this business. There are a number of houses near this switch occupied by families, and a number of hands are engaged in working the quarry and sandpit. The switch track upon which appellee was injured is generally used as a walkway by those living near the switch. Shortly before the accident occurred a local freight train of appellant arrived at this switch, and began placing cars that were used in transporting rock and sand. There were some loaded cars on the track leading to the sandpit, and in order to get them out and place them on the proper track the engine with other cars attached to it went in on this switch track and took up the cars desired to be moved. In order to place these cars where desired a running switch was made; that is, after these cars were attached the train moved forward, and when a sufficient momentum was attained, the cars to be switched were cut loose, and the speed of the balance of the train increased sufficiently to enable it to pass the switch and allow it to be thrown before the detached cars reach it, and said cars be thus placed on another track.

Appellee was walking along the switch track ahead of the train at the time this running switch was made. He heard the train coming, and got off, and stood beside the track until the engine and cars attached thereto had passed him, and then, without knowing that some of the cars had been detached, and without looking to see whether other cars were coming, he stepped back on the track behind the cars which had just passed with the engine, and after following the train a short distance was caught and run over by the detached cars and one of his legs cut off. At the time of the accident appellee was about seven years of age, and was possessed of the average intelligence of boys of his age and station in life. If he had looked down the track before going back upon it, he could have seen the approaching cars by which he was injured. The circumstances under which the accident occurred and the surrounding conditions are thus detailed by plaintiff and his witnesses:

Plaintiff testified: "My name is Willie Coleman. I am eight years old, going on nine. The train cut my leg off while I was carrying the men some water—a colored man and a white man. I don't know what they were doing, they were sitting down in the cars." Questioned as to how he came to

carry water, he said: "Mamma told me to go and get the chickens some water, and I went to get the water, and the two men told me to bring them some water. The train was there; the men were trainmen—a white man and a negro. The negro man told me first. They told me they would give me a nickle to get them some water. I brought it back, and went home and carried one bucket, and brought the other bucket back to where the men were. I was carrying it down for the two men; I was coming on down that switch track, and the engine come on, and I got off the track and let the engine pass, and then I got back on the track. I got back on the track to go down and carry the men the water; I was coming on the track, and the box cars come on down and knocked me down. I did not see them. The engine was puffing; I waited until the engine passed. When the engine passed, I got back on the track; I did not know there was any box cars around there. The box cars did not have any engine to them; they were loose to themselves. I did not see them at all. I never saw a car run without an engine. When I would go for water for my mammy or daddy, I would go on the switch track all the time. There was a path in the middle of the track; there was grass burrs on each side of the track. The cars that hit me came from behind; they hit me back of the head, both of them run over me; that is what cut my leg off. I was barefooted that day. I don't know how old I was then. I have been to school, but not at that time. I have never done any work in the field. When I went after the water I went down the switch track every time. I have seen somebody else walking up and down that track a whole lot of times." Cross-examination. "Yes, sir; when I was on the stand before I said the negro man asked me to get that water. Both of them offered to pay me to go and get that water. The negro man told me first, and the white man said, 'Yes, boy, I will give you a nickle, too.' I went down to get the water and came back, and they were gone. The engine was fastened to the cars at the time when the men first asked me to get them some water; the engine was just stopping; the engine pushed them in, and they stopped down there. When the engine passed me, I got off on Mr. Clay's side, I stepped off on one side in the little clean place, and I stayed there until the engine passed. I got off and let the train pass. I did not look up the track to see if there was anything else coming. I thought all the things had gone down; I got back on the track without looking up the track at all."

Hannah Toland, a witness for the plaintiff, testified on direct examination: "My name is Hannah Toland. I was at home when the train run up, and after they uncoupled and made the switch I stopped washing, and started to the quarry; and this boy had gone home, and been to carry his mother

some coffee down to my house, and had gone home ahead of me. I heard two men tell him: 'Say, little boy, bring us some water, and I will give you a nickle; and the other said, 'Yes, bring us some water, and we will both give you a nickle.' I went to the quarry then—then I came back from the quarry. After awhile I heard some one say, 'There's a little boy got hurt.' We all went to see who the little boy was. I got there before his mother. There were two men there when I got there—Mr. Hawkins and Mr. Glenn, the brakeman. Mr. Glenn is a colored brakeman. He was there when I got there; he was tying up this boy's legs. The boy's mother came in a few minutes afterwards. I heard a conversation between Ed. Glenn and the mother. He said if he had been in the right place and noticing his business, her little boy wouldn't have got hurt. He said he could have prevented it by stopping the cars before he run over him. She asked him how came the boy there, and the boy said, 'Mamma, this man told me if I would bring him some water, they would give me a nickle apiece.' That was after the boy got hurt and come to his senses. All the rest that lived on the place (Clay's place) used the track for a passageway. I lived in the house for two years; I used it all the time. It was commonly used by the public as a passageway, both by people and horses. I have seen children walk up and down it and use it as a pathway. I have seen it used as a passageway while the men were switching. I have been on the switch track and the engine passed, and I got back on the track. Mr. Nolan whistled, and I got off the track for the cars. Mr. Nolan is one of the brakemen. That was on another occasion. Yes, sir; the switch track is used as a common passageway for the public. I know it, because I have seen them walk it myself; every day there was some one walking that track."

George Rippetoe, a witness for the plaintiff, testified: "Q. Well, now, how much would you use this track for a passageway? A. Every day, all times during the day, when the people were coming out to work. When Mr. Clay's people would come to dinner, they would come this way, and when they would go out, they would go this way, and the quarry men—them that boarded at Clay's house—they would come around the track, and keep on to the boarding house. I don't know how many men Mr. Clay worked there at different times. He would work from 25 to 30, and as high as 40 or 50." Cross-examination. "All the people there. That is the way everybody come, and everybody over the flat, and coming to the place they called the depot, and they would come up the track—the switch track."

Rebecca Rippetoe testified: "I went to where my boy was. I found his leg cut off. When I got there Mr. Glenn, a colored brakeman, was there. I asked who in the world was it that told that little boy to get some

water, and he said he didn't know; he said he would not have had this to happen for nothing in the world. 'I didn't know he was hit until I passed over him; there was a jar, and I peeped over, and saw it was him. I certainly hate it.' He told me if he had been in his place, that he could have stopped the car from running over the boy." In regard to the switch track as a common passageway, she testified: "Everybody uses it for walking and riding. It had been used in that way ever since I have been there. It had been used there when the railroad people were there with the train; I don't know how often I have seen them use the track. I came up and down the switch track to get to the crossing and go to the well and get the water."

Ed. Glenn, a witness for the defendant, testified on direct examination: "I remember the accident of a little colored boy getting run over at the sandpit about a year and a half ago. I was on the car at the time the accident occurred. I suppose both cars run over the boy. I was brakeman on those cars for the purpose of setting the brakes. The brakes were right together in the middle of the two cars; there were no brakes on the front end of the cars. The cars I was riding on were in front of the engine. I did not see the boy before he was struck; I was standing at the brake at the rear car." Questioned as to why he did not see the boy before the cars ran over him, he testified: "I didn't have time to look. I had other business; I had to attend to my work. I never saw anybody along that track; I wasn't looking at that time; I couldn't see anybody on the car (track). I was looking out for the cars; I wasn't looking for any stock or boys. I wasn't setting down on the hind car with my feet hanging over the car. I didn't tell you in the presence of Rippetoe that I was sitting on the back car with my feet hanging over. Yes, the cars were running about 3 or 4 miles an hour. That is about as fast as a man walks."

This evidence sustains the finding of the jury that the operatives of the train which injured appellee were negligent in not keeping a proper lookout, and in thereby failing to discover appellee's presence upon the track, and that such negligence was the proximate cause of appellee's injury.

In referring to the assignments of error we will number them in the order in which they are presented in appellant's brief.

The first assignment assails the verdict, on the ground that the undisputed evidence shows that appellee's injury was due to his own negligence in going upon the track without looking or listening for the approaching cars. If appellee was an adult person, it may be that appellant's contention that, under the facts in this case, he should be held guilty of contributory negligence as a matter of law is sound, but it is well settled that the same rule of contributory negligence

which applies to persons of maturer age and discretion should not apply to young children, and the question of whether appellee was of sufficient intelligence and discretion to be chargeable, under the facts of this case, with contributory negligence was one for the jury, and their finding on that issue cannot be disturbed. *Evansich v. Ry. Co.*, 57 Tex. 128, 44 Am. Rep. 586; *Avery v. Ry. Co.*, 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809; *Thompson v. Ry. Co.*, 11 Tex. Civ. App. 307, 32 S. W. 191.

The second assignment assails the verdict on the ground that the undisputed evidence shows that, if the operatives of the train had seen the appellee when he got on the track, they could not have prevented the injury. When the operatives of the train which passed appellee first saw him on the track, he was only a short distance in front of the detached cars, which were approaching him from behind. The evidence all tends to show that if the brakeman on the detached cars had discovered appellee at the time he was first seen by the other operatives of the train, he could not, with the appliances at his command, have stopped the cars before they reached appellee, had he remained on the track. It does not conclusively appear, however, that if this brakeman had kept a proper lookout, and had seen appellee at the instant he got upon the track, the cars could not have been stopped before striking appellee. If it be true that the cars could not have been stopped in time to prevent the injury, if appellee had been seen at the time he went upon the track, it by no means follows that the accident would have been unavoidable. Had the brakeman seen appellee, as he might have done by keeping a proper lookout, he could have given him warning of the approach of the cars, and he could have gotten off the track before the cars struck him. After discovering his perilous position the operatives of the engine tried to warn appellee by blowing the whistle of the engine, and calling to him, but this warning was not understood, and manifestly could not have been as effective as a warning given from the cars that were approaching him from behind, of the approach of which he was ignorant. As before stated, we think the evidence is sufficient to sustain the finding of the jury that the negligence of the brakeman on the cars which caused the injury, in failing to keep a proper lookout, and thereby failing to discover the presence of appellee upon the track, was the proximate cause of his injury, and the assignment is therefore overruled.

The third assignment complains of the paragraph of the court's charge in which the issue of negligence on the part of the operatives of the train in failing to keep a proper lookout is submitted. The ground of the complaint is that, under the undisputed evidence, if such failure was negligence, it was not the proximate cause of appellee's injury. What we have said in discussing the preceding as-

signment answers this complaint, and the assignment is overruled.

The fourth assignment complains of the following paragraph of the charge: "If you believe from the evidence that the plaintiff was walking along the defendant's railway track, and that he failed to stop or look, or listen for approaching cars, and that such failure to stop or look or listen was negligence on his part, taking into consideration his age and discretion, which contributed to cause his injuries, or if you believe from the evidence that there was a convenient pathway along said track upon which the plaintiff could have walked in safety, and that his failure so to do was negligence on the part of the plaintiff, taking into consideration his age and discretion, then in either event, you are instructed to return a verdict for the defendant." The objection urged to this paragraph of the charge is that it is upon the weight of the evidence, in that it submitted as an issue the question of whether the appellee looked or listened before going upon the track, when the undisputed evidence shows that he did not look or listen, and the jury might have concluded from the charge that the court thought there was evidence from which they could find that appellee did look and listen before going upon the track. There is no merit in the assignment. It is true that the undisputed evidence shows that appellee went upon the track without looking to see if the cars were approaching from the direction from which the cars that injured him came, and therefore the charge does submit as an issue a question upon which the evidence raised no issue; but we do not think the jury could have been misled by such charge. Taking the charge as a whole, the jury could not, in view of the undisputed evidence in the case, have concluded from this paragraph of the charge that the court had any doubt upon this issue. It seems to us to be entirely unreasonable to believe that the jury would have reached such conclusion and have been influenced thereby. The assignment is overruled. *Railway Co. v. Groves*, 95 S. W. 1084, 16 Tex. Ct. Rep. 895.

The fifth assignment cannot be sustained. The appellee testified, as stated under this assignment, as follows: "It did not hurt me much when they cut my leg off, and nothing hurt me about it afterwards. When the doctor had me, it did not hurt until when he went to pull those clothes off. It hurt then. Nothing else about it hurt me." This is direct and positive testimony that appellee did suffer pain as a result of his injury, and therefore the court did not err in instructing the jury that, in fixing the compensation to be allowed appellee, they might take into consideration the mental and physical pain suffered by him. If the evidence did not affirmatively show such suffering, the character of the injury was such that the jury might, from common knowledge,

have found that appellee did suffer both mental and physical pain as a result thereof.

The sixth assignment of error is as follows: "The court erred in giving special charge No. 2, requested by the plaintiff, which charge was as follows: "Gentlemen of the jury: You are instructed that, under the law of this state, a railroad company is required to use ordinary care in operating its trains across and along places on its track that are commonly used by the public as passageways, where the employes of such company operating such train have knowledge thereof, in order to prevent inflicting injury upon any one who may be so using such track as a passageway at such place or places." This instruction is legally correct and was not a charge upon the weight of the evidence.

There was no error in refusing the special charges mentioned in the seventh, eighth, and ninth assignments. In so far as said charges contained correct statements of the law applicable to the evidence in this case they were included in the charge given by the court. Each of said assignments is therefore overruled.

The tenth assignment complains of the refusal of the court to instruct the jury to find a verdict for the defendant, and the eleventh assignment assails the verdict on the ground that the undisputed evidence shows that appellee was a trespasser upon appellant's track at the time he was injured, and that the operatives of the train by which he was injured, as soon as they discovered his peril, used every means in their power to prevent his injury, and therefore appellant is not liable for such injury. Our conclusions of fact before stated dispose of both of these assignments, and they are overruled.

We think the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

NEILL et al. v. KLEIBER et al.

(Court of Civil Appeals of Texas. July 1, 1908.
Rehearing Denied Oct. 8, 1908.)

1. PRINCIPAL AND AGENT—EXECUTION OF AGENCY—EXECUTION OF WRITTEN INSTRUMENT.

In 1872, the owner of land gave T., then a lessee of the land for 99 years, a power to sell it, with full power to do with it as if it were his own property. The deed executed by T., in setting out the chain of title, stated that the land was sold to the grantee "as per power of attorney to T. dated 1871, accompanying this deed," and the deeds and power of attorney, etc., were stated to be and were delivered as a part of the conveyance, but the deed was signed by T. only individually. The former owner lived some years thereafter, but never asserted any claim to the land. *Held*, that T. acted under the power of attorney in conveying the land, and did not merely convey his own interest therein; the reference to the power of attorney as dated in 1871 being a clerical error.

2. SAME—EXERCISE OF POWER—PRESUMPTION.

If from the circumstances, or the instrument executed, it is doubtful whether an agent intended to execute a power, it will be held that the power was not in fact executed.

3. TRESPASS TO TRY TITLE—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE—DOCUMENTARY EVIDENCE.

In trespass to try title, where defendants claimed under a deed from T., executed under a power of attorney from the owner, and the deed, in setting out the chain of title, recited a lease to T. and a subsequent conveyance to his principal, as well as the power of attorney, the lease to T. was properly admitted to explain the transaction between T. and his principal.

4. APPEAL AND ERROR—PRESUMPTIONS—FINDINGS NECESSARY TO SUSTAIN DECISION.

In trespass to try title, even if there was no finding that an agent acted under a power of attorney in executing a conveyance to defendants' ancestor, it will be presumed, in support of the judgment for defendants, that such was the court's finding, the conveyance itself conclusively showing that it was executed under the power.

5. PRINCIPAL AND AGENT—POWERS OF AGENT—SALE OF LAND—SALE ON CREDIT—DISPOSITION OF PROCEEDS.

A power of attorney to sell land, granting full power to do with it as if it were the agent's own property, authorized a sale upon credit, and any disposition of the proceeds which the agent might make would not invalidate the sale, as the purchaser could assume that under the power the agent could dispose of the proceeds as he desired.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Action by Jennie W. Neill and others against A. M. Kleiber and others. From a judgment for defendants, plaintiffs appeal. **Affirmed.**

John Hammon and John B. Warren, for appellants. A. R. & W. P. Hamblen, for appellees.

REESE, J. This is an action in trespass to try title by Jennie W. Neill and Charles Neill, widow and son, respectively, and heirs at law of Andrew Neill, deceased, against A. M. Kleiber and his wife, A. A. Kleiber, to recover 640 acres of land, being the same granted to Joseph Sovereign for services as a soldier at the battle of San Jacinto, and patented to him by the state of Texas July 27, 1848. The case was tried without a jury, and judgment for defendants, from which plaintiffs appeal.

There is in the record an agreed statement of facts, and also conclusions of fact and law by the trial court, from which the following facts appear: The land was surveyed for Joseph Sovereign by virtue of a certificate issued to him as a soldier in the battle of San Jacinto at some date prior to April 20, 1839. On that date Sovereign executed to J. F. Torry a conveyance of the land "for and during and unto the full end and term of 99 years from the date of the conveyance." In all of the proceedings this instrument is spoken of as a lease. The land was patented to Sovereign in 1848. On March 21, 1855, Torry conveyed the land to J. De Cordova, and on January 24, 1857, De Cordova convey-

ed to A. M. Gentry, who in turn, on February 15, 1861, conveyed it back to J. F. Torry. On March 14, 1871, Joseph Sovereign conveyed the land to Andrew Neill, and on April 9, 1872, Andrew Neill executed to John F. Torry the following power of attorney:

"I, Andrew Neill, of Galveston county, do hereby authorize and empower John F. Torry of Comal county to sell, contract and convey all or any part of the Joseph Sovereign tract of land, being 640 acres in Montgomery county, Texas, on the San Jacinto river, the same being held under my title from said Sovereign, and said agent has full power by this to do with the said land as if the same was his own property, for so doing this shall be a full warrant and power of attorney.

"Witness my hand this 9th day of April, 1872. A. Neill."

On April 18, 1872, J. F. Torry executed to Alice Ann Kleiber a conveyance of the land as follows:

"The State of Texas, County of Harris. Know all men by these presents, that we, Andrew Neill, of the county of Galveston, in the state of Texas, and John F. Torry, of Comal county, in the state of Texas, in consideration of the sum of \$500 00 in gold to us paid by Alice Ann Kleiber, of the county of Harris, in the state of Texas, and the further consideration in the premises hereinafter entered into and stipulated, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Alice Ann Kleiber, all that tract of land situated and described as follows: In Harris district, on the west bank of the San Jacinto river. Beginning at a black jack, the N. E. corner of F. Woodruff's sur.; thence W. with its northern boundary 3232 vrs. to a pine on a line run by the surveyors of Montgomery county; thence north with said line 1438 vrs. to a horn beam, from which a dogwood brs. N. 10 W. 5 vars. a hollow brs. N. 18 vrs.; thence E. 1640 vrs. to a stk. on the San Jacinto river; thence down the river with its meanders to the beginning, containing 640 acres, more or less, situated in Montgomery county, in the state of Texas, and is the grant made to Joseph Sovereign for services at the battle of San Jacinto, and is No. 122, vol. 1, and is the same tract of land leased by Joseph Sovereign to John T. Torry for 99 years, per Records of Harris County, Book R, p. 594, and sold by J. F. Torry to J. De Cordova, per records in Montgomery county, Book S, pp. 200-0, and sold by J. De Cordova to A. M. Gentry to John F. Torry per records in Montgomery county, Book Y, p. 99, and sold by Joseph Sovereign to Andrew Neill in fee simple by deed dated at Galveston, March 14, 1871, and of record in Montgomery county, Book Y, pp. 477-8, and sold by Andrew Neill to Alice Ann Kleiber, as per power of attorney, to John F. Torry, dated at Galveston, April 9, 1871, and accompanying this deed for record, all of which deeds, power

of attorney and certified copy of patent are hereby delivered and declared part of this conveyance, together with all and singular, the rights and incidents thereto appertaining. To have and to hold all and singular the aforesaid premises unto the said Alice Ann Kleiber, her heirs and assigns forever, hereby warranting title to the same unto her. the said Alice Ann Kleiber, provided Alice Ann Kleiber pays the notes for the purchase money, to secure the payments of which a lien is retained, which notes are of even date with these presents, and payable to John F. Torry, and are severally one note payable 90 days after date for \$500 gold, another note payable January 1, 1873, for \$1000 gold, and another for \$1000 gold, payable July 1, 1873.

"In testimony whereof, we hereto sign our names and affix scrolls for seals this 18th day of April, 1872.

"[Signed] John F. Torry. [L. S.]

"Witnesses:

"D. W. Shannon.

"John E. Gary."

This instrument was acknowledged by Torry in his individual capacity only. All of the foregoing instruments were duly recorded in Montgomery county, where the land lay. When Torry executed the deed to Mrs. Kleiber he delivered to her all of the foregoing recited muniments of the title, and they were in her possession, or that of her attorneys procured from her, at the trial. Appellees are the only heirs of the grantees in the deed from Torry above recited. Appellants are heirs at law of Andrew Neill, who died in 1883, and entitled to recover, unless the deed from Torry to Kleiber, together with the power of attorney, passed Neill's title. Kleiber, after the execution of the deed to Mrs. Kleiber, cut the timber off of the land, and exercised other acts of ownership for four or five years, being engaged in the sawmill business at the time. Neither appellants nor appellees have paid any taxes on the land since 1885, so far as is shown by the tax records of Montgomery county, and it is not known whether either party paid any taxes prior to that time, except that Kleiber paid the taxes for the year 1881. Appellants never knew anything about the transaction between Andrew Neill and Torry, and never heard Neill mention it in any way. Neill was a land agent, engaged largely in buying and selling lands. He died in 1883. The notes described in the deed from Torry to Alice Ann Kleiber, and payable to John F. Torry, were paid by Kleiber, part in merchandise, and part in money to Torry. The issues turn almost altogether on the effect of the deed from Torry to Kleiber; whether it was intended by Torry thereby to pass the title of Andrew Neill under the power of attorney; and, if so, whether the sale on credit, and the payment of the notes in money and merchandise to Torry's own use, was a valid exercise of the power.

The first assignment of error is addressed

to the admission in evidence, over appellants' objection, of the deed from John F. Torry to Alice Ann Kleiber. This deed is set out in full above, together with the power of attorney of Andrew Neill to Torry. The first proposition stated is that it appeared from the face of the deed that Torry did not intend thereby to act under the power of attorney from Neill. This proposition is not sound. The deed contains this recital, in setting out the chain of title, "And sold by Andrew Neill to Alice Ann Kleiber as per power of attorney to John F. Torry, dated at Galveston April 9, 1871, and accompanying this deed for record, all of which deeds, power of attorney and certified copy of patent are hereby delivered and declared part of this conveyance." The date "1871" is evidently a clerical error, as is the name in the beginning of the deed, Andrew Neill instead of "Neill," which is clearly shown by the deed itself, in the further reference to "Andrew Neill" as the grantor in the power of attorney. It was shown that all of these muniments of title, including the power of attorney, were delivered up to Mrs. Kleiber by Torry, and were in the hands of her attorneys at the trial. The fact that Torry signed the deed in his individual capacity cannot outweigh the evidence contained in the body of the deed that he intended also to execute it as attorney for Neill. If he had only intended to convey such title as he had under the old lease from Sovereign, no reference to the power of attorney from Neill was either necessary or proper, and certainly these recitals with the delivery to Mrs. Kleiber, with the other muniments of title, of this power of attorney "as part of the conveyance," is inconsistent with any intention that the deed should operate only as a conveyance of Torry's own title under the lease, without reference to the power of attorney. "If, from the circumstances or the instrument executed, it be doubtful as to whether it was the intention to execute the power possessed by the grantor, then it will not be held that by such act or conveyance that power was in fact executed." *Hill v. Conrad*, 91 Tex. 345, 43 S. W. 789. But we think that, taking the terms of the deed and of the power of attorney, there can be no doubt whatever that such was the intention. A mere naked deed by Torry, in his individual capacity, might possibly be referred to the title he had in his own name under the lease, but this is in no respect such a deed. The terms of the power of attorney which authorized him to "do with the said land as if the same were his own property" corroborates and emphasizes the other evidence as to the intention of the deed. The deed purports to convey the title in fee simple. If Torry intended only to convey such title as he had in his individual capacity, why should he have been at such pains to set out the chain of title showing that his individual title was only a lease, while the fee-simple title was in Neill?

The recital "and sold by Andrew Neill to Alice Ann Kleiber as per power of attorney to John F. Torry," etc., evidently refers to such sale then made, and not to a previous sale. It must be remembered, also, that the evidence shows that Andrew Neill lived 11 years after this sale, and it is not shown that he ever asserted any claim to the land thereafter, while Kleiber for 5 years was engaged in cutting the timber off of the land, and after his death, for more than 30 years, those claiming under Neill were silent as to any claim of title. When we consider the broad terms of the power of attorney, the absolute right given to Torry to do with the property as if it were his own, it is of no significance, as rebutting the evidence of the intention of Torry to act under the power of attorney in making the deed that he sold the land on a credit and for his own benefit. The power of attorney authorized him to do so. It is difficult to conceive of an instrument whereby broader powers could have been conferred upon an agent. In fact a full conveyance of the title could not have vested in the grantee fuller power to sell and convey than this power of attorney conferred upon Torry. We must assume that Andrew Neill knew what he was doing, and understood the full import of the extraordinary language used. What construction was placed by the parties, Neill and Torry, upon the 99-year lease to Torry we cannot tell. Inasmuch as the power of attorney was executed in 1872 and that the case of *Ames v. Hubby* (49 Tex. 705), in which it was for the first time held that such a lease was void, was not decided until 1878, it is not unreasonable to suppose that Neill and Torry understood that the lease was valid, and that the fee-simple title was held by Neill subject to this 99-year lease. Some arrangement was doubtless made, satisfactory to both parties, by reason of which Neill intended, by the power of attorney, to turn over the land absolutely to Torry, with power to appropriate the proceeds to himself. None of the propositions advanced under the first assignment present any error, and the assignment cannot be sustained.

The second assignment of error complains of the action of the court in admitting in evidence, over the objection of appellants, the lease from Sovereign to Torry. There was no error in the ruling. If for no other purpose, the lease was admissible as explaining the transaction between Neill and Torry. It was expressly referred to in the deed from Torry under the power of attorney. The trial was before the court, and the title of appellee was sustained, not upon the lease, but upon the power of attorney from Neill and the deed of Torry thereunder, the court expressly finding that the deed from Sovereign to Neill conveyed the title to the land, and that the title was in Neill at the time he executed the power of attorney to Torry.

There is no merit in the third assignment.

It is too clear for argument that the date "1871," referring to the execution of the power of attorney, as recited in the deed from Torry to Kleiber, is a clerical mistake and intended for 1872. It is also clear that in the court's conclusions he did not mean a power of attorney from Kleiber to Torry, but referred to that from Neill to Torry.

While the court does not, in exact language, find that in the deed from Torry to Kleiber Torry intended to act under the power of attorney from Neill, the general tenor of his findings is to that effect. The judgment cannot be supported upon any other ground, and if it be true that there was no finding upon this issue, we must assume, in support of the judgment, that such was the finding of the court, the evidence afforded by the deed itself being, in our judgment, conclusive in favor thereof. The fourth assignment presenting the point is overruled.

The fifth assignment is substantially disposed of by what has been said under the first assignment. The broad terms of the power of attorney from Neill to Torry fully authorized a sale upon a credit, and any disposition of the proceeds that Torry might see fit to make would not invalidate the sale. The purchaser had a right to assume that the authority given to Torry "to do with the property as though it were his own" authorized him also to use the proceeds as he might see fit. The subsequent conduct of Neill, who lived 11 years after the sale, shows complete satisfaction on his part with the conduct of Torry.

What has been said disposes of the sixth assignment of error, which is overruled.

Finding no error, the judgment is affirmed. Affirmed.

TEXAS & N. O. R. CO. v. POWELL.†

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 8, 1908.)

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—REQUISITES.

Under Court of Civil Appeals rule 31 (67 S. W. xvi), requiring the statement supporting assignments of error to contain enough of the proceedings in the record to explain and support the proposition, with a reference to the pages of the record, an assignment of error to the overruling of a motion for continuance which does not show the grounds of the motion, or set it out, but only refers to a bill of exceptions, will not be considered.

2. TRIAL—INSTRUCTIONS—ASSUMING FACTS.

In a personal injury action against the company by a switchman, there being evidence that plaintiff did not go between the cars to couple them while they were in motion, charges, based on the assumption that the uncontroverted evidence showed that he went between the cars while in motion, in violation of the company's rules, were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

3. SAME—APPLICATION TO EVIDENCE.

In an injury action by a switchman against a railroad, the evidence showing no violation of the company's rules by plaintiff, a charge as to the effect of the violation of such rules, and

of a waiver of the rules by the company, was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 590-612.]

4. APPEAL AND ERROR—HARMLESS ERROR—FAVORABLE TO COMPLAINING PARTY.

Error in charging upon the effect of a waiver of its rules by defendant railroad, where there was no evidence to show their violation by plaintiff, being prejudicial only to plaintiff, defendant cannot complain on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4056-4058.]

5. MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—PLEADING—VIOLATION OF RULES—NECESSITY OF PLEADING.

In an injury action by a switchman, if the railroad company relied on a violation by plaintiff of its rule forbidding employees to couple cars in bad order, to prevent recovery, it should have raised the issue by appropriate pleading.

6. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUE.

In a personal injury action by a switchman, where the only negligence of the company submitted to the jury was that of the engineer in moving cars without warning or signal while plaintiff was between them, it was not affirmative error to refuse charges upon defendant's liability for the condition of the car, or upon plaintiff's assumption of risk through defects in the coupling; plaintiff's right to recover having been expressly limited to injuries caused by the engineer's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 590-612.]

7. MASTER AND SERVANT—ASSUMPTION OF RISK—CONCURRENT NEGLIGENCE.

In a personal injury action by a switchman, plaintiff could recover, even though his injuries were caused by the company's negligence in backing the cars without signal or warning to him while he was between them, concurring with defects in the coupling and the dangerous condition of the car, the risks from which plaintiff knew and assumed; and hence charges exempting defendant from liability for injuries from such causes were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 659, 660.]

Appeal from District Court, Orange County; W. B. Powell, Judge.

Action by D. A. Powell against the Texas & New Orleans Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, Parker & Hefner, and Will E. Orgain, for appellant. J. W. Parker and Lovejoy & Adams, for appellee.

McMEANS, J. This is an appeal from a judgment in favor of appellee, D. A. Powell, against appellant, Texas & New Orleans Railroad Company, in which appellee recovered damages for personal injuries sustained by him. Appellee alleges in his petition that, while in the performance of his duty as switchman in the employment of appellant, in coupling cars in its yards at Echo, he was caught between a ballast car and timbers projecting over the end of a flat car, and the upper part of his body was mashed, and his forefinger so crushed that it had to be amputated; "that by mashing him in the upper part of the body he was injured in

† Writ of error refused by Supreme Court.

his chest and the organs contained therein." He alleged, as the proximate cause of his injuries, several grounds of negligence on the part of the appellant, one of which, and the only ground submitted by the court to the jury, being that of the engineer of the engine used in coupling the cars in backing the cars without signal from appellee to do so, and without notice or warning to him of the engineer's intention to do so, when the engineer knew, or in the exercise of ordinary care would have known, that appellee was between the cars for the purpose of adjusting the coupling so that they would couple when brought together, and the danger to which he would be exposed should the cars be backed without signal from appellee or without notice or warning to him. Appellant pleaded general denial, assumed risk, and contributory negligence, and violation by plaintiff of certain rules of the defendant, established for the government of its employes handling moving cars and trains, with which plaintiff was familiar, prohibiting employes from going between cars in motion to uncouple them, or to open, close, or arrange knuckles of couplers. When the case was called for trial plaintiff, before announcement of ready, filed a trial amendment, in which, in addition to the allegations of injury alleged in his original petition, he alleged that his back and spine and spinal cord and heart were injured as a direct and proximate result of the accident alleged in his petition. The case was tried before a jury, and resulted in a verdict and judgment for plaintiff, from which the appellant prosecuted this appeal.

Upon the filing of the trial amendment above referred to the appellant filed a motion for a continuance, which was overruled, and upon that action of the court it bases its first assignment of error. The statement following the assignment does not show the grounds of the motion, nor is the motion itself set out. It is true that a bill of exception in the record is referred to; but, as we understand the rules adopted for the government of this court, it is not sufficient that the pages of the record be referred to in the statement merely, but that the statement shall contain enough "of the proceedings, or part thereof, contained in the record as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record." Rule 31 (67 S. W. xvi). The statement does not comply with the rule, and therefore the assignment will not be considered.

By its second assignment of error appellant complains of the refusal of the court to give in charge to the jury the first special charge requested by it, which peremptorily instructed a verdict for defendant.

The third complains of the refusal of the court to give the second special charge requested by appellant, which is as follows: "In this case the defendant has pleaded in defense certain rules for the government of

its employes, such as plaintiff was at the time of his injuries, and it is shown, by uncontroverted evidence by plaintiff and others, that he knew and understood these rules at the time of his injuries, and that he was proceeding in violation of said rules when he was injured. You are therefore instructed that if you believe that plaintiff would not have been injured if he had obeyed the rules pleaded by defendant, then he is not entitled to recover under any circumstances from the defendant, and you will return your verdict in favor of defendant."

There is no merit in either of these assignments. They are based upon the assumption that appellee, at the time of his injury, was acting in violation of rules promulgated by appellant for his protection. The rule forbade appellee to go between cars in motion to uncouple them, or to open, close, or arrange the knuckles of couplers. There were but two witnesses to the accident resulting in plaintiff's hurts, one being the engineer, and the other the appellee himself. Appellee, who was a switchman, testified that he was engaged in coupling a string of cars, and that all the cars were coupled automatically except the last, a ballast car, which did not couple by the impact; that he undertook by the use of a lever, which could be operated without going between the cars, to adjust the coupler, but because of the chain attached to it being too long, and because the load on one of the cars had shifted so as to interfere with the proper working of the lever, he could not arrange the coupler by the use of the lever, and that it became necessary to make proper adjustment with his hands, and to that end to enter between the cars; that when the other cars came in contact with the ballast car it caused the latter to move four or five feet, and it then stopped; that he at once signaled the engineer to stop the other cars, which he did, and that while all the cars were standing, there being a space of three, four, or five feet between the ballast car and the last car of the string attached to the engine, he went in to make the adjustment, and that while so engaged the engineer, without signal from him or to him, and without notice or warning, shoved the car against him, and that he was caught between the ballast car and the timbers with which the other car was loaded, and injured. Appellee's testimony is corroborated by that of the engineer on the point that the cars were standing when appellee went between them, but testified that, while appellee was still in between the cars, he gave a signal to move the other cars toward ballast car, and that in obedience of this signal the cars were moved, and appellee was caught and injured. Thus it clearly appears that there was testimony that appellee did not go between cars in motion; and, this being true, the court properly refused to give charges based upon the assumption that the uncontroverted evidence dis-

closed that appellee did enter between the cars in motion in violation of the rule.

By its fourth assignment appellant assails the following portion of the general charge: "If you believe from the evidence that defendant company made and promulgated a rule which prohibited switchmen to go between cars in motion to couple them, or to open or close or arrange knuckles or couplers, and if you believe said rule was in force at the time of said accident, and if you believe from the evidence that plaintiff, while between the said string of cars and detached car, signaled the engineer to move said string of cars back, toward, and upon said detached car, then you will find for the defendant; but if you believe from the evidence that said rule of defendant, although in existence, was not at the time of said accident in force, or observed by the defendant or the employés, but was openly and knowingly violated by the employés of said company in like circumstances and conditions, and that it was the custom of said employés to so violate the rule, and that said company acquiesced in the violation of said rule in such cases, without protest, such would be a waiver of that rule; and if you so believe the plaintiff would not be debarred from recovering, if entitled to recover at all, because said rule was violated, if it was violated, the burden is on the plaintiff to prove, by a preponderance of the evidence, the facts which are submitted to you in this charge, and any special charges that may be given, as material to his right to recover." The ground of the complaint is that the question of waiver of defendant's rules was not raised by any pleading, and that it was affirmative error for the trial court to submit to the jury the issue of waiver vel non. As before stated, the rule relied upon prohibited employés from entering between moving cars. The only two eye-witnesses testified that the cars were not moving when appellee went between them, hence no violation of the rule was shown, and the court was not authorized by the evidence to submit a charge on that issue. This being true, the giving of the charge, if error, was against appellee, and of which appellant cannot be heard to complain. It appears from the testimony that the car that appellee was attempting to couple to the ballast car was a flat car, and loaded with heavy timbers which had shifted so that the ends of the timbers extended over the coupling, and prevented the operation of the coupling in the ordinary way, and that appellee knew of this before he went between the cars. Appellee, on cross-examination, testified that a car thus loaded was a bad order car, and should have been carded as such, and that the rules of appellant forbade employés coupling them to other cars while in that condition. Appellant insists that the violation of this rule by appellee precludes a recovery by him. It is only necessary to say, in passing on this contention, that if appellant relied upon this

rule and its violation to defeat recovery by appellee, it should have raised the issue by appropriate pleading, which it did not do.

By its fifth and sixth assignments appellant complains of the refusal of the court to give its third and fourth special charges. The third special charge contained an instruction that there was no evidence to show that defendant was negligent, or in anyway responsible, for the condition of the load on the flat car, and that it was not liable to plaintiff on account of the condition of said load. The fourth contained an instruction that whatever defects existed in the coupling apparatus, and whatever dangerous condition may have existed because of the timbers extending over the end of the flat car, were known to plaintiff before he received his injuries, and that he assumed the risk involved in such conditions, and the defendant was not liable therefor, and that the jury should not let such matters influence them in returning a verdict against the defendant. There was no affirmative error in refusing either of these charges. There was but one ground of negligence submitted to the jury, and that was the act of the engineer in moving the cars upon appellee while he was adjusting the coupler, without signal from him to do so, or of warning to him of the engineer's intention to so act, and the jury was pointedly told that the plaintiff could not recover unless they believed from the evidence that the engineer backed the cars upon plaintiff while he was between the ballast car and the last of the string, without signal to plaintiff, and that this was negligence on the part of the engineer which resulted in plaintiff's injuries.

The charges were correctly refused for the further reason that, even had appellee known of each and all of the defects and dangers in the couplings and in the condition of the load on the flat car, and even if such defects and dangers had been concurring cause or causes of his injury, still he would be entitled to recover if in conjunction with said causes his injury was received as the result of the negligence of defendant in backing the cars without notice to appellee or signal from him to do so. *Railway v. Kelly*, 98 Tex. 123, 80 S. W. 79.

The record discloses no reversible error, and the judgment of the court below must be affirmed.

Affirmed.

FIELDER v. ST. LOUIS, B. & M. RY. CO.
(Court of Civil Appeals of Texas. June 6,
1908. Rehearing Denied Oct. 8, 1908.)

1. CARRIERS — PASSENGERS — ACTIONS — EVIDENCE — ADMISSIBILITY — CAUSE OF INJURY.

In an action by a passenger for assault by the company's servants, an isolated instance of intoxication on plaintiff's part, some three months before the assault, was not admissible to show that his alleged injuries were due to alcoholism, and not to the assault.

2. APPEAL AND ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

A party has a right to have only legal evidence submitted to the jury, and irrelevant evidence admitted over objection requires a reversal, if it may have been prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4154, 4155.]

3. SAME—HARMLESS ERROR.

Where the evidence is sharply conflicting, the admission of improper testimony upon a material issue is deemed prejudicial on appeal, unless the contrary appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4040.]

4. CARRIERS—PASSENGERS—ACTIONS—ADMISSIBILITY OF EVIDENCE—IRRELEVANT TESTIMONY.

In an action by a passenger for assault by the company's employes, defendant claiming that plaintiff's injuries were due to alcoholism, the admission, over objection, of evidence that witness, the sheriff, saw plaintiff drunk on the street several months before the alleged assault, and threatened to remove him from his position as deputy if he continued to drink, together with the statements that plaintiff had then been drinking for several days and causing trouble, was prejudicial error.

5. DAMAGES—PLEADINGS—ISSUES—GENERAL DENIAL—CAUSE OF INJURY.

In an action by a passenger for assault by the company's employes, the company, under a general denial, could show that the alleged damages were not caused by the assault, but resulted from chronic alcoholism.

6. CARRIERS—DAMAGES—RIGHT TO NOMINAL DAMAGES.

If plaintiff was assaulted by the company's employes while a passenger, he was entitled to at least nominal damages, in an action against the company, even though the damages alleged resulted from other causes; and hence it was error to instruct for defendant, if the damages did not result from the assault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1340.]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by D. T. Fielder against the St. Louis, Brownsville & Mexico Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Dougherty & Dougherty, J. C. Scott, and G. R. Scott, for appellant. James B. Wells and Kleberg & Neethe, for appellee.

McMEANS, J. Appellant brought suit in the district court of Nueces county against appellee, to recover damages for personal injuries alleged to have been sustained by him through an assault alleged to have been made on him by employes of appellee at Kingsville, Tex., and while he was a passenger and on the premises of appellee at that place. Appellant's cause of action, as stated in his petition, is substantially as follows: On or about January 11, 1905, appellant boarded the appellee's train at Katherine, a station on its line of railroad, and became a passenger thereon, intending to go to Robstown, a station on appellee's railroad, and Corpus Christi, a station to which appellee was operating said passenger train; and the appellant was received and accepted by appellee as a passenger. When he reached Kingsville,

appellant alighted from the train, and paid the conductor in charge of the train his fare from Katherine to Kingsville. But he did not pay his fare or buy a ticket to Corpus Christi at that time, to wit, when he reached Kingsville, because he was in possession of a certain pass, which had been duly issued to him by the proper officer of the appellee, and at that time appellant thought this pass entitled him to transportation over appellee's railroad from Kingsville to Corpus Christi, though he was subsequently advised by the conductor of appellee's train, on a later trip, that the pass had expired January 1, 1905. And appellant also avers that he was also prepared at that time to pay his fare from Kingsville to Corpus Christi, and he would have paid the same to appellee, through its conductor, on ascertaining that said pass had gone out of date. After appellant reached Kingsville, on January 11, 1905, on appellee's railroad train, he alighted from the train for a temporary purpose, on the platform and premises of appellee, where passengers usually congregated when embarking or alighting from appellee's passenger trains, and paid the conductor his fare from Katherine to Kingsville. And while he was on said platform, awaiting the departure of the train, and while the relation of passenger and carrier existed between appellant and appellee, and while the appellee owed to appellant the duty to protect him from unlawful assault "as a passenger at an intermediate station, and as one who had reached his destination, and as one about to embark upon his journey," appellant was unlawfully and willfully assaulted by appellee's servants, agents, and employes. The assault is then described in the petition as follows: "One of the defendant's servants and employes, to wit, one Carnahan, willfully and violently, and without adequate cause, struck plaintiff a severe blow on the face; that thereupon defendant's employe, one Burke, the conductor in charge of said train, whose duty it was, as the agent of defendant company, to protect plaintiff, as a passenger, from such assaults upon his person, in utter violation of said duty, willfully and violently and negligently joined in said assault, and, striking plaintiff, knocked him down with great violence, so that his head and neck struck the ground and platform with great force; and that after he (plaintiff) was down, said Carnahan and Burke continued their assault upon plaintiff, both and each of them kicking and striking and stamping plaintiff with great force, and holding him by the legs with his head on the ground, and thereby inflicted upon plaintiff serious bodily injuries, as hereinafter set out." The answer of appellee consists of general demurrer, special demurrers, and also a general denial. Appellee also pleads specially that, if its employes Carnahan and Burke, or either of them, assaulted the appellant, the appellant was guilty of contributory negligence, because he wrongfully provoked the assault while

in an intoxicated condition; and while in such intoxicated condition, appellant, without any cause, insulted and abused said Carnahan, and threatened to strike him, and did make an unlawful and dangerous assault upon him, and endeavored to strike and inflict serious bodily injuries on him; and if said Carnahan and Burke, or either of them, struck or injured appellant, they did so in the lawful defense of said Carnahan, etc., and by reason of such facts appellant should not recover.

Appellant lived at Kingsville, Tex. On January 11, 1905, he left Kingsville for Katherine on appellee's passenger train. After staying a short while in Katherine, he became a passenger on appellee's north-bound train, intending to go through Kingsville and on to Robstown and Corpus Christi. He did not purchase a ticket before boarding the train at Katherine, but, when called on by the conductor, Burke, for his fare, tendered the conductor a twenty dollar bill, out of which he requested the necessary amount be taken; but, as the conductor did not have sufficient money to make the change, appellant told him he would pay him when he reached Kingsville, and this he did. The train remained at Kingsville 10 or 15 minutes before it departed for Robstown and Corpus Christi. During the first few minutes of this wait appellant was on the coach steps, and then descended to the platform for the purpose of sending word to his wife that he was going on to Robstown and Corpus Christi. He did not purchase a ticket from Kingsville to Robstown because he had a pass upon which he had been riding upon that section of the road, and which, he testified, he thought entitled him to ride free, and did not know to the contrary until he was refused free passage upon it subsequently. He testified further that the pass had in fact expired on December 31, 1904, but that he did not then know it, nor had his attention been in any way called to it; but that had the pass been rejected, he was prepared to, and would have, paid his fare. After appellant sent word to his wife, and while still on the depot platform, he approached one Carnahan, appellee's roadmaster, with whom he had some words, which resulted in a personal difficulty between them, during which the conductor, Burke, struck appellant and knocked him down. The testimony introduced in behalf of appellant tends to prove that damages for which he sued resulted from injuries inflicted on him by appellee's roadmaster and conductor in the course of the difficulty, while that introduced in behalf of appellee tends to show that the injuries complained of by appellant resulted from the excessive use of intoxicating liquors. On a trial before a jury verdict was rendered for appellee, upon which judgment was accordingly entered, and from which this appeal is prosecuted.

On the trial of the case the witness H. B. Wright, who in October, 1904, and at the

time of the trial, was sheriff of Nueces county, and under whom appellant, Fielder, was deputy until the November, 1905, election, was asked the following question: "Did anything occur between Mr. Fielder and yourself before your election in 1904, touching your desire or wish to withdraw or cancel Mr. Fielder's deputyship; and, if so, what did occur for the reason of doing so?" This question and the answer thereto were seasonably objected to, on the ground that the evidence sought to be elicited was irrelevant, immaterial, incompetent, and that what transpired between Wright and appellant at the time indicated in the question had nothing to do with the merits of the case. The objection was overruled, and the witness answered: "I met Mr. Fielder, I think, in October, 1904, right in front of Mr. Hull's restaurant, and he was under the influence of whisky. I would call him drunk. He was walking around, but not straight. I said, 'Mr. Fielder, if you are going to continue drinking this way, I will have to cancel your deputyship,' and he said, 'Never mind, I am going out home, and in two or three days you will find me on that little creek up there; I am going to kill myself.' I said: 'Well, if you are going to kill yourself, go on and quit bothering people.' He was drunk then." When the witness made this answer, appellant requested the court to instruct the jury to disregard the same, because the testimony was incompetent and calculated and intended to prejudice the plaintiff in the minds of the jury, which request was also overruled by the court, to which action exception was reserved. He was then asked, "What do you mean by saying, 'You are bothering the people?'" To which, over the objection of appellant that the question called for the opinion of the witness, and was irrelevant and immaterial, he answered, "It had been reported that he had been drunk the night before, and the next day, at about 11 o'clock, he was what is called 'still drunk.' He was cutting up a good deal on the hill." This answer was objected to as hearsay, and the objection overruled. The witness further testified that he never saw appellant intoxicated except this one time. The testimony as to whether appellant at the time of the difficulty with the roadmaster and conductor was intoxicated, and as to whether the injuries complained of resulted from the excessive use of intoxicants, or from the effect of the blows received by him in the encounter, sharply conflicted. While testimony to prove appellant's condition was due to alcoholism was admissible under the general issue, and was not required to be pleaded specially, we do not think that evidence of an isolated instance of intoxication, at a period so remote as three or four months prior to the time of the difficulty, tended to prove the issue, or was admissible for that purpose. Clearly what the witness said to the appellant, and his testimony as to the report which reached

him concerning appellant's condition and conduct, was not proper, and the objection to it should have been sustained. "A party has the right to have none but legal evidence submitted to a jury. And where that which is irrelevant (or hearsay) has been admitted against the objections of the party, if it may have had an improper influence upon the jury, it will require a reversal of the judgment." *Railway v. Burke*, 55 Tex. 340, 40 Am. Rep. 808; *Railway v. Thompson*, 75 Tex. 506, 12 S. W. 742. And where the evidence is sharply conflicting, the admission of improper testimony upon a material issue will be deemed prejudicial, unless the contrary appears. *Baker v. Insurance Co.*, 89 Tex. 263, 34 S. W. 604; s. c., 10 Tex. Civ. App. 523, 31 S. W. 1072; *Ebron v. Zimpleman*, 47 Tex. 522, 28 Am. Rep. 315; *Ross v. Kornrumpf*, 64 Tex. 395. We think the testimony objected to was prejudicial to appellant, and cannot say that the jury was not influenced by it. The assignments of error raising the points are sustained.

At the request of appellee the court gave to the jury the following special instruction: "In this case plaintiff sues to recover damages for the pains, ailments, diseases, injuries, etc., alleged by him as being caused by and arising from the injuries received by him, in and by reason of the alleged assault upon him by defendant's employ  s, Carnahan and Burke. In this connection you are instructed that, unless you believe from a preponderance of the evidence that such pains, ailments, diseases, injuries, etc., were received in or caused by the actual result of such assault, and have not been, and are not, caused by the excessive use of alcoholic drinks, you will find for defendant." The giving of this charge is assailed by appellant on the grounds (1) that it is not supported by the pleadings; and that a defense not pleaded should not be submitted to the consideration of the jury; and (2) that the assault, if made under such circumstances as to render defendant liable, entitled plaintiff to recover at least nominal damages for the mental and physical suffering, etc., immediately consequent upon and directly caused by the assault. The first contention is without merit. Plaintiff pleaded that certain consequences ensued to him as a result of the assault. The defendant pleaded a general denial, and under this plea it could show, either that plaintiff was not suffering the diseases and hurts alleged by him, or that such diseases or hurts resulted to him from causes other than the assault. But the second contention must be sustained. Even if the injuries of which plaintiff complained were not due to the assault, and were attributable to other causes, yet if he was assaulted under circumstances which rendered the defendant liable, he was entitled to recover for any hurts he sustained immediately consequent upon and directly caused by the assault, although the jury may have be-

lieved that the train of ills of which he complained was due to other and different causes. The charge was clearly erroneous, in that it precluded the jury from finding for plaintiff for any sum, unless they were satisfied that the assault resulted in the injuries complained of by him. *Green v. Houston Electric Co.*, 89 S. W. 442, 13 Tex. Ct. Rep. 792.

We are also of the opinion that the first special instruction requested by the defendant was upon the weight of the evidence, and that the court, in giving it to the jury, committed error.

As the judgment must be reversed, it is unnecessary, and we deem it improper, to pass upon the assignment of error complaining that the judgment of the trial court was without evidence to support it.

For the errors indicated the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

KAACK et al. v. STANTON.†

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 8, 1908.)

1. TRESPASS TO TRY TITLE—IMPROVEMENTS—PLEADINGS.

Under Rev. St. 1895, art. 5277, authorizing defendant in trespass to try title to show improvements on the land by him, and those under whom he claims during their possession, but requiring the ground of such "claim" to be stated, a plea that defendants acquired the land by deeds for value, that they believed and had good reason to believe that they had good title, and that they made improvements in good faith, relying on their title, is insufficient, since to constitute defendants' possessors in good faith, they must have been ignorant that their title was contested by one claiming a better right, unless they had strong grounds to believe that the adverse claim was groundless.

2. LIMITATION OF ACTIONS — RECOVERY OF LAND—INSANITY.

Limitation does not begin to run against one's right to recover land when actual possession is taken by others, if he is in fact insane, the suspension of the statute not depending upon an adjudication of insanity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 413.]

3. TRESPASS TO TRY TITLE—INSTRUCTION.

An instruction in trespass to try title, brought on behalf of an insane person, that one chronically insane or one adjudged insane is presumed to continue so until the contrary is shown was not error, as tending to lead the jury to believe that, if plaintiff had been once adjudged insane, he was necessarily in that condition at the time of the trial, especially in view of an instruction that, unless he was insane before possession was taken by defendants and their predecessors, limitations ran from the taking of such possession, and continued to run as long as possession was held, and that if plaintiff had any lucid intervals during defendant's possession, limitations ran from such interval.

4. INSANE PERSONS—ACTIONS—INSTRUCTIONS — "INSANE."

An instruction, in an action on behalf of an insane person, that one is deemed to be insane when unable to transact the ordinary affairs of life, understand their nature and effect, and exercise his will respecting them, is

† Writ of error refused by Supreme Court.

not objectionable, on the theory that one might not be able to transact ordinary affairs of life, and yet be sane, and that the charge did not show that mental ability was meant.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3635-3644; vol. 8, p. 7088.]

5. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction in trespass to try title, brought on behalf of an insane person, that one is deemed to be insane when unable to transact the ordinary affairs of life, to understand their nature and effect, and exercise his will respecting them, was not on the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-543.]

6. SAME—REQUESTS—NECESSITY.

A party desiring a more complete instruction on a given subject should request it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 623-641.]

7. SAME—VERDICT—SUFFICIENCY.

In trespass to try title on behalf of an insane person, defendant pleading limitations, it was not error to receive a verdict finding that plaintiff was insane when "actual possession" of the land was taken, on the theory that the verdict fails to find whether plaintiff was insane when possession was taken by L., defendant's predecessor, or by L.'s vendee, H., where it conclusively appeared that actual possession was taken by L. through H., and that H. held possession until he purchased from L., and thereafter continued in possession, and where the court instructed that if plaintiff was not insane when H. took possession, to find for defendants, since the jury must have found that H.'s possession as agent was the possession meant.

8. APPEAL AND ERROR—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The granting of a new trial for newly discovered evidence is largely within the trial judge's discretion; and, unless the discretion is abused, the appellate court will not revise his action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3876.]

9. SAME—DISCRETION NOT ABUSED.

In trespass to try title, in which plaintiff's sanity was in issue, the trial court did not abuse its discretion in refusing defendants a new trial for newly discovered evidence, asked on defendant's affidavit that they believed certain attorneys would testify to plaintiff's sanity during a certain period, and that a particular person had said that he would testify that plaintiff was sane at a specified time, but such person's affidavit was not taken because material with which to prepare it was not at hand, where the suit had been pending for 3½ years, and no effort was made to procure testimony as to plaintiff's sanity other than writing to certain county officials for copies of records, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3876.]

10. GUARDIAN AND WARD—ACTION BY GUARDIAN — PROOF OF APPOINTMENT — NECESSITY FOR.

Defendants in trespass to try title brought by a purported guardian having filed no plea putting her capacity to sue in issue, proof on that point was unnecessary, under the express terms of Rev. St. 1895, art. 1265, subds. 2, 3.

11. TRIAL — EXPRESSION OF OPINION BY COURT.

The trial judge's remark: "I think he may state whether" plaintiff was sane, on objection to a witness' qualification, was not error, as an expression of opinion as to whether the witness could determine as to plaintiff's sanity.

12. APPEAL AND ERROR—ASSIGNMENTS—SUFFICIENCY.

An assignment presenting two distinct questions is insufficient, and propositions following the assignment, and intended to explain each of the points presented, cannot supply the place of a valid assignment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3023.]

13. DEPOSITIONS—OBJECTION TO FORM—TIME FOR MAKING.

An objection that the answers of a witness testifying by deposition were not responsive to the questions is an objection to the manner and form of taking the depositions, and, not having been made before trial on notice to the adverse party, was not available on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 317.]

14. EVIDENCE—OPINIONS—SANITY.

Witnesses who know and have testified to facts bearing on an issue as to one's sanity may give an opinion as to such person's sanity, founded upon their knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2242.]

15. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting testimony is harmless, where the witness testified to substantially the same matter without objection.

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Trespass to try title by Wm. E. Stanton, by guardian and others, against Hy. Kaack and others. From a judgment for plaintiff Stanton, defendants Kaack and others appeal. Affirmed.

Gaines & Corbett, for appellants. Willett Wilson, Holland & Krause, and Wilson & Dabney, for appellee.

McMEANS, J. This was instituted in behalf of Wm. E. Stanton, alleged to be non compos mentis, by his guardian, Mary J. Worthen, and by Raymond Fretwell and Fannie Fretwell, by their guardian, John Fretwell, against Hy. Kaack, Mrs. W. K. Kaack, feme sole, Dave Kaack, Anna Kaack, John Kaack, F. S. Sherer, and J. F. Holt, in the ordinary form of an action of trespass to try title for 320 acres of land in Matagorda county, patented to the heirs of Wm. G. Ewing, and for damages. Defendants answered by plea of not guilty, and also pleaded the statute of limitations of 3, 5, and 10 years, and for the value of the improvements made in good faith by them on the land. They also vouched in as party defendants E. P. Layton, C. I. Layton, F. P. Layton, I. R. Layton, M. L. Layton, M. F. Wilson, R. H. Wilson, S. E. Tyler, and E. L. Tyler, alleged to be the heirs of M. E. Layton and Fletcher Layton, from whom defendants' ancestor purchased the land by general warranty deed, and prayed for judgment against the vouched-in defendants in the event judgment for the land should be against them. The plaintiffs by supplemental petition specially excepted to that part of defendants' answer setting up improvements in good faith, and pleaded that Wm. E. Stanton was of un-

sound mind, and had been since his infancy, and that he was of unsound mind at the time and before defendants took possession of the land in controversy, and that as to him the statute of limitations did not apply. He claimed an undivided half interest in the land. The plaintiff, John Fretwell, guardian of Raymond and Fannie Fretwell, took a nonsuit, and after the evidence was all in, the court directed a verdict for all the vouchered-in defendants, and as to this action the appellants make no complaint. The case was tried before a jury, and a verdict was rendered for plaintiff, upon which judgment was entered in his favor for an undivided one-half of the land, and for the sum of \$785.55, found by the jury for rents of the land. Plaintiff entered a remittitur of this sum. Defendants filed a motion for new trial, which was overruled, and in a proper manner brings the case before us on appeal.

The court sustained plaintiff's special exception to defendants' plea of improvements, and this action of the court is the basis of appellants' first assignment of error. The plea is as follows: "Now come the defendants in the above numbered and entitled cause by their attorneys, and represent to the court that they and those under whom they claim have had adverse possession, in good faith, of the premises in controversy, and described in plaintiff's petition, for more than one year next before the commencement of this suit; that all of said land was acquired by deeds duly executed, and for valuable considerations paid by the vendees, and the defendants herein, being said vendees and their heirs, believed, and had good reason to believe, that they thereby acquired a good and valid title thereto. And defendants further say that they and those under whom they claim have made permanent and valuable improvements on said land and premises in good faith, and depending upon their title thereto, during the time they had such possession, as follows:" Then follows the various items of improvements with the cost or value of each, aggregating \$3,050. The assignment cannot be sustained. The statute provides that the defendant may allege that he and those under whom he claims have made permanent and valuable improvements on the land sued for, during the time they have had such possession, stating the improvements and their value, respectively, "and stating also the grounds of such claim." Art. 5277, Rev. St. 1895. The only grounds of the claim asserted by appellants are that the land was acquired by them by deeds duly executed and for a valuable consideration, and that they believed, and had good reason to believe, that they had acquired a good and valid title thereto, and that the improvements were made on the land in good faith, and depending on their titles thereto, during the time they had possession. This allegation, we think, does not meet the requirements of the statutes that the grounds of the

claim shall be stated. To constitute appellants possessors in good faith they must not only have believed that they were the true owners, and have grounds for that belief, but they must have been ignorant that their title is contested by one claiming a better right, unless they had strong grounds to believe that the adverse claim is destitute of legal foundation (*Parrish v. Jackson*, 69 Tex. 615, 7 S. W. 486), and it was incumbent upon them to allege facts which would justify the belief in the validity of the title under which they claimed (*Johnson v. Schumacher*, 72 Tex. 338, 12 S. W. 207; *Thompson v. Comstock*, 59 Tex. 318; *Holstein v. Adams*, 72 Tex. 485, 10 S. W. 560; *Riggs v. Nafe* [Tex. Civ. App.] 30 S. W. 708).

The second assignment complains of the action of the court in giving plaintiffs' special charge No. 3, which is as follows: "The jury are charged that when a man becomes chronically of unsound mind he is presumed to continue in such condition until the contrary is proven; that when one is adjudged to be of unsound mind, then he is presumed to continue in that condition until the contrary is proved." The objections to the giving of this charge are that there was no evidence that Stanton was chronically of unsound mind, and because he was adjudged to be of unsound mind long after defendants had taken actual possession of the land, and because the "coupling together of the two conditions set out in the charge" was calculated to and did lead the jury to believe that if Stanton was ever adjudged to be of unsound mind, he was necessarily in that condition at the time of the suit. As to the first contention, we find that the evidence justified the giving of the first part of the charge. There was testimony to the effect that Stanton was idiotic, and had been so from his infancy, which antedated the commencement of the actual possession of the land by defendants. The other objections are without merit. Limitation did not begin to run against Stanton at the time actual possession of the land was taken by defendants, if at that time he was of unsound mind, and the suspension of the statute in such case did not depend on whether or not Stanton had been adjudged insane. Nor could the jury have understood from the charge that, if Stanton had been once adjudged of unsound mind, he was necessarily in that condition at the time of the trial, and this is especially true in view of the fact that at the instance of the defendant the jury were instructed that unless Stanton was of unsound mind before possession was taken by defendants and those under whom they claim, then limitation began to run against him from the date of taking such possession and continued to run as long as such possession was held; and, further, that if Stanton had any lucid interval during the time defendants held possession, then limitation began to run against him from the time of

such lucid interval. The assignment is overruled.

The action of the court in giving plaintiff's requested charge No. 4 is made the basis of appellants' third assignment of error. The charge instructed the jury, in effect, that a person is to be deemed of unsound mind when he has not the ability to transact the ordinary affairs of life, to understand their nature and effect, and exercise his will in relation to them. The objection is that a person might not have the ability to transact the ordinary affairs of life and yet be of sound mind; that the charge did not show that mental ability was meant, and such meaning could not be presumed. In the connection in which the language is used it is inconceivable that the jury could have understood the court to have reference to physical ability. Nor is the charge subject to the further objection urged against it that it is upon the weight of the evidence. The assignment cannot be sustained.

The charge of the court upon the issue of limitation was sufficient, and the assignments attacking it are overruled. If defendants desired a fuller charge upon the subject, they should have requested it.

The court instructed the jury that, in the event they found for plaintiff, their verdict should be as follows: We, the jury, find for the plaintiff that he was of unsound mind at the time actual possession was taken of the land, and we further find for plaintiff for rents of the land ——— dollars." The verdict was returned in the language of the charge, the jury writing in the blank the amount found by them as rents. The twelfth assignment complains that the court erred in receiving the verdict and entering judgment thereon, for the reason that the verdict fails to find whether plaintiff was of unsound mind at the time actual possession was taken by the Laytons or by their vendee, Holt. The testimony conclusively shows that actual possession of the land was taken by the Laytons through their agent, Holt, in 1881 or 1882, and that Holt, as such agent, held the possession until 1888, when he purchased the land from the Laytons; and that thereafter he continued in possession under his conveyance from the Laytons. The court charged the jury that if Stanton was not of unsound mind at the time Holt took possession, to find for defendants; and the jury must have understood from this, and so found, that Holt's possession as agent of the Laytons was the possession meant. The assignment is overruled.

What we have before said disposes of appellants' eleventh assignment, which complains that the verdict is contrary to and unsupported by the evidence, in that there was no sufficient testimony to base the finding that Stanton was of unsound mind at the time Layton's possession began in 1881. The assignment cannot be sustained.

The twelfth assignment complains of the refusal of the court to grant to defendants a new trial in order to permit them to procure newly discovered evidence. This ground of the motion is supported by the affidavit of John W. Gaines, defendants' attorney, wherein it is stated that defendants had been diligent in looking up evidence in the case; "that they had written letters to various parties in Calhoun county, the former residence of the plaintiff Stanton, and that from each of said parties they received letters stating they knew nothing with reference to Stanton and his mental condition about the time the defendants' vendors, Laytons, went into possession of the land in controversy. It shows that these attorneys wrote letters to the county clerk of Calhoun county, requesting that they be furnished with certified copies of any and all proceedings to which Wm. E. Stanton was a party, and that, in response thereto, said clerk informed them that the only judgment of record relating to such matters was the appointment of J. M. Bickford as guardian of the estate of Wm. E. Stanton in 1887; that after the trial of this cause Mr. Proctor of Victoria had stated that he remembered litigation in Calhoun county in which Stanton was a party; that immediately said attorneys undertook to and did procure certified copies of such litigation, which are attached to the affidavit, and which show that on the 30th day of May, 1881, in the district court of Calhoun county, Wm. E. Stanton was suing in his own right for the recovery of property; that on the 31st day of May, 1881, a judgment was taken by said Stanton in his own proper person. The affidavit further shows that defendants are informed and believe that Lecky & Staten, who were the attorneys for Stanton in said litigation, would testify that said Stanton was of sound mind when said suit was filed and judgment entered, and for some years thereafter; and that Staten is a resident of New Braunfels, Tex. Said affidavit further sets out that John W. Gaines, the attorney, had a conversation with Dolph Sterling, a reputable resident of Palacios, Tex., since the trial of this cause, in which the said Sterling stated that he would testify that Wm. E. Stanton was of sound mind in 1881, 1882, 1883, and 1884; that at the time of such conversation counsel had no material with which to prepare an affidavit to be signed, but that such evidence could and would be procured on another trial." One of the exhibits attached to the affidavit is a certified copy of an original petition in a suit filed by Wm. Stanton and another, in the district court of Calhoun county, against Jabez James, in trespass to try title. The petition is signed "Lackey & Stayton," and not "Lecky & Staten" as stated in the affidavit. Appellee insists that the Lackey & Stayton who signed the petition was a firm composed of Mr. Lackey and John W. Stayton, after-

wards Chief Justice of the Supreme Court of Texas, both of whom have long been dead. There is nothing in the record, however, to support appellee's contention in this regard. However this may be, the matter of granting new trials in such cases is largely confided to the discretion of the trial judge; and, unless an abuse of discretion is shown, the appellate courts will not revise his action. It appears the suit was filed on December 14, 1903, and the case was not tried until June 26, 1907, and was therefore pending about 3½ years. Several of the witnesses who testified as to Stanton's mental condition testified by deposition, and the interrogatories to them were crossed by defendants' attorneys who must have known the purpose and scope of evidence thus sought. No effort whatever on the part of the defendants to procure testimony throwing light upon Stanton's mental condition is shown, other than writing to the county clerk of Calhoun county for copies of certain records, and to the sheriff and county judge of that county, and to one F. M. Dugins, and the time that such letters were written was not stated. No good reason was stated for not procuring the affidavit of Dolph Sterling that he would testify to the truth of the matters related by him to defendants' attorneys. That there was no writing material at hand with which to prepare an affidavit at the time is not a sufficient excuse for not obtaining the affidavit at some time during the 40 days intervening between the trial and the overruling of the motion for new trial. We do not think that the matters set up in the application shows such an abuse of the discretion vested in the trial judge as to require this court to revise his ruling. The assignment is overruled.

The thirteenth assignment complains that the court erred in receiving the verdict and entering judgment thereon, because the testimony failed to show that Mary J. Worthen, who sued as guardian of plaintiff, was in fact such guardian. Defendant filed no plea putting her capacity to sue in issue, and therefore there was no necessity for any proof on that point. Rev. St. 1895, art. 1265, subds. 2, 3; *Dolson v. De Ganahl*, 70 Tex. 621, 8 S. W. 321. The assignment is overruled.

The sixteenth assignment of error is as follows: "The court erred during the progress of the trial, while discussing an objection raised to the testimony of a witness, in stating in the hearing of the jury, 'I think, Mr. Dabney, he may state whether or not he (plaintiff) was of sound or unsound mind or not.'" We do not think that the statement complained of is subject to the objection that it was an expression of an opinion of the court as to whether the witness could determine as to the soundness of plaintiff's mind. The remark was in the nature of a ruling, made by the court in response to an objection that the witness had not qualified himself to express an opinion as to plaintiff's mental soundness, after the witness had testified at

length to acts and conduct of Stanton upon which his conclusions were based, and the jury could not have understood therefrom that it was the court's opinion that the witness had the right to determine the question of Stanton's insanity. The assignment is overruled.

The seventeenth assignment complains of the action of the court in permitting the plaintiff to ask the witness James questions as to the conduct of Stanton, and also complains of the remarks made by the trial court, in answer to objections urged against the admission of certain testimony. The assignment presents two distinct questions, and is therefore, under the rules, insufficient. The two propositions following the assignment, and intended to explain each of the points presented, cannot supply the place of a valid assignment. The assignment will not be considered. *Cammack v. Rogers*, 96 Tex. 457, 73 S. W. 795.

The eighteenth assignment complains of the admission of certain testimony of the witness Dr. McFarland, the complaint being that the answers of the witness were not responsive to the questions propounded to him. The witness testified by deposition, and his deposition had been returned and filed many days before the trial began. The objection goes to the manner and form of taking the depositions, and should have been made before trial and notice given to opposite party. This not having been done, the objection was not available to defendants when made for the first time during the trial. *Railway v. Ivy*, 71 Tex. 417, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Lee v. Stowe*, 57 Tex. 449. The assignment cannot be sustained.

The nineteenth, twentieth, twenty-first, and twenty-second assignments complain of the admission in evidence, over defendants' objection, of the testimony of certain witnesses, giving their opinion of Stanton's mental condition. All these witnesses had testified to certain acts and conduct of Stanton upon which they based their opinion that he was of unsound mind. The objection is that the opinion of the witnesses as to plaintiff's mental condition was not admissible, but that the inquiry should have been confined to facts and circumstances showing mental incapacity, rather than the admission of conclusion and opinions based on same. The assignments are without merit. It seems to be now well settled that all witnesses who know the facts, and having stated such facts, may express opinions founded upon their own knowledge as to a person's mental condition. *Brown v. Mitchell*, 88 Tex. 363, 31 S. W. 621, 36 L. R. A. 64.

The witness, J. D. Grain, testified by deposition. He was asked, "Was Stanton of unsound mind or not when you knew him? How did he impress you in this regard, if he made any impression on you?" to which the witness answered, "No, he was not of

sound mind; he was generally regarded by every one who knew him as idiotic." The last part of the answer was not responsive to the question, and objection to it should have been made before trial and notice given. *Railway v. Ivy*; *Lee v. Stowe*, supra. Even had timely objection to the testimony been overruled its admission would have been harmless, in view of the fact that the witness had testified to substantially the same matter without objection, viz., that Stanton was a simpleton and simple-minded, at times idiotic, and other times seemed to be more sensible, but, while harmless, "he was never considered of sound mind." The assignment presenting the point is overruled.

The other assignments not specifically noticed have been examined by us, and we find no reversible error in any of them.

The judgment of the court below is affirmed.

Affirmed.

HILL et al. v. HOWTH, County Attorney.
(Court of Civil Appeals of Texas. March 16, 1908. On Rehearing, Oct. 8, 1908.)

1. INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—PREREQUISITES.

Where a local option election is ordered and held without the proper number of notices or without posting notices for a sufficient time, or if the order of election or the notices fail to describe the territory, the election is invalid, though every legal voter in the territory voted at the election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 41.]

2. SAME—DESCRIPTION OF TERRITORY—SUFFICIENCY.

An order for a local option election and the notices therefor sufficiently describe the territory affected as a designated precinct in a county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 40.]

ON REHEARING.

3. SAME—CHANGE OF BOUNDARIES AFTER SUBMISSION AND BEFORE ELECTION—EFFECT.

A change by the commissioners' court in the boundary of a precinct by excluding therefrom territory within which no one resides, made after the ordering of a local option election in the precinct and the posting of notices therefor, and two days before the election, does not render the election void.

Appeal from District Court, Jefferson County; J. D. Martin, Special Judge.

Proceeding by William Hill and others against C. W. Howth, as county attorney, to contest a local option election. From a judgment against contestants, they appeal. Affirmed.

See 111 S. W. 649.

V. A. Collins and Geo. G. Clough, for appellants. Chas. D. Smith and Blain & Howth, for appellee.

REESE, J. This is a contest of a local option election held in and for precinct No. 6,

Jefferson county, instituted in the district court by appellants. Said election resulted in favor of prohibition. Upon the trial judgment was rendered against contestants, from which they prosecute this appeal. The material facts are substantially as follows: On November 11, 1907, the commissioners' court created justice precinct No. 6. On November 15, 1907, the commissioners' court ordered an election to be held on December 14, 1907, in said precinct to determine whether the sale of intoxicating liquors should be permitted in said precinct. On November 21, 1907, the county clerk issued notices of said election, which were posted November 30, 1907. On December 12, 1907, the commissioners' court changed the boundaries of said precinct so as to exclude that part of its territory known as the "Driving Park," in which no one lived, and which is used as a place in which to hold the annual race meet and for other kindred purposes. On December 14, 1907, the election was held and local option carried. On December 30, 1907, the votes were counted, and the result of the election declared by the proper authority, and the same was published by the authority upon whom that duty legally devolved for the period of time and in the manner and form required by law. The election was held in and for the precinct as changed as aforesaid, and the result so declared and published.

The sole question presented by the appeal is whether the change in the boundaries of the precinct after the election had been ordered and the notices posted, and before the election, invalidated the election. It is insisted by appellee that inasmuch as there were no voters residing in the territory cut out of the original precinct by the change in the boundary lines, made two days before the election, such change could not have affected the result of the election, and no harm was done. If it be true that no man's vote would have been affected if every voter had known that, in fact, the election was to determine whether there should be prohibition within the territory of the new precinct, instead of the precinct as it existed when the election was ordered and the notices posted, we do not think it would materially affect the question, which is whether the election was ordered and held in conformity to the provisions of the statute. If a local option election is ordered and held without the proper number of notices posted, or with notices posted for an insufficient length of time, or the order of election or the notices do not describe the territory for which the election is to be held, and every legal voter in the territory voted at such election, it could not be contended that because no harm was done by the failure to post the notices, or to describe the territory to be affected, the election would be valid. The answer to such contention would be that the essential prerequisites of the statutes were not complied with. This we understand to be the holding

of the Court of Criminal Appeals (*Ex parte Conley* [Tex. Cr. App.] 75 S. W. 301), and in such cases the decisions of that court are binding upon this court (*Com'rs Court of Nolan Co. v. Beall*, 98 Tex. 104, 81 S. W. 526).

It is essential to a valid election that the order of election should properly describe the territory to be affected thereby, and that the posted notices should also describe such territory. It was a sufficient compliance with these requirements that the territory was described as precinct No. 6, Jefferson county. *Nichols v. State*, 37 Tex. Cr. App. 547, 40 S. W. 268. The election order, however, related to precinct No. 6 as constituted at the date of the order, and not to a different territory, and the same must be said as to the election notices, which followed the order and were all posted before the order was made changing the lines of the precinct. The commissioners' court had the unquestioned power to change the lines of the precinct as was done, but the result of such change, made two days before the election, was that the election was in fact held for a different territory from that for which such election had been ordered. If it be said that the voters understood that they were voting on the question of local option in the territory embraced in the precinct as changed, the reply is that no election had been ordered for such territory, nor had any notices of such election been posted. It is true that in the entire proceedings, in the election order, the notices of election, the returns of the election, and the order declaring the result, the territory is described as precinct No. 6, but this does not alter the essential fact that the territory spoken of as precinct No. 6 in the election order and the posted notices was not the territory, although still properly described as precinct No. 6, for which the election was held and the result declared and published. The syllabus of the opinion of the Court of Criminal Appeals, in *Nelson v. State* (Tex. Cr. App.) 75 S. W. 502, 8 Tex. Ct. Rep. 139, on this point is misleading. There are also some expressions in the opinion which, while not definite, seem to indicate that in the case there under discussion the lines of the justice precinct had been changed by the commissioners' court between the date of the election order and the day of the election. We have, however, examined the record of that case, and find that the boundaries of the precinct were changed the year preceding the local option election, and again the year after such election. The question of the effect of such a change after the order of election and before the day of election was not before the court, which did not intend to, and in fact did not, decide the question here presented.

We are of the opinion that the election was void—void as to the original precinct,

because the election was not held for that territory; void as to the territory remaining in the precinct after the change, because there was no order for such election and no notice given thereof as prescribed by the statute. *State v. Merchant*, 38 Tex. Civ. App. 226, 85 S. W. 483. While we do not think it is material whether or not it would have affected the result of the election if the voters had been properly notified by the order of election and the posted notices that the election was not to affect the territory taken out of the precinct by the change in the boundaries, we can readily see how the action of some voters, and possibly the final result, might have been affected by such change. It might have been the only motive with some voters to prohibit the sale of intoxicants in the Driving Park, which territory was taken out of the precinct by the change in boundaries.

The judgment of the district court should be reversed, and judgment here rendered for appellants declaring such election void; and it is so ordered.

Reversed and rendered.

On Motion for Rehearing.

At the last term of this court the judgment of the district court in this cause was reversed and judgment rendered for appellants, declaring the local option election held in precinct No. 6, Jefferson county, void. The facts are fully set out in the opinion and in the opinion of the Supreme Court in answer to certified questions hereinafter referred to, 111 S. W. 649. Afterwards, in the argument on motion for rehearing, it was for the first time pressed upon the court that the commissioners' court of Jefferson county was without power, after the election had been ordered for said precinct No. 6, to make any change in the boundaries of the precinct that would affect the right of the voters in the precinct as it had existed to determine the question of prohibition within the boundaries of the original precinct. The question was certified to the Supreme Court, and in reply thereto it is held that the commissioners' court was without such power.

No question is presented on this appeal except as to the validity of the election as affected by the change in the boundaries of the precinct after the election was ordered and notices posted, and before the election was held. In accordance with the opinion of the Supreme Court, we hold that such change in the boundaries of the precinct had no effect upon the election, and that the same was valid and fixed the status of the original precinct, including the Driving Park, as to prohibition in that territory.

The motion for rehearing is granted, and the judgment is affirmed.

MEINHART v. DRAPER et al.

(St. Louis Court of Appeals. Missouri. July 18, 1908.)

1. PARTNERSHIP—THE RELATION.

Partnership is the relation subsisting between two or more persons who have contracted together to share, as common owners, the proceeds of a business carried on by all or any of them for the benefit of all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 1-28.

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

2. SAME—REQUISITES—AGREEMENT TO SHARE PROFITS.

An agreement to share profits is an essential element in every partnership, and the absence of profit sharing is conclusive that a partnership does not exist; and voluntary associations, owning property, conducted for the mere purpose of convenience or social relations, and not for profit, are not partnerships.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 15.]

3. SAME.

Certain persons organized a rural telephone association for their benefit, and not for profit; the several members contributing their labor and a small amount each to construct the line from a dwelling to a nearby town, where it connected with a telephone switchboard occupied by other telephone lines, and the members of the association making assessments to pay for their interest in the switchboard. Every member could erect a spur line to his residence from the main line, and the spur lines and telephones where the property of such member, who could use the line free, the only charge being to strangers using it, which went to those having charge of the switchboard; and the main line was maintained by pro rata assessments against the individual members. *Held*, that the association was not a partnership, but a joint voluntary association.

4. PARTITION — PROPERTY SUBJECT — JOINT PROPERTY.

The property was held in joint ownership and subject to partition, under Rev. St. 1899, § 4432 (Ann. St. 1906, p. 2431), permitting any one or more joint owners to have partition of personal property, or of its proceeds, if it is incapable of division.

Appeal from Circuit Court, Clark County; E. R. McKee, Judge.

Suit by Lewis Meinhart against Claude Draper and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Berkheimer & Dawson, for appellants. John D. Smoot and Chas. Hiller, for respondent.

NORTONI, J. This is a suit to partition personal property. Plaintiff recovered. The court found the property was incapable of division in kind, and ordered it sold, as is usual in partition proceedings in such circumstances. Our statute (section 4432, Rev. St. 1899 [Ann. St. 1906, p. 2431]) authorizes such a proceeding by any one or more of two or more joint owners of personal property, other than boats and vessels, etc. The property involved, the partition of which is sought in this particular instance, is a telephone line, some 10 or 12 miles in length, situated in Clark county. A number of farmers entered into a voluntary association for

the purpose of constructing and maintaining a telephone line, commencing at the residence of one of them and terminating at the town of Wyaconda, at which town it connected with a switchboard into which converged several other lines as well. The line passed near the farms of the several joint owners, and by means of a short spur and telephone the residence of each was connected therewith. The purpose of the line was for the convenience and accommodation of the several owners thereof. After hearing the evidence, the court found that the several parties to the record were jointly interested therein, setting out the several interests; that the property was incapable of division in kind; and therefore ordered its sale under the provisions of the partition statute. Defendants prosecute the appeal.

The only argument advanced here for a reversal of the judgment is that the association was a partnership, and the property sought to be partitioned is partnership property. It is said, in such circumstances, a proceeding in partition will not lie, and that the only remedy available to the plaintiff is a suit in equity to dissolve the partnership and wind up its affairs. "Partnership is the relation subsisting between two or more persons who have contracted together to share, as common owners, the proceeds of a business carried on by all or any of them on behalf of all of them." 22 Amer. & Eng. Ency. Law (2d Ed.) 13; Story on Partnership, § 2. An agreement to share profits is an essential element of every partnership, and, though its presence is not conclusive that a partnership exists, the law is settled to a certainty to the effect that the absence of profit sharing is conclusive that a partnership between the parties does not exist. 22 Amer. & Eng. Ency. Law (2d Ed.) 14, 22, 23, 53, 72; 25 Amer. & Eng. Ency. Law (2d Ed.) 1130. Voluntary associations owning property and conducted for the mere purpose of convenience or social relations, without an object or purpose to accumulate or share profits among its members, are not partnerships. 25 Amer. & Eng. Ency. Law (2d Ed.) 1130, 1131; 22 Amer. & Eng. Ency. Law (2d Ed.) 53; *Maclay v. Freeman*, 48 Mo. 234; *Lucas v. Cole*, 57 Mo. 143; *Missouri Bottlers' Ass'n v. Fennerty*, 81 Mo. App. 525-534.

The argument urged for a reversal of the judgment entirely falls, for the reason the record does not disclose the partnership relation. It affirmatively appears that a voluntary association was formed. It resulted in the organization of what is termed the "Oak Grove Telephone Company." The association was purely a joint arrangement for the accommodation and convenience of the several owners, without the object or purpose of gain or profit. It further appears there were no profits made or contemplated. It appears the several members, contributing some labor and a few dollars each, constructed the telephone line from the residence of

Mr. George Koeber to the town of Wyaconda, a distance of some 10 or 12 miles. At this point it connects with the telephonic switchboard occupied as well by other local telephone lines in the county. This switchboard was owned by the several lines connecting therewith. The members of the telephone line involved in this controversy raised by an assessment and paid a total of \$20 for their interest in the switchboard mentioned. Every member of the association had the right to erect a spur from the main telephone line to his residence and connect a telephone therewith. The several spur lines and the telephones were the private property of each member. Under the rules and regulations incorporated in the contract, each member and his family, together with his hired help, had the privilege of using the line free of charge or expense. It appears the only fee or charge made for service over the line was a charge of 10 cents per message levied against strangers communicating over the line. This fee of 10 cents, instead of going into a common fund as profits of the concern, was a fee payable to the three men who had charge of the switchboard at Wyaconda, and devoted for the purpose of maintaining that instrument. It appears that, when funds were required for the purpose of repairing the main line, assessments were made pro rata upon the several members of the association for that purpose.

The evidence shows conclusively the association was organized, and the line established and maintained, exclusively for the accommodation and convenience of the several owners, and entirely without the object of gain or profit. No profits were contemplated, and none received. Under such circumstances, there is no partnership. The property was that of joint ownership, and within the contemplation of our statute above cited, authorizing the partition of personal property.

The judgment will be affirmed. It is so ordered.

BLAND, P. J., concurs. GOODE, J., absent.

STATE v. COOK.

(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. WITNESSES — EXAMINATION—CROSS-EXAMINATION—LIMITATION TO SUBJECTS OF DIRECT EXAMINATION.

Questions on cross-examination upon a subject not alluded to upon accused's examination in chief were improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 982.]

2. SAME—IMPEACHMENT.

Where it was not claimed that accused made statements in his examination in police court inconsistent with those made on trial, but only that he stated a fact at trial not stated in police court, a question as to whether he made certain statements in police court did not impeach his testimony, and was improper.

3. WEAPONS—CONCEALED WEAPONS—RIGHT TO CARRY.

One need not deposit money in bank to protect it, but may carry it on his person, and may carry concealed weapons with which to defend his property, if he believes in good faith that there is danger of attack or robbery.

[Ed. Note.—For cases in point, see note at end of case.]

4. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL—APPEAL TO PREJUDICE.

In a prosecution of a negro for carrying concealed weapons, it appearing that accused kept a negro club and had pleaded guilty to illegally selling liquor, remarks by the prosecuting attorney that it was such dives as defendant ran, and white juries backing up a negro in packing a pistol, which caused white mobs, were objectionable and prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1676.]

5. SAME—APPEAL—PROCEEDINGS NOT IN RECORD—RULING OF TRIAL COURT.

Objectionable remarks of the prosecuting attorney in argument cannot be considered on appeal, where the record does not show what ruling, if any, the trial court made on the objection thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2929.]

Appeal from Criminal Court, Greene County: A. W. Lincoln, Judge.

George Cook was convicted of carrying concealed weapons, and he appeals. Reversed, and remanded.

Val. Mason and Jas. Delaney, for appellant: Roscoe C. Patterson, for the State.

BLAND, P. J. In the month of September, 1906, defendant was arrested by the marshal of the city of Springfield, Mo., taken before the police court of said city, and there charged with violating the ordinances of said city by carrying a revolver concealed on his person. Afterwards the prosecuting attorney of Greene county filed an information in the criminal court of said county, charging defendant with the same offense. It appears from the evidence that defendant was twice tried in the police court. The fact is unimportant, except for the light it throws on defendant's cross-examination in the Greene county criminal court which resulted in his conviction. The state's evidence tends to show that defendant carried a revolver concealed on his person at the time and place alleged in the information. Defendant's evidence shows he is a farmer, and resides a short distance from Springfield, in Greene county. He admitted he had a revolver on his person on the day charged in the information, but denied that it was concealed. By way of justification for carrying the revolver, he showed that he had about \$195 in cash on his person at the time he was arrested, which was after night, and that he feared attack by thieves and robbers on his way home, and procured the revolver a few minutes before his arrest for the purpose of protecting himself and his property. Defendant is a negro, and his evidence shows that in April, 1906, three negroes were taken from the jail at Springfield

by a mob of whites and hung and burned on the public square of that city, and also introduced evidence tending to show that the negro population of Springfield was still in danger from mob violence, that they had been notified in the spring of 1906 to leave the country, and at about the same time he received two letters threatening to make way with him if he did not leave the county. The state's evidence tended to show that the excitement which had existed at the time of the mob had died out, and the negroes were not in danger of mob violence in September, 1906. The issues were submitted to the jury on instructions that were fair to defendant.

The principal errors complained of by defendant is the latitude permitted the prosecuting attorney in his cross-examination of defendant as a witness, and in remarks of the prosecuting attorney in his address to the jury. On cross-examination the prosecuting attorney, over the objection of defendant's counsel, was permitted to ask defendant whether or not he had made certain statements in the police court in regard to carrying the revolver, avowedly for the purpose of impeaching the witness. Defendant did not testify in chief to what he swore in the police court, nor did the prosecuting attorney claim that he made statements in the police court inconsistent with what he swore on the trial in the criminal court. All he claimed was that he stated a fact on the trial in the criminal court which he did not state on the trial in the police court. It seems to us that this was improper, and not legitimate cross-examination of defendant, for the reason it was not alluded to in his examination in chief, and for the further reason it did not impeach his evidence. Over the objections of his counsel, the prosecuting attorney was also permitted to ask defendant, on cross-examination, why he did not bank his money, and to show that he had received it within banking hours and could have deposited it. Defendant was not required to deposit his money in a bank or elsewhere. His legal right to carry it upon his person should not have been questioned. He not only had the lawful right to carry it on his person, but also had the right to carry arms concealed on his person to defend his possession thereof, if in good faith he believed there was danger of thieves and robbers trying to take it from him on his way home. Some words passed between a deputy sheriff and defendant just before the latter's arrest about a capias execution against defendant.

The deputy and defendant both testified to the conversation. Taking that as a foundation, the prosecuting attorney, on cross-examination of defendant, over the objection of defendant's counsel, was permitted to show that defendant kept or owned a club composed of negroes in the city of Springfield, and that defendant and other negroes had pleaded guilty to the illegal sale of liquor at this

club, and in his address to the jury the prosecuting attorney used the following objectionable and prejudicial remarks: "What causes white people to rise in a mob in a community? It's a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such dives as this defendant was running causes the mobs." Defendant's counsel objected to the above remarks, but the record does not show what ruling, if any, the court made on the objection. Therefore we are not permitted to discuss these very objectionable and prejudicial remarks. We think there is sufficient evidence in support of the verdict; but there is very substantial evidence tending to show defendant was justified under the statute in carrying the revolver, and his defense might have prevailed with the jury had the evidence and cross-examination been kept within legal bounds. In other words, we think prejudicial error intervened on the trial which calls for a reversal of the judgment.

The judgment is reversed and the cause remanded. All concur.

NOTE.

[a] (Ala. 1873) As used in the exception in Rev. Code, § 3555, touching the carrying of concealed weapons, the expression "having good reason to apprehend an attack" is more restricted than "having reason to apprehend an attack." This distinction should be observed in charging the jury.—*Baker v. State*, 49 Ala. 350.

[b] (Ala. 1873) The term "being threatened," as used in the exception in Rev. Code, § 3555, touching the carrying of concealed weapons, applies only to impending threats.—*Baker v. State*, 49 Ala. 350.

[bb] (Ala. 1875) Reasonable ground to apprehend an attack at a dangerous locality which defendant visited about daybreak will not be a sufficient excuse for casually carrying concealed a weapon procured for that visit, late in the day, at a locality not shown to be dangerous.—*Chatteaux v. State*, 52 Ala. 388.

[c] (Ala. 1876) The fact that one has been threatened with, or may have good reason to apprehend, an assault, does not justify him, under Rev. Code, § 3555, in carrying concealed weapons for self-defense, where it appears that such weapons were carried with the intention of making or provoking an attack.—*Stroud v. State*, 55 Ala. 77.

[cc] (Ala. 1881) The exception in Code, § 4109, as amended, against carrying concealed weapons, in favor of a person "being threatened with or having good reason to apprehend an attack," held to extend only to carrying them as a means of defense, and not of offense, though defendant was not bound to negative an offensive purpose on his part.—*Collier v. State*, 68 Ala. 499.

[d] (Ala. 1888) Under Code 1886, § 3775, providing that on indictment for carrying concealed weapons defendant may show "that at the time of carrying the weapon concealed he had good reason to apprehend an attack, which the jury may consider in mitigation of the punishment or justification of the offense," an instruction which predicates an acquittal upon defendant's mere belief that he was in danger of an attack, and not upon the fact that he had good reason to apprehend it, is properly refused.—*Davenport v. State*, 85 Ala. 336, 5 South. 152.

[dd] (Ala. 1889) Under Code 1886, § 3775, providing that the carrying of a concealed weap-

on may be justified by proof that defendant "had good reason to apprehend an attack," a defendant should be acquitted when it appears that when arrested with the concealed weapon a person with whom he was on bad terms had threatened to "fix him on sight," and was at the time of making the threats, which were communicated to defendant, armed with a pistol, and that defendant had to pass by this person's house on his way home.—*Dooley v. State*, 89 Ala. 90, 8 South. 528.

[e] (Ala. 1891) The well-grounded apprehension of an officer that a criminal, known to be armed, will resist arrest to the extent of taking life, does not bring him, on a prosecution for carrying a "concealed" weapon, within the provision of Code, § 3775, that apprehension of "an attack" may be shown in justification or mitigation of punishment.—*Reach v. State*, 94 Ala. 113, 11 South. 414.

[ee] (Ala. 1900) Code 1896, § 4420, provides that, on a prosecution for carrying concealed weapons, defendant may show that he had good reason to apprehend an attack, which fact the jury may consider in mitigation of punishment or in justification of the offense. *Held*, that the court properly refused to charge that, if defendant had good reason to apprehend an attack, he had a right to carry a concealed pistol.—*Barker v. State*, 126 Ala. 83, 28 South. 589.

[f] (Ala. 1904) In a prosecution for carrying a pistol concealed, in violation of Code 1896, § 4420, it was no defense that threats had been made against defendant's life sufficient to impress him with a reasonable apprehension of attack.—*House v. State*, 139 Ala. 132, 36 South. 732.

[ff] (Ala. 1905) Where one charged with carrying a concealed weapon had good ground to apprehend an attack at the time and place of carrying it, the jury may consider the fact in justification or in mitigation.—*Maxwell v. State*, 39 South. 382.

[g] (Ark. 1872) It is not a good or sufficient excuse or defense, under the statute against carrying a concealed weapon, for the defendant to show that he was in fear or danger of being attacked.—*Carroll v. State*, 28 Ark. 99, 18 Am. Rep. 538.

[gz] (Ga. 1883) It is no defense to one charged with having carried concealed weapons that his life had been threatened.—*Brown v. State*, 72 Ga. 211.

[h] (Ky. 1876) When a person has reasonable ground to believe that his person or the person of some member of his family will be in immediate danger of violence or crime at the hands of another, whenever that person is present, then he may lawfully carry concealed arms whenever and wherever he has reasonable ground to apprehend that he will encounter such person, and be exposed to the apprehended danger.—*Bailey v. Commonwealth*, 74 Ky. (11 Bush) 688.

[hh] (La. 1856) The statute against carrying concealed weapons does not contravene the second amendment to the Constitution of the United States, which provides that the right of the people to keep and bear arms shall not be infringed.—*State v. Smith*, 11 La. Ann. 633, 66 Am. Dec. 208.

[i] (La. 1858) The statute against carrying concealed weapons does not infringe the constitutional right of the people to keep or bear arms; it is a measure of police prohibiting only a particular mode of bearing arms, which is found dangerous to the peace of society.—*State v. Jumel*, 13 La. Ann. 399.

[ii] (Miss. 1886) In the trial of an indictment, under Code, § 2985, for carrying concealed weapons, threats made by a person about a year before the alleged offense was committed, are too remote to constitute the basis of justification; especially where it is admitted by defendant that, shortly after the threat was made and communicated to him, he learned that the

person had left the country, and that he had not seen or heard of him since.—*McGuirk v. State*, 64 Miss. 209, 1 South. 103.

[j] (Miss. 1892) To justify a person in carrying concealed weapons, he must be threatened with an attack, but he need not anticipate that the attack will occur at a particular time, and go armed only at such time.—*Sudduth v. State*, 70 Miss. 250, 11 South. 680.

[jj] (Miss. 1897) Within Code, § 1027, which authorizes, as a defense for carrying a concealed weapon, that defendant "was threatened, and had good and sufficient reason to apprehend a serious attack from an enemy, and that he did so apprehend," etc., defendant must show that he actually apprehended an attack and an attempt to do him great bodily harm.—*Strother v. State*, 21 South. 147.

[k] (Miss. 1903) Where, in a prosecution for carrying concealed weapons, the evidence showed that threats had been made against defendant, which had been communicated to her, an instruction that she was guilty, on proof merely that she carried the weapon concealed, was erroneous for failing to state that she was not guilty if she carried the weapon because of the communicated threats.—*Mendin v. State*, 33 South. 944.

[kk] (Mo. 1906) In a prosecution for carrying concealed weapons, in violation of Rev. St. 1890, § 1862, it was no defense that the weapon was so carried while defendant was on his own farm; there being no exception with reference to the place where the weapon is carried in the statute.—*State v. Venable*, 117 Mo. App. 501, 93 S. W. 356.

[l] (Mo. 1906) Rev. St. 1890, § 1863, provides that it shall be a good defense for carrying a weapon if defendant shall show that he had been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home, or property. *Held*, that defendant, having been threatened with great bodily harm, was entitled to carry a weapon if he in good faith believed the threat might be executed, though in fact there was really no danger thereof.—*State v. Venable*, 117 Mo. App. 501, 93 S. W. 356.

[ll] (Mo. 1906) Though under Rev. St. 1890, § 1863, declaring it a good defense to the charge of carrying a concealed deadly weapon, if defendant show that his life has been threatened, or that he had good reason to carry it in the necessary defense of his person, home, or property, it is necessary to justify the carrying of a concealed weapon by one whose life has been threatened, that he believed there was danger of the threat being executed, yet he has not the burden of showing that he had good reason to believe and did believe that the carrying of the weapon was not necessary to his defense, further than to show that his life was threatened, and that he consequently armed himself with the weapon to defend himself against the danger of such threat.—*State v. Casto*, 119 Mo. App. 265, 95 S. W. 961.

[m] (Mo. 1907) Where defendant's life was threatened repeatedly, which threats were known to defendant, and there was a high state of ill feeling between defendant and the party threatening him, defendant was justified in the carrying of a concealed weapon.—*State v. Kelly*, 101 S. W. 155, 123 Mo. App. 680.

[mm] (Mo. 1908) Though one may resist a trespass on his property, he may not kill a trespasser; but if accused in going to forbid a trespass took a gun along only to resist any attack which might be made upon him for asserting his lawful right to forbid a trespass, and he made no demonstrations with the gun except in resistance to the approach of the trespassers upon him for the purpose of assault, he did not commit an offense.—*State v. Lipp*, 110 S. W. 4.

[n] (Mo. 1908) If witnesses violated notices posted by accused forbidding trespasses on his land, wrongfully tore down his fence, entered

his land, and refused to leave, and started to assault him, he had a right to draw a gun on them in a threatening manner.—State v. Lipp, 110 S. W. 4.

[nn] (N. C. 1882) Carrying a pistol concealed, in violation of Acts 1879, c. 127, even for self-protection, is not excused by a communication of threats of violence made against defendant.—State v. Speller, 86 N. C. 697.

[o] (Tenn. 1896) The right of the owner of a gristmill to carry weapons therein is not affected by the fact that he had been "threatened."—Maupin v. State, 89 Tenn. (5 Pickle) 367, 17 S. W. 1038.

[p] (Tex. 1887) Where the evidence showed that, two days before the alleged offense, the prosecuting witness had threatened to whip defendant, but there was no further proof of any danger to defendant, *held*, that such danger was not so imminent and threatening as to prevent the legal arrest of the threatener, and justify defendant in carrying a weapon.—Darby v. State, 23 Tex. App. 407, 5 S. W. 90.

[pp] (Tex. 1888) One cannot be convicted of unlawfully carrying a pistol, where it appears that the pistol was found on his person at his place of business; that he had received anonymous letters threatening an attack on his person; and that the arrest of the person threatening the attack was at the time impossible.—Short v. State, 25 Tex. App. 379, 8 S. W. 281.

[q] (Tex. 1889) Defendant, a school-teacher, was notified before an entertainment given by himself and his pupils, that several persons would attend it and break it up; also, that it was currently rumored that he would have trouble, and that there would be a fight there that night. Defendant tried in vain to get an officer to attend, and stated to the officer that he could not ascertain who the persons were who had threatened to break up the entertainment. *Held*, that no such danger existed as to justify defendant in carrying a weapon.—Alexander v. State, 27 Tex. App. 533, 11 S. W. 628.

[qq] (Tex. 1889) Pen. Code, art. 319, relating to the offense of unlawfully carrying arms, exempts a person who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. On the trial for a violation of the statute, it appeared that defendant, a few minutes before his arrest, was attacked by one D., a larger and more powerful man than himself. Defendant fled, and was pursued some distance by D., who was armed with a club; D. threatening to kill him. Defendant then procured a pistol. *Held*, that the case was within the exemption of the statute.—Coleman v. State, 28 Tex. App. 173, 12 S. W. 590.

[r] (Tex. 1893) The fact that a weapon is drawn in self-defense does not exempt the one drawing it from indictment for unlawfully carrying arms.—Miller v. State (Cr. App.) 22 S. W. 141.

[rr] (Tex. 1894) It is no defense to a prosecution for carrying a pistol that defendant was told by a friend that parties whose names she refused to give were plotting to kill him; it not being shown that defendant had had any trouble with any one except his friend's mother, who objected to his calling on her.—Avant v. State (Cr. App.) 25 S. W. 1073.

[s] (Tex. 1894) The fact that defendant had been forced into a difficulty in his own house, and greatly cursed and abused, and that he could not afterwards leave his house without passing his assailant, who was armed with a knife, nor have him arrested, justified him in carrying a pistol.—Strickland v. State, 33 Tex. Cr. R. 559, 28 S. W. 466.

[ss] (Tex. 1895) One who, upon being insulted, arms herself with a pistol, and goes, with others, in search of the insulting party, for the purpose of obtaining an apology, and intending to shoot or whip him if he refuses it, cannot de-

fend a prosecution for carrying a pistol concealed, under the exception in Pen. Code, art. 319, in favor of one having reasonable grounds for fearing an unlawful attack upon his person.—Brown v. State (Cr. App.) 29 S. W. 1079.

[t] (Tex. 1895) Defendant was not justified in carrying a pistol the day after threats were made to take his life, where the threats were retracted on the day when made, or, if they were not retracted, defendant had opportunity to have the person so threatening arrested.—Phillips v. State (Cr. App.) 30 S. W. 1063.

[tt] (Tex. 1895) One cannot justify his wearing of a weapon on the ground that he was apprehensive of an attack, and had no time to appeal to the law for protection, unless he had such apprehension when he armed himself.—Brownlee v. State, 35 Tex. Cr. R. 213, 32 S. W. 1043.

[u] (Tex. 1902) An apprehension of being shot by unknown persons does not authorize the person fearing such danger to carry a pistol into a grand-jury room.—Lovelace v. State, 68 S. W. 274.

[uu] (Tex. 1902) Where a person apprehensive of being shot by certain known persons has an opportunity of making affidavits against them, which he fails to do, the apprehension of such danger does not authorize him to carry a pistol.—Lovelace v. State, 68 S. W. 274.

[v] (Tex. 1903) Under the statute providing that, when a party is in such imminent danger of being unlawfully attacked that he cannot notify the officers of the law, he may arm himself, a person is not justified in carrying arms when danger is not imminent, merely because he has reasonable ground to apprehend an attack.—Hood v. State, 72 S. W. 592.

[vv] (Tex. 1903) In a prosecution for unlawfully carrying a pistol, evidence that defendant had had several quarrels with other persons just prior to the time he was charged with having had a pistol, and that on one occasion these parties had pursued defendant, was not admissible in the absence of any showing that defendant was in danger so imminent as to prevent him from having the parties arrested.—Hood v. State, 72 S. W. 592.

[w] (Tex. 1905) Though Code Cr. Proc. 1895, § 318, provides that sureties on a bail bond may surrender their principal and be released, subsequent articles providing that a surety desiring to surrender his principal must obtain a warrant, a surety has no right to arrest the principal without a warrant; and the fact that a surety, without a warrant, was in search of his principal, to arrest him, did not justify his carrying a pistol.—Smith v. State, 85 S. W. 1078.

[ww] (Tex. 1905) The fact that defendant was seeking to arrest one whom he had been informed had stolen his cotton did not justify him in carrying a pistol.—Smith v. State, 85 S. W. 1078.

[x] (Tex. 1905) In order to authorize the carrying by one of a pistol on his person, under the statute, the danger of an attack on him must be so imminent and threatening as not to admit of the arrest upon legal process of the party about to attack him.—Thompson v. State, 86 S. W. 1033.

[xx] (Tex. 1906) Where, in a prosecution for unlawfully carrying a pistol, it appeared that defendant shot a certain person at her home and then pursued him with the pistol for 200 to 500 yards, defendant was not excusable on the ground that the pistol was used and carried in self-defense.—Woodroe v. State, 96 S. W. 30.

[y] (Tex. 1906) Where, in a prosecution for unlawfully carrying a pistol, defendant claimed that he traded for the pistol, and in carrying it home stopped at the house of prosecuting witness to demand from him an explanation of an insult which defendant claimed prosecutor had previously offered to defendant's wife, the fact that defendant's wife had never been insulted did not destroy the defense, if, as a matter of

fact, she told defendant that she had and he believed it.—*Quinn v. State*, 96 S. W. 33.

[z] (Tex. 1908) It appearing, in a trial for unlawfully carrying a pistol, that two days before the alleged offense defendant had been cut by a knife in a difficulty with certain persons; that the night before he had been warned of threats made by one of such persons; that on going to a neighbor's for a lawful purpose just before the alleged offense he was told such person was looking for him; that it was night, and no peace officer could be found within two miles; that he went to his mother's house near by and procured a pistol, and that shortly thereafter such persons appeared, and they and defendant began shooting—defendant could testify as to his apprehension before he procured the pistol, and as to why he procured it, since, if he believed such persons were searching for him and likely to assault him at any minute, he acted lawfully in preparing to repeal such an assault.—*Johnson v. State* (Cr. App.) 110 S. W. 451.

MOELLER v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. June 30, 1908.)

1. CARRIERS—INJURIES TO PASSENGERS—DEFECTIVE PLATFORMS—NEGLIGENCE—QUESTION FOR JURY.

Whether a carrier failing to maintain a guard rail at the end of a platform used to receive and discharge passengers was negligent, authorizing a recovery for injuries to a passenger falling from the platform while alighting from a car, *held*, under the facts, for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A passenger may rely on the promise of the conductor that he will let the passenger off at a designated place where passengers are regularly received and discharged, and he need not give notice by ringing the bell of his wish to leave the car at such place.

3. SAME—ACTION—PETITION.

A petition in an action for injuries to a passenger while alighting from a moving car which alleges that the conductor promised to let him off at a designated point, that the speed of the car was checked as it approached the point inducing the passenger to believe that the conductor was about to stop the car, and that the passenger was in the act of alighting when the car was started at an accelerated speed, throwing him from the car, charges every negligent act on the part of the conductor as to stopping and starting the car at that point.

4. SAME—NEGLIGENCE—OBLIGATION OF CONDUCTOR.

A conductor accepting the notice of a passenger to stop the car at a designated point for him must without further notice signal the motorman to stop the car at the designated point, and must see that the passenger is afforded an opportunity to alight in safety.

5. NEGLIGENCE—INFANTS—CONTRIBUTORY NEGLIGENCE.

A minor is only required to exercise that degree of care which is expected of one of his age, experience, and capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 121, 123.]

6. SAME—QUESTION FOR JURY.

Whether a minor is guilty of contributory negligence in failing to exercise the degree of care which is expected of one of his age and capacity is for the jury, unless the only conclusion that can reasonably be drawn from the evidence is that he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 347-348.]

7. CARRIERS—INJURIES TO PASSENGERS—MINORS—CONTRIBUTORY NEGLIGENCE.

Whether a boy 12 years old was guilty of contributory negligence while alighting from a moving car *held*, under the facts, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1402.]

Norton, J., dissenting.

Appeal from Circuit Court, City of St. Louis; Jas. E. Withrow, Judge.

Action by Andrew George William Moeller, by his next friend, against the United Railways Company of St. Louis. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Wm. R. Gentry, for appellant. Boyle & Priest, Geo. T. Priest, and T. E. Francis, for respondent.

BLAND, P. J. Defendant maintains and operates a double-track electric railroad, running from the western limits of the city of St. Louis west to Creve Cœur Lake, in St. Louis county. Its road crosses the Colorado steam railroad track on a wooden trestle. About three miles east of Creve Cœur Lake, west of, and running to, the trestle, is a fill or embankment about 42 feet deep. On top of this embankment, and reaching to the east end of it, are platforms about 48 feet long and 6 feet 4 inches wide, maintained for the accommodation of passengers to get on and off defendant's cars. The platform on the south side of the railroad was constructed by laying heavy timbers and filling in cinders between them. The south side of the platform is protected by a railing, and the west end by a bent or brace, running from the railing down to the timbers, but there is no railing or other guard on the east end. This platform is called in the evidence "the Colorado crossing," and is a regular place to receive and discharge passengers. Plaintiff at the time he was injured was 12 years of age, and lived with his parents on a farm near Creve Cœur Lake. On December 19, 1905, he took passage on one of defendant's cars to be carried to the Colorado crossing, on his way to a school, of which he was a pupil, one-fourth mile from the crossing. When the crossing was reached, he undertook to get off the car on to the south platform, and by the motion of the car was precipitated over the east end of the fill or embankment and injured. The action is to recover for the injury. The specific acts of negligence charged in the petition are, first, that defendant negligently failed to place a guard or rail at the east end of the platform; and, second, that it negligently started the car forward with a quick jerk as plaintiff was alighting, causing him to be thrown over the dump. The answer is a general denial and a plea of contributory negligence. At the close of plaintiff's case, he was forced by the ruling of the trial court to take a nonsuit. His motion to set aside the involuntary nonsuit was denied, and he appealed to

this court. Plaintiff testified that in December, 1905, and prior to the 19th of that month, he had ridden on defendant's cars from Creve Cœur Lake and got off at the Colorado crossing four or five times, and knew the east end of the platform was not guarded. He testified he had watched brakemen get on and off moving cars, and knew the position they took on the car to get off. He stated that, when he got on the car, he paid the conductor his fare, and seated himself on the back seat of the car; that, when the car was within about two miles of the Colorado crossing, he spoke to the conductor and told him to let him off at the crossing; that the conductor said, "All right, I will"; that the conductor was sitting in the second seat ahead of him when the car was near the crossing, reading a newspaper; that, when the car was within about half a block of the crossing, he (plaintiff) left his seat, went out on the black platform, and took a position on the steps with his face toward the car, holding on with both hands, the position he had seen brakemen take to alight from moving cars; that the car slowed up as it neared the platform, but was running too fast for him to get off when it reached the platform, and he "waited for it to slow up some more before getting off"; that it did slow up some, and, when it got within about three feet of the end of the platform, it was running a little faster than a walk, and he then attempted to alight; that just as his right foot touched the platform, his left being still on the step, the speed of the car was accelerated, causing him to be thrown around and to stumble against the timber at the outer edge of the platform, and to turn a somersault over the end of the embankment, falling on his stomach. He became very sick in a short time, vomited blood, and was seriously ill for several days. He has, however, entirely recovered.

1. In view of the fact that there is no evidence showing, or tending to show, that passengers got on or off defendant's cars at the Colorado crossing in the nighttime, or that the platform ever became crowded with passengers in the daytime, I do not think a court would be justified in holding that the failure of the company to maintain a guard rail at the east end of the platform to protect people from falling down the embankment was negligence per se; but, if a guard rail can be maintained at that point without interfering with cars running upon the tracks, then I think it should be left to the jury, under appropriate instructions, to find whether or not the company was negligent in failing to erect and maintain a guard rail at the east end of the platform.

2. Does plaintiff's evidence tend to prove defendant's servants in charge of the car were guilty of negligence in accelerating its speed in the circumstances testified to by plaintiff? Plaintiff did not ring the enunciator bell. In fact, there is no evidence show-

ing that he knew the car was equipped with enunciators. On the contrary, from the fact that he verbally requested the conductor to let him off at the Colorado crossing, the inference is that he did not know the car was equipped with such appliances. The conductor did not give the motorman a bell to stop the car at the Colorado crossing. He was sitting with his back to plaintiff when the latter left the car and took his position on the rear step preparatory to alighting, and there is no evidence that the conductor actually knew plaintiff was attempting to leave the car. From these facts in evidence it is argued by defendant's counsel that it was not negligence to accelerate the speed of the car as plaintiff was getting off. This argument leaves out of view the evidence that plaintiff had orally announced to the conductor that his destination was the Colorado crossing, and that the conductor told him he would let him off there. Plaintiff had a right to rely on this promise, and was not bound to ring the bell to give notice of his wish to leave the car at the crossing. The notice had been given and accepted by the conductor as sufficient before the crossing was reached, and it was his duty, without further notice, to give the motorman a bell to stop the car. Not only was it his duty to do this, but also to pay attention to plaintiff while he was alighting from the car. Had he attended to these duties, plaintiff would not have been injured. Instead of attending to his duties, the conductor allowed himself to become absorbed in a newspaper, and seems to have forgotten he had a boy passenger whom he had promised to stop the car at the crossing; and, as the car and its movements were under the control of the conductor, I think the company should be charged with negligence in accelerating the speed of the car as plaintiff was alighting from it. But it is contended that no such negligence as this is charged in the petition. The petition charges that, after plaintiff entered the car and paid the conductor his fare, he told the conductor of his intention to leave the car at the platform, "and asked the conductor to have the car stopped to allow him to alight at that point; that, as the car approached said trestle work and platform, it slowed down as in response to plaintiff's request, and as if for the purpose of allowing plaintiff to alight upon said platform; that, as it so slowed down, the plaintiff left his seat, went to the rear platform and down upon the lower step of said car, and when the car had so slowed down at said place when it was opposite to said platform, and while it was moving slowly, the plaintiff attempted to alight from said car upon said platform, but this plaintiff says that, while he was so in the act of alighting from said car, the defendant, through its agents and servants in charge of said car, negligently, carelessly, and recklessly caused and suffered the speed of said car to be suddenly and greatly accelerat-

ed and caused the same to start forward with a jerk, whereby plaintiff was thrown with great force and violence upon said platform, lost his balance, and was by reason of defendant's negligence in maintaining its platform in the negligent manner above set forth caused to fall down said embankment upon the ground." This allegation of negligence is broad enough to embrace every negligent act or omission of duty on the part of the conductor in respect to stopping and starting the car, and it was not essential, as defendant's learned counsel seems to contend, that plaintiff should have set forth in his petition the evidence upon which he relied to prove the negligence charged therein, which he must have done to make a specific charge of each and every act and omission of duty of the conductor causing plaintiff's injury. The gist of this assignment of negligence is that, on plaintiff's request, the conductor promised to let plaintiff off at the Colorado crossing; that the speed of the car was checked as it approached the crossing, thereby inducing plaintiff to believe the conductor was about to comply with his request and have the car stopped, and, in this belief, plaintiff prepared to alight, but, as he was in the act of alighting, the car was started at an accelerated speed, causing the injury. The car was under the conductor's control, and it is not out of place or stating the law too strong to say that it was his duty to see that plaintiff was offered an opportunity to alight from the car in safety, and any neglect of this duty was negligence for which the defendant is liable.

3. Does the evidence conclusively show plaintiff was guilty of such contributory negligence as to bar a recovery? If the suit was by an adult, I would not hesitate to answer this question in the affirmative; but, plaintiff being a minor, the law does not hold him to the same degree of care as it does persons of mature age. This doctrine of the law is well stated by Johnson, J., writing the opinion for the court in *Mann v. Railway*, 123 Mo. App., loc. cit. 491, 100 S. W. 566, as follows: "The conduct of a boy 12 years old should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces, not only an imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but, when possessed of these elements necessary to the exercise of reasonable care, it still lacks the discretion, thoughtfulness, and judgment presumed to be an attribute of the ordinarily prudent adult, and which may be said to come only with experience. Thoughtlessness, impulsiveness, and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of a child." *Anderson v. Railway*, 161 Mo. 411, 61 S. W. 874; *Burger v. Railway*, 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379. Plaintiff, being a minor, should on-

ly be held to the exercise of that degree of care which would be expected of one of his age, experience, and capacity; and the question of whether or not he was guilty of contributory negligence was for the jury, unless the only conclusion that can reasonably be drawn from the evidence is that he was guilty of contributory negligence. *Anderson v. Union Terminal Ry. Co.*, 161 Mo. 411, 61 S. W. 874; *Campbell v. Railway*, 175 Mo. 161, 75 S. W. 86; *Heinzle v. Railway*, 182 Mo. 528, 81 S. W. 848; *Anderson v. Railroad*, 81 Mo. App. 116; *Fry v. Transit Co.*, 111 Mo. App., loc. cit. 333, 85 S. W. 960; *Edwards v. Railroad*, 112 Mo. App., loc. cit. 659, 87 S. W. 587; *Butler v. Railway*, 117 Mo. App. 360, 93 S. W. 877.

Defendant cites the cases of *Graney v. Railway*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153, *Spillane v. Railway*, 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580, *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308, and *Walker v. Railroad*, 193 Mo. 453, 92 S. W. 83, as sustaining its contention of contributory negligence. In the *Graney* Case, James, the plaintiff's son, was drawn or sucked under a rapidly moving train, and killed. At page 679 of 157 Mo., page 279 of 57 S. W. (50 L. R. A. 153), the court said: "His comrades who were there present with him before the train arrived at the crossing, when the train was seen approaching, all say that it was running very rapidly. He was in a position to see the train, and it will be presumed, in view of the surrounding facts as testified to by the witnesses present, that he did see the train. If he did, then his age, nearly 12 years, his brightness and intelligence, his familiarity with the operation of trains, and the dangers incident thereto, must, under the decisions of this court, place him on the same plane as if sui juris." The facts do not fit the facts in this case, for there is no evidence that plaintiff was sufficiently familiar with the operation of street cars, or of the laws of motion, to appreciate the danger of getting off a moving car. What is decided in the *Spillane* Case is that the law will require a boy nine years of age to exercise care commensurate with the intelligence, capacity, and experience he is shown to possess. In the *Payne* Case, a negro boy 11 years old was struck and injured by a train at a road crossing in Higginsville, Mo. All the warnings available were given as the train approached the crossing, and there was no evidence of negligence on the part of the trainmen. At page 585 of 136 Mo., page 314 of 38 S. W., the court said: "The testimony of plaintiff and of his mother abundantly establish that his judgment and discretion, his ability to take care of himself, were adequate to that task; indeed, were equal to the judgment and discretion of the average man of mature years. This being the case, it is difficult to see why the same rule as to contributory negligence should not apply to a boy equal in capacity and intelli-

gence to the average man as to the danger to be apprehended and guarded against in crossing a railroad track as should apply to such man." In the Walker Case, the deceased, a boy 14 years old, for several years preceding the accident had hauled timber to coal mines near the railroad crossing. When he and his stepbrother, two years younger, had unloaded the wagon and were ready to start home, plaintiff warned them that the regular passenger train was about due. They stopped about 50 feet from the crossing, looked and listened for the train, but neither saw nor heard it, and then proceeded slowly up the slightly inclined grade to the track, looking in the opposite direction at some boys carrying fish, but at no time thereafter looking or listening for the train, which was coming at a very rapid rate, and did not discover it until it was too late for them to get across to safety. There was evidence that the whistle was not sounded within 80 rods of the crossing, and that the bell was not kept ringing; and failure in that regard is the negligence relied upon by plaintiff. Deceased and his stepbrother were not discovered by the engineer or fireman until it was too late to stop the train in time to avoid striking the wagon. "Held that, the case having been submitted to the jury on instructions asked by both sides that deceased was *sui juris*, it will be considered in this court on the same theory, and a verdict and judgment for plaintiff must be reversed on account of concurring negligence. Semble, under the facts of this case, decedent was guilty of contributory negligence as a matter of law."

None of these cases militate in the least against what I have quoted from the Mann Case, and are not authority for the contention that plaintiff should, on his own evidence, be held guilty of contributory negligence as a matter of law. Plaintiff is a farmer boy, and the only experience he had had in riding on cars previous to his injury, so far as the evidence shows, was the four or five trips he had made on defendant's line from Creve Cœur Lake to the Colorado crossing. He had seen brakemen get off running cars, but there is no evidence that he had ever alighted from a moving car or train of cars prior to the day of his injury. From his examination we judge him to be a boy of average intelligence for one of his age, but his knowledge of the effect of physical forces that operate against one in getting off a moving car was doubtless very meager. He had a pupil's anxiety to reach the schoolhouse by the time school opened, and probably thought, if he was carried beyond the crossing, he would be tardy, and the fact that the car slowed up as it approached the crossing probably led him to believe it would stop, as the conductor told him it would, to let him off. He waited for the car to stop as long as he could to alight on the platform. In these circumstances, I do not think one

of his age and lack of experience should be held as a matter of law to have had sufficient judgment and discretion to discern the risk he incurred by getting off the car traveling at the speed he described, and that he should not have been nonsuited. It seems to me the question whether or no he was guilty of contributory negligence was one for the jury to pass on.

Wherefore the judgment is reversed, and the cause remanded.

GOODE, J., concurs. NORTONI, J., dissents.

NORTONI, J. (dissenting). I am unable to accept the views of my associates in this case, and therefore decline to concur in the opinion of the court. The case presents itself to my mind, first, as one in which the plaintiff was culpably negligent; and, second, I am not convinced that the record discloses plaintiff's injury to be attributable to the negligence of defendant. In truth, it seems to me as though his injury is solely the result of his own careless conduct in stepping off of a moving car on the very brink of a precipice 42 feet in height. The evidence shows the plaintiff to be a boy 12 years of age. He was possessed of average intelligence. His testimony discloses him to be bright and alert. He said he was reared in the vicinity of Creve Cœur Lake, which is situated about 16 miles west of the city of St. Louis, and had attended school for several months prior to his injury at a schoolhouse located about one-fourth of a mile from the place where he was precipitated over the precipice by jumping off of a moving car. He testified that he had often seen persons getting on and off moving street cars in the city of St. Louis; that he had also observed brakemen getting off and on moving trains. Having been reared in this locality, which is permeated with electric railroads, it goes without saying that he was entirely familiar with the operation of cars of the kind in question and the necessary dangers incident thereto. As to the place where he was injured—that is, where he fell over the precipice down onto the Colorado railroad right of way—he was familiar with this too. This was a point where the Creve Cœur Lake Electric line, running east and west, by means of a trestle, crosses the Colorado steam railroad, which runs north and south. Plaintiff testified he had attended school at a schoolhouse one-fourth of a mile south of this crossing for three months before his injury. At another place in his examination it appears he had attended school there for seven months altogether. He testified he had gotten on and off the cars at this identical passenger platform four or five times recently prior to the day he was injured. It is certain, therefore, that he knew the situation and its surroundings. It appears in the evidence the platform erected by the defendant

company for the purpose of receiving and discharging passengers was about six feet four inches in width, and extended along the south side of its tracks immediately adjacent to its trestle over the Colorado railroad for some considerable distance. One witness stated this platform was 26 feet, and another that it was 48 feet in length. Probably the latter is correct. Defendant's car line at this point is situated on top of a high embankment at an elevation of 42 feet above the Colorado railroad tracks, which are on the surface. By attention to the evidence, and certain photographs introduced and on file in the case, it appears that the defendant's tracks crossed over and above the Colorado tracks by means of a trestlework 42 feet above the tracks of the Colorado railroad. Defendant's platform for the reception and discharge of passengers there abutted this trestlework, and the east end of the platform was the immediate top of the precipice. Plaintiff, having boarded the car at Creve Cœur Lake, some three miles west of the Colorado crossing, requested the conductor to stop the car at that point and permit him to alight. The conductor said he would do so, and thereafter took a seat in the car and became engaged in reading a newspaper. There seems to have been no other passengers on the car. When the car came within a short distance of the Colorado crossing, plaintiff saw the conductor seated reading the paper, and, without further calling his attention to his desire to alight, went out upon the back platform and stood upon the step. At this time the car was about one-half a block west of the platform, and was moving toward St. Louis, so plaintiff says, "pretty swift." At the time it reached the west end of the platform, it was maintaining a rate of speed at which the plaintiff did not care to venture to alight. It appears the car continued going eastward faster than a man's walk, or equivalent to a slow run, until the rear step thereof on which plaintiff stood was within three feet of the east end of the platform, or, in other words, within three feet of the brink of the precipice, when the plaintiff alighted therefrom, at which time, while he was in the act of alighting, the speed was accelerated again, causing his stumble and consequent somersault over the brink of the precipice to the Colorado right of way below.

Now, first, with respect to defendant's negligence. It may be stated as a proposition of law generally true that the courts will not declare a person guilty of negligence as a matter of law in alighting from a slowly moving street car on a level street, or where the surroundings are reasonably safe and secure for the purpose. This doctrine obtains with respect to cases where the car is approaching a usual stopping place and slowing down as though it were going to make a stop, for such amounts to an invitation to the passenger to prepare to alight, and at the same

time operates as an assurance that the speed will not be accelerated, at least, until the stopping place is reached. *Dawson v. Transit Company*, 102 Mo. App. 277, 76 S. W. 689. The evidence in this record presents no such case, however, for here, instead of the speed of the car being accelerated after the car slowed down and while approaching the stopping place, the acceleration of speed occurred when the car was actually leaving it. By attending to the facts and situation disclosed, it appears at the time plaintiff stepped off of the rear platform of the car that at least four-fifths of the body of the car had then passed to, and was actually upon the trestlework, 42 feet above the Colorado railroad tracks. Now, a boy 12 years of age, and every other person of average intelligence, knows full well that street cars do not stop on trestles 42 feet above the earth and discharge passengers. It appears, therefore, the plaintiff knew that, instead of the car approaching the stopping place at the time its speed was accelerated, it was actually going forward therefrom, and it is undoubtedly the law that negligence cannot be attributed to the defendant for accelerating the speed of its car when leaving a stopping place unless its servants in charge of the car actually knew the passenger was then about to alight. There is no evidence whatever in this case that either the conductor or motorman knew the plaintiff was about to alight at that time. *Armstrong v. Met. Street Ry. Co.*, 36 App. Div. 525, 55 N. Y. Supp. 493; *Outen v. N. & S. St. Ry. Co.*, 94 Ga. 662, 21 S. E. 710. It is true the conductor was reading a newspaper, and had evidently forgotten the plaintiff's request, made two miles back, to stop the car. This was no doubt carelessness on his part. However that may be, it is not one of the acts of negligence alleged in the petition and relied upon for recovery, although it is mentioned therein as a matter of inducement. That such is not relied upon as a ground of recovery is manifest from the petition. (See, also, page 7 of the brief of counsel for plaintiff, which discloses that no such ground is contended for by the argument here.) Be this as it may, the proposition to the effect that defendant was not negligent in accelerating the speed of the car upon leaving the stopping place, unless its servants knew the plaintiff was engaged in the act of alighting, is entirely sound. Of course, this doctrine would not obtain with equal force had the plaintiff stepped off the car while it was slowly approaching the stopping place.

To recur to plaintiff's contributory negligence. The evidence is that although entirely familiar with the situation, having gone to school for several months within one-fourth of a mile therefrom, having gotten on and off the cars four or five times at the identical place in question, and being possessed with full knowledge of the precipice, 42 feet

in height, the plaintiff, a boy of 12 years, possessed of average intelligence, active and alert, stepped off of a moving car within 3 feet of the end of the platform, and was thereby hurled over the brink of the precipice, and injured. It is indeed true the law makes allowance for the thoughtlessness of youth. It does not hold him necessarily irresponsible, however. In a case in which the conduct of a boy only nine years of age was involved our Supreme Court said: "To the extent that a child has knowledge and understanding of danger, or where it is of such a nature as to be obvious to even one of his years, he is in legal duty to avoid it." *Ridenhour v. K. C. Cable Co.*, 102 Mo. 270-287, 13 S. W. 889, 14 S. W. 760. This language was quoted approvingly and italicized by Judge Gantt in *Spillane v. Mo. Pac. Ry. Co.*, 135 Mo. 414-425, 37 S. W. 198, 58 Am. St. Rep. 580. In the *Spillane* Case a boy nine years and four months of age was injured while drawing a small piece of ice across a railroad track with a twine string. One end of the string was tied around his wrist and the other end around the ice. The boy was on one side of the track and the ice on the other. A passing locomotive became entangled in the string, jerked the boy against it, and occasioned his injury. The question arose as to whether or not it was the duty of a boy of that age to look and listen, as is the duty of an adult person when going about the tracks. The argument advanced was that his duty in this respect should be ascertained solely with reference to the standard of care exercised by a boy of like intelligence, experience, and capacity. It appearing from the evidence that the boy was familiar with the railroad and the operation of trains, having been about there frequently and quite intelligent, the court adjudged the same rule should be applied to him with respect to such obvious dangers as would apply to one *sui juris*. To compare the facts in judgment in the *Spillane* Case to the facts in judgment in the present case, touching the matter of obvious dangers; it seems the act of stepping off of a car moving faster than a man's walk, on the very brink of a high precipice, is fraught with dangers equal and as obvious as the act of being on one side of a railroad track, with one end of a piece of twine tied to one's wrist and the other end made fast to a small piece of ice while a locomotive is passing over the track. One would naturally expect the twine to break or be cut in twain by the locomotive wheels before entailing injury; whereas, even a boy of 12 knows the momentum incident to moving bodies. The rides, the runs, the jumps of daily life are a constant school of experience in this behalf. In *Payne v. C. & A. Ry. Co.*, 136 Mo. 562, 585, 586, 38 S. W. 308, our Supreme Court held that a bright, intelligent, negro boy, possessed of a good mind, sight, and hearing, who attempted to cross the

tracks in front of an approaching train, was guilty of negligence as a matter of law, and predicated the doctrine upon the proposition that, with respect to such obvious dangers, such an infant should be held "to the same responsibility as is possessed by and recognized in an adult."

The same doctrine is vigorously asserted in *Graney v. St. L., I. M. & S. Ry. Co.*, 157 Mo. 666, 679, 57 S. W. 276, 50 L. R. A. 153. In the *Graney* Case a small boy, familiar with railroads, etc., standing within three feet of a passing freight train, was thrown down and under the wheels by means of the current of air incident thereto. To compare the case in judgment with the *Graney* Case, it seems the act of stepping off a moving car within three feet of the brink of a precipice inheres with dangers much more obvious to either boy or man than the most usual and daily occurrence of standing within three feet of a passing train. The doctrine of those cases has been recently reviewed and approved by the court of last resort in *Walker v. Railroad Co.*, 193 Mo. 453, 481, 482, 92 S. W. 83. Although the learned judge giving the opinion in that case reluctantly subscribed to the doctrine, he recognized it as authority, and stated it to be the law of this state. And it may be said that the principal case relied upon and quoted from by Judge BLAND in the majority opinion of the court in the case now under advisement declares a boy 12 years of age who was injured while asleep on the depot platform near the track to be guilty of negligence as a matter of law. His recovery was permitted in that instance only upon the doctrine of the last clear chance; it appearing that his injury could have been averted by the exercise of ordinary care on the part of the locomotive engineer. *Mann v. M., K. & T. Ry. Co.*, 123 Mo. App. 486, 492, 100 S. W. 566.

Plaintiff in this case was entirely familiar with the situation. He admits in his testimony that he knew the precipice was there, etc., yet he stepped off from a moving car within three feet of the brink. Under such circumstances, it seems to me the danger was as obvious to a reasonably intelligent boy of 12 years as it would have been to the average adult. If the cases above cited are the law of this state, then the plaintiff's conduct with respect to the obvious danger which confronted him must be ascertained with respect to the rule applicable to those persons who are *sui juris*.

Entertaining this view, I respectfully dissent from the opinion of the court. I deem the judgment of the court in this case to be in direct conflict with the cases of *Spillane v. Mo. Pac. Ry. Co.*, 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580, *Payne v. C. & A. Ry. Co.*, 136 Mo. 562, 38 S. W. 308, *Graney v. St. L., I. M. & S. Ry. Co.*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153, *Walker v. Wabash R. R. Co.*, 193 Mo. 453, 92 S. W. 83,

and other cases asserting the same doctrine hereinbefore cited, and respectfully ask that the case be certified to the Supreme Court for final determination.

LAGERHOLM v. LAGERHOLM.

(St. Louis Court of Appeals. Missouri. June 23, 1908. Rehearing Denied Oct. 6, 1908.)

DIVORCE — JURISDICTION — JURISDICTION OF PERSON—RESIDENCE OF PLAINTIFF.

Where, in a divorce suit, plaintiff alleged he was a resident of B. county, on proof that he was a resident of J. county, the suit was properly dismissed, though the question of jurisdiction was not raised by plea in abatement.

Bland, P. J., dissenting.

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by D. W. Lagerholm against Laura Bell Lagerholm. From a judgment dismissing the petition and cross-bill, defendant appeals. Affirmed.

Ernest Green, for appellant. Andrew C. Ketrings, for respondent.

BLAND, P. J. The action is for divorce. In his petition plaintiff alleged indignities, which, if true, were sufficient under the statute to entitle him to the relief prayed for. The answer was a general denial and a cross-bill, in which defendant alleged such misconduct and indignities as to entitle her to a divorce, if she was the innocent and injured party. The parties were married in the city of St. Louis in 1890, and continued to live in said city until the year 1905, when they purchased a farm in Jefferson county, Mo., and established their home thereon. The suit was brought in the Butler circuit court. The summons was served on defendant at her home in Jefferson county. There was a mortgage of \$1,000 on the farm. Plaintiff testified that, after they moved to the farm, it was mutually agreed between himself and wife that he should go to Poplar Bluff, in Butler county, and earn wages and pay off the mortgage; that he went there, and out of his earnings paid \$350 on the mortgage, also the interest thereon and some back taxes; that, after going to Poplar Bluff, he made frequent visits of from four to six days duration to his home in Jefferson county, and these visits continued until a short time before he brought his suit for divorce. After both parties had offered their evidence, the court called plaintiff to the witness stand and the following occurred: "By the Court: Q. Why did you come down here? A. The money we had in the bank commenced to run down. We only had \$94, and it was approaching the time when I should pay the interest, and I knew I had a big mortgage and I had nothing to redeem that mortgage. Q. You thought you could hire a man to run that farm to do as well as you could, and you could come down here and make some money to pay off the mortgage? A.

Yes, sir. Q. When you got your mortgage paid off, you wanted to go back and live there? A. Yes, sir. Q. That is your home? A. Yes, sir. Q. And is yet? A. Yes, sir. Q. And has been all the time? A. Yes, sir. By Court: You had better take your divorce suit up to the county where you belong. I don't believe I have jurisdiction to try divorce cases for people living all over the state. By Defendant: We are forced into court, being brought in here to answer this petition, and, being forced in here, we think your honor has jurisdiction of the cross-bill." Whereupon both the petition and cross-bill were dismissed by the court and judgment was rendered against plaintiff for the costs, from which action of the court defendant appealed.

Plaintiff's evidence shows that his place of residence was in Jefferson county at the time he brought the suit. Therefore, the question in the case for decision is whether the provisions of the statute requiring that "proceedings (in divorce cases) shall be had in the county where the plaintiff resides" (section 2922, Ann. St. 1906) is jurisdictional, or merely prescribes the venue of such cases. In *Pate v. Pate*, 6 Mo. App. 49, this court held this provision of the statute was jurisdictional, and, to show jurisdiction, it was essential that the plaintiff allege in the petition that he or she was a resident of the county in which the suit was brought. In *Werz v. Werz*, 11 Mo. App. 30-31, Judge Thompson, reviewed the legislation on the subject, and, noticing the *Pate* Case, said: "Under a settled rule of statutory interpretation, this form may be looked to to explain the meaning which the Legislature intended to be placed upon the statute; and, taking it so, there can be no doubt that this section of the statute was not intended to declare a fact essential to jurisdiction, but was merely intended to prescribe the venue, a statement of which need not be embraced in the body of the petition. If the suit is not brought in the county of the plaintiff's residence, that is a fact pleadable in abatement; and, unless pleaded in abatement, it is waived. So far as I can learn, the profession have generally acted upon this view. My inquiries upon this subject lead me to believe that nearly all the divorces which were granted within this appellate district prior to the judgment of this court in *Pate v. Pate* were founded upon petitions which did not contain this allegation. These divorces have been followed in most cases, no doubt, by marriages, and children have been born of these marriages. If we are now to hold that these marriages are mere nullities, and that either party to one of these marriages is at liberty to have it set aside at pleasure upon application to the court for that purpose, if we lay down a rule which will make the parties to these marriages liable under the criminal statute for open and notorious adulterous cohabitation, the very greatest

evils and hardships will result. If it were necessary to do so in order to avoid these consequences, I should not hesitate to express myself in favor of overruling the decisions of this court both in *Cole v. Cole*, 3 Mo. App. 571, and in *Pate v. Pate*." In *Gant v. Gant*, 49 Mo. App. 3, the Kansas City Court of Appeals denied the authority of the *Pate Case*, and held that it was not necessary that plaintiff allege in his or her petition that he or she resided in the county where the suit was brought. It seems to me that Judge Thompson took the proper view of this provision of the statute—that it directs where the suit shall be brought, but does not require as a prerequisite to the jurisdiction of the court that the suit be brought in the county where the plaintiff resides. The circuit courts of the state are courts of general jurisdiction in both law and equity cases, and have original jurisdiction in all divorce proceedings; hence they have jurisdiction in divorce cases, irrespective of the county where they are commenced. If suit is brought in a county where the plaintiff has no right under the statute to bring it, advantage of this fact can only be taken by a plea in abatement. In such case, if the defendant files no plea in abatement but pleads to the merits, the question of venue is thereby waived, and the court may proceed to hear and determine the cause on its merits as though the suit had been brought in the proper county. The learned circuit judge followed the ruling in the *Pate Case*, which is no longer authority for the statement therein that the petition must allege that plaintiff resides in the county where the suit is brought to confer jurisdiction on the court, and I think the judgment should be reversed and the cause remanded for new trial.

But Judges GOODE and NORTONI are of the opinion that, as plaintiff alleged in his petition that he was a resident of Butler county, the trial court, on proof that he was a resident of Jefferson county, properly dismissed the cause, wherefore the judgment is affirmed.

KINGMAN ST. LOUIS IMPLEMENT CO. v. SOUTHERN RY. CO.

(St. Louis Court of Appeals. Missouri. June 23, 1908. Rehearing Denied Oct. 6, 1908.)

1. CARRIERS—CARRIAGE OF GOODS—DELIVERY BY CARRIER—DELIVERY SUBJECT TO INSPECTION—EFFECT.

Even though a consignee had a right to inspect cars of freight placed on its switch before accepting them, a delivery on the switch subject to the right of inspection released the carrier from liability as a common carrier, unless the consignee on inspection rejected the freight, and notified the carrier thereof.

2. SAME—INJURY TO GOODS—ACTIONS—EVIDENCE.

In an action against a carrier for damage to goods by flood, the evidence held to show that the cars had been delivered to plaintiff in good condition before the flood, so that its liability as

carrier had ceased when the goods were damaged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 588-593.]

3. SAME—DELIVERY TO CARRIER—CARRIER AS BAILEE.

Where, after delivery of cars of freight to a consignee, the carrier agreed to take them to higher ground to protect them from flood without any charge for switching or otherwise, except the actual expense of handling the cars to keep them out of the water, the carrier took the cars as a bailee, and not as a carrier.

4. SAME—INJURY TO GOODS—CARRIER'S LIABILITY—POSSESSION BY CARRIER—NECESSITY.

In an action against a carrier for failure to protect freight in cars from injury by flood, plaintiff must show that the goods were in defendant's possession either as a carrier or warehouseman.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Kingman St. Louis Implement Company against the Southern Railway Company. From an order overruling a motion to set aside a nonsuit, plaintiff appeals. Affirmed.

The petition is in three counts. In the first it is stated, in substance, that the defendant on June 2, 1903, as a connecting carrier, received from the Big Four Railway Company one car containing 43 Weber wagons and sundry fixtures, all in good condition, consigned to plaintiff at East St. Louis, Ill., and alleges that it was defendant's duty to exercise ordinary care to protect said property from damage while in its possession, and to deliver same to plaintiff, the consignee, in like condition as when received; that defendant on said 2d day of June placed the car in its yards in East St. Louis, known as the Sixth street yards, which are on very low ground, and subject to frequent overflow from the waters of the Mississippi river, and permitted said car to remain in said yards until June 10th; that defendant from the 2d day of June to June 10th, was informed and had knowledge that its Sixth street yards were threatened with an unusual overflow, and was requested by plaintiff to move said car to higher ground, and to a place of safety, which defendant could have done, but it negligently permitted said car to remain in its Sixth street yards, and on June 10th, while said car was in said Sixth street yards, and in the possession of defendant, it and its contents were submerged by an overflow of the Mississippi river, and the wagons and other contents of the car were damaged, etc. The second and third counts refer to the first one, and are like it in all respects, except the car in the second count was received by defendant from the Vandalla Railroad Company, and was loaded with harrows, lawnmowers, and fixtures and repairs belonging thereto. The car in the third count was received from the Chicago & Alton Railroad Company, and was loaded with binding twine. Defendant's answer consists of a general denial and the further allegation that the cars

were received by defendant from the connecting railroad to be switched and delivered to plaintiff at its place of business located on defendant's line of track in the city of East St. Louis; that on June 4th, defendant delivered the car to plaintiff at its place of business in East St. Louis, Ill., and at the time of such delivery the car and goods were in good order and condition, and in the same condition as when received by defendant. Defendant further answered that at the time alleged, and for some time prior thereto, there was a custom in general use, participated in by both plaintiff and defendant, whereby defendant delivered cars consigned to plaintiff by placing them at plaintiff's platform at its place of business at the switch track known as "Kingman switch," and that defendant, in accordance with said custom, placed these cars on said switch track, thereby delivering the same in good order, etc.; that thereafter, on June 6th, after such delivery, and while the cars were standing on the Kingman switch at plaintiff's platform, plaintiff, for its own convenience and accommodation, and without any consideration therefor, requested defendant to move said car from said Kingman switch and place the same in defendant's yard, known as its Sixth street yard, and alleges that thereby plaintiff ratified and accepted the aforesaid delivery of the car and estopped itself to deny the same; that defendant, without any consideration therefor, and for the accommodation of plaintiff, removed said car from said switch and placed the same in its Sixth street yard; that but for such request defendant would not have moved said car from the Kingman switch, and, if any damage occurred to the property, it was while same was in the Sixth street yard under the circumstances alleged. The answer to each of the three causes of action is substantially the same. Plaintiff denied that the cars were billed in care of the Kingman switch; admitted that on June 6th the car was placed on the Kingman switch in East St. Louis, and was at that time in good condition; denied that the car was then delivered to plaintiff or accepted by it, and denied that the custom alleged in defendant's answer was the custom followed between plaintiff and defendant in delivering cars, but alleged that in all cases, by custom and usage, cars billed to plaintiff in East St. Louis were placed upon Kingman switch at a convenient place for unloading; that plaintiff had 48 hours in which to inspect, unload, and accept the same, and had the right at all times to reject any and all cars after the same were placed upon said switch, and to give any additional and further instruction pertaining to the moving and handling of the same until received and unloaded by plaintiff; and denied that it requested the defendant to place said cars in its Sixth street yard, or that the same were ever delivered to plaintiff. The replies to the answers to the separate

causes of action are substantially the same. The reply also denies all other allegations of new matter in the answers to all the counts. A stipulation was entered into by the parties and filed in the cause, to the effect that car No. 8754 was at 10 o'clock on June 4, 1903, placed on the switch track known as "Kingman switch," in East St. Louis, Ill., which track runs along in front of plaintiff's warehouse; that car No. 12291 at 8 o'clock on the forenoon of June 5, 1903, was similarly placed; that car No. 93060 was on June 4, 1903, at 5 o'clock, similarly placed.

Edward H. Bowle, the government official local forecaster in charge of the weather bureau at St. Louis, in June 1903, testified that his first warning was issued on May 31st; that on June 2d he issued the following notice: "Mississippi is at or above the danger line at all points in the St. Louis district. The rise will continue rapidly." On the following day he issued the following notice: "St. Louis. Rate of rise will continue rapidly; 33½ ft. will be reached Friday morning, 34½ Saturday morning, stage of 35 ft. Sunday night or Monday. Measures to protect property for 36 ft. stage Monday should be taken." On the next day, the 4th, he issued the following: "St. Louis. During last 24 hours Mississippi rose ¼ ft. to stage 33½, stage 35 ft. St. Louis will be reached by Saturday noon, 36 ft. Sunday night, and stage 37 to 37½ ft. by Tuesday. Measures to protect property at stage of 37½ ft. at St. Louis should be taken." The day following, the 5th, he issued the following statement: "St. Louis. Rise will continue rapidly through the next forty-eight hours, stage 37½ ft. Monday or Tuesday night being reached. Measures to protect property at stage of 37½ to 38 ft. should be taken." Witness testified that the following day he sent out practically the same report; that he published reports on the daily weather map issued from the office, 1,200 copies of which were circulated in St. Louis and vicinity; that his reports were published in all the daily papers of St. Louis and East St. Louis; that his duties were to forecast the weather for St. Louis district, St. Louis and vicinity, to send out warnings and the forecast of rivers of St. Louis district.

The following stipulation of facts was entered into by the parties, and read in evidence: "That defendant, Southern Railway Company, received from the Cleveland, Cincinnati, Chicago & St. Louis Railway Company at Brooklyn Station, in East St. Louis, Ill., on June 2, 1903, at 5:55 o'clock in the afternoon, St. Louis & San Francisco car No. 8754, consigned to the plaintiff at the city of East St. Louis, Ill., and that said defendant thereafter, and at 10 o'clock in the forenoon of June 4, 1903, placed the said car upon the plaintiff's track, known as 'Kingman switch,' in East St. Louis, Ill., which said track runs along in front of plaintiff's warehouse. That the defendant Southern Railway Company

received from the Chicago & Alton Railway Company, at Brooklyn Station, in East St. Louis, Ill., on June 3, 1903, at 7:20 o'clock in the afternoon, Missouri Pacific car No. 12-291, consigned to the plaintiff at the city of East St. Louis, Ill., and that said defendant thereafter and at 8 o'clock in the forenoon of June 6, 1903, placed said car upon switch track known as 'Kingman switch,' in East St. Louis, Ill., which said track runs along plaintiff's warehouse. That the defendant Southern Railway Company received from the Pennsylvania Railway Company at Willows Station, in East St. Louis, Ill., on June 4, 1903, at 5 o'clock in the afternoon, Pennsylvania car No. 93,060, consigned to plaintiff at the city of East St. Louis, Ill., and that said defendant thereafter, on the 6th day of June, 1903, early in the forenoon, placed said car upon the switch track known as 'Kingman switch,' in East St. Louis, Ill., which said track runs along in front of plaintiff's warehouse." "Kingman switch," spoken of in the stipulation, is about 1,000 feet long. Plaintiff's platform is toward the west end of the switch, and is about 276 feet long. The east end of the switch is about 600 feet from the platform. Commercial firms other than plaintiff used this switch, which had no connection with any other line of railroad except defendant's, to receive and send out freight.

In regard to the delivery of cars on the switch by defendant, H. P. Farr, who was assistant manager for plaintiff in June, 1903, testified as follows: "If there was sufficient room at the loading platform, the railway company usually placed the cars for unloading, removing the same after unloading was completed. But if, as was quite often the case, the track along the platform was already full of cars, they would set the loaded cars on the east end of the Kingman switch, placing the same at the platform as soon as cars could be taken out, which had been either unloaded or loaded by the Kingman people. If the car was set at the platform at once, the Kingman people were privileged to have 48 hours in which to unload the same without the demurrage commencing. If, however, the car was set at the east end of the track or switch on account of the Kingman people not being able to take care of the same promptly, the 48 hours commenced at the time the car was set on the east end of the track, and, if the Kingman people did not get the car unloaded within 48 hours from the time of placing on the east end of the track, they then had to pay demurrage for any additional time required to unload it." Witness testified that this custom had been in existence certainly as far back as 1900.

R. M. Slater, who was local freight agent at East St. Louis in June, 1903, testified that defendant merely acted as a switching line for plaintiff, and delivered cars to it by simply switching them on the Kingman switch, which was taken as delivery, and that it was not necessary to place a car at plaintiff's

platform to make delivery of it; that he knew nothing of a delivery subject to acceptance, in any case, and never received any notice of the rejection of these cars; that after the cars were placed on the switch the railroad company had nothing further to do with them, nor control over them, and that for all movements after cars were placed on the switch the railroad company made an extra charge. Plaintiff's evidence tends to show that the custom was to place cars billed to plaintiff in front of its platform, but, if there was not sufficient room, they would be placed on the east end of the switch, and, as soon as the track was cleared and room made, they would be set at the platform by defendant.

L. Wolfmeyer, one of plaintiff's employees, stated that he had a conversation with Mr. Campbell (an employe of defendant) in regard to moving the property on the morning of June 3d. Mr. Campbell said he did not think the water would reach St. Louis. Witness told him that Mr. Burns, the manager, had instructed him to arrange for the moving of the cars over to the bluffs, or, if necessary, to Belleville, out of the reach of the water, and that Mr. Campbell agreed to keep the property out of the reach of the water; that his final instructions were to take them to the bluffs or Belleville; that he was informed at Mr. Campbell's office that the way was open at the time he made the request, there being no obstruction on the track east of East St. Louis. This witness stated that he understood the three cars were on the Kingman switch at the time he called on Mr. Campbell. Therefore he is mistaken as to the date he made said call, and must have called not earlier than June 6th, as the agreed statement of facts states that all the cars were not placed on the Kingman switch until June 6th.

W. J. Crockett, assistant city engineer of the city of East St. Louis, testified that the city was protected all around by railroad embankments with dykes along the front or western part which effectually protected the city from the overflow of 1892 and 1897; that at the approach of the flood of 1903 the city authorities, knowing where the weak points were, took measures to strengthen the protection against the approaching water and elevated the railroad embankments; that the people of the city were not alarmed by the reports sent out by the weather bureau; and that he thought the city would be safe from damage by the flood, and felt secure until the morning of June 9th, when the water broke through the Illinois Central embankment in the southern part of the city. Witness described this embankment as being high and very strong, carrying three railroad tracks; that it had withstood all previous floods, and had never broken or given cause for alarm, and was relied on to protect the city from the water coming from the south; that its weakness did not develop until on the

morning of the 9th, when it broke; that the flood of 1908 was the greatest in the history of the city for the last half century, came the quickest, rose the fastest, and did the greatest amount of damage; that on the breaking of the embankment all the southern part of the city was flooded, including defendant's Sixth street yards.

Plaintiff's evidence proved the three cars were submerged and their contents damaged by the water. At the close of plaintiff's evidence, the court gave an instruction in the nature of a demurrer to the evidence on all the counts of the petition, whereupon plaintiff took a nonsuit, with leave to move to set the same aside. Its motion to set aside the nonsuit was overruled, and the appeal was thereafter duly taken and perfected.

Sturdevant & Sturdevant, for appellant.
McPheeters & Harris, for respondent.

BLAND, P. J. (after stating the facts as above). Defendant contends that the nonsuit was proper for the reason the evidence shows the three cars were delivered to plaintiff June 6th, on the Kingman switch, in good condition, and hence were not in defendant's possession as connecting carrier on June 9th, when they were submerged, as alleged in the petition. Plaintiff's evidence tends to show that it had the right to inspect the cars after they were placed on the switch before accepting them. This right does not militate against defendant's contention that a delivery on the switch was a sufficient delivery to release it from liability as a common carrier as to said cars, for a delivery subject to the right of inspection placed them under the dominion of plaintiff, and defendant had no right to interfere with that dominion, unless on inspection plaintiff rejected the cars and notified defendant of its rejection. This was not done, and we hold that the evidence proves all the cars had been delivered to plaintiff by defendant, as connecting carrier, in good condition, and that defendant's liability as a common carrier ceased before the contents of the cars were damaged by the flood.

Plaintiff's evidence tends to show that on or about the day the last car was delivered on the Kingman switch plaintiff communicated to defendant its fear that the cars were in danger from the fast approaching flood, and requested defendant to move them to higher ground; that defendant promised and agreed to move them to a place beyond the reach of the flood, and could have done so by the exercise of ordinary diligence, but, instead, negligently moved them to its Sixth street yards, where they were more exposed to the flood than they would have been had they been left on the Kingman switch. Wolfmeyer's testimony is that the agreement finally reached was that defendant would haul these cars beyond reach of the water, agreeing to do so without any profit to its company, except that plaintiff should reimburse the Southern

Railway Company for any actual expense it might be put to in handling the cars to keep them out of the water, this expense, if any, to cover the service and the charge of the railway company for the use of the cars, but it would make no charge for the switching. This evidence shows that defendant agreed to take charge of the cars as a bailee (not as a carrier) under an agreement to remove them to a place of safety. It did not perform this agreement, and, if liable at all, is liable for a breach of the contract to move the cars to higher ground out of reach of the flood. Now, if we concede, for the sake of the argument, that there was a sufficient consideration to support the contract, the action is not to recover damages for any breach of that contract, but is to recover damages for a breach of defendant's duty as a common carrier to protect plaintiff's goods from injury by the flood. To maintain this action, it was incumbent on plaintiff to show that the goods were in the possession of defendant, either as a common carrier or warehouseman. The evidence shows that the goods were in the possession of the plaintiff; hence plaintiff failed to make out its case, and the demurrer to the evidence was properly sustained.

The judgment is affirmed. All concur.

BARREB v. CITY OF CAPE GIRARDEAU. (St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. MUNICIPAL CORPORATIONS — LIABILITIES FOR INJURIES INFLICTED BY SERVANTS.

A municipal corporation is not liable for an injury inflicted by a servant while exercising a corporate franchise conferred on the municipality for the public good, but is liable for injury inflicted by its servant while exercising a power conferred on the municipality for its private benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1568.]

2. SAME.

A municipal corporation is liable for a wrongful act committed by its street commissioner while performing his duties in improving a street: the work being a ministerial function, and relating to corporate interests only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1572.]

3. TRIAL—EVIDENCE—INSTRUCTIONS.

Where, in an action against a city for an assault committed by an employé holding the positions of street commissioner and police officer, the evidence did not show that the occasion authorized the exercise of the powers of a policeman, an instruction that, if plaintiff was arrested by the employé when he was acting as policeman, there could be no recovery, though plaintiff received permanent injuries, was properly refused, because of the want of evidence on which to predicate it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. SAME—INSTRUCTIONS—PROVINCE OF JURY—QUESTIONS OF LAW.

In an action against a city for an assault committed by defendant's street commissioner who was resurfacing a street, the defense being that plaintiff, a street car driver, was unlawfully removing gravel from the tracks, a requested

charge to find for defendant if the jury should find that plaintiff was himself engaged in an unlawful act, and that his injury was the direct result thereof, was properly refused, as submitting to the jury the legal status of plaintiff's act in removing the gravel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 467.]

5. DAMAGES—PERSONAL INJURIES—EXTENT OF INJURIES—QUESTION FOR JURY.

Where the evidence on the issue of the extent of a personal injury is conflicting, the question of its extent is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 533, 534.]

6. SAME—AMOUNT OF DAMAGES—QUESTION FOR JURY.

The compensation to be awarded in a personal injury action is peculiarly within the province of the jury in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 533, 534.]

7. APPEAL AND ERROR—REVIEW—EXCESSIVE DAMAGES.

In determining whether the verdict in a personal injury action is excessive, the evidence most favorable to plaintiff should be given its full probative force, and, when that is done, if it clearly appears that the verdict is excessive, the appellate court may set it aside on the ground that the jury was influenced by passion or misapprehended the instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

8. DAMAGES—PERSONAL INJURY—ASSAULT—EXCESSIVE DAMAGES.

Where, in an action for injuries to a person 60 years old, the evidence showed that the injuries, not only caused a permanent and almost total loss of the use of plaintiff's left arm, but that it was the source of almost constant pain and suffering, a verdict for \$4,500 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

Norton, J., dissenting.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by Elijah Barree against the city of Cape Girardeau. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 197 Mo. 382, 95 S. W. 330, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763.

In the summer of 1902 plaintiff was rightfully operating a street railway by horse power over Spanish street, in the city of Cape Girardeau. Its street commissioner, Fritz Brunke, by order of the city council, in August of that year was engaged in improving Spanish street outside of the street railway track by hauling creek gravel and spreading it on the street outside of and up to the rails of the street railway. On August 21st plaintiff was operating a car on the street, carrying passengers and doing his own driving. His evidence tends to show that in dumping gravel on the street it was permitted to cover the rails in places to such depth as to make it dangerous to drive his car over it; that he had a shovel and broom on the car, and, when he came to a point where the rails were covered with gravel, he would stop his car, take his shovel and broom, and clear the rails of the gravel, and then proceed. The street commis-

sioner, Brunke, objected to plaintiff removing the gravel from where he had placed it, and warned him two or three times not to disturb the gravel. About 10 o'clock a. m., and when plaintiff was making his third or fourth round with his car, he came to where one or two loads of gravel had been dumped, covering one of his rails. He stopped his car, took his shovel, and was removing the gravel from the rail, when Brunke, according to plaintiff's evidence, came up in an angry mood, with a shovel in his hand which he drew on plaintiff, and said to him: "I have told you all I am going to tell you about shoving the gravel off. I will arrest you, and take you and put you in jail." He then struck at plaintiff with the shovel. Plaintiff ward off the blow with his shovel. Brunke caught plaintiff's shovel, wrenched it from him, struck him in the face with his fist, and then took hold of plaintiff's arm, and tore his shirt off him, and started to lead him to jail. As they passed the car, plaintiff caught hold of the handle bar, and protested against being dragged from his car, on which there were three passengers. Brunke was unable to break plaintiff's hold on the car, and called one of his employes to his aid, and the two, by lurching and jerking, broke plaintiff's hold, and marched him off to the jail. Friends of plaintiff interceded, and he was permitted to give a recognizance for his appearance before the police court, and then go his way. Plaintiff was not required to appear in the police court; the matter having been dropped before the day he was to appear. In regard to the injury, plaintiff's evidence tends to show that the muscles of his left arm were torn loose from their moorings, and have become atrophied, causing a partial loss of the use of the arm. The evidence further shows the injury has caused, and will continue to cause, him a great deal of pain and suffering. Defendant's evidence tends to show that in repairing the street Brunke, when gravel would be unloaded on it, would send his son, a boy, to clear the track of any gravel that might lodge on it; that plaintiff had on several occasions before the difficulty thrown the gravel from about the rails into the gutter and under the sidewalks, and that at the time of the difficulty he was shoveling the gravel from the outside of the rail and throwing it into the gutter; that he resisted arrest, and no more force was used than was necessary to arrest him and conduct him to the jail. Brunke testified he did not strike at plaintiff with his shovel or raise it to strike him, but threw it down, that plaintiff came at him with his shovel drawn, and that he grasped it and wrenched it from his hands. Ordinances of the city were offered which showed that Brunke was regularly appointed street commissioner and also special policeman, and occupied this dual capacity at the time of the difficulty, and he testified that he made the arrest as a policeman. The action is to recover damages laid at \$10,000 caused by

the assault made upon plaintiff by Brunke. The petition charges that Brunke was the agent and servant of the defendant city, engaged in repairing Spanish street at the time the assault was made. A demurrer to the petition was sustained by the trial court, and the case was appealed to the Supreme Court. That court held the petition stated a cause of action, and reversed the judgment and remanded the cause. The trial resulted in a verdict for plaintiff and his damages were assessed at \$5,000. Plaintiff remitted \$500 of the damages and judgment was rendered in his favor for \$4,500, from which defendant appealed to this court.

Robt. L. Willson, for appellant. Sam M. Green and R. G. Ranney, for respondent.

BLAND, P. J. (after stating the facts as above). In the opinion of the Supreme Court in the case (*Barree v. Cape Girardeau*, 197 Mo., loc. cit. 388, 389, 95 S. W. 331, 6 L. R. A. [N. S.] 1090, 114 Am. St. Rep. 763) the court said: "It stands admitted by the demurrer that Fritz Brunke was the servant of defendant at the time of the commission of the injury complained of by plaintiff; but, if the injury was committed while Brunke was in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the wrongful acts of its servant. On the other hand, if Brunke was in the exercise of a power conferred upon defendant corporation for its private benefit, then the defendant is liable for the wrongful acts of its servant, as in the case of a private individual. *Murtaugh v. St. Louis*, 44 Mo. 479; *Williams, Municipal Liability for Tort*, § 11. In *Hillsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352, it is said: 'Corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and that their acts are but the acts of individuals; and, if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.' The making and improving of the streets by the city and keeping them in repair is a ministerial function, and relates to corporate interests only. It is well settled in this state that a municipality is liable for negligence in the construction of streets or sewers. *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Werth v. Springfield*, 78 Mo. 107; *Wegmann v. Jefferson City*, 61 Mo. 55; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463."

Defendant concedes that it is liable for the wrong complained of by plaintiff, if committed by Brunke while engaged in his duties as street commissioner. On the other hand, it is not contended by plaintiff that defendant is liable for the wrong if committed by Brunke as a police officer of the city, for

the reason the act would not be for the corporate advantage of the defendant city, but for the public good and in the exercise of a corporate franchise. The contention of the defendant is that Brunke was acting at the time he committed the injury on plaintiff as a policeman in the exercise of a corporate franchise, and for the public good, and on this theory of the case asked the court to give the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff, Elijah Barree, was arrested by Fritz Brunke, and that at the time of said arrest said Brunke was a duly appointed and acting policeman of the city of Cape Girardeau, and as such policeman of said city arrested said Barree, and although you may believe from the evidence that said Elijah Barree received at the hands of said policeman in making said arrest serious and permanent injuries, that said defendant, the city of Cape Girardeau, is not liable in this action, and your verdict will be for the defendant." The court refused to give the instruction, and this ruling is assigned as error. This instruction should have been given if there is any evidence tending to show Brunke made the arrest as a policeman. The evidence is all one way, that at the time Brunke injured plaintiff he was engaged as the agent of the defendant city in making and superintending repairs of the street, and that the assault was made on plaintiff because, as Brunke testified, plaintiff was displacing gravel which Brunke himself had spread on the street, and while Brunke was replacing gravel plaintiff had shoveled away from the railroad track. Brunke could not in the same transaction and at the same moment act as the authorized agent of the defendant city in the performance of an act for the private benefit of the city and as a police officer in the discharge of a function for the good of the public. He could not at the same time in one transaction use one of his hands in the discharge of his duties as street commissioner and the other as a special police officer. Besides, the evidence wholly fails to show the occasion demanded or required that Brunke could rightfully exercise his powers as a policeman, for the plaintiff was not violating any law of the state or ordinance of the city, but was doing what he had a perfect right to do, and what was necessary to be done to enable him to proceed with his car.

2. Defendant asked the following instruction, which the court refused to grant, to wit: "The court instructs the jury that, although you may believe and find from the evidence that plaintiff was injured by Brunke as a servant and agent of the defendant, yet, if you further find that plaintiff, Barree, was himself engaged in a wrongful act at the time of the injury, and that the injury is the direct result of his wrong doings, then your verdict must be for defendant." No error was committed by refusing this instruction

for the reason it submitted to the jury to find the legal effect of the evidence in respect to plaintiff's action in removing gravel from the rails. It was the province of the court, not of the jury, to pass upon the legal effect of the evidence. *Charles v. Patch*, 87 Mo. 450.

3. Defendant contends very strenuously that the damages are excessive. Plaintiff was over 60 years of age at the time he was injured. His evidence tends to show that the injury, not only caused a permanent and almost total loss of the use of his left arm, but that it is the source of almost constant pain and suffering. It is true defendant's evidence tends to show the injury was but slight. The question as to the extent of the injury was one for the jury, as was, also, the amount of the compensation, and, in determining whether or not the verdict is excessive, the evidence most favorable to plaintiff should be considered, and it should be given its full probative force. When this is done, if it yet clearly appears the verdict is excessive, then an appellate court may safely conclude the jury was influenced by passion or prejudice or misapprehended the court's instructions on the measure of damages. But it should be kept constantly in mind that the jury and the trial court, who saw the witnesses and the complaining party, are in a much better position to judge of the extent of the injury than is an appellate court, and it should also be remembered that the compensation to be awarded is peculiarly the province of the jury.

While it seems to us the compensation awarded to plaintiff is large, yet in the light of his evidence we are not prepared to say it is excessive, and affirm the judgment.

GOODE, J., concurs.

NORTONI, J. (dissenting). In the majority opinion it is conceded that Brunke, the street commissioner, was a police officer of the city of Cape Girardeau as well, and as such had full authority to arrest persons infringing the law. It is likewise conceded that if Brunke inflicted plaintiff's injuries while he was acting in his capacity as police officer—that is, while exercising a franchise conferred upon the corporation for the public good—then the defendant city should not respond to the plaintiff in damages in this action for injuries received at the hands of Brunke in the exercise of his authority as policeman. *Barree v. Cape Girardeau*, 197 Mo. 382, 95 S. W. 330, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763. The defendant sought to avail itself of this phase of the doctrine in defense of the action, and requested an instruction submitting the question as to whether Brunke acted as police officer in arresting plaintiff. I am of opinion this instruction should

have been given. It seems to me there is ample evidence in the record tending to show, first, that Brunke acted in his capacity as policeman in making the arrest; and, second, that plaintiff Barree was actually engaged in a disturbance of the peace, which conduct called for the exercise of the corporate franchise for the public good, when the arrest was made. Plaintiff himself testified that, before Brunke laid his hands upon him, he told him (Barree) that he would arrest him and put him in jail if he did not desist disturbing the gravel, and that during the same conversation, after Brunke had arrested him, he said: "Brunke, I will go up there with you and file a bond." It appears from the evidence of both plaintiff and Brunke that Brunke actually arrested plaintiff and took him to the very door of the jail. It appears to my mind that Brunke did this as policeman, and not as street commissioner, for he claimed at the time to be acting as a policeman. That he was clothed with authority in that behalf there is no question. It would be an unusual occurrence for a street commissioner to arrest one and conduct him to the jail, while it entirely comports with the duties of a police officer to do so. Mr. Morrison, a member of the city council, was present at the time. While plaintiff was engaged in disturbing the gravel, Mr. Morrison said to Brunke: "I will tell you what you do. You go and swear out a warrant." Brunke replied: "All right, if you say so. We don't have to, though. You know I am a police." Brunke testified that he then walked toward plaintiff, and "then he [plaintiff] had his shovel up like he wanted to hit me," whereupon Brunke grabbed the plaintiff and made the arrest. Brunke also testified that he deputized some one to aid in making the arrest. Certainly a street commissioner would have no authority to deputize one to aid him in making an arrest. Such an act is entirely consistent with the authority and duties of a policeman. Mr. Morrison, a member of the city council who was present, testified: "Mr. Barree took his shovel and went at Mr. Brunke's head. Mr. Brunke knocked the first lick off, and the second lick he caught the shovel, and in the scramble he accidentally hit Mr. Barree, and Mr. Brunke asked me what to do. I said: 'Take him to the courthouse, and fine him for disturbing the peace.'" It is clear to my mind that these facts and others in the record tend to prove, first, that the plaintiff Barree was actually engaged in a breach of the peace at the time Brunke arrested him; and, second, that Brunke made the arrest as policeman and in his authority as police officer of the city of Cape Girardeau. I am therefore of opinion that the court erred in refusing defendant's instruction submitting this matter of defense to the jury.

STATE v. VAUGHN.

(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. GRAND JURY—NAMES OF GRAND JURORS—NAME OF FOREMAN—RECORD.

The clerk of the circuit court should enter in the record the names of the grand jurors, the name of the foreman, and the fact that the jury was duly impaneled, sworn, and charged to make diligent inquiry and true presentments of violations of law.

2. SAME—NUMBER OF GRAND JURORS.

A constitutional and statutory grand jury must be composed of 12 men.

3. CRIMINAL LAW—APPEAL—RECORD—PRESUMPTIONS.

Where the record does not state whether the grand jury returning an indictment was composed of 12 men, the court, on reviewing the denial of a motion to quash the indictment as not returned by a lawful grand jury, will presume in favor of regularity on the part of the court that the jury was composed of 12 men.

4. INDICTMENT AND INFORMATION—MOTION TO QUASH.

On a motion to quash an indictment, the burden of showing that the grand jury returning the indictment was not composed of 12 men, and that the court was imposed on in charging a grand jury of less or more than 12 men, and in directing the clerk to administer the proper oath to them, is on the party challenging the jury.

5. GRAND JURY—PROCEEDINGS—RECORD—NUNC PRO TUNC CORRECTION.

Where the order issued by the clerk to the sheriff directed the summoning of 12 men for a grand jury, and the return of the sheriff recited that he had summoned 12 men to serve as grand jurors, the court could correct the record, where it failed to show that the grand jury was composed of 12 men, by a nunc pro tunc entry showing that the grand jury was composed of 12 men.

6. SAME—FOREMAN—APPOINTMENT—NECESSITY.

A foreman is indispensable to a grand jury, for he only is authorized to administer oaths to witnesses, and no indictment is valid unless indorsed "a true bill" over his official signature, and all presentments to the court must be by him in the presence of the other members of the grand jury.

7. CRIMINAL LAW—APPEAL—RECORD—PRESUMPTIONS.

Where the record is silent as to the appointment of a foreman of a grand jury returning an indictment, the court will, on reviewing the denial of a motion to quash the indictment on the ground that no foreman was appointed, presume that the court appointed a foreman, and that the clerk omitted to record the appointment.

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

O. P. Vaughn was convicted of violating the dramshop act, and he appeals. Affirmed.

Ragland & McAllister, for appellant. Jas. P. Boyd, for the State.

BLAND, P. J. The appeal is from a conviction for a violation of the dramshop act on an indictment preferred by a grand jury. Appellant filed a motion to quash the indictment for the following reasons: "That it does not appear upon the face of the record: First. That said indictment was properly preferred by a lawful grand jury. Second. What person or persons composed the al-

leged grand jury mentioned in the indictment. Third. That there were a lawful number of persons summoned to constitute such grand jury or that the same was either lawfully organized, impaneled, or sworn. Fourth. That a lawful grand jury or any grand jury was returned to the term of court at which said indictment purports to have been returned. Fifth. That said indictment was returned against this defendant to this court and filed. Sixth. That said indictment was presented to the court by the foreman of said alleged grand jury as required by law. Seventh. That this court ever appointed a foreman of said alleged grand jury, or that any person was properly and lawfully appointed foreman of said grand jury, or that there was a foreman of said grand jury."

The motion strikes at the record relating to the impaneling and organization of the grand jury. In support of the motion appellant offered the following:

Circuit Court Record No. 25, page 432:

"Now on this 20th day of November, 1905, an order for a grand jury for the December term, 1905, is received from the judge of this court and filed herein as follows, to wit:

"State of Missouri, County of Monroe—ss.: I, David H. Eby, judge of the Tenth judicial circuit of Missouri, deeming it necessary that a grand jury be convened at the December term, 1905, of the Circuit Court of said county, do hereby order that a grand jury be convened at the Court House in the town of Paris, in the county aforesaid, on the first day of said term, and that the sheriff of said county select said jury. Witness my hand and official signature this 18th day of November, 1905. David H. Eby, Judge of the Tenth Judicial Circuit of Missouri."

Circuit Court Record No. 25, page 432:

"Now on this 20th day of November, 1905, comes J. K. P. Masterson, sheriff, and files return of summons for a grand jury for December Term, 1905."

Circuit Court Record No. 25, page 442, December 11, 1905:

"Now comes W. R. Baskett and William Donaldson, grand jurors summoned herein, and are by the court excused."

Circuit Court Record No. 25, page 447, December 11, 1905:

"It is ordered by the court that the sheriff summon two grand jurors to fill the vacancies of W. R. Baskett and William Donaldson, to be and appear in this court, Tuesday, December 12th, 1905, at 9 o'clock a. m."

Circuit Court Record No. 25, page 450, December 12, 1905:

"Now comes the sheriff, F. M. Nolen, and makes return of the two grand jurors, heretofore ordered by the court to fill vacancies as follows: G. D. Moore and A. J. Batsell."

Circuit Court Record No. 25, page 453, December 12, 1905:

"Now on this day, December 12th, 1905,

the grand jurors heretofore summoned to be and appear at this term of court receive the charge of the court and are duly sworn by the clerk to the faithful performance of their duties according to law."

Circuit Court Record No. 25, page 531, December 23, 1905:

"Now on this 28th day of December, 1905, comes the grand jury into open court and return the following indictments: * * * 'No. 68. State of Missouri, Plff., v. O. P. Vaughn, Deft. Capias ordered and issued. Indictment for illegal sale of intoxicating liquor. Indorsed: A true bill. J. J. Brown, Foreman.'"

Over the objections of appellant the state offered the following:

"State of Missouri, County of Monroe—ss.: Be it remembered that among the records of the circuit court within and for the county and state aforesaid the following is found of record, to wit:

"State of Missouri, County of Monroe—ss.: I, David H. Eby, judge of the Tenth judicial circuit of Missouri, deeming it necessary that a grand jury be convened at the December Term, 1905, of the circuit court of said county, do hereby order that a grand jury be convened at the courthouse in the town of Paris, in the county aforesaid, on the first day of said term, and that the sheriff of said county select said jury.

"State of Missouri, County of Monroe—ss.: I, James H. Hill, clerk of the circuit court within and for the county and state aforesaid, hereby certify that the above and foregoing is a full, true, and complete copy of the order made by David H. Eby, judge of the Tenth judicial circuit of Missouri, for a grand jury, as fully as the same remains and appears of record in my office in the circuit court records of said county and state. Witness my hand with the official seal of my said office hereunto affixed. Done at office in Paris, this 20th day of November, A. D. 1905. James H. Hill, Circuit Clerk, Monroe County, Missouri. [Seal.]

"To the Sheriff of Monroe County, Missouri—Greetings: These are hereby to command you to summon twelve good and lawful men to be and appear at the courthouse in the city of Paris on the 11th day of December, 1905, to serve as grand jurors for the December term of the circuit court for the county of Monroe and state of Missouri. Witness my hand with the official seal of my office hereunto affixed. Done at my office in Paris this 20th day of November, A. D. 1905. James H. Hill, Circuit Clerk, Monroe County, Missouri. [Seal.]

"I hereby certify that I executed the within writ in the county of Monroe and state of Missouri, by summoning the following named persons to serve as grand jurors at the December term, 1905, of the circuit court of Monroe county, Missouri, to wit: J. J. Brown, H. J. Clapper, Daniel Fleming, W. R.

Baskett, William Donaldson, William Woods, Hayden Hayes, Gene Riley, T. C. Delaney, William McDowell, John Hawkins, and R. R. Mitchell. J. K. P. Masterson, Sheriff of Monroe County Missouri.

"Filed Nov. 20, 1905. James H. Hill, Clerk, by P. G. Marr, D. C."

Oral evidence was also offered to the effect that the signature of J. J. Brown, under the indorsement on the indictment, "A true bill," was his genuine signature. The court overruled the motion to quash, to which appellant saved an exception, and on that ruling makes his only assignment of error on the appeal. The clerk should have entered in the record the names of the men composing the grand jury, the name of the one appointed foreman, if one was appointed, and the fact that the jury was duly impaneled, sworn, and charged to make diligent inquiry and to make true presentments of all violations of law given them in charge by the court, etc. The record shows a body of men as a grand jury received the charge of the court and were sworn by the clerk to faithfully perform their duties. A constitutional and a statutory grand jury must be composed of 12 men. The record does not state whether this grand jury was composed of 12 men, and therefore it is contended that the record fails to show that the jury was a lawful one. True, you cannot prove by the record the grand jury was composed of the required 12 men, and, if you exclude the evidence offered by the state showing that 12 were summoned, of whom 2 were excused and 2 bystanders summoned in their stead, there is no affirmative evidence at all as to the number of men who were charged and sworn as a grand jury. But are we to upset the proceedings of a court of record having general jurisdiction on what no doubt was a misprision of the clerk by failing to enter on the record the names of the persons composing the grand jury, and assume that the judge was blind or negligent, and may have impaneled a body of more or less than 12 men as a grand jury; or should we indulge the presumption of regularity and right action on the part of the court where the record is silent? In such circumstances, to quote the language of Judge McFarland, in *State v. Orrick*, 106 Mo., loc. cit. 118, 17 S. W. 176, 329, it would seem impossible that the court could be imposed on to charge a grand jury of less or more than 12 men, and direct the clerk to administer the proper oath to them in such circumstances. The onus to show that he was imposed upon is upon the party challenging the jury. But, aside from this, the order issued by the clerk to the sheriff to summon a grand jury and the return of the sheriff, though not in the form of a special venire, and though it did not run in the name of the state, was a paper in the case and a sufficient memorandum, from which the court might have cor-

rected the record by a nunc pro tunc entry, showing that the grand jury was composed of 12 men.

2. There was no entry of record showing that Brown was appointed foreman. A foreman is indispensable to a grand jury. He only of the members is authorized to administer oaths to witnesses, and no indictment is valid unless indorsed "A true bill," over his official signature, and all presentments to the court must be by him in the presence of the other members of the grand jury. Now, because the record is silent about the appointment of a foreman, must we hold there was no foreman to swear the witnesses, to indorse the indictment as a true bill, and present it to the court, or should we presume the court appointed Brown foreman, and the clerk omitted to record the appointment. We repeat what we have said about the other phase of the case, that it would seem impossible that the court failed to appoint a foreman, or that it would have received and ordered filed an indictment indorsed by a member of the jury who had not been appointed foreman. It is more consistent with reason and more promotive of justice to presume that the court appointed Brown foreman of the jury, but that the clerk omitted to enter the appointment on the records of the court. To do this is but to apply the presumption of right action on the part of courts of record when their records are silent as to the action had. *Meddis v. Kenney*, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496; *Ball v. Woolfolk*, 175 Mo. 278, 75 S. W. 410; *Wall v. Holladay-Klotz Land & Lumber Co.*, 175 Mo. 406, 75 S. W. 385; *Rosenberger v. Railroad*, 96 Mo. App. 504, 70 S. W. 395.

No reversible error appearing, the judgment is affirmed.

ROBINSON v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. June 23, 1908. Rehearing Denied Oct. 6, 1908.)

1. MASTER AND SERVANT—INSTRUCTIONS—PLEADINGS AND ISSUES.

In an action for injuries to a railway employé while loading trucks on a flat car, an instruction predicating a recovery on the fact that plaintiff was injured while performing his duty under the direction of his foreman, and while at his place of duty coemployés or the foreman negligently caused the trucks to fall on him, was proper under the fellow servant act, as authorizing a recovery, if the injury was caused either by the negligence of a fellow servant or by the combined negligence of a fellow servant and the foreman, and was within a petition alleging that the injuries were sustained in consequence of the negligence of the vice principal and collaborators.

2. SAME.

An instruction, in an action for injuries to a railroad employé while loading trucks on a flat car, authorizing a recovery if the employer failed to supply sufficient appliances for loading the trucks, etc., was within a petition alleging the failure of the employer to furnish the employé with reasonably safe appliances with which to do the work.

3. PLEADING—PETITION—DEFECTS.

The defect that a petition sets forth in separate paragraphs in one count two causes of action appears on its face, and under Ann. St. 1906, § 598, must be taken advantage of by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 435.]

4. SAME—WAIVER.

Under Ann. St. 1906, § 602, a defendant, failing to demur to a petition setting forth two causes of action in separate paragraphs of one count, waives the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1370.]

5. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—"FELLOW SERVANT."

A petition, in an action for injuries to a railroad employé while loading trucks on a flat car, which alleges that the vice principal and a fellow servant of plaintiff negligently caused the trucks to fall on the employé by permitting the blocks behind the wheels to fall from their proper positions, etc., shows that the vice principal is but a "fellow servant," engaged in the performance of the duties of a laborer, within fellow servant act (Ann. St. 1906, § 2875), declaring that persons engaged in the common service of railroads, and working together at the same time and place, are fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 370.]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

6. SAME—FELLOW SERVANTS.

Where the negligent act of a foreman complained of was not done in the exercise of his authority, but as a collaborer at the time with those under his control, his act is that of a fellow servant, and not that of a vice principal.

7. SAME—EVIDENCE—INSTRUCTIONS—APPLICABILITY.

Where, in an action for injuries to a railroad employé while loading trucks on a flat car, the evidence showed that the accident was the result of the negligence of a fellow servant in doing a particular act, an instruction that, if the blocks used were reasonably safe, and at the time of the accident were placed behind the trucks in the usual manner, and the trucks ran over the blocks and down the skids, etc., there could be no recovery was properly refused.

8. SAME—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a railroad employé while loading trucks on a flat car, the evidence showed that the usual methods employed by other railroad companies to load trucks were either with a cable and engine or with a derrick, evidence of such methods, and that they were safer than the method adopted by the employer, was admissible to show negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 925.]

9. DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict for \$4,500, for the substantial loss of the use of an arm of a person 40 years old, and for injuries impairing his health, rendering him unable to dress himself, and causing him constant physical pain, with no hope of relief, is not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by William Robinson against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Moses Whybark, for appellant. Pierce & Reeves, for respondent.

BLAND, P. J. Plaintiff, on January 6, 1906, was injured while assisting a crew of men to load trucks on a flat car for defendant at Hayti, Mo. The action is to recover for the resulting damages. The petition is in one count, but sets forth two distinct assignments of negligence, one of commission as follows: "While plaintiff was working as a common laborer, and employed by defendant, engaged in the work of operating its railroad in Pemiscot county, Mo., under the orders, direction, and immediate supervision of defendant's foreman, or overseer, and, while in the line of his duty, he, with other employes of defendant, were engaged in loading large and heavy trucks, or parts of cars, on a flat and open car, in Hayti, in said county; the said car being on one of defendant's switch tracks in the corporate limits of Hayti. That the trucks were of iron or steel, and weighed several thousand pounds each, and the mode adopted for loading them was to place the ends of two rails, or skids, some 20 feet in length, on the end of the flat car, which was about 5 feet in height, and the other ends of the skids on the rails of the railroad track, then rolling, pushing, and pulling the trucks upon and along the skids on to the flat car. While he was assisting his coemployes in loading the trucks in that way, and under the supervision of his foreman, who was the vice principal of defendant, and his coemployes, the defendant's said foreman and vice principal and coemployes and collaborators negligently, carelessly, and recklessly permitted and caused one of the trucks to fall and roll against and upon plaintiff, inflicting serious and permanent injuries on his left breast, left side, and back, and ribs of his left breast, and left shoulder and collar bone, thereby causing his left arm and shoulder to become permanently stiff and useless. That at the moment he was injured he was between two skids immediately behind the truck, which had been rolled or shoved up the skids to about their middle, and he was where it was his duty to be, and he was in the act of catching or fastening a hook to the truck for the purpose of drawing and pulling it on to the flat car. Blocks or scotches had been placed on the skids, immediately behind the wheels of the trucks, to prevent it from rolling back or falling; and the said vice principal and one or more of plaintiff's collaborators or fellow servants were, at the moment the plaintiff was in the act of fastening the hook, holding the scotches in their proper places behind the wheels of the truck, as it was their duty to do, when suddenly and without a warning to or knowledge of plaintiff, the vice principal and collaborators carelessly removed the scotches from their proper places, and negligently permitted them to move and fall from their proper position behind the wheels

of the truck, and thereby causing the truck to fall and roll upon plaintiff, and inflicting upon him the said injuries." The other assignment of negligence (of omission) is as follows: "That it was the duty of defendant to furnish plaintiff and his coemployes with reasonably safe, sufficient, and proper machinery to load the trucks, but it neglected to do so, and thereby caused him to receive his injuries; that the ordinary and customary way and manner of loading these trucks on flat cars was by the use of a derrick or wrecker, and this renders the loading of trucks reasonably safe, while to so load without a wrecker renders said labor and work very dangerous and unsafe; that defendant and its vice principal negligently and recklessly ordered and required plaintiff and his collaborators to so load, or attempt to load, said trucks without thus providing them with a wrecker, thereby causing the injuries aforesaid; that the injuries complained of were not within the ordinary risk of his employment; that the dangers incident to the loading of said trucks in the way and manner adopted by the defendant on this occasion were known to the defendant, but were wholly unknown to plaintiff, and plaintiff, when injured, was exercising ordinary care." The answer was a general denial and a plea of contributory negligence. On the threshold of the trial, and at the close of plaintiff's evidence, defendant moved that plaintiff be required to elect upon which cause of action or assignment of negligence he would rely. The court overruled the motions. Plaintiff was employed by defendant as a car repairer and blacksmith, and had never loaded trucks until the morning of the day he was injured. Pat Murray, who was a section foreman, had charge of loading the trucks, and plaintiff and one or two other car repair men were ordered by the boss to assist the section gang. Defendant's statement of the facts, with the corrections and additions to follow, will give a correct history of the case.

The statement is as follows: "These trucks consisted of two pair of car wheels of standard gauge 4 feet 8½ inches, weighing from 3,000 to 5,000 pounds. The method employed to load these trucks was two skids, about 6x8, and about 20 feet in length, bolted together at each end and in the middle with rods. One end of the skids was placed on the end of the car, and the other down on the track, and fit the track. A block and tackle was fastened on top of the flat car, and a rope with hooks at the end hooked over the axle, and by means of the block and tackle the trucks were pulled along the skids up on the car by men on the car; and, as they would pull the trucks, they would scotch them, and then catch a new hold, and scotch and pull again. Pat Murray and Charles Martin were on the ground attending to the scotching, Murray on one side of the skids, and Martin on the other, and plaintiff

and George Lawhorn were also on the ground. Keenan was on the ground between the trucks and the end of the flat car, attending to placing the hook around the axle. The others were up on the flat car, pulling the trucks up the skids by means of the block and tackle. The scotches were of 2x4 pieces of oak and a foot and a half or two feet long, and were sound; and they used them in loading the trucks before and after the injury. They had loaded 10 or 12 pairs of trucks the day before plaintiff was injured, and at least 1 pair was loaded before he got hurt, and they were all loaded on the skids in the same manner. The scotches were placed behind the rear wheels of the trucks, and right under the flange of the wheels, slightly angling, so that they would catch squarely against the wheel; and this plan of scotching was pursued before and after the injury. These skids were used at Hayti all the time. As they were pulling up a pair of trucks in this manner, Keenan, who was on the ground between the trucks and the flat car attending to the hooks, made a suggestion that they take the hooks off the axle, and fasten them underneath on the sand board, so the trucks would pull up easier. They generally agreed that this change was advisable, and concluded to try it. When this suggestion was made, Keenan was at his place, and Pat Murray was standing on one side of the skids, and Charles Martin on the other side, at their places, attending to the scotches, and plaintiff and Lawhorn were on the ground at their places. Murray said they would try the change. The sand board was between the two pair of wheels of the trucks and down below them, and hung around the bolster between the wheels and underneath them, being only a short distance between the sand board and the track and ground between the trucks. While Keenan was trying to fasten the hook to the sand board, Murray said, 'Boys, take hold and see if you cannot help fasten the hook,' or words to that effect. Lawhorn at once went in behind the trucks to help Keenan fasten the hook to the sand board, and plaintiff immediately followed him, and both of them were reaching for the hook to help Keenan, and while in that act plaintiff put his leg over the axle, and between the axle and the sand board, and was reaching for the hook, and while in this position the scotches slipped or gave way, or the wheels rolled over them, and the trucks rolled back on the skids over both plaintiff and Lawhorn. Lawhorn was slightly injured, but plaintiff quite seriously. The skids were just the width of the truck, and the same gauge as the railroad track and made to load trucks. They all worked to advantage to get the trucks loaded, and all wanted to get done and seemed to be in a hurry. They finished loading the trucks the day of the accident, and continued in the work as before. No one in particular was told by Mur-

ray to go in to assist Keenan, but Lawhorn and plaintiff were the only ones on the ground, besides Murray and Martin. The others, seven or eight in number, were on the car pulling the trucks up the skids by means of the block and tackle. After plaintiff was injured he was taken to his house in Hayti, and treated for his injuries, and his collar bone and other fractures were set by Doctor Jones, but he removed the bandages himself shortly after they were fixed. He was hurt on the 6th day of January, 1906. On Sunday evening after the injury he was sent to the hospital at Springfield, and was there seventeen days, and voluntarily left, as he states: 'I just told them it is nothing for me to do but suffer, and I can suffer at home with my family as well as here, and I am going home.' They told him that they would rather he would not leave, but he declined to stay, and told them he would go home, and the doctor told him to keep the bandages on three weeks, and he came home. The plaintiff himself testified that he was, by profession, a physician; that he graduated at the Barnes Medical College and Marion Simms College on March 16, 1885, and practiced medicine at Fancy Farm, Ky., for eight years. For the first six years he did a good business, 'and got to fooling in patents and lost money.' Part of the patents he got up was a ball bearing buggy box. 'One was a buggy fan to go on top of a buggy to keep a fellow cool when he was riding along.' That did not go very well, and he quit practicing. Murray was section foreman, but was not the foreman of plaintiff, but Lawhorn and several others were section men under Murray. Gibson was plaintiff's foreman, and also the foreman of Keenan and Martin. They worked in the mechanical department, and in Gibson's absence plaintiff says, as to Martin, 'Thinks they made him a sort of a straw boss, to say what to do in Mr. Gibson's absence.' Martin's crew went down and assisted in loading the trucks at Murray's request."

Plaintiff's evidence tends to show the trucks were loaded under the supervision of Murray, and that plaintiff and the other two men taken from Gibson's repair crew were, for the time being, a part of Murray's crew. In respect to his injuries, plaintiff testified as follows: "Q. State if you were suffering at that time? A. It was about all I could do to live. Q. How were you suffering? What happened to you—what portion of the body? A. I couldn't get my breath. I was mashed in here (pointing). Q. In where? A. Around my lungs and heart. Q. Which side? A. On the left side. Q. How did it affect your ribs? A. It seemed to pull the bone blade, bone—scapula—off from the shoulder, tearing it loose, and seemed to crack some of the ribs underneath. At least for three or four weeks I couldn't hardly get my breath on account of that hurting so bad through there, and there was two ribs, I think, fractured down

here. Q. On the left side? A. Yes, sir. Q. Three or four ribs fractured on the left side? When you say fractured, you mean broken? A. No, sir; kind of a green stick fracture. I don't know that they came in two, but they all popped. That caused them to go in when the shoulder came in. Q. How long did you remain at home before you went away? A. That was done on Saturday morning, and I was carried away Sunday evening, I think. Q. Where were you taken to? A. Taken to Springfield. Q. Hospital? A. Yes, sir; railroad hospital. Q. St. Louis and San Francisco Railroad Hospital? A. Yes, sir. Q. How long were you confined to your bed after this injury? A. Well, after I went to the hospital I was up and down all the time for 17 days. After they bandaged me up I could really stand up better than I could lay down. Q. How long did you stay at the hospital? A. I stayed there 17 days. Q. State whether you suffered much or little during all that time? A. I suffered considerably all the time. Q. Do you still suffer? A. Yes, sir; I suffer more or less all the time. I can't lay on this side any more. I either have to sit propped up in the bed to sleep, or lie on my right side. Q. You say you continually suffer now? A. Yes, sir; and the greatest trouble is that I am sorter losing the motion and use of my arm; it has a queer feeling in the arm all the time. Q. Is that arm now in that particular getting better or worse? A. It is gradually getting worse. Q. What was your weight and the condition of your health at the time of this injury? A. I was in good health then. Q. How much did you weigh? A. About 150 or 155. That used to be my weight. Q. What is the condition of your health now as compared with that time? A. Well, I am in tolerably fair health except this trouble. * * * Q. What is the condition of your arm at the present time—or shoulder? A. Well, it had growed back all right, no more than the joint won't let it work up higher. Q. Indicate to the jury, as high as you can reach your arm? A. That is as high as I can get it (indicating). Q. State whether or not it pains you to raise it that high? A. Yes, sir; it hurts. Q. It does pain you? A. Yes, sir; I can hold my arm to me this way and use it pretty well, but when I get it away from me I haven't much strength in it. Q. State to the jury whether or not you can raise your elbow any higher than on a level with your shoulder? A. No, sir; I can't. * * * Q. State to the jury whether or not you can lift the arm up to your head? A. No, sir; I can't do that. Q. State to the jury what is the condition of the locomotion of that arm back in front of your body and behind you? A. I can't put my coat on. I have no motion in the shoulder to throw my coat up. Q. State to the jury whether or not you can now get on and off your clothes? A. No, sir; I haven't been able to do that by myself. I have to have help to put on my shirt and my coat. Q. State whether or not that

locomotion or the use of that arm is getting better or worse? A. No, sir; it is not getting better." Over defendant's objections, plaintiff was permitted to show that if a cable rope had been rigged to pull the trucks on the cars with an engine, it would have been a safer way than to pull them up by hand power, but that the easiest and safest way to load them would have been with a derrick. The jury found for plaintiff, and assessed his damages at \$5,000. Plaintiff remitted \$500 of the damages assessed, and judgment was rendered for him for \$4,500, from which defendant appealed, having first filed a timely motion for new trial, and in arrest of judgment, which the court overruled.

Plaintiff's second instruction is as follows: "If the jury believe from the evidence that on the ——— day of January, 1906, plaintiff was in the employ of defendant; that at said time, while so employed, and while in the line of duty as such and under the direction of defendant's foreman he, together with other employes and collaborators, was engaged in loading or attempting to load certain heavy trucks on to a flat car; that he was at his place of duty behind said trucks; and that one or more of said collaborators or foreman negligently and carelessly, and without warning to or knowledge of plaintiff, removed the scotches from their proper places behind the wheels of said trucks, or negligently and carelessly permitted said scotches to move and fall from their proper places, and thereby negligently and carelessly permitted or caused said trucks to fall and roll against and upon plaintiff's body, inflicting the injuries complained of—then the verdict should be for the plaintiff, unless the jury further believe that plaintiff was guilty of negligence contributing directly to the injury. By the term 'negligence,' as used in these instructions, is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances."

1. Defendant contends that this instruction submits the question of recovery on the fact that plaintiff was ordered into a dangerous position by his foreman, and while in that position was injured by the carelessness and negligence of the foreman in permitting the truck to roll back upon him. The instruction predicates plaintiff's right to recover upon these facts: First, if he was in the employ of the railroad company; second, if in the performance of his duty, he, with others, by direction of his foreman, was engaged in loading trucks on a flat car; third, if while at his place of duty behind the trucks, one or more of his collaborators, or a collaborator and the foreman, negligently and carelessly permitted or caused the car trucks to fall and roll upon him, and was not himself guilty of negligence, he is entitled to recover. We think the instruction is clearly drawn under the railroad fellow-servant act, and author-

izes a recovery if the injury was caused either by the negligence of a fellow servant, or by the combined negligence of both a fellow servant and the foreman, and is not an instruction authorizing a recovery for the carelessness of the foreman alone, and is within the scope of the first assignment of negligence in the petition.

2. Plaintiff's fourth instruction is as follows: "It is the duty of the defendant to use ordinary care and diligence in selecting and furnishing to its employes reasonably safe and suitable machinery, tools, and appliances with which to carry on the business and work of defendant. So, if the jury believe from the evidence that on the _____ day of January, 1906, plaintiff was in the employ of defendant; that while so employed, and in the line of his duty as such employe, and under the direction of defendant's section boss or foreman, he received the injuries complained of; that said injuries resulted from undertaking or attempting to load upon a flat car certain heavy trucks by the means and use of skids, blocks, or scotches, ropes, pulleys, and hooks; that said means, tools, and appliances were not reasonably safe, sufficient, and suitable for loading said trucks, and which injury might have been prevented by ordinary care and precaution on the part of defendant in selecting and furnishing reasonably safe, sufficient, and suitable tools, machinery, and appliances; that defendant, through its agents, knew that the means, tools, and appliances used were unsafe, unsuitable, or insufficient, or might have known the same by the exercise of reasonable care and diligence—then the jury will find for plaintiff, if they believe from the evidence that he was, at the time of said injuries, exercising ordinary care and prudence, and did not know, nor by the exercise of ordinary care could have known, that the means, tools, and appliances used were unsafe, unsuitable, and insufficient, and that the exposure to danger on account thereof was increased." This instruction predicates plaintiff's right of recovery on the second assignment of negligence in the petition; that is, the failure of defendant to furnish plaintiff with reasonably safe appliances with which to do the work he was required to perform. Plaintiff's instruction No. 6 is a repetition of his instruction No. 4 in a condensed form. His other instructions are on the measure of damages, and are counterparts of defendants on contributory negligence, so plaintiff's case was submitted to the jury on the two assignments of error set forth in the petition, and on evidence which conduced to prove both. If it be conceded that there are two causes of action stated in the one count of the petition, they are not so commingled as to mislead or confuse, but are set forth in separate paragraphs, and the defect (if there is one) appeared upon the face of the petition, and should have been taken advantage of by de-

murrer (section 598, Ann. St. 1906). For failure to so take advantage, defendant waived the defect. Section 602, Ann. St. 1906. *Boyd v. Transit Co.*, 108 Mo. App. 303, 83 S. W. 287; *House v. Lowell*, 45 Mo. 381; *Thompson v. School District*, 71 Mo. 495; *Blair v. Railroad*, 89 Mo. 383, 1 S. W. 350.

3. It is contended that the duty of the master to furnish his servant safe appliances with which to do his work is a common-law duty, and hence the fellow-servant law does not apply. There was no attempt to apply it to that phase of the case.

4. It is further contended that the first paragraph of the petition does not state a cause of action under the fellow-servant law, for the reason Murray was a foreman. The act (section 2875, Ann. St. 1906) provides: "That all persons who are engaged in the common service of such railroad corporation, and who while so engaged, are working together at the same time and place, to a common purpose of same grade, neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employes, are fellow servants with each other: Provided, that nothing herein contained shall be so construed as to make any agent or servant of such corporation in the service of such corporation a fellow servant with any other agent or servant of such corporation engaged in any other department or service of such corporation." The evidence shows that though Murray was foreman of the sectionmen helping to load the trucks, it does not show that he was plaintiff's foreman, but that in loading the trucks, and at the time of the injury, he was working as a collaborer with the rest of the men, and the appellation of foreman, applied to him by the witnesses, does not make him one, or change his character from that of a collaborer to a vice principal. It is true the petition alleges that plaintiff was put to work loading the trucks by direction of, and under the immediate supervision of, defendant's foreman or overseer. The negligence charged is charged as the joint or concurring negligence of both the vice principal and a fellow servant, and is, in substance, that the vice principal and a fellow servant of plaintiff, while he was under the trucks to help adjust the hooks to the sand board, were holding the scotches in their proper places behind the wheels of the truck, when suddenly and without warning they, the vice principal and collaborer, carelessly removed the scotches from their proper places, etc., causing the trucks to fall or roll upon plaintiff. Thus it appears by affirmative allegations of the petition that while Murray is called a vice principal, he is in law but a fellow servant, engaged at the time of the injury in the performance of the duties of a laborer. It is the act, and not the rank, of the vice principal which determines whether two employes are fellow servants (*Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522), and where

the negligent act complained of was not done in the exercise of representative authority, but in the capacity of a collaborer at the time with those under his control, his act is that of a fellow servant. *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S. W. 664; *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399, 83 S. W. 986; *Stephens v. Lumber Co.*, 110 Mo. App. 398, 86 S. W. 481; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App., loc. cit. 314, 91 S. W. 460, and cases cited.

5. It is contended that defendant's employes departed from a safe way of loading the trucks, and undertook to adopt an unsafe one, resulting in plaintiff's injury. There is no evidence to sustain this contention. The injury did not result directly from the effort to change the hooks from the axles of the truck to the sand board, but was caused by the failure of Murray and Martin to hold their scotches in place.

6. The refusal of the following instruction, asked by defendant, is assigned as error, to wit: "(6) You are further instructed that if you believe from the evidence that the blocks used for scotching the trucks on the skids were reasonably safe for the purpose, and at the time of the injury they were placed behind the trucks in the usual manner, but after the hooks had been removed from the axle the trucks either ran over the blocks and down the skids, or the skids slipped from behind the trucks, and they ran down the skids on plaintiff, and injured him, then the injury was the result of accident, and the plaintiff cannot recover." The evidence is very meager as to how the trucks got away from Murray and Martin. They were handling the scotches, but neither of them could or would tell what happened to cause the trucks to run down or fall on plaintiff. The skids were securely fastened together. They did not spring apart and let the trucks down. The scotches were used successfully all the day previous to the accident in loading trucks, and also all the day afterwards, and proved sufficient to hold trucks on the skids. Therefore there is no room for a reasonable inference that plaintiff's injury resulted from a purely accidental cause. On the contrary, the only reasonable inference to be drawn from the facts and circumstances in evidence is that the accident was the result of the negligence of Murray or Martin, or of both, in handling the scotches. If this view of the facts is correct, there is no evidence in support of the instruction, and no error was committed by the court in refusing to give it.

7. It is insisted that the court erred in permitting plaintiff to show that machinery, in the shape of a wire rope and blocks and pulleys, to be operated by an engine, had been ordered to load the trucks before the day of the accident, and also erred in permitting plaintiff to show that this mode of loading trucks would have been safer and easier than by hand power, and erred in permitting plain-

tiff to prove that the trucks could have been loaded much easier and with greater safety than by the means employed by defendant. In support of this contention, defendant's learned counsel makes the following quotation from *Chrismer v. Bell Telephone Company*, 194 Mo., loc. cit. 208, 209, 92 S. W. 378, 6 L. R. A. (N. S.) 492, which is there quoted from *Titus v. Railroad*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944, to wit: "Some employments are essentially hazardous, * * * and it by no means follows that an employer is liable 'because a particular accident might have been prevented by some special device or precaution not in common use.' All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style or implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages and habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct; but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." Most of this paragraph was also quoted in *Minnier v. Railroad*, 167 Mo. 119, 120, 66 S. W. 1072. In *Blundell v. Mfg. Co.*, 139 Mo., loc. cit. 558, 559, 88 S. W. 103, 105, it is said: "The master is entitled to conduct his business in his own way and with such appliances as he sees fit, subject to the qualification that the appliance shall be reasonably safe, considering the character of the work to be done." The same doctrine is stated in the case of *Holmes v. Brandenbaugh*, 172 Mo., loc. cit. 64, 72 S. W. 550.

As said in the *Pennsylvania* case, "the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business;" and if there was clear and uncontradicted evidence that the method and appliances employed by defendant to load trucks on flat cars was the ordinary method and the appliances the customary

ones employed by railroad companies for such work, it would have been the duty of the trial judge to have withdrawn the second assignment of negligence from the jury. But the evidence shows the usual methods employed by other railroad companies to load trucks was either with a cable and engine or with a derrick. Only one witness (Jones) testified that one time, at Milan, Tenn., he saw trucks loaded in the way employed by defendant. Moreover, the evidence tends to show the method and machinery employed by defendant was dangerous. The evidence objected to, we think, tends to prove defendant's failure to employ the method and appliances in common use among railroad companies, and that in their stead it employed more dangerous ones, and was admissible as tending to prove negligence. *Beard v. American Car Co.*, 72 Mo. App. 583; *Monahan v. K. C. Clay & Coal Co.*, 58 Mo. App., loc. cit. 74; *Spencer v. Bruner*, 126 Mo. App. 94, 103 S. W. 578.

8. It is contended that the verdict is so excessive as to demonstrate that the jury was influenced by prejudice or passion. Dr. B. T. Jones, the defendant company's physician, testified that he made a very thorough examination of plaintiff the day he was injured, and discovered no other serious injuries than a fracture of the collar bone; that he set that properly, and so adjusted the bandages as to hold it in place, but on his return the next morning he found the bandages slit and the fractured collar bone out of place. Plaintiff admitted he had the bandages slit to relieve his arm of pain. Dr. A. R. Cowan testified that he had known the plaintiff, Dr. Robinson, and that he had been in his employ as a druggist for about two months, and appeared to be unable to do everything necessary to be done in a drug store, couldn't get his arms up to reach the bottles on the shelves, nor sweep, nor things of that kind; that he was crippled in his left shoulder; that he made no particular examination of plaintiff until the day he testified in this case, and discovered on this examination that his collar bone was fractured; also the scapula, or shoulder blade had been broken; that he examined his breast and side, and found no other injuries, but he had been complaining of his side ever since he was in his employ; and that in his opinion the injury to plaintiff's collar bone and shoulder blade are permanent. Plaintiff's testimony in respect to his injuries is set out in the statement of facts. The evidence shows that plaintiff did not use proper care to effect his recovery; but defendant got the benefit of this evidence by instruction No. 7, given at its request. Forty-five hundred dollars is not excessive compensation for plaintiff's injuries, in the light of his evidence and that of Dr. Cowan. The substantial loss of the use of an arm, to be broken in health at the age of 40 years, to be

unable to dress one's self, to suffer constant physical pain, with no hope of relief, is an intolerable condition.

Discovering no reversible error, the judgment is affirmed. All concur.

GRAVES et al. v. ST. LOUIS, M. & S. RY. CO.

(St. Louis Court of Appeals. Missouri. June 30, 1908.)

1. ACKNOWLEDGMENT—DEEDS—VALIDITY AS BETWEEN PARTIES.

A deed, though unacknowledged, is valid between the parties, and imports a consideration, and is not open to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 26-33.]

2. DEEDS—FRAUD—EFFECT.

One who has been induced by fraud to execute an unacknowledged deed of a railroad right of way cannot recover the value of the land appropriated for the right of way and the damages caused thereby without first obtaining the cancellation of the deed.

3. PLEADING—OBJECTIONS TO EVIDENCE—EFFECT.

An objection to evidence on a count in the petition demanding rental value of overflowed lands for several years, for the reason that separate and distinct causes of action are stated therein, does not reach the objection that several causes of action are blended in one count, where they are so stated as to be severable by separately stating the rent for each year, so that defendant could not be prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1433, 1434.]

4. RAILROADS—APPROPRIATION OF LAND FOR RIGHT OF WAY—CONSEQUENTIAL DAMAGES—RECOVERY.

An unacknowledged deed expressing an inadequate consideration for the granting of a railroad right of way passes an equitable title to the right of way, in spite of fraud in obtaining it, and the grantor is estopped from recovering consequential damages caused by the construction of the railroad on the right of way until the deed is set aside.

5. NUISANCE—PERSONS LIABLE.

Where a railroad company created a nuisance by the manner of the construction of its roadbed, the successor of that company is not liable for the erection of the nuisance, but only for its continuance after notice.

6. PLEADING—PETITION—REFERENCE FROM ONE COUNT TO ANOTHER.

Under Ann. St. 1906, § 593, providing that, when different causes of action are stated in one petition, they must be separately stated with the relief sought for each cause of action so that they may be intelligently distinguished, it is not necessary to repeat in each count mere matter of inducement, nor allegations common to all the counts, and a reference to them in succeeding counts suffices, but each count must contain allegations necessary to state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 118.]

7. RAILROADS—INJURIES FROM CONSTRUCTION OF RAILROAD TRACK—ACTIONS—PETITION—SUFFICIENCY.

Where, in an action against a railroad company for appropriating land for its right of way, and for damages to other land occasioned by floods, the allegation of the petition of the failure of the company to construct drainage ditches is not a part of the second or third counts, a subsequent count alleging that because of the failure to construct drains along the side of

the roadbed to connect with ditches so as to afford a sufficient outlet for surface water along the railroad, when such drainage has been rendered necessary by the construction of the railroad, to the damage of plaintiff, as stated in designated counts, etc., is bad for failing to state that the construction of the roadbed obstructed the natural flow of the surface water, and that there were ditches into which such water could have been conveyed by lateral ditches, and that the company failed to construct ditches, causing plaintiff's land to be overflowed.

8. TRIAL—VERDICT—SUFFICIENCY.

A verdict which states the amount awarded for the separate causes of action alleged in the separate counts of the petition, and which states the gross amount, is a separate verdict on each count, and is valid.

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by Julia E. Graves and another against the St. Louis, Memphis & Southeastern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

The petition contains six counts. The first one alleges, in substance: That the Southern Missouri & Arkansas Railroad Company in the year 1902, without leave, wrongfully entered upon the following described lands of plaintiffs, situated in Ripley county, Mo., to wit: S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 6, township 22 N. of range 4 E., and constructed their roadbed across said land, thereby appropriating $6\frac{1}{2}$ acres of said land to their own use. That tracks were laid upon said roadbed, and defendant, the successor of the Southern Missouri & Arkansas Railroad Company, is in the possession of said railroad and operating it over plaintiffs' lands. That no compensation has ever been paid plaintiffs for the land so appropriated, the value of which, together with the value of its use since so appropriated, being \$175, for which sum judgment is asked. The second count alleges that the Southern Missouri & Arkansas Railroad Company cut down timber growing upon said $6\frac{1}{2}$ acres of land, of the value of \$25, and appropriated it to its own use. The third count alleges that, in constructing the roadbed, the Southern Missouri & Arkansas Railroad Company threw up embankments on the land appropriated which caused the water to back up on adjacent lands, depriving plaintiffs of their rental value for the years 1902, 1903, 1904, and 1905, inclusive, to plaintiffs' damage in the sum of \$72. The first paragraph of the fourth count states that the Southern Missouri & Arkansas Railroad Company unlawfully and wrongfully entered upon plaintiffs' lands, and erected a standard-gauge railroad thereon, thereby separating plaintiffs' farm into two tracts, to plaintiffs' damage in the sum of \$300. The second paragraph of this count alleges that defendant inclosed its road by a fence on either side, and put in such heavy gates at farm crossings on plaintiffs' land that they could not be opened and shut, to plaintiffs' damage in the sum of \$300, and, though re-

quested to put up proper gates, has failed and refused to do so, in violation of section 1105, Rev. St. 1899 (Ann. St. 1906, p. 365). The aggregate of the damages under this count is laid at \$600. The fifth count alleges that defendant has failed and refused to construct suitable ditches through plaintiffs' land for more than three months after the completion of its road, causing surface water to back and stand in barrow pits made by defendant, and upon plaintiffs' land along and adjacent to the road, which water becomes stagnant and emits foul and noxious odors, polluting the air and rendering the locality unhealthy, whereby the value of plaintiffs' land is depreciated and the health and happiness of plaintiffs impaired to their damage in the sum of \$200. The sixth count is to recover the statutory penalty for defendant's failure to comply with section 1110 (page 368), by constructing ditches to drain off the surface water caused to accumulate by the fill of the roadbed. The answer was a general denial of each of the six counts.

The verdict of the jury is as follows:

We, the jury in the above-entitled cause, find the issues for the plaintiffs as follows, to wit:

- | | |
|---|----------|
| (1) Under the first count of the petition, for land taken for right of way | \$130 00 |
| (2) Under the second count of the petition for cutting down and taking timber trees | |
| (3) Under the third count of the petition for submerging land, loss of rents and profits for the years 1902, 1903, 1904 and 1905, in the sum of \$18 yearly | 72 00 |
| (4) Under the first paragraph of the fourth count of the petition, damage to whole tract by location of road and cutting farm in twain | 150 00 |
| Under the second paragraph of the fourth count of the petition, for failing to construct and maintain gates | |
| (5) Under the fifth count of the petition for stagnant water and foul odors | 100 00 |
| (6) Under the sixth count of the petition, penalty | 300 00 |

Amounting altogether to..... \$762 00

A timely motion for new trial proving of no avail, defendant appealed.

Plaintiffs' evidence tended to prove the allegations of each of the six counts of the petition. Defendant, over plaintiffs' objections, read in evidence a signed, but unacknowledged, deed from plaintiffs, dated August 6, 1901, purporting to convey to the Southern Missouri & Arkansas Railroad Company a right of way through the lands described in the petition. This deed recites a consideration of \$1, but the proof shows no consideration whatever was paid. Defendant's evidence tends to show that there is no natural drainage to which surface water on plaintiffs' land can be conveyed by lateral ditches, should they be constructed along defendant's road, and that the roadbed does not have the effect of causing surface water to back up on plaintiffs' land, but serves to protect it from the overflow of Little Black river.

Jas. Orchard, for appellant. C. D. Yancey, for respondents.

BLAND, P. J. (after stating the facts as above). 1. The objection interposed to the admission of the deed in evidence was a decision of the Supreme Court in the case of the Southern Missouri & Arkansas Railroad Company against plaintiffs herein. 182 Mo. 211, 81 S. W. 405. The purpose of that suit was to compel the plaintiffs to acknowledge the deed. The circuit court denied the relief, and the Supreme Court affirmed the judgment, on the ground that the evidence tended to show the signatures of plaintiffs to the deed were obtained through false and fraudulent representations. The defendants (plaintiffs here) did not ask for affirmative relief and hence the deed was not canceled.

In its instructions on the first count of the petition (asking damages for the value of the land), the court ignored the deed and instructed the jury if they found the land had been taken and appropriated by defendant, and plaintiffs had not been compensated therefor, to find for them, and assess their damages at the value of the land so taken and appropriated for railroad purposes. Defendant on this and on all other counts of the petition offered a demurrer to the evidence. Defendant contends that the deed is valid between the parties, and plaintiffs are estopped to deny it was given without consideration. The deed, though unacknowledged, is valid as between the parties (*Genoway v. Maize*, 163 Mo. 224, 63 S. W. 698), and imports a valid consideration, and is not open to collateral attack. If a stipulated price had been agreed upon and defendant had failed to pay the agreed price, plaintiffs, on a proper pleading, might have recovered the agreed price, but nothing of that kind was pleaded or proved. Plaintiffs may, in an appropriate proceeding, have the deed set aside and canceled, and then recover the value of the lands appropriated for railroad purposes, and the damages, if any, caused thereby, but, until this is done, they cannot recover on the first count in the petition.

2. On the second count plaintiffs did not recover anything.

3. Defendant objected to the introduction of any evidence on the third count, for the reason four separate and distinct causes of action (rental value of six acres of overflowed land for four separate years) are stated in one count. The contention is that this objection was a demurrer to the petition, and should have been sustained. This would be so if the count had wholly failed to state a cause of action, but it does not reach the objection that several causes of action are blended in one count of the petition, if they are so stated as to be severable. The rent for each year is stated separately—that is, it is itemized—so that defendant could not have been prejudiced by this pleading, even if we

concede (which we do not) that more than one cause of action is stated in the third count.

4. In respect to the first paragraph of the fourth count, on which plaintiffs recovered \$150, it is contended that plaintiffs are estopped to recover by their deed conveying the right of way to the Southern Missouri & Arkansas Railroad Company. As stated above, until set aside for fraud, the deed, though not acknowledged, is good as between the parties thereto, and as it expresses a consideration, though it be inadequate, the equitable title to the right of way passed, and plaintiffs are estopped to recover consequential damages caused by the construction of the railroad on the right of way conveyed by them. *Bobb v. Bobb*, 7 Mo. App. 501; *Hannibal & St. Joseph R. R. Co. v. Green*, 68 Mo. 169; *Novelty Mfg. Co. v. Pratt*, 21 Mo. App. 171. The judgment on the first paragraph of the fourth count of the petition is reversed.

5. The fifth count is for damages resulting from the erection and maintenance of a nuisance. The petition shows that the Southern Missouri & Arkansas Railroad Company, not defendant, erected the nuisance. The evidence tends to show that the nuisance is caused from stagnant surface water accumulating in the barrow pits made in the construction of the roadbed by the Southern Missouri & Arkansas Railroad Company, the grantor of defendant. Therefore defendant is not liable for the erection of the nuisance, but is liable for its continuance after receiving notice of it, if such notice was received. *Wayland v. Railway*, 75 Mo. 548; *Silver v. Railway*, 101 Mo. 79, 13 S. W. 410. The instruction on this count held defendant liable for both the erection and continuance of the nuisance. This, we think, was error, and reverse the judgment on this count and remand the cause as to said count for new trial.

6. The sixth count of the petition is as follows: "For a sixth and further cause of action against the defendant, the plaintiffs state that because of the neglect, failure, and refusal of the defendant to construct and maintain suitable ditches and drains along each side of its roadbed, to connect with ditches, drains, or water courses, so as to afford sufficient outlet to drain or carry off the water along such railroad, whenever such water has been obstructed, or such drainage has been rendered necessary by the construction of such railroad, resulting directly to the damage of these plaintiffs, as is fully stated in the third and in the fifth counts of this petition, these plaintiffs are entitled to recover the penalty of \$500 provided by the section 1110 of the Revised Statutes of Missouri of 1899 for the violation of said section, and for the failure, neglect, and refusal of the defendant to perform its duty thereunder. Wherefore the plaintiffs pray for judgment for the sum of \$500 for penalty under section 1110, aforesaid, with costs." The point is

made by defendant that this count falls to state a cause of action, and for that reason its demurrer to the evidence on said count should have been given. It will be observed that, to make himself understood, the pleader referred to the third and fifth counts of the petition, and attempted by a mere reference to these counts to bring allegations therein essential to the statement of a cause of action into the sixth count; in other words, the pleader attempted to state a cause of action by reference to statements in other causes of action stated in separate counts of his petition. The statute (section 593, Ann. St. 1906) provides that, when different causes of action are stated in one petition, they "must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligently distinguished." It has been held that, where allegations that are common to all the counts are clearly stated, they need not be repeated, but a reference to them in succeeding counts will suffice. This would apply to the allegation that defendant company bought the road of the Southern Missouri & Arkansas Railroad Company and thereafter operated it; nor is it necessary to repeat mere matter of inducement, but each count must contain all the allegations necessary to the statement of a cause of action. *Boeckler v. Railway*, 10 Mo. App. 448. The allegation in respect to the failure of defendant company to construct drainage ditches is not common to all the counts of the petition, nor to the second or third counts; hence it was essential that plaintiffs state in the sixth count of the petition that the construction of the roadbed obstructed the natural flow of surface water; that there were ditches, drains, or natural water courses into which such obstructed surface water could have been conveyed by lateral ditches constructed along the sides of the roadbed; that defendant failed to construct such ditches, causing plaintiffs' land to be overflowed by obstructed surface water and resulting in damages. *De Lapp v. Railroad*, 69 Mo. App., loc. cit. 573. We think the demurrer to the evidence on the sixth count should have been sustained.

7. Defendant contends that there should have been a separate verdict, signed by the foreman, on each count of the petition. The law requires a separate finding and assessment of damages by the jury on each count of the petition, which may be and is generally done in one verdict, over the signature of the foreman. Such a verdict is, in effect and in law, a separate verdict on each count of the petition, and the validity of the verdict so found is not affected by the fact that at the end of the verdict the gross amount of the damages is stated.

The judgment is reversed and remanded, with directions that the court retain the verdict on the third count of the petition, and permit plaintiffs to amend the sixth count if so advised. All concur.

ST. LOUIS, I. M. & S. RY. CO. v. COALSON. (Supreme Court of Arkansas. June 22, 1908.) APPEAL AND ERROR—REVIEW—VERDICT OF JURY.

A judgment against a railway company for killing one lying on a track will not be disturbed on appeal, when sustained by the evidence, though the jury would have been justified in finding for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3937.]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by Mollie Coalson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lovick P. Miles and T. B. Pryor, for appellant. Rowe & Rowe, for appellee.

HILL, C. J. On the 28th of November, 1906, Samuel Coalson was lying upon a railroad track near the city of Ft. Smith, with his head resting upon one of the rails, when a train known as the "Greenwood train," on its way to Ft. Smith, ran upon him and struck him. He was in such a position that his head would have been run over by the engine, but the brakeman, who was at that time riding on the pilot, managed to push his head from the rail in time to save it; but his action did not save his body from being seriously injured, from which injuries he died shortly thereafter. This is an action brought by his widow, for herself and as next friend of her minor children, to recover of the railroad company damages for his death. She recovered in the circuit court, and the railroad company appealed.

The only question in the case is whether the train operatives were negligent in failing to prevent the injury to Coalson after his perilous position was discovered by them. The law upon this subject has been recently discussed and applied in the following cases: *St. L. & S. F. Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *St. L. I. M. & S. Ry. Co. v. Evans*, 74 Ark. 407, 86 S. W. 426; *St. L. I. M. & S. Ry. Co. v. Hill*, 74 Ark. 478, 86 S. W. 303; *C. R. I. & P. Ry. Co. v. Bunch*, 82 Ark. 522, 102 S. W. 369; *Adams v. St. L. I. M. & S. Ry. Co.*, 83 Ark. 301, 103 S. W. 725; *St. L. I. M. & S. Ry. Co. v. Raines* (Ark.) 111 S. W. 262. The instructions were in conformity to the principle announced in these cases, and there is no error found in any of them. There is nothing in them that calls for discussion, as they are but applications of the settled principles governing in such cases. There was testimony, if believed by the jury, which would fully warrant them in finding that the train operatives, not only could have seen, but that they actually did see, the perilous condition of Coalson in time to have prevented injuring him, but that the only effort made to avoid injury was the continued sounding of the

whistle, and at last the efforts of the brakeman on the pilot to push him from off the rail. On the other hand, the testimony of the trainmen is clear, candid, and emphatic that they did not discover his perilous condition until too late to avoid the injury, and when it was discovered they did all in their power to prevent it. The jury would have been justified in rendering a verdict for the defendant under this testimony, and, in fact, it is somewhat surprising that they did not; for the trainmen's testimony was not weakened or contradicted by cross-examination, as was the case with much of the plaintiff's evidence.

There is nothing else in the case, and the judgment is affirmed.

BRYANT LUMBER CO. v. STASTNEY.

(Supreme Court of Arkansas. Sept. 21, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In a suit for personal injury to an employé, caused by lumber falling, whether he was directed to go to the place of injury *held*, under the evidence, a jury question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1040-1043.]

2. SAME—FELLOW SERVANT RULE—APPLICABILITY.

The fellow servant doctrine could not be applied to a suit by an employé for injury caused by lumber falling, he claiming that he was directed by the foreman to go to the place, since his cause of action, if any, is for the employer's failure to provide a safe place to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 393.]

3. SAME—SAFE PLACE TO WORK—MASTER'S DUTY.

An employer's duty to provide a safe place of work cannot be delegated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

4. SAME—NEGLIGENCE NOT PRESUMED.

Negligence of an employer is not presumed, because the employé was injured by a lumber pile falling, through a passing engine striking projecting pieces.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 881.]

5. SAME—DEFECTS—EMPLOYER'S DUTY TO DISCOVER.

An employer must use ordinary care to discover and repair defects and to discover and obviate dangers; the degree of care being tested by the character of the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 252, 253.]

6. SAME.

If a lumber yard employé was directed to go to a particular place to work, the employer is liable for injury to him, caused by its failure to see that the route he was directed to take was safe, or by failing to warn him of any danger not so obvious that he would be negligent in following the direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 297, 310.]

7. SAME.

A lumber yard foreman was not negligent towards an employé respecting the fall of a pile of lumber on which they were standing, caused by a passing engine striking projecting pieces, if

he used ordinary care to ascertain whether the lumber was properly piled and in notifying plaintiff of any danger.

8. TRIAL—ABSTRACT INSTRUCTIONS IMPROPER. Instructions embodying general statements of law are improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 582, 583.]

9. SAME.

Instructions assuming facts to exist are improper, where the existence of such facts are jury questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

10. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether it was obviously dangerous for an employé to go upon a lumber pile *held*, under the evidence, a jury question, in an action for injury to him resulting from the lumber falling through a piece being struck by a passing engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1083, 1112.]

Appeal from Circuit Court, Perry County; Robert J. Lea, Judge.

Personal injury action by Mike Stastney against the Bryant Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mehaffy & Armistead, for appellant. Jones & Hamiter, for appellee.

HILL, C. J. Mike Stastney was a Bohemian about 20 years of age, and was employed by the Bryant Lumber Company to work in its lumber yards. He spoke but little English. He was employed in piling boards, and the foreman came to him and directed him to go to a different place to work, and he followed the foreman in going to the new duty assigned to him. The lumber company had a spur track running into its lumber yards, upon which they used a switch engine for the purpose of pulling the cars to receive its lumber. There was a pile of lumber stacked about 2½ feet from the track, a sufficient distance for the engine and cars to clear it, and this lumber had only been stacked about 10 minutes prior to the occurrence in question. It was necessary to go over or pass by this pile of lumber in going to the new work assigned to Stastney, and he and his coworker, who was also directed to go to the new place of work, followed the foreman when he gave them the order to work at the new place. The foreman went on top of this pile for the purpose of seeing that the track was clear. The engine was then within about 40 feet of it, and was approaching. The foreman saw that the lumber pile was sufficiently distant from the track to be clear of the engine; but finally he noticed that two pieces were sticking out from the lumber pile about 4½ feet above the ground, and then he knew that the cars would strike the pieces and knock the pile down. He jumped, and saved himself; but Stastney did not get off in time, and the pile was knocked down by the engine and injured him.

The lumber had been piled by other laborers, who were also under the supervision of the foreman; and the cause of the pile of lumber falling was the negligent manner in which these two sticks were allowed to extend over the track, or the failure of the employé running the engine to discover that fact. There was a curve near this place, and it is probable that the engineer in charge of the engine could not have seen the danger. For the injury received, Stastney brought suit and recovered judgment in the circuit court, and the lumber company has appealed.

Stastney testified that the foreman told him to come with him and load the car, and he understood that he was ordered to go with the foreman; and he and his coworker did so, and followed the foreman onto the pile of lumber which fell, and received no warning of the insecure position of the pile to which he was carried on his route, nor notice from the foreman of the impending danger from the approaching engine. On the other hand, the foreman testified that he did not tell him to follow him, but merely directed him to go to another pile of lumber to work there, and that his own act of going upon the lumber pile was not connected with carrying these men to their new place of work, but merely to see if the track was clear, which was a part of his duty as foreman of the yard; and he says that immediately upon discovery of the peril he gave notice by signs and voice to Stastney. This conflict as to the facts upon which the case hinges is irreconcilable, and should go to the jury, upon proper instructions, for their determination.

The defendant's theory of the case was that the act causing the injury to the plaintiff was due to the negligence of his fellow servant. This occurred before the passage of the act of March 8, 1907 (Acts 1907, p. 162). The court refused the instructions presenting this theory, and the court was correct in doing so. The fellow servant doctrine has no place in the case. If Stastney has any action, it is for the failure to provide him with a safe place to work; and the duty resting upon the master to provide a safe place to work is a nondelegatory duty, and is always master's duty, whether performed in fact by the president of the company, a foreman, or a day laborer. *Railway Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; *St. L., I. M. & So. Ry. Co. v. Inman*, 81 Ark. 591, 99 S. W. 832; *Archer-Foster Const. Co. v. Vaughan*, 79 Ark. 20, 94 S. W. 717.

No presumption of negligence arises from the mere happening of the accident which caused the injury in such actions as these between master and servant; but the master is required to exercise ordinary care in discovering defects and in repairing them, and in discovering dangers and obviating them, and this care and prudence must be tested by the business in which the master is en-

gaged and the circumstances surrounding it, and commensurate with its requirements. *Ultima Thule, Ark. & Miss. Ry. Co. v. Calhoun*, 83 Ark. 318, 103 S. W. 726; *St. L., I. M. & So. Ry. Co. v. Andrews*, 79 Ark. 437, 96 S. W. 183; *Mammoth Vein Coal Co. v. Looper (Ark.)* 112 S. W. 390. It follows that if the testimony of Stastney is true—and that is a matter for the jury—then the company would be liable if it failed to exercise due care to see that the route over which he was directed to travel in getting to his work was not safe, and, if not safe, that he was not warned of its danger, and that this danger was not so obvious and patent that he would be guilty of contributory negligence in following the directions of his employer. Upon this theory, and this theory alone, could the plaintiff recover; and hence it is wholly immaterial whether the foreman or some of his coworkers were negligent in stacking the lumber or running the engine against it, for that is not the inquiry—the sole inquiry being whether the master had exercised due care in providing him a safe place to travel to his work, and, if not safe, whether it had warned him of the dangers, unless they were of so obvious a character that every one of common experience must be presumed to take notice of them.

The court refused this instruction: "You are instructed that if the foreman exercised the care of a reasonably prudent man in ascertaining the fact that the lumber was improperly piled, and acted as promptly as was demanded of a reasonably prudent man in notifying plaintiff of the danger, then it cannot be said that the foreman was guilty of negligence." No instruction was given upon this point. This instruction correctly states the law as applied to the facts of this case, and it went to the very core of the controversy. This subject has been recently reviewed in the cases of *Mammoth Vein Coal Co. v. Looper (Ark.)* 112 S. W. 390, and *Western Coal & Mining Co. v. Garner (Ark.)* 112 S. W. 392.

The defendant asked several instructions as to the duty of a servant assuming risks which were open to his observation, or of dangers readily discoverable by him by the use of ordinary care. Some of these might well have been given; but it is questionable whether the court would have reversed the cause for failure to give them, because the instructions are not specific, but are general statements of the law on this subject, and seem to take for granted that this was an obvious risk, whereas it is a matter of fact for the jury to determine, and not one of law for the court to determine, as might be inferred from these requested instructions. They rather assume that there was some obvious and patent risk in going upon the lumber pile, and the evidence does not justify that. In fact, the foreman did not discover at once the protruding pieces of lumber; and it may well have been that from

Stastney's point of view they could not have been seen, or their effect comprehended, while, on the other hand, their disastrous effect might have been so obvious as to render it a piece of rashness to have gone upon the plea. This was a question of fact that should have been sent to the jury. No better exposition of the law on this subject can be found than in the opinion of the late Mr. Justice Riddick in the case of *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837.

Judgment reversed, and cause remanded.

CHICAGO, R. I. & P. RY. CO. v. COTTON.
(Supreme Court of Arkansas. Sept. 21, 1908.)

1. CARRIERS—CARRIAGE OF FREIGHT—LIMITED LIABILITY CONTRACT.

A contract between a railroad company and a shipper, limiting the liability of the carrier to loss or injury on its own line, is binding, if based on a valid consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 817-819.]

2. SAME.

In the absence of a stipulation restricting liability, the acceptance of goods by a carrier for transportation implies an undertaking on its part to transport them to the place to which they are consigned, even though beyond its own line, and to be responsible for loss or injury occurring on the line of a connecting carrier.

3. SAME.

Plaintiff, a shipper of cattle, demanded an unrestricted liability contract of defendant railroad. After the cattle were loaded and accepted by defendant, to be delivered at a point beyond its own line, and the train was in the act of starting, plaintiff was compelled to sign a contract restricting liability to injuries on defendant's line, being refused an opportunity to ship on unrestricted terms. *Held*, that the restrictions were void, and no defense, where injury resulted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 951.]

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by R. S. Cotton against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee, R. S. Cotton, sued appellant, the Chicago, Rock Island & Pacific Railway Company, for the loss of 11 and the injury to 23 head of cattle, occurring, as he alleges, in transit from Ola, Ark., to National Stockyards, Ill., in December, 1906. Appellant answered, denying all the material allegations of the complaint, and with its answer exhibited a copy of the contract under which it claims said shipment had been made, and averred that in accordance with the contract of shipment said cattle had been promptly and safely delivered to a connecting carrier, the St. Louis & San Francisco Railroad Company at Wister, Ind. T., in the same condition in which they were received at Ola. Appellee filed a reply to this answer, alleging that the contract of shipment exhibited with appellant's answer, and which purported to

limit appellant's liability to injuries received on its own line, was procured by coercion and is therefore void.

The facts are undisputed and are as follows: R. S. Cotton testified: "I am the R. S. Cotton who shipped the cattle mentioned in the complaint. I shipped 34 head from Ola, Ark., and they were in good condition when shipped. They would average 725 to 750 pounds. White and Lipsey were with me when the cattle were loaded. I did not accompany the shipment. I obtained a bill of lading from the agent. Q. What did you state to the agent? A. I went in, and said I wanted an unlimited liability bill of lading, because I was not going. I did not look at the contract, for I went in in a rush, and the agent said I would have to have some one to sign up with me. The train was ready to pull out, and I called to the man that was with me, and as I signed up the train pulled out. The cattle were consigned to Stewart Sons & McCormick. I do not know what became of the contract. I have tried to get a copy of it, but failed. The cattle were worth \$250 or \$300 more at Ola when they were shipped than I received from them in St. Louis, and cattle were worth more in St. Louis at that time than in Ola. When the cattle were sold they weighed 650 pounds; that is, the 23 head which got there. Eleven of them were lost. I don't know what became of them. The cattle we sold in St. Louis brought 2½ cents per pound." On cross-examination he testified as follows: "Q. You can read and write? A. Yes, sir. Q. The agent signed for the railroad company, and you signed for yourself? A. Yes, sir. Q. Do you state to the jury and to the court that this is not the contract you signed—not the one you got? A. It is not the one I should have got. I had to ship on this one, or not ship them. He said: 'The train is ready to pull out now. It is moving, and you will have to be in a hurry.' Q. Did you sign that after you loaded the cattle? A. Yes, sir." Other testimony was introduced by appellee in regard to the loss of and injury to the cattle; but, as the amount of the verdict is not questioned, it is not necessary to abstract it. The appellant adduced testimony tending to show that the cattle were not lost or injured on its line of railway, and over the objections of appellee read to the jury the contract above referred to, in which it limited its liability to loss or injury on its own line of railway.

The court refused the instructions asked for by appellant, and over its objection instructed the jury as follows: "Gentlemen of the jury, you are instructed that this is a suit for damage to stock received for shipment at Ola, Ark. You are the sole judges of the weight and sufficiency of the evidence. If you find from the evidence that the plaintiff's stock was lost or damaged by unreasonable delay, or by reason of rough handling, at any point between Ola and St. Louis, you

will assess his damages at such sum as you think the evidence justifies. The burden of proof is upon the plaintiff to make out his case by a preponderance of the testimony; but a bare preponderance is sufficient, however."

There was a jury trial, and a verdict for appellee for \$209. The case has been brought here by appeal.

Buzbee & Hicks and Geo. B. Pugh, for appellant. Bullock & Davis, for appellee.

HART, J. (after stating the facts as above). The sole question to be determined in this case is whether or not the contract signed by the parties to this litigation is void for the reason that it was procured by coercion. If the contract in question is valid, the appellant has expressly limited its liability to loss or injury occurring on its own line of railway, and is not liable; for under the undisputed facts of this case the loss of and injury to the cattle occurred on the line of the connecting carrier. That a contract between a railway company and a shipper limiting the liability of the carrier to loss or injury on its own line is binding, if based upon a valid consideration, we refer to the following: *C., R. I. & P. Ry. Co. v. Slaughter*, 84 Ark. 423, 106 S. W. 208, and cases cited. On the other hand, it is equally well settled in this state that, in the absence of a stipulation restricting liability, the acceptance of goods by a carrier for transportation implies an undertaking on its part to transport them to the place to which they are consigned, wherever that may be, even beyond its own line, and to be responsible for loss or injury occurring on the line of a connecting carrier. *St. Louis Southwestern Railway Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894; *K. C., Ft. S. & M. R. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. Rep. 61; *St. L., I. M. & So. Ry. Co. v. Randle*, 85 Ark. 127, 107 S. W. 669.

The undisputed testimony shows that the cattle had been loaded in the cars and accepted by the railroad company to be delivered at a point beyond its own lines, and that the train was in the act of starting before the contract was submitted to appellee for his signature. Appellee demanded an unrestricted liability contract, because he did not intend to accompany the cattle, and for that reason, if any loss or injury occurred to the cattle, he would not know whether it happened on the line of the initial or the connecting carrier. He was refused any other contract than the one exhibited, and was compelled to sign it in order to ship his cattle. He was refused the opportunity to ship on unrestricted terms, and the restrictions are void. The contract, therefore, was not properly evidence in this case, and no defense can be based upon it. It passes out of the case. *St. L. & San Francisco R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *St. Louis & San Francisco R. Co. v. Burgin*, 83 Ark. 502, 104

S. W. 101; *St. L. & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75; *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230. The case stands as if appellant had accepted the cattle consigned from Ola, Ark., to National Stockyards, Ill., without making a contract restricting its liability to loss or injury over its own line of railway.

Hence under the rule above declared appellant was liable for any loss or injury occurring on the line of its connecting carrier, and the judgment is affirmed.

CARDEN v. BAILEY.

(Supreme Court of Arkansas. July 13, 1908.)

1. JUSTICES OF THE PEACE — APPEAL — "APPEARANCE."

The filing of an affidavit and bond for appeal by a defendant in justice court constitutes an appearance, and gives the circuit court jurisdiction of defendant on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 602.]

For other definitions, see Words and Phrases, vol. 1, pp. 449-451.]

2. SAME—JURISDICTION OF CIRCUIT COURT.

The perfecting of an appeal from a justice of the peace gives the circuit court jurisdiction of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 602.]

3. SAME—TRIAL IN CIRCUIT COURT.

In the circuit court on appeal from a justice of the peace, the cause is tried de novo on the merits, and defendant appealing from a justice's judgment against him cannot object in the circuit court to the want of service of summons in the justice court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 662.]

4. SAME—PROCEEDINGS FOR APPEAL.

The party appealing from a justice's judgment must see that the justice files in the office of the circuit clerk a transcript, as required by Kirby's Dig. § 4670, and, on his failure to do so, the circuit court may in its discretion dismiss the appeal or affirm the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 621.]

5. SAME.

The successful party in justice court filing in the circuit court the transcript of the docket entries of the justice and the process and papers in the suit as required by law, after the failure of the defeated party appealing to procure the filing of the same for nearly two years, is entitled on his motion to an affirmance of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 621, 728.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by A. J. Carden against Ed Bailey and others. From a judgment of the circuit court in favor of defendants on their appeal from a justice's judgment, plaintiff appeals. Reversed and rendered.

This is an action of attachment instituted against appellee on July 25, 1905, in a justice of the peace court. Appellee was alleged to have left the state. Therefore a warning order was issued and proof of pub-

lication filed with the justice. A personal judgment was on the 25th day of September, 1905, rendered against appellee by the justice of the peace. On the 6th day of October, 1905, the defendants filed an affidavit for appeal to the circuit court, also an appeal bond in the sum of \$60, with T. G. Malloy and John Barrow as sureties thereon. On the 25th day of September, 1907, the defendants having failed to file transcript from the lower court to the circuit court, the plaintiff filed said transcript, and asked the affirmance of the judgment of the lower court against the defendants and their sureties on the appeal bond. The court refused to affirm the judgment, and gave judgment for defendants.

E. M. Merriman, for appellant. John Barrow and T. G. Malloy, for appellees.

WOOD, J. (after stating the facts as above). The filing of the affidavit and bond for appeal by the appellees was such a substantive act as to constitute an appearance to the proceedings, and gave the circuit court jurisdiction of the persons of appellees on appeal. See *Holloway v. Holloway*, 85 Ark. 431, 108 S. W. 837; *St. L., I. M. & S. Ry. Co. v. State*, 68 Ark. 561, 60 S. W. 654; *Silver v. Luck*, 42 Ark. 268; 1 Crawford's Dig. 15, "Appearances."

The perfecting of the appeal from the justice of the peace gave the circuit court jurisdiction of the cause. *Harrison v. Trader*, 29 Ark. 85, 97. In the circuit court on appeal from the justice court, the cause is tried de novo on its merits. The appellees could not object in the circuit court, on appeal from the justice court, to the want of service of summons in the latter court. *K., C. & M. R. R. v. Summers*, 45 Ark. 295; *Hopkins v. Harper*, 46 Ark. 251. It was the duty of the justice of the peace on or before the first day of the next term of the circuit court after the appeal had been allowed by him to file in the office of the circuit clerk a transcript of his docket entries and the process and papers in the suit. Section 4670, Kirby's Dig. It was the duty of appellees here to see that the transcript was lodged with the circuit clerk as the law requires, and, upon failure to do so, it was in the discretion of the circuit court to dismiss the appeal or affirm the cause for the failure to prosecute. *Wilson v. Stark*, 48 Ark. 73, 2 S. W. 346; *Smith v. Allen*, 31 Ark. 268; *McGehee v. Carroll & Jones*, 31 Ark. 550; *Hughes v. Wheat*, 32 Ark. 292. It was to call forth this discretion of the court that appellant filed the transcript from the justice docket, and moved for an affirmance of judgment of the justice. He was entitled to the relief asked. *Wilson v. Stark*, supra.

The court erred in rendering judgment for the appellees. The judgment is therefore reversed, and judgment is rendered here in favor of appellant against appellee for the

amount of the judgment of the justice of the peace, with interest thereon from the day of its rendition.

ST. LOUIS SOUTHWESTERN RY. CO. v. LEDER BROS.

(Supreme Court of Arkansas. July 13, 1908.)

1. TRIAL — INSTRUCTIONS — CONFLICTING INSTRUCTIONS.

In an action for the failure of the carrier to furnish cars for the shipment of freight, an instruction given for plaintiff, correctly stating the general duties of carriers, and an instruction given for defendant, correctly stating what will excuse a carrier for nonperformance of its duties, are not in conflict, and, when read together, they state the law, though the instructions would have been clearer had the excuse been stated with the general duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

2. SAME.

Where instructions clearly state the law, and, when considered together, they present every proper view of the facts, and are not in conflict, there is no error in presenting them separately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

3. CARRIERS — FAILURE TO FURNISH CARS — DAMAGES.

That a shipper suing for the failure of a carrier to furnish cars for the shipment of hay could have secured cars in subsequent months, and that the market was as good as when cars were demanded and refused, did not limit his recovery to nominal damages.

4. SAME.

Where a carrier failed to furnish cars for the shipment of hay and the necessities of the shipper required him to sell the hay at the local price, he could recover the difference between the local price and what he could have obtained in the desired market.

5. SAME.

The mere fact that a commodity intended to be shipped is not on the platform of the carrier is not an excuse for the carrier's failure to furnish cars, when the commodity is under the control of the shipper, and ready for shipment in the usual way.

6. APPEAL AND ERROR — REVIEW — IMMATERIAL QUESTIONS.

Where sufficient undisputed evidence sustained the amount of the recovery for the failure of a carrier to furnish cars, the fact that other damages not recoverable were claimed was unimportant.

Appeal from Circuit Court, Prairie County; T. P. Atkins, Special Judge.

Action by Leder Bros. against the St. Louis Southwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. H. West and J. C. Hawthorne, for appellant. Trimble, Robinson & Trimble, for appellees.

HILL, C. J. This is the second appearance of this case here. See 79 Ark. 59, 95 S. W. 170. On the reversal, there was a trial resulting in a verdict in favor of the plaintiff for \$240, and the railroad company has appealed. The substance of the facts will be found in the

statement of facts, with such instructions as here commented upon.

It is contended that the second and third instructions, given on behalf of the plaintiff, are in conflict with the third and fourth given on behalf of the defendants. The second and third instructions are correct general statements, and the third and fourth, given at the instance of the defendant, are also correct statements where applicable to excuse the carrier for a failure to perform its duties. It would have been better form, and would have made the instructions more clear, had the rule constituting the excuse been stated along with the rule stating the general duty resting upon the carrier of furnishing cars. But, as has frequently been said by this court, all of the law of the case cannot be stated in one instruction; and, so long as all of the instructions are each correct statements, and, when considered together, present every proper view of the facts, and are not in conflict with each other, there is no error in presenting them separately. What was said in *St. L. S. W. Ry. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112, is applicable here: "Criticism is made of some of the instructions, in that they seem to permit a recovery if the jury find the defendant guilty of negligence without the qualification, 'and unless they find the deceased not guilty of contributory negligence.' Taking these instructions as a whole, the court think they make it clear to the jury that contributory negligence on the part of deceased would defeat a recovery, even should they find the defendant guilty of negligence. It is generally impossible to state all the law of the case in one instruction; and, if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others"—citing authorities. The defendant endeavored to have the court instruct the jury that if the plaintiff could have procured cars in January and February to ship their hay, and the market had not depreciated, or was as good as in December, that no recovery other than for nominal damages could be had for the hay which was sold before the market price fell. The court properly refused to give this instruction. This theory would require the shipper to await the turn of the market to find out whether the railroad company had injured him by failing to furnish him cars. If there should be a rise in the market in the price of the commodity he was offering, he would be benefited by the refusal of the railroad company to furnish him cars. If the market price fell, he would be more greatly damaged than had he sold at the price obtaining at the time of the refusal. If he continued to hold his commodity and the price went down, the railroad company could well have contended in a suit claiming the difference in price when the goods were offered and that to which it had

fallen later that they were only liable for the price that prevailed at the time they failed to furnish him with cars. In this case the business necessities of the parties required them to sell the hay at the price prevailing in the locality, instead of getting a better price elsewhere, which they would have received had they been able to ship to the desired market. That difference was the true measure of damages. 3 *Hutchinson on Carriers*, § 1366; *St. L., I. M. & S. Ry. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *Crutcher v. C., O. & G. Ry. Co.*, 74 Ark. 358, 85 S. W. 770; *C., O. & G. Ry. Co. v. Rolfe*, 78 Ark. 220, 88 S. W. 870.

Defendant asked an instruction that the plaintiffs could not recover damages for the depreciation in the price of so much of the hay as was on their farm, five miles from the station. The facts were that the hay which the plaintiffs desired to ship was stored partly at their warehouse near the station and partly in a barn on their farm, five miles distant. Whenever the plaintiffs got a car they loaded the hay from the warehouse near the station, or hauled it from their barn on the farm. This was the customary and usual method of shipping hay. It is undisputed that the plaintiffs had the hay under their control and ready for shipment as soon as cars were furnished therefor; and it cannot be questioned that they in good faith demanded cars to ship this identical hay, which was ready for shipment according to the usual method of shipping such commodities when the demand for cars was made. The shipper has a reasonable time, after his car arrives, to load it. This is not a question of delivery to the carrier, but is a question of furnishing cars in order that the shipper may make delivery to the carrier. The mere fact that the commodity was not on the platform is not an excuse for failing to furnish cars when the commodity is under control of the shipper and ready for shipment in the usual way such commodity is shipped. *St. L., I. M. & S. Ry. Co. v. Ozler* (Ark.) 110 S. W. 593; *St. L., I. M. & S. Ry. Co. v. Wynne Hoop & Cooperage Co.*, 81 Ark. 373, 99 S. W. 375.

The verdict is assailed as being excessive; and probably some of the items claimed would not be recoverable. But there is sufficient undisputed evidence to sustain the amount of the recovery, and hence these other matters become unimportant.

The judgment is affirmed.

ST. LOUIS, I. M. & S. R. CO. v. TAYLOR
et al.

(Supreme Court of Arkansas. Sept. 21, 1908.)
1. CARRIERS—FAILURE TO FURNISH CARS—ACTIONS—EVIDENCE.

Where, in an action for the failure of a carrier to furnish cars for the shipment of live stock, the answer denied the allegations of the complaint, and alleged that it entered into a contract for the shipment, which required notice

of any claim for damages within one day after reaching destination, which notice was not given, the testimony of a witness that he, on behalf of plaintiff, requested cars and informed the agent of the number required, etc., was competent under the issues.

2. TRIAL — EVIDENCE — OBJECTIONS—SUFFICIENCY.

Where only a part of the testimony of a witness is improper, a general motion to exclude the entire testimony, without specifically objecting to any particular part, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 248.]

3. APPEAL AND ERROR—HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Where a witness who sent a telegram testified fully as to its contents without contradiction, the refusal to allow a copy or memorandum of the telegram to be read in evidence was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4161-4170.]

4. CARRIERS—FAILURE TO FURNISH CARS—ACTIONS—DEFENSES.

In an action for the failure of a carrier to furnish cars, the fact that, after the damages sued for had accrued, plaintiff and the carrier entered into a contract for the shipment of the freight, did not affect plaintiff's right to recover the damages sustained.

5. SAME.

In an action for the failure of a carrier to furnish cars for the shipment of live stock, the court properly confined the issue to damages growing out of the carrier's failure to furnish transportation in accordance with an agreement made by plaintiff with a station agent; he having authority to receive and ship freight, and therefore implied authority to agree to furnish cars for such purpose on a certain day.

Appeal from Circuit Court, Marion County; B. B. Hudgins, Judge.

Action by H. A. Taylor and others against the St. Louis, Iron Mountain & Southern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is a suit by appellees to recover damages of appellant for an alleged negligent failure on the part of appellant to furnish appellees cars for the shipment of certain cattle and sheep, which appellees tendered to appellant for shipment at the latter's station called Zinc. Appellant denied in its answer all the material allegations of the complaint, and set up that appellant entered into a contract which provided: "That, in the event of any damage to the shipment covered by said contract, appellees would give notice within one day after the arrival of the stock at destination of their intention to present a claim for damages," and alleged that appellees did not give such notice. The testimony of one Hicks on behalf of appellees is substantially as follows: That appellees lived near Everton, Ark., on another railway line, about 16 miles from the town of Zinc, and, failing to get cars at home on Monday, the 5th day of November, 1906, together with Mr. Magness and witness, wrote a letter to Mr. Snoddey at Zinc explaining the situation, and asking for cars in which to ship their stock, and on Thursday Mr. Snoddey called witness over the telephone, and told him that he had 11 cars, and wanted to know how many the

crowd would take. He told the agent he would see the boys, and let him know in an hour. That, when he called up Mr. Snoddey later on the phone, they could not understand each other, and that he got the operator at Yellville to repeat the phone message for him (Yellville being between the two places), telling Mr. Snoddey that Mr. Hicks, Mr. Magness, and Mr. Taylor wanted nine cars, and of that number appellee Taylor wanted two and would load that morning, and that the agent at Zinc replied that he had the cars for them. Appellant asked the court to exclude the testimony of witness Hicks from the consideration of the jury because such testimony was not responsive to the issue in the case. The motion was overruled, and defendant excepted. The testimony of Hicks as to the contract of appellant to furnish cars to appellees on Saturday, November 10, 1906, was fully corroborated by another witness for appellees. On behalf of appellant, witness Campbell testified, among other things, that he was the agent at Yellville, and sent a telegraph message for one Hicks to the station agent at Zinc for cars for Hicks Bros., Magness, and Ramsey; that the appellees were not mentioned in the message. Appellant offered to introduce in evidence the telegram sent by Hicks, above referred to, and a memorandum made by the agent covering his conversation with Hicks, but the court sustained plaintiff's objection to the introduction of such testimony, to which action of the court the defendant at the time saved its exceptions. Appellant introduced the contract under which appellees afterwards shipped their cattle and sheep, containing the following provision: "That as a condition precedent to the recovery for any damages for any loss or injury to live stock covered by this contract for any cause, including delays, the second party will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from point of shipment, or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at the destination to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims, and to any suit or action brought thereon."

The court, over appellant's objection, gave the following instruction: "(1) The court instructs the jury that if you find by a preponderance of the evidence that L. L. Snoddey was in November, 1906, a station agent of the defendant at Zinc, Ark., on defendant's line of railway and in sole charge of the same, and of the business of the defendant at that point, engaged in receiving and shipping

freight for said defendant, and that he entered into a contract as such agent with the plaintiff or another for him to furnish cars for the shipment of cattle and sheep at a specified time, the 10th of November, 1906, as set out in plaintiff's complaint, and that plaintiff in performance of said contract and acting under the same drove his cattle and sheep from home to Zinc, Ark., and there tendered them to said agent for shipment in accordance with said contract, and the defendant failed and refused on its part to comply with said contract by not furnishing said cars at the time agreed upon, you will find for the plaintiff such damages as you may find that he is entitled to." Appellant asked, and the court refused, among others, the following request for instruction: "(2) If you find from the evidence that the plaintiffs did not give notice in writing within one day after the arrival of his stock at its destination to some general officer of the defendant company, or of the delivering line or to the nearest station agent of the defendant company to the place of shipment or of destination of his claim for damages, you will find for the defendant." Appellant duly saved its exception. The verdict and judgment were for appellees, and this appeal was duly prosecuted.

F. M. Mehaffy and J. E. Williams, for appellant. Frank Pace, for appellees.

WOOD, J. (after stating the facts as above). The court did not err in refusing to exclude the testimony of the witness Hicks. He was acting for himself and also for appellees in making the contract with appellant's agent for furnishing cars. Certainly part of his testimony was germane to the issue, and was proper. If it be conceded that certain portions of it were hearsay and improper, the appellant did not specifically object to any particular parts of his evidence. Its motion to exclude was general, and, as the testimony was competent and some portions at least were relevant to the issue, appellants' objection cannot avail. *Central Coal & Coke Co. v. Niemeyer Lumber Co.*, 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570; *Mallory v. Bradmeyer*, 76 Ark. 358, 89 S. W. 551. There was no error in refusing to allow the copy or memorandum of the telegram to be read in evidence. The witness who sent the telegram testified fully as to its contents and the conversation had, and his testimony on that point is not controverted.

The rulings of the court in giving and refusing instructions were correct. The suit was for a failure to furnish cars, and not on a contract of shipment. That was entered into after the damage sued for had occurred to the appellees by appellant's failure to furnish the cars, and cannot affect appellees' right to recover for such failure. *St. Louis, I. M. & S. R. Co. v. Law*, 68 Ark. 218, 57 S. W. 258; *St. Louis S. W. Ry. Co. v. McNeill*, 79 Ark. 470, 96 S. W. 163; *St. L. & S. F. Ry.*

Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75; *St. Louis & San Francisco Ry. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161.

The court did not err in confining the issue to damages growing out of appellant's failure to furnish transportation in accordance with the agreement made by appellees with appellant's station agent at Zinc. He had authority to receive and ship freight, and therefore the implied authority to agree to furnish the cars for such purpose on a certain day. 2 *Hutchinson on Car.* § 630, and cases cited. There was abundant evidence to support the allegations of the complaint. The court declared the law, and its judgment is correct.

Affirmed.

STUCKEY et al. v. LOCKARD et al.
(two cases).

SAME v. STEPHENS et al.

(Supreme Court of Arkansas. July 13, 1908.
On Rehearing, Sept. 21, 1908.)

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—EVIDENCE NOT SHOWN BY RECORD.

Where a chancery cause was heard on testimony preserved in the record, and on oral testimony of various witnesses not preserved, the presumption is that the oral testimony sustains the decree, if that be within the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

2. EXECUTORS AND ADMINISTRATORS—SALES—PURCHASE BY ADMINISTRATOR—VALIDITY.

A purchase by an administrator at his own sale is voidable, and not void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1500.]

3. EQUITY—LACHES—STALE DEMANDS.

Equity will not aid in enforcing stale demands, where the party seeking relief has been guilty of negligence, and has slept on his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 206.]

4. EXECUTORS AND ADMINISTRATORS—PURCHASE BY ADMINISTRATOR—REMEDY OF PERSONS INTERESTED IN ESTATE.

Persons interested in an estate are not confined to the remedy of avoiding a purchase by the administrator at his own sale, but they may elect to have the sale ratified, and hold the representative for the value or price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1590.]

5. SAME.

The right of persons interested in an estate to set aside a purchase by the administrator at his own sale must be exercised within a reasonable time after the purchase became known, as otherwise there will be a presumption of ratification.

6. SAME.

A sale by an administratrix was confirmed in October, 1901. A deed from the bidder to the administratrix was made two days later. Subsequently the administratrix remarried, and died, leaving a will devising her property to her second husband, who sold the premises to a third person about four years after the execution of the deed to the administratrix. The purchaser knew of the heir's claim that the sale by the administratrix was invalid, but he was a purchaser for value, and went into possession. The heirs knew from the time of the

administratrix's sale of the purchase by the bidder and of his conveyance. *Held*, that a suit brought by the heirs subsequent to the purchase by the third person to set aside the administratrix's sale on the ground that she was the purchaser at her own sale was barred by laches.

On Rehearing.

7. APPEAL AND ERROR—CLAIMS RAISED FOR THE FIRST TIME ON REHEARING—REVIEW.

Where laches was pleaded in the answer of defendant and argued in his brief on appeal, the claim that one of plaintiffs was a minor and unaffected by laches, raised for the first time on rehearing after the reversal of the judgment for plaintiffs, will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3242.]

Appeal from Jackson Chancery Court; Geo. T. Humphries, Chancellor.

Separate suits by Elizabeth Lockard and others against Lynn Turley and others, and by same plaintiffs against George K. Stephens and others. From decrees for plaintiffs in each case, defendants in each case appeal. Decree in first case affirmed, and in second case reversed and remanded.

Separate appeals were taken in these cases, but they have been abstracted and briefed, and considered together. No. 135 is for the recovery by the heirs at law of Adam Bach of lot 3, block 30, Davis' addition to the city of Newport, which had been sold to Geo. K. Stephens as hereinafter explained. No. 143 is for the recovery by the said heirs of lot 2 same block, which had been sold to Lynn Turley.

The appellees' counsel thus state the case: "These suits were brought by the heirs at law of Adam Bach, deceased, to set aside an administratrix's sale of lots 2 and 3, in block 30, of Davis' addition to the city of Newport, in Jackson county, Ark., on the ground that the administratrix purchased the lots at her own sale through her agent, S. M. Stuckey. The complaints alleged that S. M. Stuckey, acting for the administratrix, bid in lot No. 2 for \$395, and lot No. 3 for \$307.50; that no deed was executed or delivered by the administratrix to Stuckey; that two days after the sale Stuckey conveyed both lots to the administratrix by deeds reciting the exact consideration bid by Stuckey; that Stuckey was a mere conduit for the title from Lalla R. Bach, as administratrix, to her individually; and that no consideration actually passed between the administratrix and Stuckey, nor was any consideration intended to be passed. The answers admit the administratrix's sale; admit that no money was paid by Stuckey to the administratrix; allege that no consideration was paid because Stuckey sold the lots to the administratrix for the exact amount bid by him before the purchase price became due; and allege improvements, and that the administratrix had paid off a mortgage on the lots for which reimbursement was claimed. The answers also allege that Stephens and Turley were innocent purchasers for value

without notice. Adam Bach died on the 7th of October, 1899, seised and possessed of a considerable estate, consisting of real and personal property. He left a widow, Lalla R. Bach, an infant child, who soon after died, and several brothers and sisters, who are the plaintiffs in these suits. On the 18th of October, 1899, Lalla R. Bach was appointed and qualified as administratrix of his estate. On the petition of Mrs. Bach, the homestead was set apart to her, and commissioners were appointed to assign her dower. The commissioners reported that the real property belonging to the estate had a total valuation of \$10,170; that there was a mortgage on lots 2 and 3, in block 30, Newport, Ark., amounting to \$2,413.65; that the net value of the real property, after deducting the mortgage debt, was \$7,756.35; and that the value of the dower interest, being one-third of the net value of the real property, was \$2,585.45. The commissioners further reported that the value of lots 2 and 3, in block 30, was \$5,000; that the incumbrances on them was \$2,413.65; and that the net value of the lots was \$2,586.35. As the estimated value of the dower interest was \$2,585.45, and the net value of lots 2 and 3 was \$2,586.35, the commissioners set aside lots 2 and 3 to the widow for her dower, subject, of course, to the incumbrance which she would have to discharge. * * * Subsequently the administratrix filed a petition in the probate court, praying for an order to sell the real property belonging to the estate for the payment of debts. The petition described the real property, and included the reversionary interest in lots 2 and 3, in block 30, in which a life estate had been vested in the widow as her dower. * * * On the 8th day of May, 1901, the court granted the petition, and made an order of sale. This order describes specifically each piece of real property, and the lots in controversy were described as 'the reversionary interest in lots two and three in block thirty in Davis' addition to the city of Newport.' On the 22d day of October, 1901, the administratrix filed a report of the sale, reciting, among other sales, as follows: 'The reversionary interest in lot 2, block 30, Davis' addition, Newport, to S. M. Stuckey, \$395.00; the reversionary interest in lot 3, block 30, Davis' addition to the city of Newport, to S. M. Stuckey, for \$307.50.' On the same day, October 22, 1901, the sale was approved and confirmed. On the same day the administratrix signed and acknowledged a deed from herself as administratrix to S. M. Stuckey, purporting to convey to him the reversionary interest in lot No. 2 for \$395 and the reversionary interest in lot No. 3 for \$307.50. While this deed bears date the 22d of October, 1901, it was not filed for record until August 24, 1905, and the proof shows that the deed was never, in fact, delivered to S. M. Stuckey. It was filed for record long after the death of Lalla R. Bach, the administratrix. On the

24th day of October, 1901, S. M. Stuckey conveyed to Lalla R. Bach lots 2 and 3 by a deed which recites a consideration of \$702.50. This is the sum of \$395 bid by Stuckey for lot No. 2, and \$307.50 bid by Stuckey for lot No. 3. Lalla R. Bach afterwards intermarried with W. L. McGee. Upon her death she devised all of her property, including lots 2 and 3, to W. L. McGee. On the 1st of September, 1905, McGee conveyed lot No. 3 to George K. Stephens, who is the defendant in case No. 135, for \$2,200. The deed recites that \$500 was paid in cash, and that the balance of \$1,700 was evidenced by a note due November 1, 1906. On the 7th day of September, 1905, McGee conveyed lot No. 2 to Lynn Turley, the defendant in case No. 143, for \$2,300. The deed recites that \$500 was paid in cash, and that the balance of \$1,800 was evidenced by a note due November 1, 1906. Each deed retained a lien for the unpaid purchase money. The complaint alleges that the administratrix, acting through her agent, S. M. Stuckey, purchased the two lots in controversy at the administratrix's sale. It is admitted that Stuckey bid in the lots, and that he afterwards conveyed them to Mrs. Bach. It is also admitted that Stuckey paid nothing on his bid. He attempts to explain this by saying that he sold to Mrs. Bach at the same price at which he purchased and before his purchase money became due."

For the purposes of the decision it is not material to review the evidence. The findings of the court will be accepted as correct. In the Stephens Case the court found "that within a short time after said sale the said S. M. Stuckey entered into a contract to sell and convey the said reversionary interest so purchased by him to the administratrix, Lalla R. Bach, which contract was made before the confirmation of said sale, on the 22d day of October, 1901; that said contract was carried out by the execution of a deed from the said S. M. Stuckey to the said Lalla R. Bach on the 24th day of October, 1901, conveying said reversionary interest to her; that the legal effect of said contract was to render the said administratrix a purchaser of said reversionary interest at her own sale; that the defendant, Geo. K. Stephens, purchased the said lot 3 with full knowledge of the facts availing said administratrix's sale," and gave judgment for the recovery of the property, and appointed a commissioner to state an account between the plaintiffs and the defendant Stephens. In the Turley Case the court made a similar finding. In the decree in the Turley Case, which was tried at a term subsequent to the trial of the Stephens Case, the record recites that it came on to be heard on the pleadings, which were mentioned, "and the depositions of S. M. Stuckey, C. R. Hite, Geo. K. Stephens, W. L. McGee, and Lynn Turley and M. B. Brewer, the oral testimony of M. M. Stuckey, S. M. Stuckey, J. W. Phillips, C. M. Erwin,

and Geo. K. Stephens, the abstract of title, the indemnifying bond referred to in the deposition of Geo. K. Stephens," etc. In other respects the decree in the Turley Case was similar to that in the Stephens Case. The defendants in each case appealed.

Stuckey & Stuckey and Jos. W. Phillips, for appellants. Murphy, Coleman & Lewis, for appellees.

HILL, C. J. (after stating the facts as above). 1. So far as the appeal in case No. 143, designated in the statement of facts as the Turley Case, is concerned, the decree must be affirmed, because it shows that the case was heard upon certain testimony which is preserved in the record and the oral testimony of various witnesses which is not made part of the record. There is no bill of exceptions preserving the oral testimony, and the presumption is that the oral testimony would sustain the decree. It is not contended that the complaint does not state a cause of action or that the decree is beyond the issues. This subject is discussed in the case of *Rowe v. Allison* (this day decided) 112 S. W. 395.

Decree affirmed.

2. So far as No. 135, the Stephens Case, is concerned, the record is complete, and enables the court to dispose of it upon its merits. If it be conceded that the testimony adduced support the allegations that Stuckey was a mere conduit through which the title passed from Mrs. Bach as administratrix to Mrs. Bach individually—a point argued at some length—yet plaintiffs' (appellees') evidence lacks an essential element to enable them to recover in a court of equity. In the case of *Crawford Co. Bank v. Bolton* (this day decided) 112 S. W. 398, the authorities are reviewed, and the principle declared that the purchase by an administrator at his own sale is voidable, and not void. The sale of the property was confirmed on the 22d day of October, 1901, and a deed from Stuckey to the administratrix made on the 24th of October, 1901. Thereafter the administratrix married, and afterwards died, leaving a will in which she devised the property to her second husband, and he sold the same for value to Stephens on the 7th day of September, 1905. Although the court found that Stephens had knowledge of the claim of the Bach heirs, still it is an undisputed fact that he was a purchaser for value, and went into possession under his purchase. This suit was brought on the 25th of October, 1905.

In addition to the facts stated in the statement of facts, Mr. Stuckey's testimony is undisputed that Miss Bach, through her attorney, bid on both the lots at the administrator's sale, and one of them was struck off to her, but her bid was withdrawn, and Stuckey's bid then was accepted. It is also established that the purchase price was paid by the administratrix, and was used to pay

the debts of the estate. It is evident that the heirs of Bach knew from the time of the sale of the purchase by Stuckey, and immediately thereafter they had knowledge, or means of knowledge, that he conveyed to the administratrix, and that the money was paid into the estate. All the facts that have been brought into evidence in this case were known to them at that time, or by reasonable diligence could have been known to them. Chief Justice English, for this court, said: "But where the statute is not relied on as a defense, or where there is no statute of limitation, a court of equity will not aid in enforcing stale demands, where the party had been guilty of negligence and slept upon his rights. The chancellor refuses to interfere after an unreasonable lapse of time from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost [citing authorities]. No precise rule, applicable to all cases, as to what lapse of time will constitute a demand a stale one, in the sense above indicated, can be declared. Each case must, to some extent, depend on its own circumstances, and will be construed or modified by them, and by analogy to other known and settled rules of law." *Wilson v. Anthony*, 19 Ark. 16. See, also, *Cook v. Martin*, 75 Ark. 40, 87 S. W. 625, 1024.

To come to the precise point of this case, the principle controlling it is thus stated: "It follows that interested persons are not confined to the remedy of avoiding the sale, but have the right to elect whether they will have the sale set aside or ratify it and hold the representative as trustee for the value or price. The right to have the sale set aside must be exercised within a reasonable time after the irregular purchase has become known to the person seeking its avoidance, as acquiescence in the sale for a long time will create a presumption of ratification." 18 Cyc. 772. Mr. Justice Scholfield for the Illinois court said: "Numerous cases have been decided by this court where delay for a much less period than that fixed by the statute of limitations has been held to preclude the right of the party to bring the suit. In such cases, it is said, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, the prosecution of the suit; and no general rule can be laid down for the guide of the court in every case." *Williams v. Rhodes*, 81 Ill. 571. And in that case a delay of five years and one month was held unreasonable. In the recent case of *Brinkerhoff v. Brinkerhoff*, 226 Ill. 550, 80 N. E. 1056, where the facts are strikingly similar to those at bar, and the delay about the same as in this case, the court said: "Moreover, the sale was voidable, and, while laches from delay cannot arise until knowledge has been acquired by those who are charged with it, and a party is not held to the same diligence to discover fraud

where the person charged therewith is in the relation of trust and confidence which requires him to disclose the truth to the other, yet it is plain appellants, from the day of the sale, knew that Taylor had advanced money for the loan. There is nothing to show that there was any diligence, until after his death, to find out as to his actual interest in the land. Henry Brinkerhoff remained in open, notorious possession, controlling and managing the land, from the time of the sale. So far as this record discloses, Taylor Brinkerhoff never claimed that he had any interest in it of any kind or nature. His brothers and sisters never asked him what his interest was. There is no reason to suppose, from his talk with them as to advancing the money, that he would have concealed the actual state of affairs, had inquiry been made." So, in this case, there is absolutely no fact now brought to the court that could not have been brought to the court the day after the deed of Stuckey to Mrs. Bach was executed. In the meantime the property passed into the hands of Mrs. Bach during her lifetime, and to her second husband as her devisee, and finally into the hands of third parties before action was taken, and the time which has elapsed is over four years. The court holds the time is unreasonable in view of the situation of all the parties and the changing circumstances, and that this lapse of time has indicated an acquiescence in the receipt of the purchase money by the estate, and that it is too late now to order its restitution, and, in lieu thereof, the recovery of the property by the heirs.

The judgment is reversed, and cause remanded, with directions to dismiss the complaint.

On Rehearing.

Appellee asks for a rehearing, and the first matter presented is a consideration of the facts constituting laches. The court has carefully considered the argument made, and it fails to carry conviction.

In addition to this argument, it is said that one of the plaintiffs was a minor when the transaction occurred, and is still a minor. It is argued that a minor is not to be deprived of his inheritance on the ground of laches, and authorities are cited to that effect. Counsel say: "As the court does not allude to his minority in the opinion, we are convinced that in the stress of the adjourning hours the court overlooked it." A re-examination of the abstracts and briefs shows that counsel on both sides overlooked this fact, if it is a fact. It is not mentioned in either the abstracts or the briefs; nor is it mentioned in the transcript other than in the style of the complaint, which contains the names of all of the plaintiffs including "Peter Bach, minor, by his next friend, Elizabeth Lockard"; but there is neither allegation nor evidence that Peter Bach is a minor.

Laches was pleaded in the answer and argued at length in the brief for appellants, and the first time that it is claimed that one of the parties is a minor and unaffected by laches is in the motion for rehearing.

The motion for rehearing is denied.

WESTERN UNION TELEGRAPH CO. v. SHOFNER.

(Supreme Court of Arkansas. July 13, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—OVERRULING OBJECTIONS—MISJOINDER OF PARTIES.

Where separate actions against two defendants could have been consolidated pursuant to Act May 11, 1905, p. 798, No. 339, authorizing the consolidation of causes of action of like nature, the overruling of an objection for misjoinder of the two defendants in one action was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 4070.]

2. EVIDENCE—SUFFICIENCY—TESTIMONY OF PARTY.

In an action for damages for mental anguish from delay of a telegram announcing the critical illness of plaintiff's mother, positive testimony of plaintiff and of R., in whose care the telegram was addressed, that, if the telegram had been promptly delivered to R., it would have been sent to plaintiff immediately, and that plaintiff would have attended her mother's funeral, when uncontradicted by direct evidence or circumstances, was properly credited by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2438.]

3. TELEGRAPHS AND TELEPHONES—DELAY IN TRANSMISSION—ACTION—EVIDENCE.

In an action for mental anguish caused by delay of a telegram, whereby plaintiff was prevented from attending her mother's funeral, evidence that according to train schedules plaintiff could have reached the place of the funeral in time, if the telegram had been promptly delivered, made out a prima facie case that she could have arrived in time, and plaintiff was not bound to negative the contingencies of wrecks, washouts, or other accidents which might have delayed her arrival.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 63.]

4. SAME.

Where, in an action for the failure of a telegraph company to deliver to the sendee a message announcing the critical illness of her mother at a distant town, thereby preventing her attendance at the funeral at another town, the sendee testified that her mother lived at the latter town, and that her mother would be buried there, and that, if the message had been promptly delivered, she would have attended the funeral at the latter town, sufficiently showed that she would have been present at the place where the funeral was in fact held.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 63.]

5. SAME.

A message delivered to a telegraph company for transmission which recited, "Mother can live but a few hours," was sufficient on its face to charge the company with notice of damages which might result from negligence in handling it.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Action by Mrs. T. W. Shofner against the

Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearona, W. C. Rodgers, and Rose, Hemingway, Cantrell & Loughborough, for appellant. W. P. Feazel, for appellee.

MCCULLOCH, J. This is an action instituted by Mrs. T. W. Shofner to recover damages resulting from alleged negligent failing of the telegraph company to properly transmit a telegram informing the plaintiff of the critical illness and impending death of her mother. Mental anguish is alleged to have been endured by her on account of being denied the privilege of attending her mother's funeral. The plaintiff resided at Corinth, Ark., a village in Howard county, about seven miles from Nashville. Corinth is off the railroad, and has no telegraph or telephone connections, Nashville being the nearest point of communication. Her mother was at Rule, Tex., and her brother, C. W. Bacon, filed with the agent of the Western Union Telegraph Company at Rule on April 27, 1907, the following message, and paid the tolls thereon: "Mrs. T. W. Shofner, Corinth, Ark. via Nashville, Ark. Care Will Rountree. Mother can live but a few hours. [Signed] C. W. Bacon." The message was transmitted over the wires of the Western Union Telegraph Company from Rule, Tex., to Hope, Ark., thence to Nashville, over the wires of the Arkansas & Louisiana Railway Company; the latter company being engaged in operating a telegraph line for public service between the two last-named points. Before the message was delivered to the plaintiff or to Will Rountree, the words "care Will Rountree" were omitted therefrom, and the alleged negligence upon which the action is based consists in this omission. The testimony, though conflicting, tends to establish the fact that the message contained the words when it was filed with the Western Union for transmission, and the undisputed evidence shows it was not contained in the message delivered by that company to the Arkansas & Louisiana Railway Company. So it may be treated as established by the verdict that the words in question were negligently omitted from the message by the servants of the Western Union. The action was instituted and progressed to trial against both companies, but, after the testimony was all in, the court gave a peremptory instruction to the jury to return a verdict in favor of the railway company. Will Rountree, the person originally named in the message, resided at Nashville, and was closely related by marriage to Bacon, the sender of the message. The message reached Nashville at 5:30 p. m. on April 27th; but, as it contained no directions concerning delivery, and the operator at that place had no information concerning the means of delivering it through Will Rountree, he resorted to the only method at his

command in mailing it to Mrs. Shofner at Corinth, and, as there was no mail until two days later on Monday, April 29th, the message did not reach her until that day, which was too late for her to attend the funeral of her mother, who died on Sunday, April 28th, at Rule, and was buried on Tuesday, April 30th, at Abilene, Tex. The evidence tends to show that, if the omitted words had remained in the message, it would have been delivered to Rountree Saturday evening, that he would have sent it out to plaintiff the same evening, and that the latter could and would have attended the funeral of her mother. The evidence shows that, if she had received the message in time, she could have left Nashville at 8:30 a. m. on Sunday, April 28th, and by ordinary railroad travel reached Abilene at 4:27 p. m. on April 29th, which would have been 17 hours before the funeral. The jury returned a verdict in favor of the plaintiff against the Western Union Telegraph Company, assessing the damages at \$500, and said defendant appealed.

Misjoinder of the two defendants in one action is assigned as error; the court having overruled a motion to strike out the name of one of the defendants on the ground that the complaint did not state a case of joint liability. This motion should have been sustained; but, as separate actions against the two defendants could have been consolidated and tried together, pursuant to the statute (Act May 11, 1905, p. 798, No. 339), authorizing the consolidation of "causes of action of like nature or relative to the same question," no prejudice resulted from the ruling. *Mahoney v. Roberts* (Ark.) 110 S. W. 225.

It is earnestly insisted that plaintiff has failed to make out a case for damages, because it is too uncertain whether or not Rountree would have promptly sent the message out to plaintiff at Corinth if it had been delivered to him in time, or whether she would have gone to her mother's funeral if she had received the message in time, or whether the train ran on schedule time between Nashville, Ark., and Abilene, Tex., on the occasion named. The jury had before them the positive assertions of plaintiff and Rountree that the message would have been

delivered in time, and that plaintiff would have attended her mother's funeral but for the negligence of the defendant. There is nothing in the circumstances of the case to contradict them, and the jury were warranted in finding that the statements were true. Proof that, according to the train schedules, plaintiff could have left Nashville at 8:30 Sunday morning and reached Abilene at 4:27 Monday afternoon, made out a prima facie case sufficient to warrant a finding by the jury that she could have reached there in time for the funeral. It was not a question of presumption, but one of proof, and the court properly refused to give any instruction as to a presumption either way about trains running on schedule time. Of course, there might have been washouts or wrecks which hindered the running of trains so that plaintiff could not have reached Abilene until after the funeral; but those are unusual things which need not be negatived in the evidence. Plaintiff might, in driving from Corinth to Nashville, have encountered a swollen water course which prevented passage, or her horse might have run away and crippled her, so that she could not travel, but those were contingencies more or less remote which it was not necessary to negative.

It is also contended that, as the telegram did not mention the place of burial, the delay in delivery could not have prevented plaintiff from going to Abilene, and that defendant is not liable for the alleged mental anguish caused by the negligent omission of the words from the message. Mrs. Shofner testified that her mother lived at Abilene, and she knew that the burial would be at that place and she would have gone there, notwithstanding the fact that her mother was sick at Rule. The message on its face related to sickness and death, and was sufficient to charge the telegraph company with notice of damages which might result from negligence in handling it.

There are other assignments of error which are not deemed of sufficient importance to discuss. The case was fairly tried, and the evidence sustains the verdict.

Affirmed.

COLE v. NORTH AMERICAN LEAD CO.
(St. Louis Court of Appeals. Missouri. March 31, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

That near a planing machine were some shavings on the floor on a block of wood in which the operator stepped, throwing him off his balance, causing his hand to get in the knives of the machine, was not actionable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 179-205.]

2. SAME—GUARDING MACHINERY—"SHAFTING."

The knives of a planing machine, set in a rotating cylinder or axle, are not shafting, within Rev. St. 1899, § 6433 (Ann. St. 1906, p. 3217), requiring "the belting, shafting, gearing and drums" in manufacturing establishments, when so placed as to be dangerous to employees, to be guarded when possible; the connection showing that the statute is intended to apply, not to tools proper, but to mechanical devices by which the tools are operated, and section 4160 requiring all words used in a law, except technical ones, to be given their usual sense, and technical words to be given their import as used by experts.

3. SAME—CONTRIBUTORY NEGLIGENCE.

The operator of a planing machine, who started it up, then raked some shavings from under it with his left hand, with the other not far from the planer knives, and, rising from his stooping position, stepped on a block of wood covered with shavings, which turned, throwing him off his balance, and his right hand against the knives, was not guilty of negligence as matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1084-1132.]

4. WORDS AND PHRASES—"SHAFT."

The word "shaft" is defined as an axle, mandrel, arbor, or other long and usually cylindrical bar, especially if rotating, and subject to torsional stress; a lengthy shafting.

Appeal from Circuit Court, Madison County; Chas. A. Killian, Judge.

Action by one Cole against the North American Lead Company. Judgment for defendant. Plaintiff appeals. Affirmed and certified to the Supreme Court.

B. H. Boyer and Jerry B. Burks, for appellant. E. D. Anthony and J. F. Lee, for respondent.

GOODE, J. This plaintiff lost part of his right hand in consequence of its slipping against the knives of a planing machine in defendant's factory, and instituted this action for damages. The machine consisted of a metallic table, with a smooth surface. The table, which was about a foot in width, was divided into two sections; the section in front of the knives being adjustable at different heights. Between the two sections were the planing knives. They were set in a metallic cylinder or axle which rotated rapidly. In planing, the operator would lower the adjustable table so the surface of the board to be planed would be cut to the proper depth, and would then slide the board against and over the knives, passing it over the stationary end of the table behind the knives. The pedestal on which the table was placed had two open-

ings in the side under the table and near the floor. Shavings would fall into this pedestal, and either pass out at the opening or be raked out by the operator. If allowed to remain in the pedestal, they would choke the machine. The shaft or axle on which the knives were fixed was run by a belt leading to a shaft in the floor of the shop, which shaft was, in turn, connected with a belt running on a countershaft near the ceiling. All the machinery in the room was operated by power transmitted from the engine room by shafting. This plaintiff, in obedience to an order from his foreman, undertook to plane a piece of timber. At the time the planing machine was idle, but plaintiff adjusted the belting so as to set it in motion. After it had started, he stooped to rake some shavings from the pedestal with his left hand, having his right hand not far from the knives at the time. As he raised from his stooping posture, he stepped on a block of wood lying on the floor and covered with shavings. The block turned, throwing plaintiff off his balance and his right hand against the knives of the planer, which lopped off a portion of three of his fingers and his thumb. At the conclusion of the testimony the court directed a verdict for defendant, and plaintiff appealed.

A careful study of the pleadings and evidence has satisfied us there is only one question of doubt raised on the appeal; that is, whether or not the planing machine ought to have been guarded in obedience to the statute, which says: "The belting, shafting, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Rev. St. 1899, § 6433 (Ann. St. 1906, p. 3217). The petition avers it was possible at all times to securely guard the planing machine and knives and thereby make them safe, and asks damages for failure to guard them, and does not count on negligence in not posting notices that the knives were unguarded on the theory that it was impossible to guard them. Other assignments of negligence are contained in the petition, based on the failure of defendant to guard belts, pulleys, and other shafting in the room, and on allowing debris and shavings to accumulate on the floor of the room; but we are satisfied no case was made on those facts. Omission to guard other portions of the machinery was not the proximate cause of the accident, and the circumstance that some shavings were on the floor was not actionable negligence. Unless the defendant was remiss in omitting to guard the knives of the planer, the case must be classed as an accidental casualty for which the defendant is not responsible. Plaintiff testified the

knives could have been guarded without interfering with the use of the planer, and undertook to state how this could have been done. It is far from clear to our minds that it could have been; but perhaps the question would be for the jury if the machine falls within the scope of the statute. The lower court held the statute "did not apply to working parts of the machine, but only to the parts used in transmitting power—gearing, pulleys, shafting and drums"; that it covered only parts of machinery used "to transmit power to the working parts—belts, shafts, pulleys, and cogwheels." In *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956, a machine precisely like the one by which plaintiff was hurt, as far as we are able to determine from the description in the opinion, was held to come within the statute. The court said, after describing the planer: "We conclude that this horizontal instrument with the knives fastened thereon was 'shafting' in the sense and meaning of the statute. We think it wholly unlike the machine described in *Smith v. Forrester Box Co.*, 193 Mo. 715, 92 S. W. 394, and that the case is not applicable." If the statute required the machine in question to be guarded, it is because it was "shafting" within the meaning of that word as used in the statute. "Shafting" is defined in the *Standard Dictionary* as follows: "A system of stout rods or shafts, usually cylindrical, mounted in bearings and serving to carry pulleys, gear wheels, or the like, for communicating power, as from a motor to machines." Webster defines the word as meaning "a system of connecting shafts for communicating motion." Shafting appears to have a different meaning in mechanics from "shaft," which is defined in the *Standard Dictionary* as "an axle, mandrel, arbor, or other long and usually cylindrical bar, especially if rotating, and subject to torsional stress, as a steamer shaft, a fly-wheel shaft." It is also defined in the same work as "a lengthy shafting." It may be said the metal cylinder in which the knives were set was a shaft without outraging the meaning of the term. So it might be said they were set in an axle or on a rod. A saw rotating on an axle is in a certain sense set on a shaft or shafting; and perhaps the same may be said of other tools. The point is whether the word "shafting" in the statute includes such a meaning. The connection in which the word is used, along with belting, gearing, and drums, indicates the statute is intended to apply, not to tools proper, but to mechanical devices by which the tools are operated; that is, by which power is transmitted to them to rotate them or impart other motion to them. In *Smith v. Forrester Box Co.*, 193 Mo. 715, 92 S. W. 394, it appeared the plaintiff was injured while working with a planing machine, but his injury resulted from his hand being caught between two rollers in the rear of the planing knives over which the planed boards ran. The Su-

preme Court held those rollers were not "shafting" within the sense of the statute, and the proprietor was not required to guard them. We are mindful of the fact that this statute is remedial, and ought to be liberally construed to realize the purpose of the Legislature. *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S. W. 678. But it cannot be extended beyond the meaning its words will bear. It looks to us like the planing knives, though set in a shaft or axle, were in substance a tool, and not shafting, and hence not covered by the statute. The statutes require all words used in a law, except technical ones, to be given their usual sense, and technical words to be given their import as used by experts. Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252). No layman would describe the planer as "shafting," and according to the dictionaries the word "shafting" technically used does not include in its meaning a planer like the one in question.

It is contended for defendant that plaintiff was guilty of negligence contributing to his injury, and hence was not entitled to recover, even if the statute was violated. We find no evidence in the record which would justify a court in holding he was guilty of contributory negligence as a matter of law. The case turned on whether or not the defendant failed to comply with its statutory duty.

We hold it did not, and affirm the judgment; but, as we deem our decision in conflict with that of the Kansas City Court of Appeals in *Millsap v. Beggs*, supra, we certify the cause to the Supreme Court for final decision. It is so ordered. All concur.

TENNENT v. UNION CENT. LIFE INS. CO.
(St. Louis Court of Appeals. Missouri. July 18, 1908.)

1. INSURANCE—LIFE INSURANCE—STATUTES AS PART OF THE CONTRACT.

Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), declaring when suicide shall and shall not be a defense in an action on a life policy, is a part of a Missouri contract of insurance.

2. PLEDGES—CONSTRUCTION OF CONTRACT—WHAT LAW GOVERNS.

The *lex loci contractus* is a part of a contract for the loan of money and the pledge of property as security therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 2.]

3. SAME.

A loan from a foreign insurance company was negotiated at its home office in Ohio. The note containing the contract of pledge was dated at Ohio and made payable there, but was signed in Missouri. The acceptance by the company completing the bargain was made at its home office. *Held*, that the contract was an Ohio contract, and the rights of the parties must be determined by the laws of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 2.]

4. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES.

In the absence of any proof, the courts of a state having a common-law origin will presume

that the law of a sister state having a common-law origin is the same as the law of the forum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

5. COURTS—RULES OF DECISION—PRECEDENTS—COMMON LAW.

Where a decision turns on the construction of the common law of a sister state, the court will follow its own precedents in expounding the rules applicable to a particular transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 322.]

6. PLEDGES—SALE BY PLEDGEE—VALIDITY.

A contract of pledge, which authorizes the sale of the security without notice, at public or private sale, on default in payment, does not authorize a public sale without public notice, though it dispenses with notice to the pledgor, and a public sale without public notice is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 178.]

7. SAME—POSSESSION BY PLEDGEE AFTER INVALID SALE.

Where the pledge remains in the possession of the pledgee after an invalid sale, he continues to hold it as a pledge, subject to the rights of the pledgor as before the sale.

8. SAME—ACTION TO REDEEM—ADEQUACY OF LEGAL REMEDY.

A suit in equity to redeem a pledge after an illegal sale is not maintainable, the remedy at law by an action for conversion being adequate.

9. SAME.

Where, notwithstanding the payment of the debt secured by a pledge or a proper tender thereof, the pledgee continues to withhold the pledge from the pledgor, detain or replevin, lies to reinstate the pledgor in possession.

10. SAME.

A pledgee, who insists that the indebtedness has been paid by the sale of the pledge, waives further tender of the debt.

11. SAME—ENFORCEMENT OF RIGHT OF ACTION PLEDGED.

While the pledgee of a chose in action has, as a general rule, the exclusive right to enforce it at maturity, and the pledgor cannot maintain the suit alone, it is proper to prosecute the suit in the name of both the pledgor and pledgee, so that all parties may be before the court, and their rights determined by the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 191.]

12. ASSIGNMENTS—ACTIONS BY ASSIGNEE.

While at common law the assignee of a chose in action could sue thereon only in the name of his assignor, and while in the courts of equity the assignee, being the real party in interest, could maintain a suit in his own name, the assignee under the Code (Rev. St. 1899, §§ 539, 540 [Ann. St. 1906, pp. 574, 575]), abolishing forms of action, and requiring that the party in interest shall prosecute, may bring an action at law in his own name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 200-203.]

13. PLEDGES—"CONTRACT OF PLEDGE"—NATURE.

A "contract of pledge" is a legal obligation, made by the deposit with the pledgee of personalty as security for a debt or other engagement, with an implied power of sale on default, the pledgor retaining the general ownership, subject to the lien of the pledgee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 1.

For other definitions, see Words and Phrases, vol. 6, pp. 5412-5416; vol. 8, p. 7756.]

14. SAME—ACTION BY PLEDGOR.

The assignor of an obligation or lien as security, if he has an interest in it, may sue to enforce it, but the assignee is a necessary party.

15. SAME.

A beneficiary in a life policy, pledged to the insurer to secure a loan, may, on an invalid sale by the insurer, on default in payment of the loan, and after the death of insured, sue on the policy.

16. HUSBAND AND WIFE—MARRIED WOMEN—ESTOPPEL.

The enabling provisions of the married woman's statute render a married woman sui juris, and the doctrine of estoppel, with respect to persons other than her husband, obtains against her the same as against other persons not under disability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 232-234.]

17. ESTOPPEL—ESTOPPEL IN PAIS—GROUNDS.

The ground on which an estoppel in pais, in the nature of acquiescence by silence, proceeds, is fraud, actual or constructive, on the part of the person sought to be estopped.

18. SAME.

A debtor may lose his right to question the sale of his collateral by acquiescing therein for an unreasonable time, with knowledge of the material facts, especially when during such period the security has greatly increased by value.

19. SAME.

Estoppel by acquiescence in silence is founded on knowledge and assent; and, unless the party against whom the estoppel is invoked knew all the material facts, there is no estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128-135.]

20. SAME.

Insured and beneficiary in a life policy, being man and wife, pledged it to the insurer to secure a loan. Insured and beneficiary signed the note containing the contract of pledge, which permitted insurer on default to sell, without notice, at public or private sale. The insurer sold the policy on default at public sale without public notice. The beneficiary had no personal information that the policy was to be or was sold, and did nothing to encourage the insurer to believe that she acquiesced in the sale. Held, that she was not estopped to assert her rights in the policy, based on the invalidity of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128-135.]

21. SAME.

Insured and beneficiary in a life policy, being man and wife, pledged it to the insurer for a loan. Insured and beneficiary signed the note containing the contract of pledge, and designated insured's business address as the post office address of both. Insured received notice that the policy would be sold for default in payment, and after the sale he received notice thereof and of the amount realized, and acquiesced in the sale. Held, that the designation of the business address of insured as the address of both did not make insured his wife's agent to receive notice of the sale for her, so as to charge her with knowledge thereof which would support an estoppel by acquiescence against her to attack the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128-135.]

22. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—EFFECT.

Where insured, in a life policy pledged to insurer for a loan, was the agent of the beneficiary, who signed the note with him, to receive notice of a sale of the policy on default, only such knowledge could be imputed to the beneficiary as insured possessed as to a sale.

23. ESTOPPEL—KNOWLEDGE OF FACTS.

Where a pledgee's sale of a life policy pledged for a debt was invalid, either because the sale was without public notice, or because not made in a public place, mere knowledge by the pledgor that the sale was invalid for one reason was insufficient to estop her by acquiescence from attacking the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128-135.]

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by May Scott Tennent against the Union Central Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Kinealy & Kinealy, for appellant. James L. Minnis, for respondent.

NORTONI, J. This suit is on a policy of life insurance. The finding and judgment were for the defendant in the circuit court, and the plaintiff prosecutes an appeal.

The plaintiff and her husband, the insured, jointly borrowed a sum of money from the defendant insurance company, and pledged the policy sued upon as collateral security for the loan. Default having occurred, under the stipulations of the collateral note, the insurance company sold the pledge to satisfy the indebtedness, became the purchaser thereof at the sale, and canceled the policy. Thereafter the insured departed this life, and the plaintiff, after offering to pay the loan for which the policy had theretofore been pledged and sold, instituted this suit to recover the amount of the policy, less the loan, notwithstanding the pledge, alleged sale, and cancellation of the policy. The theory of the plaintiff's case is that the sale and consequent cancellation of the policy by the defendant company was invalid, and therefore the policy remains in the possession of the company as pledgee, subject to her rights as general owner, identically as it did prior to the alleged sale.

The material facts out of which the controversy arises are as follows: During the month of December, 1900, John H. Tennent, Jr., negotiated an insurance to the amount of \$4,000 on his life with the defendant company. The policy was made payable to his wife, May Scott Tennent, the present plaintiff. The annual premium was paid by him at the time. By a stipulation to that effect further premiums of the same amount fell due annually on the 15th day of December of each year. The insured paid the premiums which thereafter fell due on the 15th day of December in the years 1901 and 1902, and gave his notes for the premium which fell due December 15, 1903. These notes were outstanding and unpaid on June 25, 1904, at which date the insured and the plaintiff, his beneficiary, negotiated a loan from the defendant company for \$155 on the security of the policy. For this amount the insured and the plaintiff executed their joint promissory note, dated Cincinnati, Ohio, June

25, 1904, whereby they jointly and severally promised to pay to the order of the defendant, Union Central Life Insurance Company, \$155, at its office in Cincinnati, Ohio, with interest at 8 per cent. per annum, payable annually; the note falling due on or before five years after its date. While this note was actually signed by the parties in the city of St. Louis, Mo., the loan was negotiated with the insurance company at Cincinnati, Ohio, and the note was finally accepted and approved by the defendant at its home office. This note is termed a collateral note, and it contains a contract with respect to the collateral pledge of the insurance policy to the defendant as security for its payment. Under this collateral note and contract plaintiff and the insured agreed to keep the premiums paid on the policy, and that if any installment of interest on the note, or any premium on the policy, should become due and unpaid, then the principal and accrued interest on the note should immediately become payable, and for default in the payment of any premium on the policy, or otherwise mentioned, the insurance company was thereby authorized to sell the policy, "at any time or place without notice at public or private sale." The insurance company was further authorized to become the purchaser of the pledge at such sale, if it so desired, at an amount not less than the amount of the indebtedness evidenced by the note; and the insurance company agreed to account to the makers of the note for any surplus, after satisfying the indebtedness. In accordance with the arrangement, which was consummated by the loan, the insurance company applied \$119.04 of the amount of the loan to the payment of the notes given by the insured on December 15, 1903, for the premium on the policy due on that date. The remainder of the amount of the loan, \$35.96, was paid to the insured and his wife, the plaintiff, by draft, and was employed by them for purposes other than the payment of premiums on the policy in suit. The premium falling due December 15, 1904, was not paid, and, the insured having failed to pay the same after demand, the defendant insurance company, on March 15, 1905, mailed notices to both the insured and the plaintiff, who resided in the city of St. Louis, to the effect that, unless the premium of December, 1904, was paid, the policy would be sold at public sale by the insurance company at its office in Cincinnati as for default therein and for the purpose of satisfying the indebtedness evidenced by the note heretofore mentioned. It appears the insured received this notice. It also appears that his wife, the plaintiff, received no notice whatever of the proposed sale of the pledge. Afterwards an agent of the insurance company called upon the insured and discussed the matter of the sale of the policy, to be had on March 31, 1905. The insured said he would be unable to pay the premium, and consented to the

sale, so far as he was concerned. This conversation was with the insured only, however. His wife, the plaintiff, had no knowledge whatever thereof. No public notice of the sale was given. In accordance with the notice theretofore given to the insured and the plaintiff, the policy was sold at public outcry in the defendant's office at Cincinnati, Ohio, on the 31st day of March, 1905. The treasurer of the insurance company acted on its behalf in making the sale. The policy was bid in, at the request of this same officer of the company, by one of its clerks for an amount sufficient to satisfy the note, \$155. There were present at this sale the treasurer of the company, who acted as auctioneer, a clerk in the employ of the company, who acted as bidder for the company, and one other of the company's employés. At the conclusion of the sale the policy was marked "Canceled," placed in the files of the defendant company, and the transaction involving the insurance mentioned, together with the plaintiff's indebtedness, was canceled on the records of the company as of that date. Notice was mailed on the same day to both the insured and the present plaintiff, rendering an account of the sale, merely stating that the policy, No. 216,596, issued to John H. Tennent, had been sold that day, at the company's office, in accordance with notice recently addressed to the insured and beneficiary, for the amount of the loan, for the reason of the nonpayment of the premium on the policy theretofore mentioned, and that the policy had been canceled. This notice the insured received. The notice mailed to the plaintiff to that effect failed to reach her, however. No further premiums were paid on the policy, nor was anything paid or tendered on the note mentioned until after the death of the insured. The insured, John H. Tennent, Jr., came to his death by an act of suicide on May 28, 1906, nearly 14 months after the alleged sale of the policy in pledge. Although no premium had been paid on the policy after that of December 15, 1903, which was paid out of the loan in July, 1904, the policy was possessed of a reserve value amounting to \$244. This reserve value, computed under the rule of our statute (section 7897, Rev. St. 1899 [Ann. St. 1906, p. 3752]) for the purpose of purchasing extended insurance, was sufficient, when applied as a single premium on temporary insurance for the full amount written in the policy, to continue it in force for a considerable time beyond the date of the insured's death. Plaintiff instituted this suit by declaring upon the policy of insurance, and prays for the amount thereof, less the amount of the loan and accumulated interest thereon.

The answer is one of confession and avoidance. It admits the issuance of the insurance policy, payable to the plaintiff, and other material matters, and affirmatively pleads the facts pertaining to the loan of \$155 thereon to the plaintiff and her husband, the

pledge of the policy as collateral security therefor, and the alleged public sale of the pledge for default on the note, and the purchase and cancellation of the policy. Replying to this affirmative defense, the plaintiff alleges that the pretended sale of the pledge was invalid and of no effect, and therefore the policy remained in full force in the defendant's possession, as a pledge collateral to the indebtedness mentioned in the note. It is conceded the policy is a Missouri contract, and that therefore our statute (section 7896, Rev. St. 1899 [Ann. St. 1906, p. 3750]), providing substantially that suicide of the insured shall be no defense to an action on the policy unless it appears the insured contemplated suicide at the time of taking out the insurance, controls this feature of the case. That is to say, this statute is parcel of the contract, and nothing appears tending to prove the insured contemplated suicide at the time of applying for the insurance.

Plaintiff's case proceeds in affirmance of the theory that the sale of the policy by the defendant, under the circumstances stated, was invalid, and that the defendant continued to hold the same as a pledge. This proposition, of course, involves the idea of general ownership in the plaintiff pledgor. To determine this question with the degree of precision of which it is worthy, it becomes essential to ascertain, first, whether we are to look to the Missouri or to the Ohio law pertaining to the sale of pledges for our guidance. The solution of this question to some extent depends upon whether or not the collateral note and contract of pledge is a Missouri or an Ohio undertaking, for the *lex loci contractus* is essentially parcel of the contract. The application for the loan of \$155 on the security of the policy was submitted to the home office of the insurance company at Cincinnati. Although the collateral note containing the contract of pledge was actually signed in this state, the bargain respecting the loan was incomplete until it was approved and accepted by the defendant company at its office in Cincinnati. The note was dated at Cincinnati, and by its terms made payable there. Under these circumstances the collateral note is an Ohio contract. The approval and acceptance of the note in Ohio was the act which rendered the bargain complete. The rights of the parties are therefore to be determined by reference to the law of that state, provided the law of Ohio in respect of such matters is before the court. *Johnston v. Gawtry*, 83 Mo. 339; *Id.*, 11 Mo. App. 322; *Phoenix Mut. Life Ins. Co. v. Simons*, 52 Mo. App. 357; 22 *Amer. & Eng. Ency. Law* (2d Ed.) 1344. There is nothing in the case indicating what the law of the state of Ohio may be. In the absence of proof on this question, it is generally presumed by the courts of one state that the law of a sister state is the same as the law of the forum. *Flato v. Mulhall*, 72

Mo. 522; *Warren v. Lusk*, 16 Mo. 102; *Johnston v. Gawtry*, 83 Mo. 339; *Id.*, 11 Mo. App. 322; *Lucas v. Ladew*, 28 Mo. 342; 13 *Amer. & Eng. Ency. Law* (2d Ed.) 1060. It is true this presumption does not obtain with respect of the common law as to those sister states which we know, as a historical fact, were peopled by countries other than the source of the common law, and were subject to organized and civilized communities emanating from jurisdictions other than those in which the common law obtained. *Clark v. Barnes*, 58 Mo. App. 667; *Bain v. Arnold*, 33 Mo. App. 631; *Flato v. Mulhall*, 72 Mo. 522; *Sloan v. Torry*, 78 Mo. 623; 13 *Amer. & Eng. Ency. Law* (2d Ed.) 1062, 1063; 6 *Amer. & Eng. Ency. Law* (2d Ed.) 280, 281. However this may be, the presumption does obtain with respect to those states having a common origin, formed from the original colonies, and such as have been formed from territory acquired since the Revolution, which was not, at the time of its acquisition, occupied by an organized and civilized community. The presumption obtains with respect to the state of Ohio, carved as it was out of the great northwest territory, which, at the time of acquisition, was not under the jurisdiction of an organized, civilized community other than the United States or England. *Kratz v. Preston*, 52 Mo. App. 251; *Roll v. St. L. & Colo. Smelt. Co.*, 52 Mo. App. 60; *Amer. Oak Leather Co. v. Wyeth Hdw., etc., Co.*, 57 Mo. App. 297; 6 *Amer. & Eng. Ency. Law* (2d Ed.) 280. The reasoning of the law proceeds upon the theory that civilization and government were transplanted to and established in this territory by former residents of those states in which the common law obtained, and therefore they are presumed to have carried to the new country the common law, its principles and traditions, and incorporated them into the Constitutions and the early institutions of the state government. 13 *Amer. & Eng. Ency. Law* (2d Ed.) 1060, 1063; 6 *Amer. & Eng. Ency. Law* (2d Ed.) 280; *Savage v. O'Neil*, 44 N. Y. 298; *Norris v. Harris*, 15 Cal. 226; *Johnston v. Gawtry*, 83 Mo. 339; *Id.*, 11 Mo. App. 322; *Warren v. Lusk*, 16 Mo. 102.

It therefore appears the matter under advisement is to be disposed of in accordance with the principles of the common law, which obtains alike in Ohio and Missouri. In such circumstances, when the decision turns upon the construction of the common law of a sister state, the court will follow its own precedents in expounding the rules applicable to a particular transaction. *St. Nicholas Bank v. State Natl. Bank*, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; *Ray v. Western Pa. Natl. Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; 6 *Amer. & Eng. Ency. Law* (2d Ed.) 283.

The common law pertaining to the sale of pledges, under circumstances very much resembling the case in judgment, has been ful-

ly declared by the court of last resort in this state. These adjudications control the solution of the question now presented. The collateral note stipulated that the policy might be sold for any one of the several defaults therein mentioned, at any time or place, and without notice, at either public or private sale. The sale relied upon by the insurance company in this case is asserted to have been a public sale. In other words, it is not claimed that the pledge was sold under the provisions of the contract authorizing a private sale. The fact is the policy was sold at auction by the treasurer of the company, in the company's office at Cincinnati, and no public notice whatever was given of the intended sale. Now the very idea of a public sale involves, of course, notice thereof to the public, to the end that the public shall be invited as bidders, and, further, that the sale shall be had in a public place, to which the public, one and all, may resort for the purpose. Our Supreme Court construed a pledge contract, containing a provision authorizing a public sale without notice, to mean that such provision, with respect to a public sale, dispenses with notice to the pledgor only, and did not authorize the sale of the pledge without full public notice to that effect. *Laclede Natl. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528; *Hagan v. Cont. Natl. Bank*, 182 Mo. 319, 81 S. W. 171. And likewise, in a case where a contract authorized the pledgee to sell certain stocks held by it in pledge at any place, the same court declared the sale, which was alleged to have been a public sale, had in the Merchants' Exchange, to which only members were admitted, to be invalid, for the reason it was not had in a public place. *Hagan v. Cont. Natl. Bank*, 182 Mo. 319, 81 S. W. 171. In view of these two established propositions in our law the alleged public sale of the insurance policy at the company's private office, and without public notice, was invalid, and therefore the policy remained, at the time of the institution of this suit, in the hands of the pledgee as a pledge, to which the plaintiff sustained the relation of pledgor, and in whom resided the general ownership of the policy; for it is generally true where the pledge remains in the possession of the pledgee after an invalid sale, he continues to hold it as a pledge, subject to all of the rights of the pledgor identically as before the invalid sale. *Hagan v. Cont. Natl. Bank*, 182 Mo. 319-343, 81 S. W. 171; 22 *Amer. & Eng. Ency. Law* (2d Ed.) 892; *Jones on Pledges* (2d Ed.) § 741; *Schaaf v. Fries*, 90 Mo. App. 111; *Sharpe v. Nat. Bank*, 87 Ala. 644, 7 South. 106.

It is urged that, although the sale was invalid and the policy remains in the possession of the defendant as a pledge, this suit cannot be maintained on the policy. There is no doubt a suit in equity, looking to the redemption of the pledge, could not be maintained in these circumstances, for the reason

the law furnishes adequate redress. *Nelson v. Owen*, 113 Ala. 372-376, 21 South. 75; *Jones on Pledges and Collateral Security* (2d Ed.) § 556; 16 Ency. Pl. & Pr. 645, 646; 22 Amer. & Eng. Ency. Law (2d Ed.) 892. The remedy available, and usually employed, where the pledgee has destroyed or converted the pledge to his own use, is trover as for conversion. 16 Ency. Pl. & Pr. 645-648. *Jones on Pledges* (2d Ed.) §§ 556-561; *Southworth Co. v. Lamb*, 82 Mo. 242; *Schaaf v. Fries*, 90 Mo. App. 111. And where, notwithstanding the payment of the debt or a proper tender thereof, the pledgee continues to withhold the pledge from the pledgor, detinue or replevin will lie to the end of reinstating the pledgor in possession. 16 Ency. Pl. & Pr. 649; *Nelson v. Owen*, 113 Ala. 372, 21 South. 75; *Miles v. Walther*, 3 Mo. App. 96; *Schaaf v. Fries*, 90 Mo. App. 111. There is authority for the proposition that, even though the instrument or obligation pledged is an obligation of the pledgee, with the general property residing in the pledgor, as in the case of bank bills issued by a bank, and afterwards pledged to it, as collateral for a loan, trover will lie against the bank, and in favor of the pledgor, for their value in case of conversion. *Jones on Pledges* (2d Ed.) § 562; *Abrahams v. Southwest R. R. Bank*, 1 S. O. 441, 7 Am. Rep. 33. But the form of action here employed is neither that of trover as for conversion, seeking to recover the value of the pledge, nor that of replevin, seeking to acquire possession of the pledge itself. This suit is by the pledgor, and against the pledgee, who occupies the dual relation of pledgee and debtor to the pledgor, in virtue of the obligation contained in the instrument in pawn. The precise question for decision is, can the pledgor in these circumstances maintain a suit against the pledgee, on its obligation contained in the instrument pledged? Learned counsel argues that to say a person can pledge an undertaking as security for a debt, and at the same time retain power to enforce the undertaking during the life of the pledge, involves a contradiction. To sustain the proposition it is insisted that the security derived from the pledge arises from two circumstances: First, the pledgor has no power to resume possession of the article, or enforce the undertaking pledged until the debt is paid; and, second, the pledgee has power or the right to sell upon default. It is said, if the pledgor had the power to resume possession or enforce the obligation of the pledge before payment of the debt, the security sought to be vouchsafed by the contract of pledge would be entirely destroyed. There can be no doubt this argument is entirely sound in respect of pledges generally. It proceeds upon the theory that the debt for which the pledge was given in the particular instance was neither paid nor tendered. It is very true the plaintiff still owes the \$155 indebt-

edness, and interest thereon, to the defendant. There was a sufficient tender of its payment, however, prior to the institution of this suit. This tender was rejected. The defendant asserted that the indebtedness had been paid by the sale of the pledge, the policy canceled, and that, by virtue of the sale, the general property in the policy, theretofore residing in the pledgor, had been entirely divested. Plaintiff was not permitted to pay the indebtedness, for the reason the defendant would not accept it. The formalities of a further tender were waived by the defendant insisting the debt was paid; for it cannot insist that there is no indebtedness and at the same time assert its right to a tender to extinguish the identical debt it insists has been paid. *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396; *Westlake v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *Deichmann v. Deichmann*, 49 Mo. 107; *Whelan v. Reilly*, 61 Mo. 565.

The plaintiff, replying to defendant's answer, avers she still owes the indebtedness mentioned, and prays to be given judgment for the amount of the policy, less the amount of her note and interest thereon. It is true, generally speaking, that the pledgee of a chose in action has the right to enforce it when it becomes due, and that such right is exclusive; that is, the pledgor cannot maintain the suit alone. The pledgee thus suing on or for the value of the pledge occupies the relation of trustee to the use of the pledgor, and recovers, if at all, as such; the obligation being to apply so much of the recovery as is necessary to the extinguishment of the debt, and hold the remainder in trust for the pledgor. *Norton v. Warner*, 3 Edw. Ch. (N. Y.) 106; *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586; 22 Amer. & Eng. Ency. Law (2d Ed.) 894-896; 6 Ency. Pl. & Pr. 639-641; *Jones on Pledges* (2d Ed.) §§ 429, 430. At common law the assignee of a chose in action could sue thereon only in the name of his assignor, while in the courts of equity the assignee, being the real party in interest, could maintain a suit in his own name. The obvious purpose of our Code was to abolish mere fictions of law and forms of procedure, to the end of affording a simple and adequate remedy touching the substance in every case instead. It was therefore provided, in section 539, Rev. St. 1899 (Ann. St. 1906, p. 574), that there shall be but one form of action for the enforcement of private rights; and by section 540 (page 575) that every such action shall be prosecuted in the name of the real party in interest, except as otherwise provided in exceptional cases, which are unimportant here. A contract of pledge is a legal obligation, effectuated by the pledgor depositing with the pledgee personal property as security for an indebtedness or other engagement, with an implied power of sale in the pledgee on default. In such circumstances the pledgor remains possessed of

a general ownership in the property pledged, subject only to the lien of the indebtedness existing in favor of the pledgee. *Ottumwa Nat. Bank v. Totten*, 114 Mo. App. 97, 89 S. W. 65; *Richardson v. Ashby*, 132 Mo. 238-246, 33 S. W. 806; *Brewster v. Hartley*, 37 Cal. 15-25, 99 Am. Dec. 237; 22 Amer. & Eng. Ency. Law (2d Ed.) 864-865.

Although a suit may be prosecuted and a recovery had thereon by the pledgee alone, it is entirely competent, and in fact it comports precisely with the spirit of the Code, for such suit on the instrument pledged to be prosecuted in the name of both the pledgor and the pledgee against the obligor in the instrument, to the end that all parties interested therein shall be before the court that the several rights of the obligor in the instrument, the general owner thereof, and the lienor thereon may be fully determined and finally precluded by the judgment. Indeed it has long been settled that one, who has assigned an obligation or lien as collateral security, may, if he has an interest in it, maintain an action for its enforcement, and that the assignee is a necessary party to such action. *Ridgway v. Bacon*, 72 Hun, 211, 25 N. Y. Supp. 651; *Dickey v. Porter*, 203 Mo. 1-22, 101 S. W. 586. There are remarks to be found in *Dickey v. Porter*, supra, which would seem to extend the doctrine quite beyond what has been said in this opinion. An attentive consideration of the facts of that case, however, will disclose that it was one of exceptional circumstances; and, in view of the fact that the indebtedness for which the tax bill therein pledged had been paid prior to the trial, the judgment of the court given thereon is obviously sound. In that case the suit was by the pledgor to enforce the lien of a special tax bill, held in pledge at the time the suit was instituted. The indebtedness for which the tax bill had been pledged was discharged, however, before the trial; and, upon full consideration, the court declared the pledgor might maintain an action on the obligation, notwithstanding the pledge was outstanding at the time the suit was instituted. The question turned upon the proposition that the pledgor, notwithstanding the pledge at the time of the institution of the suit, was the real party in interest when judgment was given, and that all interests in the tax bill were then before the court and in judgment. It is no doubt true that, where a suit on a pledged instrument is prosecuted by the pledgor alone, without joining the pledgee, and against a third party, who is obligor in the pledged instrument, the recovery, if at all, would be perforce of the pledgor's general ownership in the pledge, and possibly to the exclusion of the pledgee's interests; for the pledgor is not, under those circumstances, a trustee executing the trust to the benefit of the pledgee, as is a pledgee to the use of the pledgor when he recovers on the

pledge. In those circumstances it is quite probable that the third party, the obligor in the pledged instrument, might possibly be subjected to the annoyance of two suits, for there is no doubt as to the right of the pledgee to sue thereon. When we look to the obvious purpose of our Code provision commanding suits to be prosecuted in the name of the real party in interest, it is manifest no such result could be entailed by sustaining the present action; for here, while the pledgor alone is plaintiff, the pledgee, obligor in the instrument pledged, is defendant, and therefore all parties in interest are before the court as parties to the record. The judgment given by the court on such a record essentially disposes of all interests in the controversy, and thus meets and satisfies the fundamental notion involved in the Code provision respecting the real party in interest. We are not disposed to say that prior to the payment of the debt the pledgor alone, without joining the pledgee, can maintain a suit on the obligation of the pledged instrument against the maker thereof, who is a third party, unless the rule of *Dickey v. Porter*, supra, compels it. That case, as we understand it, does not go to the extent of asserting the doctrine mentioned, and if it did, it would not be precisely in point here, for the facts under advisement in the present instance do not present the question suggested; that is, the obligor in the instrument sued upon is not a third party. The court is of the opinion, however, that it is entirely proper, upon the peculiar facts presented by this record, for the pledgor to maintain this suit against the pledgee on the policy, and this, for the reason that while both the pledgor and pledgee are not parties plaintiff, they are both parties to the record, and the judgment of the court will essentially determine as between them all interests in the obligation contained in the pledged instrument, the indebtedness for which it was pledged, and the relative rights of the parties in the fund arising from a recovery on the pledge. It is certain that both pledgor and pledgee could not join as plaintiffs in this action against the defendant insurance company, who is pledgee, and at the same time obligor in the instrument it is holding in pledge, for the reason the defendant could not sue itself; and, were the defendant pledgee a coplaintiff to the action, there would be no defendant against whom to prosecute the suit. Although the pledgor is not possessed of the entire interest in the pledge, the obligor in the instrument pledged being the pledgee thereof, and at the same time defendant in the action, we are persuaded that the spirit of the Code, requiring suits to proceed in the name of the real party in interest—that is, to the end that all parties in interest shall be before the court—is fully satisfied in this instance, and therefore sustain the action in the form it has assumed. *Dickey v. Porter*,

203 Mo. 1, 101 S. W. 586, is at least authority for the principle invoked.

Although the plaintiff was a married woman at the time of the pledge and until the death of the insured, nevertheless the enabling provisions of our married woman's statute render her *sui juris*; and therefore the doctrine of estoppel, with respect to persons other than her husband, obtains against her, identically as it does against other persons not under disability. *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788. It is argued that plaintiff is estopped to assert her rights in the policy; that she acquiesced in the sale thereof. The proof shows affirmatively that plaintiff had no personal information that the pledge was about to be sold, or that it was sold, to satisfy the debt, and that she neither made a statement nor did an affirmative act encouraging the defendant to believe that she acquiesced in or otherwise affirmed the sale of the policy. An estoppel in pais in the nature of acquiescence by silence is relied upon. The ground upon which an estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped. 2 *Herman on Estoppel*, § 944. It is insisted that the silence of plaintiff, with respect to the rights she asserts, for a period of 14 months, and until the pledge had increased from \$244 to \$4,000 in value, operates a constructive fraud at least upon the defendant, and ought therefore to preclude plaintiff's right of recovery. If all of the elements of an estoppel were present, the argument would be persuasive indeed, for it is well settled that a debtor may lose his right to question the sale of his collateral by acquiescing therein, with full knowledge of all of the material facts respecting the transaction, for an unreasonable time; and especially does this doctrine obtain where something has transpired during the period of acquiescence, operating to greatly enhance the value of the security pledged. *Jones on Pledges* (2d Ed.) §§ 647b-743; 22 *Amer. & Eng. Ency. Law* (2d Ed.) 886; *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24 L. Ed. 855; *Hill v. Finigan*, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279; *Downer v. Whittier*, 144 Mass. 448, 11 N. E. 585; *Earle v. Grant*, 14 R. I. 228. However this may be, acquiescence imports and is founded on knowledge and assent. The doctrine is entirely without influence, unless it appears the party against whom it is invoked was fully aware of his rights, for a person cannot acquiesce in a matter in respect of which he is ignorant, nor can one be precluded by the doctrine of acquiescence unless possessed of full knowledge as to his rights, and all of the material facts and circumstances attending the particular transaction in respect of which the doctrine is invoked. 2 *Herman on Estoppel*, § 1062; *Sharpe v. Nat. Bank*, 87 Ala. 644, 7 South. 106; *Galbreath v. Newton*, 30 Mo. App. 380; *Burke v. Adams*, 80 Mo. 504, 50

Am. Rep. 510; *Jones on Pledges* (2d Ed.) 637b.

Plaintiff having no personal knowledge whatever concerning the sale of the pledge, it appears she is not estopped by having acquiesced therein, unless the knowledge which her husband possessed concerning the matter is imputable to her on the principle of agency, and is sufficient, when imputed, to affix knowledge on her as principal. It appears in the evidence the insured transacted all of the business pertaining to the loan and the pledge of the policy. That is to say, the insured took the application for the loan to his home, the plaintiff signed it, and the insured returned it to the company. The same procedure was followed with respect to the note, and when the draft was returned, payable to both the insured and the plaintiff, the insured indorsed and conveyed it to his home, where the plaintiff affixed her indorsement, and he returned it to the office of the company's agent in St. Louis, where it was cashed. After the plaintiff had signed the note, the insured likewise delivered the policy to the company as a pledge, and this, of course, was with the consent of the plaintiff. These facts certainly tend to prove an agency on the part of the insured for the plaintiff, in so far as negotiating the loan and depositing the pledge is concerned. There is not a word in proof, however, tending to show an agency of the husband thereafter, and the only circumstance relied upon by the learned counsel as indicating a purpose on the part of the plaintiff to constitute the insured her agent thereafter is an indorsement on the collateral note containing the contract of pledge, signifying 1224 Washington avenue, St. Louis, as the post office address of the makers of the note. The evidence discloses the parties resided in the city of St. Louis; that No. 1224 Washington avenue was the address of the Tennent Shoe Company, and the business office of the insured. The argument advanced is that, by affixing her signature to the note and designating her husband's business office as a proper address, she thereby directed the insurance company to address all correspondence about the matter to her husband's office, and thus constituted him her agent for receiving notice of the sale. It appears the insured received notice that the pledge would be sold. It also appears that after the sale he received notice stating the sale had been made, and the amount realized thereon. It is conclusively established as well that the insured asserted for himself he was content to have the policy thus sold for the indebtedness, and it may be, in view of his positive statement to that effect, that he would have been estopped from thereafter asserting a claim to the policy had it increased in value in his lifetime. This may or may not be true. It does not appear that he had knowledge of all the facts which rendered the sale invalid. **A**

to him, the question of estoppel and acquiescence is not in judgment, and therefore no opinion will be given thereon. The question with which the court is concerned is the agency of the insured for his wife, the plaintiff, for the purpose of receiving notice, and as to whether or not his knowledge thereabout should be imputed to the plaintiff, and if so, whether such knowledge as he possessed, when imputed to the plaintiff, is sufficient to preclude her rights under the doctrine of acquiescence by silence. The mere designation of No. 1224 Washington avenue, St. Louis, when considered with all other circumstances in the case, can hardly be regarded as sufficient to establish an agency on the part of the insured to receive notice of the sale, and thus charge the plaintiff with knowledge affording a sufficient basis for an application of the somewhat severe doctrine which forfeits rights by acquiescence. Be this as it may, to concede for the purpose of the case that the insured was the agent of the plaintiff for the purpose mentioned, it is certain that only such knowledge could be imputed to her as her agent possessed with respect to the sale of the pledge. The insured was in no wise acting as her agent when he expressed a purpose to acquiesce in the sale of the policy. His statement was based upon an expressed inability to pay further premiums. In this connection he spoke for himself alone, and there is no effort to affix this expression of a purpose on his part against the plaintiff, on the theory that he was her agent. The entire argument is directed to affixing acquiescence, by silence, on the plaintiff, predicated upon the doctrine of imputable knowledge possessed by the insured in this behalf to the plaintiff. Now, upon examining the matter of knowledge on the part of the insured, we ascertain that at no time was the insured informed the sale of the policy would be made, nor that it was afterwards made, without public notice. It does appear, however, that he knew the sale was to be had, and was had, at the company's office. Not a word or circumstance in proof discloses that the insured knew the company intended to sell, or afterwards did sell, the pledge through the form of a public sale without public notice. The sale was invalid for either one of two sufficient reasons: First, because it was in form a public sale, and without the essential prerequisites of public notice; and, second, because it was had in a private office, when it should have been had in a public place. Mere knowledge that the sale was invalid for one reason is insufficient to advise the pledgor to the end of forming a competent judgment as to her rights, when it appears the sale was invalid for another reason, which was unknown to her. The proposition has been pointedly determined by a court of high authority. *Sharpe v. Nat. Bank*, 87 Ala. 644-650, 7

South. 106; *Jones on Pledges* (2d Ed.) 637b. It may be a party, possessed of knowledge that his securities had been sold through the mere form of a public sale, presuming, of course, that public notice had been given, is willing to forego his rights and acquiesce in the result, although the sale was had in a private place, and the securities, to some extent, sacrificed; on the other hand, the same person may object with vehemence and assert his rights forthwith, upon being advised that no notice whatever was given to the public concerning the sale, and that this essential prerequisite, designed to invite the world and assemble prospective purchasers to the end of enhancing the selling value by competitive bidding, had been entirely omitted. To invoke the doctrine of acquiescence it is essential that the party against whom it is invoked shall have knowledge of all the material facts, and not of a portion of such facts only. 2 *Herman on Estoppel*, §§ 944-1064; *Sharpe v. Nat. Bank*, 87 Ala. 644-650, 7 South. 106. By imputing, then, to the plaintiff all of the knowledge with respect to the sale possessed by her husband, it is obviously insufficient to sustain an application of the doctrine of acquiescence as against her.

The judgment will be reversed, and the cause remanded with directions to the trial court to enter judgment on the policy for the plaintiff for the amount thereof, with 6 per cent. interest thereon from the date of the institution of this suit, less her indebtedness to the defendant of \$155, with interest at the rate of 8 per cent. per annum, from June 25, 1904. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

STEWART v. WATSON.

(St. Louis Court of Appeals. Missouri. Oct. 6, 1908.)

1. EVIDENCE—RELEVANCY—REPUTATION OF PARTIES.

In civil actions, the reputation of neither party is usually in issue, and it cannot be attacked, unless it is first supported by the adversary or is placed in issue by the nature of the action, as in actions for libel, slander, or malicious prosecution, in which cases the value of reputation is considered in assessing the damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 177-187.]

2. ASSAULT AND BATTERY—EVIDENCE—REPUTATION OF DEFENDANT—ADMISSIBILITY.

Where, in assault and battery, no evidence of the reputation of defendant for peaceableness was offered, evidence that his reputation was bad was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 42.]

3. TRIAL—EVIDENCE—OBJECTIONS—TIME FOR MAKING.

Where, in assault and battery, defendant did not object to questions as to whether a witness knew the reputation of defendant as to

peace and quietude, and whether that reputation was good or bad, until after the questions had been answered, the objection came too late; a question which discloses that the answer will be incompetent requiring a prompt objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 185.]

4. ASSAULT AND BATTERY—PETITION—GENERAL DAMAGES.

Where the petition in assault and battery charges a willful and unprovoked assault and a beating and wounding, plaintiff's humiliation, bodily pain, and mental anguish are elements of general damages, and recoverable as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 53.]

5. SAME.

Under a general allegation of assault and battery, plaintiff may recover such damages as naturally result from the act complained of.

6. SAME—DAMAGES—MENTAL DISTRESS.

In actions for assault and battery, the jury may consider, not only the mental distress which accompanies and is a part of the bodily pain, but also that other condition of the mind of the person injured, which is caused by the insult of the blows received and tends to humiliation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 53.]

7. DAMAGES—GROUNDS—PRESUMPTIONS.

The law infers bodily pain and suffering, injury to the feelings, and mental anguish from personal injury.

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by Jesse Stewart against Bob Watson. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Miller, for appellant. J. V. Conran, for respondent.

NORTONI, J. This is a suit for damages alleged to have accrued to the plaintiff because of an assault and battery upon him by the defendant. Plaintiff recovered in the circuit court, and the defendant appeals.

The evidence tended to prove that the defendant, without reasonable cause therefor, or upon very slight provocation, at most, assaulted the plaintiff and beat him into insensibility. He remained unconscious from about 5 o'clock in the afternoon until about 5 o'clock the following morning. The plaintiff suffered great physical pain and mental anguish, as well as humiliation and insult, from the assault and injuries received. He paid out a considerable amount for medicines and medical attendance. The jury assessed his damages at, and awarded him a verdict for, \$750. There is no complaint leveled against the sufficiency of the evidence, nor the amount of recovery.

The first assignment of error relates to the reception of evidence pertaining to the character and reputation of the defendant. Plaintiff's counsel propounded a question, inquiring as to whether the witness was familiar with the general reputation of the defendant in the community as to being a quarrelsome, dangerous, violent, and turbulent man. To this question the witness answered: "Yes,

sir." Plaintiff's counsel then inquired: "Is that reputation good or bad?" Witness answered: "It is bad." After these two questions had been propounded, and answers thereto received, defendant's counsel objected to the evidence as being wholly incompetent and irrelevant. The objection was overruled, and exception saved. It is certain that in actions of this nature, and in civil actions generally, the character of neither party is in issue, and cannot be the subject of attack, unless it is first supported by the adversary or placed in issue by the nature of the proceeding itself. In civil actions, character and reputation is put at issue only by the nature of the proceeding in that class of cases, such as libel, slander, malicious prosecution, etc., in which its value is to be considered in assessing the damages. *Vawter v. Hultz*, 112 Mo. 633-639, 20 S. W. 689; 2 Amer. & Eng. Ency. Law (2d Ed.) 1001, 1002. There had been no evidence introduced in the case at bar tending to prove the defendant's reputation for peace and quietude in the community was good, and therefore the evidence introduced in this behalf on the part of the plaintiff was clearly incompetent. However this may be, the defendant waived his right to complain thereof by not objecting to the testimony until after it was received. In the present instance, each of the questions propounded clearly disclosed to the defendant and his counsel their purpose. Notwithstanding this, no objection thereto was interposed until after the second answer was received, and it appeared to be unfavorable to the defendant's cause. The testimony, being elicited, as it was, by direct and pointed questions, disclosed its incompetency, and there was thereby ample opportunity afforded the defendant to interpose his objection and prevent the reception of the evidence. In such circumstances, it is a rule that the party objecting will not be permitted to sit idly by and await the answers until he discovers the testimony is unfavorable to him, and then, for the first time, raise his objection. Numerous cases sustain the doctrine that such conduct on the part of the complaining party operates a waiver of his right to complain thereafter. *Maxwell v. H. & S. J. Ry. Co.*, 85 Mo. 95-106; *Martin v. Block*, 24 Mo. App. 60-62; *Foster v. Mo. Pac. Ry. Co.*, 115 Mo. 165-183, 21 S. W. 916. The assignment will therefore be overruled.

On the measure of damages, the court instructed the jury, among other things, that if they found for the plaintiff they might consider as elements of damage the humiliation, bodily pain, and mental anguish, if any, which he suffered, directly resulting from the battery. The argument advanced is that humiliation, bodily pain, and mental anguish are not competent elements of damage under the pleadings. The petition charges only a willful, wrongful, and unlawful assault, without just cause or provocation,

and that the defendant was beaten and wounded by the plaintiff, to his damage, etc. In other words, the allegation is general only, to the effect that the plaintiff was beaten and wounded by the defendant. The argument is that humiliation and physical and mental pain are elements of special damage, and therefore to be specially pleaded. It is certain that under a general allegation the plaintiff may prove and recover such damages as naturally and necessarily result from the act complained of. This is true, for the law implies that such damages as necessarily and naturally result from the act will, of course, proceed from it. Damages of this character are general, as contradistinguished from special damages. Sutherland on Damages (3d Ed.) § 418. It is quite clear that bodily pain, mental suffering, humiliation, and insult, resulting from an assault and battery of the nature before us, are necessary and natural concomitants of the act complained of. They are, therefore, general damages, and in no sense special. No one could receive a beating, such as was rendered the plaintiff in this case, without suffering insult and humiliation therefrom. And it is the rule in actions for assault and battery that the jury may consider not only the mental distress which accompanies and is a part of the bodily pain, but they may consider as well that other condition of the mind of the injured person which is caused by the insult of the blows received and tends to humiliation. Sutherland on Damages, § 95; Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475; Wadsworth v. Treat, 43 Me. 163; Smith v. Holcomb, 99 Mass. 552. And so, too, the law infers bodily pain and suffering from personal injury. 2 Sutherland on Damages (3d Ed.) § 421; West v. Forrest, 22 Mo. 344. The law implies as well that injury to the feelings and mental anguish results from personal injury. Brown v. Han. & St. Joe Ry. Co., 99 Mo. 310-319, 12 S. W. 655; West v. Forrest, 22 Mo. 344. Humiliation, bodily pain, and mental anguish, each and all resulting as they do from an unprovoked assault and consequent personal injury, are elements of general damages, and properly referable to the jury under the general allegation of assault and wounding contained in the petition.

The judgment will be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

STATE ex rel. HURST v. BASSETT et al.
(St. Louis Court of Appeals. Missouri. Oct. 6, 1908.)

1. INTOXICATING LIQUORS—LOCAL OPTION ELECTION—NOTICE.

Where a notice of a local option election, otherwise sufficient, recited that the election was "ordered to be holden" at the usual voting precincts for the holding of any general election

of the state officers, except in a certain city, on Wednesday, November 8, A. D. 1905, to determine whether liquor should be sold within the county, outside the city, was not defective for failure to state specifically that on the day in question, the election "would be held."

2. SAME—POLLS—HOURS.

Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), provides that a local option election shall be conducted and the results ascertained under the law governing general county elections. Section 6991 (Ann. St. 1906, p. 3408) provides that in general county elections the polls shall be open from 7 a. m. until 6 p. m., unless the sun shall set after 6, when the polls shall be kept open until sunset. Held that, where a local option election notice provided that it should be conducted in accordance with the county election laws, it was not defective for failure to state the hours during which the polls would be open; section 6991 (Ann. St. 1906, p. 3408) fixing such hours, being a part of the notice.

Appeal from Circuit Court, Barry County; F. C. Johnston, Judge.

Certiorari by the state, on the relation of J. B. Hurst, against Hugh Bassett and others. From a quashal of the writ, relator appeals. Affirmed.

R. H. Davis and W. Cloud, for appellant
D. H. Kemp, for respondents.

NORTONI, J. This proceeding was instituted in the circuit court. Relator sued out a writ of certiorari, directing the judges of the county court of Barry county to return into the circuit court a complete transcript of the proceedings had in the county court with respect to the hearing of a petition for, and ordering an election looking to the adoption of, the local option law in the county outside of the city of Monett. Upon a return being made thereto, the circuit court quashed the writ, and relator prosecutes this appeal.

The argument urged against the regularity of the election relates entirely to the sufficiency of the published notice to the effect that an election would be held on a certain day thereafter. It is conceded that the notice was published for a sufficient length of time and in a proper newspaper. The question leveled against its sufficiency relates entirely to the form of expression employed therein; that is to say, it is argued, even though the notice be full and complete in many respects, it is insufficient, in that it fails to say in plain language that an election for the purpose contemplated "will be held" on the date therein mentioned, or employ other appropriate and pointed words to that effect. The county court, in its order of record, directed that the notice should be had and given in the following form, and it was published in a newspaper designated, for a sufficient length of time, precisely as formulated by the court in its order, which is as follows:

"Notice of Special Election.

"Whereas, the county court of Barry county, state of Missouri, convened in regular

session at the courthouse in the city of Cassville, in the county of Barry, state of Missouri, on Monday, the 2d day of October, A. D. 1905, ordered a special election submitting to the qualified voters of Barry county, state of Missouri, outside of the corporate limits of the city of Monett, in said Barry county, state of Missouri, a city having a population of twenty-five hundred inhabitants and more at the time of the presentation of the petition herein, to wit, October 2, 1905, as shown by the last national census (and the city of Monett was the only city in Barry county, state of Missouri, having a population of twenty-five hundred inhabitants at the date of filing of the petition herein, to wit, October 2, 1905, and such was so found by the court), the question whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of said Barry county, state of Missouri, lying outside of the city of Monett aforesaid, under and by virtue of an act of the Legislature of the state of Missouri, approved April 5, 1887, entitled 'An act to provide for the preventing of the evils of intemperance by local option in any county in this state by submitting the question of prohibiting the sale of intoxicating liquors, to the qualified voters of such county, to provide penalties for its violation and for other purposes.'

"And whereas, on the 2d day of October an application by petition, signed by one-tenth and more of the qualified voters of Barry county, state of Missouri, who reside outside of the corporate limits of the city of Monett, in said Barry county, state of Missouri, who are qualified to vote for members of the Legislature in said county and state, was presented to the county court of said Barry county, state of Missouri, praying that a special election be ordered to be held in said Barry county, state of Missouri, to determine whether or not spirituous liquors, including wine and beer, shall be sold within the limits of Barry county, state of Missouri, outside of the city of Monett, in said Barry county, state of Missouri.

"Said petition was duly considered by the county court of Barry county, state of Missouri, and it determined and adjudged that said petition was signed by one-tenth and more of the qualified voters of Barry county, state of Missouri, who reside outside the corporate limits of the city of Monett, who are qualified to vote for members of the Legislature in said Barry county, state of Missouri, and that the city of Monett, in said Barry county, state of Missouri, was the only city in said Barry county, state of Missouri, that contained a population of twenty-five hundred inhabitants and more at the date of the presentation of said petition to the county court of said Barry county, state of Missouri, to wit, October 2, 1905, and that the county court determined the population of the cities of Barry county, state of Mis-

souri, by the last national census, which was the last census taken in said county.

"It was thereupon ordered by the county court of Barry county, state of Missouri, as follows:

"First. That a special election be and the same is hereby ordered to be holden at the usual voting precincts for the holding any general election of state officers, except in the city of Monett, in said Barry county, state of Missouri, a city having a population of twenty-five hundred inhabitants and more as shown by the last national census on Wednesday, November 8, A. D. 1905, for the purpose of determining by the qualified voters of Barry county, state of Missouri, outside of the city of Monett, in said county, whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of said Barry county, state of Missouri, lying outside of the corporate limits of the city of Monett in said Barry county.

"Second. That said special election shall be held at the usual voting precincts for holding any general election of state officers in said Barry county, state of Missouri, as follows: [Here follows a list of the voting precincts of the county.]

"Third. That the judges of said special election have been appointed by the county court of Barry county, state of Missouri, by order of record as follows: [Here follows a list of the judges appointed for the several voting precincts.]

"Fourth. All persons voting at said special election who are against the sale of intoxicating liquors shall have written or printed on their ballots, 'Against the sale of intoxicating liquors;' and all those who favor the sale of intoxicating liquors shall have written or printed on their ballots, 'For the sale of intoxicating liquors.'

"Fifth. That notice of said special election shall be given by publication in the Cassville Republican, a newspaper printed and published in the city of Cassville, in said Barry county, state of Missouri, for the period of four consecutive weeks, twenty-eight days, the first publication to be in the issue of said Cassville Republican on Thursday, October 5, 1905; the second publication in the issue of the same paper on Thursday, October 12, 1905; the third publication to be in the issue of Thursday, October 19, 1905; the fourth publication to be in the issue of Thursday, October 26, 1905; and the last publication to be in the issue of Thursday, November 2, 1905, so that the last insertion shall be within ten days next before said special election; that said notice of said special election shall be signed by the presiding judge of the county court of Barry county, state of Missouri, and attested by the clerk of the county court of said county under the seal of the county court of Barry county, state of Missouri.

"Sixth. Said special election shall be conducted, the returns thereof made and the

result thereof ascertained and determined in accordance in all respects with the laws of the state of Missouri governing elections for county officers.

"Seventh. That at said special election aforesaid no one shall be allowed to vote who is a resident of the city of Monett in said Barry county, state of Missouri, or who is not a qualified voter in Barry county, state of Missouri. Qualified voters residing in Monett township and outside the corporate limits of the city of Monett will vote at the usual voting precincts as herein designated at the city of Monett.

"James H. Pratt,

"Attorney for Petitioners, Neosho, Missouri.

"In testimony whereof, we have caused this notice of election to be signed by the presiding judge of the county court of Barry county, state of Missouri, and attested by the clerk of said court, and the seal of said court to be affixed thereto.

"Done at the city of Cassville, in Barry county, state of Missouri, this 2d day of October, 1905.

Hugh Bassett,

"Presiding Judge of the County Court of Barry County, Missouri.

"C. D. Manley, [Seal.]

"Clerk of the County Court of Barry County, Missouri."

Our statute providing for notice of an intended local option election does not afford a particular form therefor, nor does it enumerate any particular characteristics essential thereto, as will appear by consulting the statute, as follows:

"Sec. 3020. Notice of Election—How Given.—Notice of such election shall be given by publication in some newspaper published in the county, and such notice shall be published in such newspaper for four consecutive weeks, and the last insertion shall be within ten days next before such election, and such other notice may be given as the county court or municipal body ordering such election may think proper, in order to give general publicity to the election." (Ann. St. 1906, p. 1736.)

It is very true the notice did not say in express words that the election would be held on a certain date, and, as said before, the argument by which its sufficiency is challenged relates to this matter only. Relator's counsel say: "We contend that notice should have been given stating specifically and unequivocally that on a certain date the election will be held for the purpose," etc. This argument is entirely without merit. The notice as formulated and published was certainly sufficient to inform the general public that an election, for the purpose therein stated, would be had and held in each of the several precincts of Barry county, outside of the city of Monett, on November 8, 1905. It will be observed that its headline in capital letters proclaims "Notice of a Special Election," after which it proceeds

to recite the essential prerequisites of the proceedings in the county court looking to the submission of the local option proposition to a vote in the county outside the city of Monett, as is authorized by statute. It recites that the petition was duly considered by the court and adjudged to be sufficient, etc. The county court ordered a special election to be holden at the several voting precincts of the county on the 8th day of November, 1905, to the end that the qualified voters might determine the question by giving their votes for or against the proposition, as they might be inclined. It directed that the election should be had at the usual voting precincts for holding general elections for state officers, etc., and proceeded to name and designate the several precincts throughout the county. It recited that the judges to preside at and conduct such special election had been appointed, and named them for every precinct throughout that portion of the county in which the election was to be held. It directed the voters' attention to the form of the ballot to be employed therein, and informed them that those who were against the sale of liquors should have written or printed on their ballots, "Against the sale of intoxicating liquors," while those in favor of the sale thereof should have written or printed on their ballots, "For the sale of intoxicating liquors." It further directed that the notice should be published in the Cassville Republican, a newspaper printed and published in Cassville, Barry county, and named the several days upon which the publication should be had in this journal. The voters were informed thereby as well that the special election should be conducted, the returns thereof made, and the results thereof ascertained and determined in accordance with the laws of the state of Missouri governing elections for county officers, and that persons residing within the city of Monett, which had a population of more than 2,500 inhabitants, were not qualified voters in the election to be had thereon. All of these things were promulgated over the signature of James H. Pratt, attorney for the petitioners, and over the certificate published therewith, signed by Hugh Bassett, presiding judge, and C. D. Manley, clerk of the county court, attested by the seal thereof. It appears that these officers, under their hand and the seal of the court, declared the above and foregoing to be a notice of election which they had caused to be signed by the presiding judge and attested by the hand and seal of the clerk of the court. Every possible element of a sufficient notice of such an election is contained therein, unless it be the designation of the time at which the polls should open and close. The local option law (section 3027, Rev. St. 1899 [Ann. St. 1906, p. 1733]) provides, however, that "such election shall be conducted

and the results thereof ascertained and determined in accordance in all respects with the laws of this state governing general elections for county officers," etc.

Section 6991, Rev. St. 1899 (Ann. St. 1906, p. 3408), of the general laws of this state with respect to general elections for county officers, and pertinent to the case now before us, provides that the polls shall open at 7 o'clock in the morning and continue open until 6 o'clock in the evening, unless the sun shall set after 6, when the polls shall be kept open until sunset. This provision is parcel of the public and general laws of the state on the subject of elections. It is a rule of public policy that all persons must take notice of the public laws of the state. 21 Amer. & Eng. Ency. Law (2d Ed.) 588. Therefore, it appearing in the published notice of election that the same was to be conducted in all respects under the election laws of the state concerning the election of county officers, the hours at which the polls were to open and close must be regarded as though specified in the notice of election published in accordance with the provisions of the general statute above referred to. As a matter of law, the voters were advised of the hours. To declare that the notice of election was insufficient for the reason that it failed to sufficiently indicate that a special election would be held on the 8th day of November, 1905, would be equivalent to declaring the voters of Barry county non compos mentis. No man of ordinary intelligence and prudence could read the publication over the hand of the presiding judge and clerk of the county court, with seal attached, in the particular newspaper designated as the medium by which the notice should be communicated and published on the particular days which the order of the court required without knowing that an election for the purpose mentioned was to be had on the date mentioned. The presumption obtains that the county court acted and ordered the notice published for the purpose therein disclosed; that is to say, what the notice recited the court had done in the premises was to the end that an election should be had. To presume otherwise would not comport in any respect with the rules of law nor the standard by which the conduct of affairs is ordinarily determined. It would be a violent presumption, indeed, for a voter reading this document, purporting to be a notice over the hand of the presiding judge and clerk, attested by the seal of the court, to conclude that it conveyed a meaning otherwise than that the proceedings mentioned therein, looking to the submission of the local option proposition, were in good faith and to be effectuated throughout the various precincts by the judges therein named conducting an election on the 8th day of November, 1905. The standard which the law sets up, and

by which the appropriate and orderly conduct of human affairs is ascertained and measured in the various relations of life, is that of an ordinarily prudent man in given circumstances. 21 Amer. & Eng. Ency. Law (2d Ed.) 584. It is certain that no ordinarily prudent man in Barry county, who read this notice, would fail to understand that it was notice that an election on the local option proposition would be had on the date therein named. It appears in the record that a very large vote was polled at the election. It is therefore certain the voters did understand it, and very generally availed themselves of the privilege to express their preference at the polls.

The judgment is affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur

COLUMBIA BREWERY CO. v. ROHLING et al.

(St. Louis Court of Appeals. Missouri. Oct. 6, 1908.)

WITNESSES—COMPETENCY—TRANSACTION WITH
DECEDENT—CORPORATIONS—"PARTY TO A
CONTRACT."

Under Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), excluding the surviving party to a contract from testifying after the other party's death to transactions had with him, in an action by a corporation on notes, it was improper to allow defendants to testify as to an agreement by the deceased agent of the corporation to cancel the notes; the term "party to a contract," as applied to a contract by a corporation, meaning the person who negotiated the contract, rather than the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 660.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Columbia Brewery Company against H. Rohling and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Charles Fensky, for appellant. Muench, Walther & Muench, for respondents.

NORTONI, J. This is a suit on a promissory note. It originated before a justice of the peace in the city of St. Louis, and found its way into the circuit court. The finding and judgment were for the defendants. Plaintiff prosecutes the appeal.

The evidence tended to prove that the defendants were partners, conducting a dramshop and grocery store in the city of St. Louis. On November 14, 1896, they borrowed from the plaintiff brewery company the sum of \$300, for which they executed their joint promissory note, payable on demand, with interest at the rate of 6 per cent. They continued the saloon and grocery business about a year thereafter, at which time it appears the plaintiff brewery company, by

its agent, one Harry Lange, induced them to dissolve the partnership, as the business was insufficient to support two families. The defendant Rohling retired from the business, and the same was continued by defendant Menke, his half-brother. It appears the plaintiff brewery company was in some manner interested in the saloon before and after the partnership was dissolved. The saloon sold plaintiff's brew of beer. One Harry Lange was the agent of the brewery company. He looked after their collections and adjusted the brewery company's business affairs with its customers in that section of the city. The defense interposed to the note is that it was settled by an arrangement between the defendants and Lange, the plaintiff's agent, as follows: That Rohling retired from the saloon and turned the business over to his half-brother, Menke, at the instance and request of Lange, who represented the Columbia Brewery Company, in an arrangement whereby the brewery company paid to him \$200 and canceled his portion of the indebtedness represented by the \$300 note in suit. Defendant Menke continued the business for several months, and finally, at the instance of the brewery's agent, Lange, executed a deed of trust to a representative of the company for the benefit of the plaintiff. Menke continued the business for about three months after this deed of trust was executed, when, at the request of Lange, he surrendered possession and turned over the entire business, fixtures, etc., to another patron of the plaintiff brewery company. The evidence tends to prove that, in consideration of the surrender of the business and turning over possession thereof to another customer of the brewery, Lange, the brewery's agent, agreed to cancel Menke's indebtedness represented by the note and all other indebtedness which he then owed the brewery company. It appears that Lange, the agent of the brewery company, departed this life prior to the suit, and the testimony of both defendants with respect to the contracts with him, whereby they insist the indebtedness was canceled, was received by the court over the objection and exception of the plaintiff.

Plaintiff's counsel objected on the ground

that Lange is dead, and it was therefore incompetent for the defendants to testify as to the two separate contracts had with him concerning the payment or cancellation of the note in suit. This evidence was incompetent under the provisions of section 4652, Rev. St. 1899 (Ann. St. 1906, p. 2520), and should have been excluded by the court. It is true the deceased agent, Lange, was not an original party to the contract or cause of action, within the strict letter of the statute. He was the contracting agent, however, and therefore falls within the terms of the statute as construed by our Supreme Court. A "party to a contract," as the term is used in the statute, when considered with reference to the contract of a corporation, means the person who negotiated the contract, rather than the corporation in whose name and interest it was negotiated. *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Southern Com. Sav. Bank v. Slattery*, 166 Mo. 620, 66 S. W. 1066. Under the statute excluding the surviving party to a contract from testifying after the death of the other party, the rule is the death of the contracting agent operates to exclude the surviving party who contracted with him. See the following cases in point: *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Sidway v. Mo. Land, etc., Co.*, 163 Mo. 342, 63 S. W. 705; *Southern Com. Sav. Bank v. Slattery*, 166 Mo. 620, 66 S. W. 1066; *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816; *Central Bank v. Thayer*, 184 Mo. 61, 82 S. W. 142; *Nichols v. Jones*, 32 Mo. App. 657; *McCormick Harvester Company v. Heath*, 65 Mo. App. 461; *Nelson v. Railway*, 66 Mo. App. 647; *Winters v. K. of P.*, 96 Mo. App. 1, 69 S. W. 662; 30 Amer. & Eng. Ency. Law (2d Ed.) 1049, 1050.

Plaintiff's agent, Lange, whom it is alleged negotiated the settlements and contracted to cancel the defendant's indebtedness, being dead, the court erred in permitting the defendants to testify touching the contracts and settlements with him, over the objection and exception of the plaintiff. This error was highly prejudicial.

The judgment will be reversed, and the cause remanded. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

COLEMAN v. STATE.

(Court of Criminal Appeals of Texas. June 6, 1908. On Rehearing, June 24, 1908. Second Rehearing Denied Oct. 14, 1908.)

1. INTOXICATING LIQUORS — LOCAL OPTION LAW—VIOLATIONS—EVIDENCE.

In a trial for violating the local option law by the sale of a bottle of beer, it was not error to permit the state to prove that the bottle received by the witness from accused was labeled "Budweiser."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 291.]

2. SAME—INSTRUCTIONS.

Where, on a trial for violating the local option law, a witness testified that he bought a bottle of beer from accused, and put 15 cents on the counter, and accused testified that he did not turn over to accused a bottle of beer, and did not get the 15 cents, but that he gave beer to the witness, and the court charged that, if the jury had a reasonable doubt as to whether accused received pay for the beer, they should acquit, the refusal to submit the issues whether accused sold or intended to sell any intoxicant to the witness, and whether he took the 15 cents, was not error.

Appeal from Coleman County Court; F. M. Bowen, Judge.

Dave Coleman was convicted of violating the local option law, and he appeals. Affirmed.

Woodward & Baker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law.

The witness Hammond testified that he bought a bottle of Budweiser beer from appellant, and put 15 cents on the counter, and walked out. Under his testimony this was an intoxicant. He said he had no recollection of what Coleman was doing at the time he put the money on the counter, and did not know what became of it. When he returned, he did not see the money, and did not know whether appellant saw him put the money on the counter, had no recollection of appellant giving him a bottle of beer at different times, and that he had no recollection of having accepted any beer that appellant gave him. He had accepted whisky on one occasion. He drank Uno, and could tell the difference between Uno and beer. The bottles were shaped and looked alike. When he placed the money on the counter, it made about the usual noise that a nickel would make. It was proved by the witness King that Budweiser beer was intoxicating. Appellant testified that he knew the witness Hammond; that he never turned over to him a bottle of beer, nor did Hammond put 15 cents on the counter for the bottle of beer; that, if he ever put 15 cents down on the counter in his place of business, he never saw it, and did not get it, and knew nothing of it; that he had set beer up to him, but never charged him anything for it. On cross-examination he said he did not go to the witness Hammond and ask him to sign an order for a dozen bottles of beer and date it back,

and tell him that if he would do so he could present the order in court, and that would be all there was to it. Hammond, being recalled, testified that appellant came to him and told him he had an order that if he would sign for a dozen bottles that he could present it in court, and that would be all there was to the case; that he declined, and would not sign any such order.

Under this state of facts appellant requested special instruction, which the court refused to give, submitting the issue made by appellant's evidence that he did not sell or intend to sell any intoxicant to the alleged purchaser, and that he did not take the 15 cents, if any was placed on the counter by said purchaser. In other words, he presents in the special instruction his theory of the case, as testified by himself, that he neither sold the purchaser intoxicants nor received any money for it, but only "set up" the beer to Hammond. This was an issue squarely made by the testimony, and upon which appellant had the right to have the jury pass upon under appropriate instruction. Appellant did what he could in the way of asking a special charge, and this was refused. This was error.

The witness Hammond testified the bottle he received from appellant had a label on it with "Budweiser" printed on the label. Exception was reserved to the action of the court permitting the state to prove such label was on the bottle. We are of opinion this was not error.

The other questions suggested for revision have been decided adversely to appellant's contention in other cases decided at the present term.

For the error indicated, the judgment is reversed and remanded.

BROOKS, J., absent.

On Rehearing.

DAVIDSON, P. J. On a former day of this term the judgment herein was reversed because of the refusal of the court to give appellant's special requested instruction in regard to his theory of the case as testified by himself, to wit, that he neither sold the intoxicant nor received any money for it, but only set up or gave the beer to Hammond. It was said in the original opinion that this issue was presented by the testimony, upon which appellant had a right to have the jury pass on under appropriate instructions. A charge is embodied in the transcript, as stated in the original opinion, presenting this matter, which was refused by the court. The state filed a motion for rehearing, upon which certiorari was ordered to perfect the record. Upon return of this writ we find the court gave the following charge, which was omitted from the transcript: "Gentlemen of the jury, you are charged that, if you have a reasonable doubt as to whether or not the defendant received any pay for the beer, it

will be your duty to find the defendant not guilty." The court, upon reviewing this question, is of the opinion that this sufficiently presents such issue for a decision of the jury, and, this being so, it was not reversible error to refuse the other instruction requested by appellant.

Believing the issue was sufficiently presented by the given requested instruction, we grant the motion for rehearing, and set the reversal aside, and now affirm the judgment.

PROCTOR v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908.)*

1. CRIMINAL LAW—TRIAL—ORDER OF PROOF—DECLARATIONS OF CONSPIRATOR.

Where the evidence conclusively showed a conspiracy, the fact that declarations of a conspirator in the absence of the co-conspirator were received in evidence before the evidence proving the conspiracy was immaterial, though the better practice requires the evidence of the conspiracy should be first given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1013.]

2. WITNESSES — EXAMINATION — REFRESHING MEMORY.

Where a witness on a second trial stated that he could not remember, and that his memory was better at the first trial, the court properly permitted him to refresh his memory by reading his former testimony, if, after doing so, he could swear that the same was true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 885.]

3. CRIMINAL LAW—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The refusal to permit a witness called by accused to testify at whose instance he was first subpoenaed was harmless, where the witness subsequently stated that he was first summoned by the state and was afterwards attached as a witness for accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3147.]

4. WITNESSES—EXAMINATION—IMPEACHMENT.

Where, on a trial for homicide committed by accused and his brother pursuant to a conspiracy because of an insult decedent had offered to a daughter of the brother, the daughter testified that she had told her father and accused of the insult, evidence that after the killing she stated that decedent had not insulted her, except to say to her, after her refusal to go with him to a lemonade stand to get lemonade and to a water barrel to get water, that he wanted to see her on some other business, was competent as impeaching evidence.

5. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

Where there was evidence that accused and his brother killed decedent pursuant to a conspiracy to kill because of an insult he had offered a daughter of the brother and that the killing occurred on the first meeting of decedent, the court properly charged on manslaughter committed for insults to a female relative.

6. SAME—EVIDENCE—ADMISSIBILITY.

Where there was evidence that accused and his brother killed decedent pursuant to a conspiracy, and that after the killing accused told his brother to go to accused's house and get a cartridge for his pistol, and that the brother started towards the house, evidence that the brother came to the house of accused and got a

cartridge to fit a pistol that he then had was admissible, though accused was not present.

7. SAME—INSTRUCTIONS.

Where it was undisputed that the accused and his brother together, or one of them, killed decedent for insults offered to a daughter of the brother, an instruction that if the brother was informed that decedent had insulted his daughter, and the brother believed it to be true and killed decedent the first time he met him and knew him, there was adequate cause for the killing, was not erroneous as not only requiring the killing to take place the first time that the brother met decedent after being informed of the insult, but also that the brother knew decedent.

8. SAME.

Where, on a trial for murder by accused and his brother pursuant to a conspiracy to kill decedent, an instruction that if the brother killed decedent without justification accused was not guilty, unless he was present and knew his brother's intent, and acted with him in the commission of the offense, and aided or encouraged him, and unless the brother committed the offense in pursuance of the common intent, was not erroneous for failing to state with whom the brother had formed the common intent.

9. CRIMINAL LAW—INSTRUCTIONS.

A charge must be read as a whole, when passing on a criticism based on its failure to fully state the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

10. SAME.

On a trial for murder by accused and his brother pursuant to a conspiracy, an instruction that, if the state introduced any act of the brother done in the absence of accused after the commission of the homicide, the jury will not consider it, unless accused directed the brother, in which case they "will consider it" as legal evidence against accused, is not erroneous for using the quoted phrase, instead of "may consider it."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1858.]

11. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

Where the evidence does not suggest the issue of self-defense, the error in giving a correct charge on the law of self-defense is not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 716.]

Appeal from District Court, Cass County;
P. A. Turner, Judge.

Chas. H. Proctor was convicted of manslaughter, and he appeals. Affirmed.

T. D. Rowell and O'Neal & Figures, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was tried in the district court of Cass county, and convicted of manslaughter, and his punishment assessed at five years' confinement in the state penitentiary.

The evidence in substance shows that deceased, Harry Newman, a young man, was at a picnic near the town of Jefferson, having gone there from Marshall, where he lived; that he offered an insult to Miss Effie Proctor, the daughter of W. R. Proctor; that W. R. Proctor is a brother of Chas. H. Proctor. The evidence further shows that the deceased invited Miss Effie Proctor to go with him for a walk, and when a short distance from the pavilion, where a dance was proceeding,

*Motion to dismiss motion for rehearing, on account of death of appellant, granted October 14, 1908.

he unbuttoned his pants and showed the young lady his privates, and she screamed and ran back to the pavilion. The Proctors thereupon proceeded to hunt for and finally found the deceased at the depot in Jefferson, waiting for a train to go back to Marshall. W. R. Proctor took his daughter to the depot to identify the deceased. The Proctors at that time were not acquainted with deceased. When they arrived there, the Proctor brothers brought the deceased into the presence of the daughter and she identified him. Then Chas. H. Proctor, the defendant, who had a pistol in his hand, according to the testimony of some of the witnesses, hollowed to the crowd to stand back and immediately fired a pistol, and the bullet entered the back of deceased's head, from which he instantly died. Several witnesses swear positively that W. R. Proctor did the shooting, but some of the testimony clearly suggests that Chas. H. Proctor, appellant, did the shooting. The evidence clearly suggests, and the court properly charged on, the doctrine of conspiracy; that is, that the Proctors had conspired to kill the deceased, which they did on the first meeting after the insult was offered to the daughter of W. R. Proctor.

Bill of exceptions No. 1 shows that while the witness Isaiah Goldberg, a witness for the state, was on the stand, and after he had testified that W. R. Proctor, Miss Effie Proctor, and himself were in a carriage on their way from the picnic grounds to town, they being the only persons in the carriage, except Christopher, the driver, the defendant, Chas. H. Proctor, not being present, the witness was permitted to tell what W. R. Proctor said to his daughter in the absence of the defendant. Thereupon the witness stated that W. R. Proctor said to his daughter, Miss Effie Proctor, "You say he is red-headed?" and she said, "Yes;" that then he said nothing more until he got to Robert's saloon, when the said W. R. Proctor said to Miss Effie Proctor, "Keep your eyes peeled, or be on the lookout." W. R. Proctor then went into Robert's saloon and came right out; did not stay there over a second or two. This testimony was objected to, because there was no evidence to show a conspiracy between W. R. Proctor and Chas. H. Proctor, and no evidence had been introduced to show that the said W. R. Proctor and Chas. H. Proctor were principals in the commission of the offense. The court overruled all of said objections and approved the bill, with the following explanation: "This occurred before the killing. I had tried this case once before, and knew that the evidence would show prima facie a conspiracy. The jury were charged to consider the acts and declarations of W. R. Proctor in furtherance of the common purpose done or said before the homicide, if the evidence showed a conspiracy beyond a reasonable doubt; otherwise, to disregard them. See evidence of Isaiah Goldberg. It shows a conspiracy. When the par-

ties in the carriage left the picnic grounds, C. H. Proctor asked W. R. Proctor if he had a gun. W. R. Proctor replied: 'No; let me have yours.' C. H. Proctor replied: 'No; you go and find him and send for me.' We do not deem it necessary to collate all the evidence in this case showing a conspiracy on the part of the Proctor brothers to kill the deceased, and it is by no means certain from this record as to which one fired the fatal shot. It is true all the witnesses that swear positively swear that appellant's brother shot the deceased, but the circumstances are very cogent that appellant did the shooting. Be this as it may, the evidence was clearly admissible. It is not necessary, but the better practice, under the rules of this court, to first establish a conspiracy before permitting the declarations of the conspirators in the absence of each other to be admissible; but the testimony is admissible, and the court properly admits same, where the evidence suggests a conspiracy. The evidence in this case conclusively shows a conspiracy, and it is immaterial whether the acts of the party in the absence of the defendant were introduced before the conspiracy was proved, or afterwards; the conspiracy having subsequently been proved. See *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Armstead v. State*, 22 Tex. App. 51, 2 S. W. 627; *Stevens v. State*, 42 Tex. Cr. R. 154, 59 S. W. 545; *Cain v. State*, 42 Tex. Cr. R. 210, 59 S. W. 275. The court in its charge told the jury to disregard the acts and conduct, as well as declarations, of W. R. Proctor, unless the state had proved a conspiracy in this case.

Bill of exceptions No. 2 shows that while Hendrix Lowery, a witness for the state, was on the stand, and had testified in chief for the state, and had been turned over to appellant's counsel to be examined, and they had completed their cross-examination, the district attorney then handed to the witness Lowery a carbon copy of his testimony heretofore taken six months ago on the trial of this case, with the request from the district attorney to the witness that he read over the carbon copy, the witness having already testified in his direct examination on this trial that he did not remember whether or not the defendant, Chas. H. Proctor, had hold of the deceased at the time he was shot, and after the witness Lowery had read said carbon copy the district attorney asked him what, if anything, was Chas. H. Proctor doing at the time Newman was shot. The witness then answered that he had hold of him. This bill is approved, with this statement: "The witness said it had been a long time, and that he could not remember, and said that his memory was fresher and better at the first trial, and he would like to read his evidence. After reading it, he said he now remembered distinctly. Defendant was offered an opportunity to cross him." There was

no error in the action of the court in overruling this objection. The witness had a right to refresh his memory from his former testimony, if, after reading same, he could swear same was true. This was a proper practice, and a legitimate mode of getting the facts before the jury.

Bill of exceptions No. 3 shows that while Clyde Munden, a witness for defendant, was on the stand, the defendant's attorney asked said witness at whose instance he was first subpoenaed to attend this court, six months ago. The court refused to permit said question according to the bill; but same is approved with this explanation: "After the objection was sustained in the examination of the witness, he testified to all the above facts; that he was a deputy sheriff of Harrison county, lived at Marshall, knew Harry Newman, and was his friend; that he was first summoned as a witness by the state, was excused by the state, and was afterwards attached as a witness for the defendant. When the witness first took the stand, the defendant asked at whose instance he was first summoned, by the state or defendant. Objection was made that it was immaterial, and sustained; but this very fact was afterwards testified to by this same witness, as well as the other facts stated above." Clearly, with this explanation, there could have been no injury in the ruling of the court.

Bill No. 4 shows that the state was permitted to prove by Whit Castner, over appellant's objection, the following: That Miss Effie Proctor came to the home of the defendant, Chas. H. Proctor, after the killing, crying, and that Mrs. Eddie Proctor introduced her to the witness, and that Mrs. Eddie Proctor then asked Miss Effie Proctor what on earth the young man had done to her to cause all this trouble, and that Miss Effie Proctor replied that he had asked her while at the dance platform to go with him to the lemonade stand to get a glass of lemonade, and that she told him that she did not want any lemonade, and that he then asked her to go with him to the water barrel to get some water, and that she told him that she did not want any water, and that he then said that he wanted to see her on some other business, and that this was all that was done or said, and that she took this as an insult. Appellant objected to this, because in the absence of the appellant, and because said evidence was wholly immaterial and highly prejudicial to the rights of appellant, because the true issue in this case is not what Miss Effie Proctor may have told Mrs. Eddie Proctor in the presence of the witness Whit Castner, after the killing, as to what the insulting words and conduct of the deceased was towards her; but the real issue is as to what Miss Effie Proctor told her father, W. R. Proctor, and her uncle, Chas. H. Proctor, the appellant. The court approves this bill with the statement that the charge limits this evidence to impeaching purposes. It in

some respects contradicts the statement that Miss Effie Proctor made to her father and appellant, and to that extent renders improbable that she told her father and appellant what she swears she told them. The testimony was admissible. *Norman v. State*, 26 Tex. App. 225, 9 S. W. 606; *Fassett v. State*, 41 Tex. Cr. R. 400, 55 S. W. 497; *Hobbs v. State* (decided at present term) 112 S. W. 303. The court properly charged on all phases of manslaughter committed for insults committed to a female relative upon the first meeting.

Bill of exceptions No. 5 complains that the state was permitted to prove by the witness Whit Castner that he saw W. R. Proctor, after the killing of Harry Newman, at Chas. H. Proctor's residence; that W. R. Proctor came there for the purpose of getting a cartridge to fit a pistol that he (W. R. Proctor) then had in his hand of 38 or 41 caliber; that W. R. Proctor got the cartridge and it fitted the pistol; that this was a short while after the killing, and defendant Chas. H. Proctor was not present. This bill is approved with this explanation: "See evidence of Walter Jackson. He testified that a short time after the killing he and the two Proctors were together, and took a drink together in Dreben's saloon, and just after they left the saloon C. H. Proctor told W. R. Proctor to go to his house and get a cartridge for his pistol, told him where he would find it at his house and the number and kind, and that W. R. Proctor at once left them and started towards the house of C. H. Proctor. This was the only act or declaration of W. R. Proctor after the homicide, in the absence of C. H. Proctor, that was admitted in evidence. See charge of the court as to acts of W. R. Proctor after the homicide, in the absence of C. H. Proctor. I charged the jury to consider such acts if they believed from the evidence, beyond a reasonable doubt, that C. H. Proctor directed W. R. Proctor to do them; otherwise, to absolutely disregard them." Clearly, with this explanation, the testimony was admissible.

Appellant in his motion for a new trial objects to the following charge: "If you believe from the evidence W. R. Proctor was informed that the deceased, Harry Newman, had used insulting words or had been guilty of insulting conduct towards his daughter, and that he believed it to be true, and that he killed him the first time he met him, and knew him, after being so informed, then this would be adequate cause." The error complained of by appellant is that it did not only require the killing must take place the first time that W. R. Proctor met deceased after he was informed of the insult to his daughter, but also that he (W. R. Proctor) must know the deceased in order to reduce the homicide to manslaughter. It was not necessary for the charge to contain the statement that he knew him, but such statement could certainly not have injured appellant.

There is no question but what deceased's name was Harry Newman. There is no question but what appellant and his brother together, or one or the other of them, killed Harry Newman for insults to the daughter of W. R. Proctor.

The eighth ground of appellant's motion for new trial complains of the following charge: "If you believe from the evidence, beyond a reasonable doubt, that W. R. Proctor unlawfully shot and thereby killed said Harry Newman with a pistol, and that he was not justified in so doing on the grounds of self-defense, as that law is given you in this charge hereafter, then you will find the defendant Chas. H. Proctor not guilty, unless you find from the evidence, beyond a reasonable doubt, that the defendant was present and knew the unlawful intent of W. R. Proctor, and acted together with him in the commission of said offense, and aided him by acts or encouraged him by words or gestures in the commission of said offense, and that W. R. Proctor committed said offense in pursuance of a common intent, and in pursuance of a previously formed design, in which the minds of both united and concurred." Appellant insists that the latter part of said charge is error, because same does not state with whom he (W. R. Proctor) had formed the common intent to commit the offense, and because the same does not state with whom the previously formed design to commit the offense was entered into. A charge must be read as a whole when passing on this character of criticism. Furthermore, we do not think the charge is subject to the criticism, when viewed alone.

The tenth ground of the motion complains of the following charge: "If you find that the state has introduced any act of W. R. Proctor done by him in the absence of Chas. H. Proctor after the commission of the homicide, then you will not consider it in finding your verdict, but you will wholly disregard it, unless you find from the evidence, beyond a reasonable doubt, that Chas. H. Proctor directed said W. R. Proctor, in which event you will consider it as legal evidence in the case against Chas. H. Proctor." There was no error in this charge. Appellant's criticism is that the court says "you will consider it," instead of "may consider it." This is hypercritical. The court, in this case, charged on the law of self-defense; but, as the Assistant Attorney General suggests, we have read the evidence carefully, and we see nothing in the same to suggest the issue of self-defense. However, the court's charge is correct, if the issue had been in the case, when read as a whole. See *Hoover v. State*, 35 Tex. Cr. R. 342, 33 S. W. 337.

The evidence in this case conclusively shows that deceased was killed for offering insults to appellant's brother's daughter. It further shows that appellant heartily and thoroughly co-operated in the incipency of the matter with his brother in killing the

deceased, that the killing took place upon the first meeting, and the evidence thoroughly supports the verdict. The charge is in no respects erroneous, such as requires a reversal of this case.

Finding no error, the judgment is affirmed.

GARRISON et al. v. McLAIN et al.†
(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 10, 1908.)

WILLS—REQUISITES—DEED OR WILL—EFFECT AT GRANTOR'S DEATH.

Since an estate of freehold or inheritance may be made to commence in futuro by deed as by will, an instrument in the form of a statutory deed was not testamentary because of a clause that it was not to take effect before the grantor's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 209, 210.]

Appeal from District Court, Hill County; Sam R. Scott, Judge.

Action by Mrs. B. J. Garrison and others against John B. McLain and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Morrow & Smithdeal, for appellants. R. M. Vaughan and Works & McGee, for appellees.

RAINEY, C. J. Appellants instituted this suit against appellees to recover an undivided three-fourths interest in and to three tracts of land. Appellants claim title as heirs of John M. McLain, and appellees claim title to the 403-acre tract by virtue of two separate deeds of conveyance, made by John M. McLain to his sons, John B. McLain and H. N. McLain, on January 11, 1898, and to the other two tracts through deeds made at the same time by said John M. McLain to his wife, Catherine Flora McLain, and daughter, Mattie Lou McLain. The case was tried before a jury on special issues as to the delivery of said deeds, and the construction of the deeds was left to the court. A verdict was rendered by the jury to the effect that the deeds had been delivered, and the court construed the instruments to be deeds of conveyance, and judgment was rendered against the appellants. As we view the case, there is only one controlling question, and that is the proper construction to be given the said instruments—whether testamentary in character, or valid deeds of conveyance.

On a former trial of this case the district court held the instruments to the sons to be testamentary in character, but held otherwise as to the conveyance to the wife and daughter. On appeal the Court of Appeals, Third District, to which court the cause had been referred, reversed and remanded the case, as there was some question in the case as to the delivery of the deeds. In an opinion by Mr. Justice Fisher it was held, in effect, that the language, "This deed to take effect at my death, and not before," used in said

† Writ of error refused by Supreme Court.

deeds, when construed in connection with the other language therein, which was, in substance, that used in the form specified by our statutes for conveyances, did not make the said instruments testamentary in character. In said opinion said instruments are set out in full, and the discussion there made as to the law of this case accords with the views of a majority of this court, and reference is here made to said opinion as expressing all that is necessary to be said on the subject. *McLain v. Garrison* (Tex. Civ. App.) 88 S. W. 484, same case on rehearing 89 S. W. 284.

On the last trial the case was tried in accordance with said opinion, and in view of that fact our Associate, Mr. BOOKHOUT, concurs with the disposition we here make of the case, but disagrees with the holding that said instruments on their face are not testamentary in character.

The evidence supports the verdict, and the judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. JAMES.

(Court of Civil Appeals of Texas. July 2, 1908. Rehearing Denied Oct. 8, 1908.)

1. APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is final.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. PLEADING—DEFECTS—AIDER BY VERDICT.

The defect in a petition, good as against a general demurrer, but defective as against a special exception based on the indefiniteness of the act constituting the negligence complained of, is cured by a verdict after trial, without any action on a special exception, and on a charge predicating a recovery for plaintiff on a finding of the acts alleged to be negligence as a fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451-1477.]

Appeal from District Court, Morris County; P. A. Turner, Judge.

Action by Ben James against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke and Schluter & Singleton, for appellant. Terrell & French, for appellee.

PER CURIAM. 1. There is evidence to support the finding of the jury that Tom Gilstrap acted as porter on the excursion train with the consent and knowledge of the conductor. There is evidence in the record that Gilstrap not only acted as porter on the train going to Dallas, but that he also acted in that capacity in returning from Dallas on the train. The evidence on the question of Gilstrap's being a porter of the appellant is in conflict, and in such state of the record it was a matter purely for decision by the jury. Their finding in the matter is final.

2. Because, from the facts alleged in the petition, there might be inferred or implied negligence, by fair and reasonable intentment the petition could be held good as against a general demurrer. But, if a special exception had been insisted on because of indefiniteness of the act alleged being negligence or not, then we are inclined to the opinion that the exception should have been sustained, and that it would have been reversible error to have failed to sustain the exception. No exception, however, appears to have been acted on in the record. There having been a verdict in the case, without action on demurrer or exception, we are of the opinion that any defect in the allegations and petition has been cured by the verdict. The court, in his charge to the jury, predicated a recovery for the plaintiff on a finding by the jury of the acts alleged to be negligence as a fact.

3. The petition in effect alleged permanent injuries, or probability of permanent injuries, from which appellee might suffer. The charge in this respect is not affirmative error. The case is ordered affirmed.

KRUEGEL v. JOHNSON et al.†

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 10, 1908.)

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—REVIEW—ABSENCE OF STATEMENTS OF FACT OR BILLS OF EXCEPTIONS.

Assignments that the court erred in denying plaintiff's motion without trial, and without either party having opportunity to announce ready for trial, and in denying plaintiff a jury, though presenting correct legal propositions, can not be sustained on a writ of error, in the absence of statement of facts or bills of exception showing that the court acted as alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2412-2416.]

2. SAME—GROUPING ASSIGNMENTS—BRIEFS.

Where assignments of error are grouped, and are not copied in the brief, propositions thereunder cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3094.]

3. SAME—FINDING OF FACTS.

Without a statement of facts in the record, the findings of fact are conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867-2877.]

Error from District Court, Dallas County; Richard Morgan, Judge.

Motion by Herman Kruegel against J. Roll Johnson and others to compel Johnson, as sheriff, and the sureties on his bond, to pay a judgment assigned to plaintiff because of the sheriff's failure to levy an execution. Judgment for defendants, and plaintiff brings error. Affirmed.

Herman Kruegel, for plaintiff in error. Jeff Word, for defendants in error.

RAINEY, C. J. Herman Kruegel filed a motion in the district court against J. Roll Johnson, sheriff of Dallas county, and the

† Writ of error refused by Supreme Court.

sureties on his official bond, to recover the amount of a judgment rendered in case No. 14,225, H. D. Peck v. Murphy & Bolanz, in favor of said Peck, alleging that said Johnson, as sheriff, had failed to levy an execution issued in pursuance of said judgment, and make return thereon, and that the said judgment had, for a valuable consideration, been transferred to him. On hearing, a judgment for defendants was rendered, and Kruegel brings the case here by writ of error.

The first assignment of error is, in effect, that plaintiff in error was denied a jury in the trial of the cause, and the second assignment of error is, in effect, that the court erred in acting on the motion without trial, and without either party having an opportunity to announce ready for trial, etc. These assignments present correct legal propositions, but there is no statement of facts, nor bills of exception in the record, nor anything of record showing that the court acted in the manner complained of. Such being the state of the record, there is nothing upon which to base a proper conclusion and said assignments are therefore overruled.

The third and fourth assignments of error are not copied in the brief as required by the rules, but are presented as grouped, as follows: "The court erred in overruling and refusing motion for penalty," etc., and in entering order or judgment against Kruegel on its finding of facts and conclusions of law that the sheriff did make the levy in question by reason of having been enjoined, and in going outside of the record into another case to find that fact, if it existed. Said assignments are not presented in any other form. Several propositions are made thereunder, but none can be considered under such a presentation.

The court filed his conclusions of fact and law as follows:

"Findings of Fact. J. Roll Johnson, as sheriff, did levy the execution which it is alleged he did not levy, and he was enjoined from any further proceedings under or by virtue of said execution by an injunction granted by the Honorable Thos. F. Nash, judge of the Fourteenth judicial district of Texas.

"Conclusions of Law. Upon the foregoing findings of fact, the motion should be overruled."

There being no statement of facts in the record, this court will have to take the findings of fact by the trial court as warranted by the evidence. The findings of fact of the court showing that the sheriff had been enjoined, and nothing showing error therein, is conclusive of that question.

The fifth assignment, that the court erred in overruling amended motion to rescind and vacate order overruling and refusing to hear motion for penalty, etc., finds no support in the record, and it is overruled.

The judgment is affirmed.

HAMES et al. v. STROUD et al.

(Court of Civil Appeals of Texas. July 3, 1908. Rehearing Denied Oct. 10, 1908.)

1. ATTORNEY AND CLIENT—EMPLOYMENT—CONTRACTS.

An attorney is not bound to defend persons charged with a crime, and may fix the terms on which he will act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 328, 329.]

2. SAME—DEALINGS BETWEEN ATTORNEY AND CLIENT—GOOD FAITH.

An attorney in dealing with his client must act with the utmost fairness, and in perfect good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 239.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to show that an attorney dealt fairly with his clients, and transactions between them could not be set aside on the ground of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 289.]

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHT OF SURVIVING WIFE.

The surviving wife before remarrying may dispose of community property to settle community debts which are an incumbrance on the property, irrespective of the rights of the heirs thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Husband and Wife, §§ 1012, 1026.]

5. SAME.

Where a wife as community survivor has disposed of land in settlement of an incumbrance thereon which existed prior to, but was enforced after, the death of the husband, she could not recover the land without at least offering to pay the amount acknowledged to be due thereon.

6. BILLS AND NOTES—BONA FIDE HOLDER—FRAUD.

One who becomes an owner of a note before maturity for a value and without notice, and who procures a judgment foreclosing a lien securing it, cannot be defeated because of the alleged fraud of the payee of the note.

Appeal from District Court, Rockwall County; F. L. Hawkins, Judge.

Action by Elizabeth Hames and others against L. D. Stroud and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Chas. G. Evans and F. W. Bartlett, for appellants. T. B. Ridgell and Worð & Charlton, for appellees.

RAINEY, C. J. This suit was instituted May 14, 1906, by Elizabeth Hames and her seven children, two of whom were minors, against L. D. Stroud and M. S. Bailey. The nature of the suit was to set aside a certain conveyance for fraud, and to recover 124 acres of land, alleging, in substance, that L. D. Stroud, the attorney for appellants, had as such attorney gained their confidence, and had thereby fraudulently overreached them in his dealings with them. Answers were filed, and, upon a hearing, the court instructed a verdict for defendants, and judgment was rendered accordingly, from which this appeal is prosecuted.

The appellants complain that the court err-

ed in directing a verdict for defendants. All the assignments are based on this, and, if there is no error in the court's action in this respect, all the other assignments of error fail and need not be discussed. The evidence, in substance, shows that Levi Hames and Elizabeth Hames were husband and wife, and had seven children, viz., Fred, Georgia, Thomas, Garfield, Arthur, Mansfield, and Levi Hames, the last two minors at the institution of this suit. In 1897 Levi Hames died intestate, leaving surviving him his wife, said Elizabeth Hames, and said children. At the time of said Levi Hames' death, he and his wife owned as community property the 124 acres of land in controversy, on which existed a certain amount, about \$700, due for purchase money. Thereafter, on March 15, 1898, one W. H. Atherton was appointed and qualified as administrator of the estate of Levi Hames. Atherton and wife, being the owners of the notes given for said purchase money, transferred them to one W. L. McCord, together with such title as they had in the land. McCord, failing to collect said notes through the probate court, and said administration being closed, instituted suit in the district court to recover on said notes and to foreclose the vendor's lien on the land, making Atherton, administrator, Elizabeth Hames, and all her children parties to said suit. On May 9, 1900, Elizabeth Hames and four of her children, viz., Fred, Thomas, Georgia, and Mansfield Hames, executed their two promissory notes for \$250 each, with 10 per cent. interest, payable to the order of L. D. Stroud, and, to secure the payment of said notes, they executed a deed of trust on their interest in said 124 acres of land. In consideration of said notes, said Stroud agreed to secure legal services in defending the foreclosure suit brought by McCord as aforesaid, and said Stroud further agreed as follows: "Now, I undertake and agree to defend said suit, or any other suits that may be brought by said McCord, or any other person or persons, on said pretended vendor's lien notes; and, in case I fail entirely to defeat said suit or suits, then the two notes this day executed to me by said Mrs. Elizabeth Hames and her other children above named shall not be collected by me. In case I shall by any means defeat as much as one-half of said claim, then I shall only be allowed to collect the first note. I hereby agree that I will not transfer, assign, or sell said notes to any other person without the consent of the said Mrs. Elizabeth Hames and the others whose names are signed thereto." The McCord suit was dismissed; plaintiff taking a nonsuit. Subsequently McCord brought a second suit against the Hameses, seeking to recover the land, asserting superior title, or, in the alternative, for a recovery of about \$1,200 claimed as due for the purchase price of said land. L. D. Stroud procured the services of Word & Charlton, attorneys, to assist in the defense of said

suit, and in consideration therefor transferred to them one of the notes for \$250. This suit resulted in a judgment in favor of McCord for \$572.50, and a foreclosure of the vendor's lien. In both of said suits the said Stroud rendered his services with the assistance stated in full compliance with his contract. During the pendency of the McCord suits four of Elizabeth Hames' sons, viz., Thomas, Mansfield, Garfield, and Arthur, together with one Scott, were indicted and jailed charged with the theft of hogs, whereupon, on January 20, 1903, the said Elizabeth Hames and said sons, desiring the legal services of the said Stroud, entered with him into the following contract: "Know all men by these presents that this contract this day made and entered into by and between L. D. Stroud, on the one part, and Mrs. Elizabeth Hames, Georgia Hames, Thomas Hames, Garfield Hames, and Arthur Hames, on the other part, witnesseth: That the said L. D. Stroud hereby agrees to and binds himself to become the counsel and attorney of the said Thomas Hames, Mansfield Hames, Garfield Hames, and Arthur Hames for four hundred dollars in each case, who are now in jail charged with theft of hogs, and to defend them against said charge in all of the courts in which said charge may be prosecuted, as well as to prosecute any appeals which may be necessary to the higher courts, as well as to counsel with and advise in all matters necessary in and about securing their acquittal of said charge; and the said Stroud further agrees on the same price (\$400.00) and binds himself to likewise counsel and defend Joe Scott, connected with, or who may be connected with or accused of said charge, either as principal or accomplice, in the offense charged against said first four named persons so charged. And he further agrees and binds himself to continue as attorney and counsel of the said Mrs. Elizabeth Hames and all other defendants in a certain suit pending in the district court of Rockwall county, wherein one W. L. McCord is plaintiff, seeking to establish a debt and foreclose a lien against a certain tract of land situated on the west side of the East Fork of Trinity river in Rockwall county, and being 124 acres of the E. R. Foster survey. And in the event that said McCord, or any of his assigns, successors or administrators, or other legal representatives, shall recover said debt therein claimed or any part thereof, the debt claimed being estimated at about \$1,200.00, then the said Stroud agrees and binds himself to pay off and discharge the same within twenty days from the rendition of final judgment, but he shall have the right to prosecute an appeal to any of the higher courts and suspend said judgment by an appeal supersedeas bond, in which event he shall pay off and satisfy any and all judgments, as well as costs, which may be rendered in said cause. And the said Stroud further agrees and binds himself to procure

ball for said defendants in said criminal charge, and procure their release from their present custody, and to keep them at liberty until they are finally tried, provided that said defendants shall not depart from Rockwall county, where they are bound to appear, without the consent of the said Stroud, but each shall report to him once every week from and after the date of said bond. And the said Stroud further agrees and binds himself to pay off and discharge a certain note, now amounting to about \$300.00, held by Word & Charlton, of Dallas, Texas, and secured by a deed of trust lien on said land, which note is now over due, and surrender to said Elizabeth Hames her note for \$107.00. In consideration of the foregoing obligations of the said L. D. Stroud, the said Elizabeth Hames, Georgia Hames, Thomas Hames, Garfield Hames, and Arthur Hames, joined by one T. B. Ridgell, have this day executed and delivered to the said L. D. Stroud a good and sufficient general warranty deed of even date herewith, conveying to him said 124 acres of land. Now, it is agreed and fully understood by the parties to this contract and the parties to said deed that if the said Mrs. Elizabeth Hames, acting for herself and also on behalf of the said Georgia Hames, Thomas Hames, Garfield Hames, and Arthur Hames, shall procure on or before January 1, 1904, a purchaser or purchasers for said tract of land, on terms of one-half cash and balance in two equal notes due in one and two years respectively from the date of said purchase, and bearing interest at the rate of eight per cent. per annum from date, and which shall amount to more than what the said Elizabeth Hames, Georgia Hames, Thomas Hames, Garfield Hames, and Arthur Hames shall be obligated to pay the said Stroud by reason of liabilities he has assumed, and together with his said attorney's fees, then the said Stroud binds himself to make to said purchaser, upon the terms aforesaid, a good and sufficient deed when requested to do so by the said Mrs. Elizabeth Hames. Said Stroud further binds himself to pay to Mrs. Elizabeth Hames and the others for whom she acts all of the surplus price which the said land shall bring over and above said consideration and obligations, provided that he is not yet liable in said McCord suit, but when said suit is finally settled, if said McCord shall not recover, then the said Stroud binds himself to pay to said Elizabeth Hames, and all of the other grantors in said deed except the said T. B. Ridgell, the full amount for which said suit is brought, as a part of the consideration of said deed. And, if the said McCord shall only recover part, then said Stroud binds himself to pay the difference between the full amount sued for and the amount actually recovered and costs therein. It is agreed and understood that Elizabeth Hames and her children shall occupy said premises as tenants of the said L. D. Stroud for the

year 1903, and pay him \$100.00 rent, to be paid on the first day of December of said year. It is further agreed that if said suit of W. L. McCord is tried and disposed of before the first day of January, 1904, and if said first four named criminal cases shall be tried and disposed of or said Stroud's liability by reason of making said ball bonds shall cease by the final disposition of said cases before the first day of January, 1904, and if the said Mrs. Elizabeth Hames shall repay to said L. D. Stroud all moneys he is compelled to pay by said McCord suit, and shall repay what he has assumed and paid on said Word & Charlton note, and shall also pay to him all attorney's fees which may be due him under this contract before January 1, 1904, then the said L. D. Stroud binds himself to reconvey said land by a good and sufficient deed to the said Elizabeth Hames and her children, who have signed the same, provided, said land has not been sold at her request, as hereinbefore provided. Subject to the foregoing conditions, the said deed is absolute." On said date Elizabeth, Georgia, Thomas, Garfield, and Arthur Hames and T. B. Ridgell executed to said Stroud a deed of conveyance to said land, reciting a consideration of \$2,500. All of the criminal cases were disposed of as follows: Scott became a witness for the state, and thereby secured an acquittal. Three of the Hames boys were acquitted, and the other forfeited his bond, and has never been tried. T. B. Ridgell assisted in the trial of the criminal cases, with the knowledge of the said Elizabeth Hames and the accused, and Stroud paid him for such services \$400.

After the affirmance of the McCord judgment by this court, Stroud, in keeping with his agreement so to do, took steps to pay the same, and thereby protect the land from sale in satisfaction of the foreclosed vendor's lien. He paid the costs of this court, and procured the issuance of its mandate. He then had a conference with Elizabeth Hames as to the best course to be pursued for the protection of the interests of all parties. Elizabeth Hames wished to retain the land. Some question arose between her and Stroud at this conference as to the character of the deed which he held to the land, she insisting that it was only a mortgage, while he was disposed to regard it as a straight-out deed. This matter was adjusted by Stroud agreeing that, however the disputed fact might be, he would reconvey the land to the grantors upon their paying him what was due and owing to him. This was satisfactory to Elizabeth Hames, if some means could be devised for raising the necessary cash money. The land furnished the only basis for hope in this direction. Stroud told her that he doubted if a loan could be secured on an undivided interest in the land, and that he thought the best hope would be to take necessary steps to involve the two minors' interests along with those of the

others. They discussed the question of taking out letters of guardianship on their estates, but concluded it would be too expensive. Stroud then suggested that the land be sold in satisfaction of the McCord judgment, with the understanding that he would bid it in at the sale, and afterwards convey it to her, thereby putting the legal title to the entire tract in her. This was thought to offer the best and cheapest and most equitable settlement of the matter. Elizabeth Hames agreed to that course, and it was pursued successfully. After the sale under the McCord judgment, Stroud and Elizabeth Hames had another conference, with a view to adjusting matters between them. In this conference she represented all of the plaintiffs in this suit, according to the allegations of their petition herein. At this conference in June, 1905, disputes arose between them as to the amount due Stroud, and as to other matters. These disputes were all satisfactorily compromised and adjusted between them. The conference ended by a reconveyance of the land by Stroud to Elizabeth Hames in consideration for her four vendor's lien notes, three for \$1,000 each, and one for \$263. In this settlement Stroud's claim amounted to over \$4,100; but he settled for the four notes stated. The children, except the two minors, consented in writing to the reconveyance of the land by Stroud to their mother. Stroud soon after the settlement transferred the notes to defendant Bailey, receiving cash therefor. Default was made in the payment of the first note when due; and, by their terms, this matured the others, at the option of the holder. Elizabeth Hames sought to secure a loan on the land, with a view to taking up the notes, but was unsuccessful. Suit was brought by Bailey on all of the notes, and to foreclose the vendor's lien on the land. No defense was made by Elizabeth Hames, and the judgment went as prayed for. The land was sold under this judgment, and was bought in by defendant Bailey. In the McCord suit Ridgell was allowed by the court \$300 as guardian ad litem for representing the minors, and no exceptions were taken thereto in that suit, and this amount was paid by Stroud. Bailey was an innocent purchaser of the notes, had sued on them, and recovered judgment by default, foreclosing the lien on the land.

The evidence in the case we think shows that Stroud faithfully performed the services as attorney in the litigation that he contracted to perform. He had prevented a recovery in the first suit instituted by McCord. In the second suit he had prevented a recovery of the land by McCord, and had caused a reduction in the amount claimed nearly one-half. The criminal suits had been successfully defended, with the exceptions of one of the sons who had forfeited his bond and fled the country, and whether or not Stroud has incurred liability on this

the record does not disclose. His fees in the criminal cases seem high, but the only testimony on this point is that they were reasonable. The sons were in jail, and the mother was distressed when the contract for the fee was made, but Stroud was not responsible for the existence of such facts, and was under no obligation to defend the boys, and had the right to exact the terms upon which he was willing to undertake their defense. We appreciate the rule that obtains with respect to the relation between attorney and client. The attorney in dealing with the client must act with the utmost fairness, and in perfect good faith. There was no misrepresentation made by Stroud in dealing with said clients shown by the evidence. He made contract with reference to his fees and securing the payment thereof, and this he had a right to do. It seems that, after a deed had been given him to the land, the parties expressed a wish to retain it, or that they only intended it as a mortgage, when he reconveyed it to them, reserving a lien thereon to secure what was due him. Not only this, but in this settlement, in which all parties seemed to be satisfied, he reduced his claim of \$4,199 to \$3,263, for which he accepted notes, with a lien to secure it and for nearly two years there seems to have been no complaint from the parties, and not until a writ of possession was issued, when this suit was brought. The survivor of community, the wife before remarrying, has the right to dispose of community property to pay off and settle community debts. Especially is this so where the debt is an incumbrance on the particular property, and this irrespective of the rights of heirs in the property. *Davis v. McCartney*, 64 Tex. 584; *Henry v. Vaughan* (Tex. Civ. App.) 103 S. W. 192; *Withrow v. Adams*, 4 Tex. Civ. App. 445, 23 S. W. 439. McCord recovered a judgment foreclosing a lien on the land for the purchase money thereof, which incumbrance existed before the death of Levi Hames, and Elizabeth Hames, as community survivor, had the right to dispose of the land in settlement of said incumbrance, and the various transactions had in relation thereto were sufficient to divest title out of plaintiffs, and, before they could recover the land, they must at least offer to pay the amount acknowledged to be due on said land, but this they have not done. Bailey, having become the owner of said notes for a valuable consideration, without notice, and having procured a judgment thereon foreclosing the lien on the land, cannot be defeated for the alleged fraud of Stroud.

We are of the opinion that the evidence is such that no other judgment should be rendered thereon, and the court properly directed a verdict for defendants; and the judgment is affirmed.

Affirmed.

WATERMAN v. CHARLTON et al.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 10, 1908.)

1. PUBLIC LANDS—MILITARY LAND CERTIFICATES—NATURE OF PROPERTY.

A certificate for land issued for military services in the army of the republic of Texas, as provided by the declaration of 1835, is, until located, personal property.

2. DESCENT AND DISTRIBUTION—WHAT LAW GOVERNS.

A citizen of Virginia who entered the military service of Texas in her war for independence after her adoption, in 1835, of her declaration promising citizenship and donations of land to volunteers, and who died in her service, was, when he died, a citizen of Texas, and the citizenship of his wife and child followed his, and, on his death, his estate descended in accordance with the laws of Texas.

3. PUBLIC LANDS—MILITARY LAND WARRANTS—CERTIFICATE AND PATENT TO HEIRS.

A certificate and patent to the heirs of a person who entered the military services of Texas in her war for independence after the adoption, in 1835, of the declaration promising citizenship and donations of lands to volunteers, is a certificate and patent to those who were heirs and entitled to inherit under the laws of Texas in force in 1836 at the time of the death of such person.

Error from District Court, Hood County; R. W. Simpson, Judge.

Action by William Wallace against C. A. Waterman, M. R. Charlton, and others, in which an issue as to title to land between C. A. Waterman on one side and J. J. Jarvis and another on the other side were involved. From a judgment in favor of J. J. Jarvis and another, C. A. Waterman brings error. Affirmed.

Mounts & Jones, and Leake & Henry, for plaintiff in error. Hart & Hart, for defendants in error.

BOOKHOUT, J. This suit was originally instituted in the district court of Wood county by one William Wallace as plaintiff, in which suit C. A. Waterman, J. J. Jarvis, Mrs. M. R. Charlton, and the Texas & Pacific Railway Company were made parties defendant. The suit was in trespass to try title for the recovery of two tracts of land in Wood county, Tex., one of 1,280 acres, and the other of 640 acres, patented to the heirs of William Wallace, who fell in the massacre at Goliad. The plaintiff subsequently took a nonsuit, and abandoned his case, and as the case went to trial it involved only an issue of title to the land between the several defendants, C. A. Waterman, plaintiff in error, on the one side, and J. J. Jarvis and Mrs. M. R. Charlton, defendants in error, on the other. It was conceded by all parties that the Texas & Pacific Railway Company should have judgment for that part of the land occupied by it for its right of way. The plaintiff in error C. A. Waterman claimed title to both tracts of land, and pleaded affirmatively, in addition to his defensive pleading, seeking to have the title adjudged in him as against

the contesting defendants J. J. Jarvis and M. R. Charlton. The defendant in error J. J. Jarvis pleaded defensively with the usual pleading in trespass to try title, and also pleaded affirmatively against C. A. Waterman, asking that the title to 1,080 acres out of the 1,280-acre tract be adjudged to him. Mrs. M. R. Charlton answered by plea of not guilty, and further answered that she was entitled to the 640-acre survey and to 200 acres from the 1,280-acre survey, being the owner thereof, and prayed judgment of the court. In this condition of the pleading, the defendant J. J. Jarvis expressly assumed the burden of proof. The court also instructed the jury that the burden of proof was upon M. R. Charlton. The trial of the case in the district court resulted in a verdict and judgment in favor of J. J. Jarvis against Waterman and Charlton for 1,080 acres of the land, and in favor of M. R. Charlton against the other defendants for the 640-acre survey, and for 200 acres out of the 1,280-acre survey. From this judgment, C. A. Waterman, plaintiff in error, sued out a writ of error to this court.

William Wallace and Celinda Woolwine were married in 1835 at Christianburg, Va., and lived in the family of the wife's father, at Christianburg, between four and six months thereafter. Wallace left his father-in-law's house, where he and his wife had been living, and came to Texas to enlist in the army of Texas. He did enlist, and was massacred at Goliad in 1836. His wife remained in Virginia at her father's home. Subsequent to the death of William Wallace, a child was born to him and his wife, and lived some months, when it died. The wife of Wallace died in 1878. The defendant in error J. J. Jarvis deraigned his title under a deed from William C. Pendleton; said Pendleton making his conveyance under a power of attorney from Celinda Wallace, the surviving widow of William Wallace. The plaintiff in error, C. A. Waterman, deraigned his title through deeds from the surviving brothers and sisters of William Wallace, and the only issue is: Which had the title to convey, the surviving wife or the surviving brothers and sisters of William Wallace? If the former, title to the land in controversy between Waterman and Jarvis vests in Jarvis, and, if the latter, vests in Waterman. The evidence showed that the patents to the heirs of William Wallace, through which patents both parties claim the title to the land, were issued under a certificate of date December 26, 1849, which certificate entitled the heirs of William Wallace to 1,920 acres of land by virtue of his services in the army of the republic of Texas for three months, from December 25, 1835, to March 27, 1836, and having fallen at the massacre at Goliad. On this certificate the two patents were issued to the heirs of William Wallace of date February 16, 1852.

The contention of plaintiff in error is that the certificate for the land was personal prop-

erty, and that the law of the state of Virginia regulating the descent of personal property controls. The contention of defendants in error is that William Wallace at the time of his death was a citizen of Texas, and his citizenship by operation of law drew with it the citizenship of his wife and child, and that the laws of descent of Texas control the inheritance. The certificate for the land issued in 1849, but the same was not located until 1852, and the right to the same, until located, was personal property. It seems clear that under the statutes of descent in Virginia, introduced in evidence, upon the death of William Wallace, and the death of his child subsequently occurring, the title to the certificate would pass in two-thirds interest to his brothers and sisters, through whom plaintiff in error claims, and one-third to his wife, Celinda Wallace, through whom defendants in error deraign title. The material question, then, is: Does the law of Virginia or that of Texas control the inheritance? Prior to 1835 Coahuila and Texas formed one state of the Mexican Republic. On November 7, 1835, the people of Texas, in convention assembled, adopted a declaration that, by reason of Gen. Santa Anna and other military chieftains having overthrown the federal institutions of Mexico and dissolved the social compact which existed between Texas and other members of the Mexican Confederacy, the people of Texas, availing themselves of their natural rights, solemnly declare that Texas is no longer morally or civilly bound by the compact of the Union, that they do not acknowledge that the present authorities of the nominal Mexican Republic have the right to govern within the limits of Texas, and that they will not cease to carry on war against the said authorities while their troops are within the limits of Texas. By the eighth clause of this declaration, Texas declared "that she will reward by donations in land, all who volunteer their services in her present struggle, and receive them as citizens." 4 Sayles' Ann. St. pp. 137, 138. The testimony shows that William Wallace came from Virginia to Texas to take part in the Texas Revolution. The exact date of his coming to Texas is not shown by the record; but it is to be inferred that it was shortly after the adoption of this declaration. The certificate recites that he served faithfully and honorably in the army from the 25th day of December, 1835, until the 27th day of March, 1836, and fell in the massacre of Goliad. The question recurs: Was he a citizen of Texas at the time of his death? This must be determined by his act and the circumstances surrounding his coming to Texas. He had been a saddler in Virginia, had been married only a few months, and was living with the family of his father-in-law. He must have been desirous of securing a home of his own, and bettering the conditions of his family. It is to be inferred that he heard of the war which Texas was

waging against Mexico, and of the liberal donations of land promised by Texas to those who volunteered their services, and that by enlisting he would be received as a citizen of Texas. These were the circumstances surrounding William Wallace at the time he came to Texas to volunteer in the army of Texas. Under these facts, William Wallace in coming to Texas to enlist in the army must have intended to become a citizen of Texas. Texas had solemnly promised to receive those volunteering in its army as citizens, and Wallace came to Texas in compliance with this promise, and volunteered in the army, and lost his life while serving therein. In our opinion he was at the time of his death a citizen of Texas. Such was the holding of Judge Maxey of the federal court in *Kircher v. Murray* (C. C.) 54 Fed. 617, under a state of facts quite similar to these. See, also, *Russell v. Randolph*, 11 Tex. 463; *Clements v. Lacy*, 51 Tex. 157, 158. William Wallace being at the time of his death a resident of Texas, his residence constructively drew with it by operation of law the residence of his wife and child. It follows from the above remarks that in our opinion, William Wallace being a citizen of Texas, his estate at his death descended in accordance with the laws of Texas. The certificate issued to, and was patented to, the heirs of William Wallace. This means those who were heirs and entitled to inherit under the laws of Texas in force in 1836, at the time of the death of said Wallace. *Goodrich v. O'Connor*, 52 Tex. 375. We conclude that upon the death of William Wallace his estate descended to his wife and child, and that, upon the death of the child, its interest therein descended to the mother. Upon the death of the mother, Celinda C. Wallace, the land descended to her sister, M. R. Charlton, except that sold by Celinda C. Wallace to defendant in error J. J. Jarvis.

The judgment is affirmed.

DENISON & S. RY. CO. v. CITY OF DENISON.†

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 10, 1908.)

1. MANDAMUS—STREET RAILROADS—STREETS—DUTY TO PAVE.

Where a street railroad's franchise required it to pave the street between its rails and one foot on the outside thereof in the same manner and at the same time as the streets through which the track was laid should be paved by the city, a judgment in mandamus commanding the railway company to forthwith proceed to pave that portion of M. street occupied by its tracks and one foot outside the rails with the same kind of material and at the same time that the city does its part of the work was not objectionable for failure to sufficiently describe the material with which the work was to be done, or the manner and time of doing it.

2. SAME—EVIDENCE.

Where a street railway's franchise required the railway to pave its portion of the street and one foot outside the rails in the same man-

† Writ of error refused by Supreme Court.

ner and at the same time the streets should be paved by the city, proof that the city was actually engaged in paving a street on which defendant's tracks were laid, and that defendant had refused to pave its portion of the street, not because of financial inability, warranted mandamus compelling the railway company to forthwith comply with its franchise obligation.

Error from District Court, Grayson County; B. L. Jones, Judge.

Mandamus on petition of the city of Denison against the Denison & Sherman Railway Company. From a judgment granting the writ, respondent brings error. Affirmed.

Head, Dillard & Head, for plaintiff in error. E. J. Smith, for defendant in error.

TALBOT, J. This suit was instituted by the defendant in error to compel the plaintiff in error, by writ of mandamus, to pave certain parts of Main street of the city of Denison. The petition alleged, in substance: That plaintiff in error was operating electric street cars in the city of Denison under a franchise granted by said city to Scott, Youree & Scott, to which the plaintiff in error had succeeded, which required plaintiff in error to pave that part of the street between its track rails and one foot on the outside thereof in the same manner and at the same time as the streets through which its track is laid shall be paved by the city. That "Main street" is the principal thoroughfare of the city of Denison, and that a contract had been entered into between said city and a construction company for the paving of said street. That, under said contract, a large amount of material was on the ground, a large portion of said street torn up and not open to travel, and the work of paving the same actually begun. That plaintiff in error had been notified of the letting of the contract for the paving of said street of the time when the work would begin, of the character of the work, the material to be used and within what time the work was to be completed. That notwithstanding the notice thus given, and plaintiff in error's duty under the terms of the contract and franchise under which it was operating, it had arbitrarily, willfully, wrongfully, and without any reasonable excuse or justification refused to pave that part of the street between its rails and the one foot on the outside thereof embraced in the paving contemplated by the contract entered into with the said construction company. The plaintiff in error answered in the district court by general and special demurrers and by special plea, which need not be stated. A trial before the court on October 9, 1907, resulted in an order granting a peremptory writ of mandamus, to reverse which this writ of error is prosecuted.

It is contended that the judgment rendered is invalid because it fails to define with sufficient particularity the things that the defendant is required to do, and, if sufficient in this respect, is not sustained by the evi-

dence. The specific objections to the judgment are (1) that it does not sufficiently describe or designate the manner in which the defendant is required to do the work it is commanded to do; (2) that it does not sufficiently describe or designate the material which the defendant is to use in doing the work required of it; (3) that it does not sufficiently describe or designate the portion of Main street which defendant is commanded to pave; (4) that it does not sufficiently designate the time within which or at which the defendant is required to do said work. We are of the opinion that neither of these objections to the judgment is well taken. That the order or judgment in cases of this character should specifically state the act to be performed is a general rule well settled by the authorities and fully recognized by this court. But we do not think the rule has been violated in the framing of the judgment here complained of. The judgment reads as follows: "On this, the 9th day of October, came on to be heard the above-entitled cause, whereupon the court, after hearing the pleadings, evidence, and argument of counsel, orders that a peremptory writ of mandamus issue, directing and commanding the defendant, the Denison & Sherman Railway Company, to forthwith proceed with all reasonable dispatch, to have that portion of Main street occupied by its tracks and twelve inches on the outside of the rails, in the same manner and with the same kind of material and at the same time that the city does its part of the work." By the terms of the franchise under which the plaintiff in error is operating, it is obligated to pave that portion of the street in question between its track rails and one foot on the outside of each rail in the same manner and at the same time as the streets, through which the street railway tracks are laid, shall be paved by the city.

The pleadings and evidence show that the city of Denison before the institution of this suit had begun the paving of Main street of said city with vitrified brick, and that the plaintiff in error had due notice that such improvement had been commenced and was progressing and of the character of the paving material being used. The judgment, as will be observed, commands the plaintiff in error "to forthwith proceed with all reasonable dispatch to pave that portion of Main street occupied by its tracks and twelve inches on the outside of the rails in the same manner and with the same kind of material and at the same time that the city does its part of the work." This was in accordance with the contract entered into between the plaintiff in error and the city, and is fully as specific as the contract itself. It required the plaintiff in error to do its part of the paving of Main street, which was not to extend along said street beyond the paving done by the city at the same time and in the same manner the city's work was being done,

and with same kind of material that the city was using. It was the duty of the plaintiff in error, under the terms of its contract with the city, to ascertain and know the manner of doing this work and the kind of material that was being used by the city in doing it, and to conform thereto in doing the paving undertaken by it. These things it did in fact know, as shown by the evidence. But, in view of the terms of the contract sought to be enforced, the duty therein devolved upon the plaintiff in error, as intimated, the language of the judgment was sufficiently specific to avoid any misconception on plaintiff in error's part of what it was thereby required to do, and was sufficiently defined. We are also of the opinion that the evidence was amply sufficient to authorize and support the judgment rendered. It is undisputed that the city was actually engaged in paving Main street, and that the plaintiff in error had refused to pave that portion occupied by its track, or any part thereof. It was also established beyond controversy that the financial condition of plaintiff in error did not prevent it from carrying out the contract.

The president of the company testified: "Our failure to pave is not due to any financial inability on our part. We are not financially embarrassed." The contention that, inasmuch as the city was paving one side of the street in question at a time, the plaintiff in error could not be required to do its part of the work until the city completed one side and commenced on the other, is not tenable. It was the duty of plaintiff in error to commence its part of the paving at the time the city commenced to pave, and to keep pace with the progress of the city's work.

The judgment of the court below is affirmed.

GOUGH MILL & GIN CO. et al. v. LOONEY.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 10, 1908.)

1. CORPORATIONS—STOCK SUBSCRIPTIONS—AGREEMENT AS TO LIABILITY—EFFECT.

One subscribing for corporate stock could not rely upon representations by the corporation's representatives that he would not be required to pay anything for the stock except possibly 10 per cent. of it, and that it would be given him for his support of the corporation; the representations being regarded as mere expressions of opinion and insufficient to create a contract.

2. EVIDENCE—PAROL TESTIMONY—ADMISSIBILITY TO AFFECT WRITING.

Parol testimony is admissible upon proper allegations of fraud, accident, or mistake to defeat a written contract, or to show its real terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1890–2020.]

Appeal taken from Delta County Court; Jno. L. Ratliff, Judge.

Action by W. A. Collins and another, partners as Collins & Dulaney, against D. L.

Looney; the Gough Mill & Gin Company and another being made parties on defendant's prayer. From a justice's judgment for defendant Looney against his codefendants, the codefendants appealed to the county court, whence they appeal from a similar judgment. Reversed and remanded for a new trial.

Patteson & Sharp, for appellants. J. L. Young, for appellee.

TALBOT, J. Collins & Dulaney, a partnership firm composed of W. A. Collins and W. F. Dulaney, brought this suit in the justice court of Delta county, Tex., against D. L. Looney to recover the sum of \$100, besides interest and attorney's fees, alleged to be due on three promissory notes executed and delivered by the said Looney to J. C. Bailey as the secretary of the Gough Mill & Gin Company May 30, 1902, and indorsed to the said Collins & Dulaney in the due course of trade. Looney pleaded, among other things not necessary to state, that the notes were given to cover his subscription for stock in the said Gough Mill & Gin Company, a private corporation; that his subscription for said stock was secured by the false and fraudulent representations of the promoters of said corporation before its organization, and the notes obtained after its organization by like representations on the part of the agents of said corporation. He prayed that the said J. C. Bailey and Gough Mill & Gin Company be made parties to the suit, which was done, and that, in the event a judgment was rendered against him, he have judgment for a like amount against them. In the justice court Collins & Dulaney recovered judgment against appellee Looney for \$140.80, and recovered judgment over against Bailey and the Gough Mill & Gin Company for the same amount. From the judgment against them, the said Bailey and Gough Mill & Gin Company appealed to the county court, in which court similar judgments were rendered, and the appellants perfected an appeal to this court.

It is assigned that the trial court erred in overruling appellant's general and special exceptions to appellee's answer. These exceptions were leveled particularly at that portion of the answer setting up the alleged false representations, by which it is claimed the execution of the notes sued on was obtained, which is in substance, as follows: That appellee did not desire the gin company stock; that, when the company was being organized, the representatives and promoters thereof falsely represented to him that Collins & Dulaney would put up the gin and wait on the company for the money so expended until it paid itself out, and that he, appellee, would never have to pay anything for the stock taken by him, except possibly 10 per cent. thereof; that they wanted his patronage and influence, and would give him his stock therefor; that appellee was induced to

sign the notes sued on the following fall after he subscribed for the stock through the false and fraudulent representations made to him by the agent of the Gough Mill & Gin Company, to the effect that said notes were simply taken for the purpose of making the business show up properly, and that he would never have to pay them. It is also assigned that the court erred in admitting, over the objection of appellant, testimony in support of the above allegations, and in charging the jury as follows: "But if you should find as described in the preceding paragraph, and you should further find that the Gough Mill & Gin Company, through its agents and representatives, and J. C. Bailey, represented to and told the defendant, Looney, that if he would subscribe for the aforesaid stock that he should not have to pay anything for said stock except possibly 10 per cent. of it, but that the stock would be given him for his support and patronage to said company, and, on such representations and relying thereon, he was induced to subscribe for, and did subscribe for, the stock and executed the notes herein sued on therefor, then, and in that event, you will find for Looney and against Gough Mill & Gin Company and J. C. Bailey for whatever and the same amount that you find for Collins & Delaney as against Looney." We are of the opinion these assignments should be sustained. The representations alleged were not of such a character as justified the appellee to rely and act upon them. They were inconsistent with the well-known legal effect and purposes of the contract appellee entered into, and must be regarded as a mere prediction, or expression of opinion of the party making them, and relied on by the appellee at his peril. In so far as the alleged statements constituted promises, they were not sufficient to create a contract, and afford no ground of judicial cognizance. It is also a general rule that "statements looking to the future, and not coming to a contract, are not within the cognizance of the law." Such, we think, was the character of the statements alleged. Clearly, the charge quoted and complained of was error. In the case of *Railway Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, it is said: "Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters, there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question, upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, cannot be treated as agent, because the nominal principal is not then in existence, and hence, where there is nothing more than a contract by a promoter in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced. The promoters themselves are liable upon the contract, unless the

person with whom they engage agrees to look to some other fund for payment." This decision of our Supreme Court is well sustained by authority, and the error in giving the charge here in question requires of itself a reversal of the case.

It is unnecessary for us to discuss appellant's proposition that the pleading objected to and the evidence offered in support of it were obnoxious to the general rule that parol evidence is inadmissible to vary the terms of a written contract. It cannot be questioned that such evidence is admissible upon proper allegation of fraud, accident, or mistake to defeat such a contract altogether, or to show its real terms.

The other assignments either relate to the questions already considered, or point out no reversible error, and need not be discussed.

For the reasons stated, the judgment of the court below is reversed and the cause remanded for another trial between the appellants and the appellee.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HAGLER.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 10, 1908.)

1. TRIAL—INSTRUCTIONS COVERED BY THOSE GIVEN.

A requested charge was rightfully refused where substantially covered by the main charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

2. SAME—SUBMISSION OF MATTERS NOT SUPPORTED BY EVIDENCE.

A refusal of a charge that, if the water was diverted by a ditch cut by another, defendant railroad company was not liable for the overflow of plaintiff's land, is not error, where there is no evidence that such ditch caused any water to accumulate above the embankment of the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

3. WATERS AND WATER COURSES—ACTIONS FOR INJURIES—INSTRUCTIONS.

Though the measure of damages for flooding lands is the market value of the crops at the time and place of overflow, yet the omission of the word "place" in the charge defining the measure of damages was not calculated to mislead the jury, where the evidence related to the market value of the crop as it stood in the field at the time of the overflow, and there was nothing in the evidence or charge to suggest that the market value at any other place could be considered.

4. SAME—EVIDENCE—ADMISSIBILITY.

In an action against a railroad company for flooding lands, evidence of the length of the trestle of another railroad company whose road ran about one-half mile distant from and parallel with defendant's road in the valley and between defendant's road and plaintiff's land was pertinent to show the conditions in the valley, and that the construction of the other railroad did not affect the flow of the water; and that it might serve the purpose of comparison did not render it objectionable.

5. SAME—MEASURE OF DAMAGES.

In an action against a railroad company for flooding lands, witnesses other than plaintiff, who testified to the value of the crops destroyed when matured, testified as to their value

as they stood in the field at the time of the overflows, when the railway company's counsel objected, which led the court to hold that the value of the crops, less the expense of making and gathering, was the rule. All the witnesses were questioned as to the cost of maturing and marketing such crops, and as to the expenses incurred thereon up to the time they were destroyed. Held that, taking all the evidence into consideration, the rule was not violated that the correct criterion of the value of a growing crop is what that character of crop was worth when matured, making proper allowances for the expenses of further cultivation and care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 255.]

6. EVIDENCE—OPINION EVIDENCE—CONSTRUCTION OF EMBANKMENT.

An expert hydraulic and civil engineer who had had much experience in railroad construction, and who had examined the embankment of defendant railroad company and also of another railroad company whose road was about one-half mile distant, and who was familiar with the topography of the country above, between, and below the embankments, and who had run levels over the entire valley, was properly permitted to testify that in his opinion the manner in which defendant's embankment was constructed was not good engineering.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1343.]

Appeal from District Court, Dallas County; Thos. F. Nash, Judge.

Action by J. M. Hagler against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas & Rhea, for appellant. Turney & Lewis and Gano, Gano & Gano, for appellee.

RAINEY, C. J. J. M. Hagler, the appellant, brought this suit against the Missouri, Kansas & Texas Railway Company of Texas, appellee, to recover damages for the negligent building of its embankment across Five Mile Valley, through which flows Five Mile creek, which caused the waters of said creek during the overflows of 1904 and 1905 to become congested and diverted from its natural course, which caused the water to back against and on the west side of said embankment so as to break same and precipitate a great volume of water over plaintiff's land, and destroy his growing crops on same, to his damage \$4,100. Defendant pleaded the general issue, unusual and unprecedented rainfall, and diversion of the water by the construction of a ditch by the Trinity Rod and Gun Club, and not by any act of the defendant. A trial before a jury resulted in a verdict in favor of plaintiff for the sum of \$1,500.

The verdict and judgment are attacked on the ground that the preponderance of evidence does not warrant same. The evidence is sufficient to warrant the conclusion that the railway company in the construction of its embankment did not leave therein sufficient openings for the passage through of the waters of the overflows in the years of 1904 and 1905, which were not unusual or unprecedented, but said embankment caused the waters to back up and break said em-

bankment for the width, in one instance, of 90 feet, and in the other of 1,100 feet, which diverted the water from its natural course, and over and across plaintiff's land, destroying his growing crop, to his damage to the extent of the verdict and judgment, \$1,500. No injury resulted from the ditch cut by the Trinity Rod and Gun Club. The contention of appellant that the verdict and judgment are not supported by the evidence is not sustained.

The requested charge, to the effect that if the water was diverted by the club ditch, etc., to find for the defendant, was rightfully refused, as this issue was substantially covered by the court's main charge. Besides, we think the evidence fails to show that said ditch caused any water to accumulate above the embankment which caused the injury.

Complaint is made of the following paragraph of the charge of the court as being erroneous, misleading, and incomplete, to wit: "If you find for the plaintiff, the measure of damages should be such an amount as you believe from the evidence would be the reasonable market value of the crops that were destroyed, if any, at the time of the respective overflows, in the condition they were at the time of the overflows, respectively." The defect pointed out in the charge is that it does not restrict the jury in assessing the damage to the market value of the crop at the place where destroyed. While the law in such cases prescribes the measure of damage to be the market value at the time and place of the damage, yet, in this instance, the omission of the word "place" in the charge was not calculated to mislead the jury, as the evidence as to damage related to the market value of the crop as it stood in the field at the time of the overflow, and there was nothing in the evidence or charge to suggest that the market value at any other place could be considered.

Appellant's fifth assignment of error is: "The court erred in allowing the plaintiff to prove, over the objection of this defendant, by the witnesses Thatcher and Peeler, the length of the trestle in the Central track, all of which is more fully shown by the stenographer's report of the trial of this cause." The proposition under this assignment is: "A comparison of the size of the trestle in the embankment of the Houston & Texas Central with the trestles in the embankment of the appellant did not tend in any way to show that the maintenance of the embankment of the appellant had caused the diversion of the surface water and the break of its embankment, and was immaterial and highly prejudicial." The Houston & Texas Central Railroad runs about one-half mile east of and parallel with the appellant's road in Five Mile Valley, and between appellant's road and appellee's land. The evidence was pertinent to show the conditions in the valley, and that the construction of the Houston & Texas Central Railroad did not affect the

flow of the water. This, we think, the plaintiff had a right to prove in making out his case, in that the diversion of the water was caused by appellant's embankment, and not that of the Houston & Texas Central Railroad. The evidence being legitimate, that it served the purpose of comparison does not render it objectionable.

There was no error in admitting the evidence of plaintiff as to the value of such crops when matured. The measure of damage in this case is the value of the crops at the time, place, and condition in which they were at the time of the overflow. Witnesses, other than plaintiff, testified as to the value of the crops as they stood in the field at the time of the overflows, when appellant's counsel objected, which led the court to hold that the value of the crops, less the expense of making and gathering, was the rule. All the witnesses were questioned as to the cost of maturing and marketing such crops, and as to the expenses incurred thereon up to the time they were destroyed. In *Railway v. McGowan*, 73 Tex. 362, 11 S. W. 338, a case involving the destruction of growing crops, the court said: "The only correct criterion for ascertaining the value of a growing crop at that period of its existence is to prove what that character of crop was worth at or near the place where it was grown when matured, and to make proper estimates and allowances from ascertained or ascertainable facts for the contingencies and expenses attending further cultivation and care." When all the evidence is taken into consideration, this rule was not violated.

Other assignments are made to testimony, but none in our opinion are tenable.

There was no error in permitting the witness Thatcher to testify that in his opinion the manner in which the defendant's embankment was constructed was not good engineering. The evidence shows Thatcher to have been an expert hydraulic and civil engineer, who had had a great deal of experience in the construction of railroads. He had examined the embankments of both railroads, and was familiar with the topography of the country above, between, and below these embankments, and had run levels over the entire valley.

We are of the opinion that the verdict is not excessive. It is less than the testimony of some of the witnesses would have warranted.

We have considered all the assignments of error presented; and, finding no material error, the judgment is affirmed.

BUCHANAN et al. v. ROLLINGS et al.

(Court of Civil Appeals of Texas. July 3, 1908.
Rehearing Denied Oct. 8, 1908.)

1. WILLS—PROBATE OF LOST WILL—ACTION—BURDEN OF PROOF.

Where an alleged will was not produced in court in probate proceedings, and was last

seen several months before testator died, it is presumed to have been revoked during her lifetime, and the burden was on proponent to show the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 663.]

2. SAME—EVIDENCE—SUFFICIENCY—REVOCA-TION OF WILL.

In probate proceedings where the will was not produced in court, the evidence held insufficient to overcome the presumption that it had been revoked during testator's lifetime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 732.]

3. SAME—ADMISSIBILITY—DECLARATIONS OF TESTATOR AS TO EXECUTION.

In proceedings to probate an alleged will which was not produced in court, testator's declarations tending to show the execution of the will, its contents, and that it was in existence until about 10 days before her death, while not in themselves sufficient to prove the execution of the will, were admissible for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 696.]

4. SAME—LOST WILL—CONTENTS.

Testator's declarations, which were admissible in probate proceedings to prove the contents of a lost or destroyed will, shown to have been executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 695.]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Proceedings by J. I. Rollings and others against E. H. Buchanan and others to probate a will. From a judgment admitting the will to probate, contestants appeal. Reversed and remanded for new trial.

Moore, Park & Birmingham, M. J. Hathaway, and Dudley & Dudley, for appellants. B. B. Sturgeon, W. F. Moore, and Burdett & Connor, for appellees.

WILLSON, C. J. The appeal is from a judgment of the district court of Lamar county, admitting to probate as the last will of Hettie C. Buchanan, deceased, the contents, as testified to by witnesses, of a writing alleged to have been the will, wholly written by herself, of said Hettie C. Buchanan, and to have been lost or secreted, suppressed or destroyed, by appellants Buchanan and Mary Higdon. The proceedings resulting in the judgment appealed from were commenced in the county court of Lamar county by appellee J. I. Rollings, who in his application to probate the alleged will averred that he was one of the legatees named therein. A judgment admitting the alleged will to probate also was rendered in that court. From the testimony of one of the witnesses it appears that at the time she died (August 16, 1904) Mrs. Buchanan was about 45 years of age. From the testimony of another witness it appears that she was then about 60 years of age. She had been twice married—the first time to one Mich Webb, who died in May, 1902. She was married to appellant E. H. Buchanan December 28, 1903. While she and Webb were husband and wife they accumulated, it seems, proper-

ty of considerable value. They had no child of their own, but in his infancy, on the death of his mother, who was Mrs. Buchanan's sister, had taken charge of and cared for as their own child, Johnny Mich Rollings, at the time of the trial about 20 years of age, the son, by his marriage with Mrs. Buchanan's said sister, of appellee J. I. Rollings. Webb died testate, and by his will left his entire estate to his surviving wife. By the terms of her alleged will as probated Mrs. Buchanan devised to Johnny Mich Rollings her homestead situated on Webb street in the city of Paris, and a farm consisting of about 145 acres, situated in Lamar county; in trust to James I. Rollings, for the use and benefit of said Johnny Mich Rollings, all her money and personal property; to one Wooten Saufley, her nephew, a house and lot in Paris; and to one Will Saufley, another nephew, a house and lot in the same city. Appellant Mary Higdon was Mrs. Buchanan's sister.

Before a will can be admitted to probate it must be proved "that such will has not been revoked by the testator." Sayles' Ann. Civ. St. 1897, art. 1904. We think appellants' contention that such proof was not made on the trial of this case in the court below must be sustained. The alleged will could not be found, and was not produced in court. It was last seen at a time when Mrs. Buchanan was a widow, before she was married to Buchanan, and several months before the time when she died. It was then in her custody. The presumption, therefore, was that she had revoked it during her lifetime. The burden of overcoming this presumption by proof to the contrary was on appellees. Evidence showing the regard entertained by Mrs. Buchanan for Johnny Mich Rollings, the principal devisee in the alleged will, the confidence she had in his father, J. I. Rollings, named in the alleged will as trustee for said Johnny Mich, and her declarations indicating the will to have been in existence from time to time after it was made until within 10 or 12 days of the date of her death, were relied upon as establishing the contention made that the will had not been revoked by her during her lifetime; and evidence that she habitually kept the alleged will in a certain shot pouch, that her husband and sister, appellants here, had opportunity to procure possession of and destroy the will, and that not only the will, but also the shot pouch in which Mrs. Buchanan kept it, after her death could not be found, was relied upon as tending to establish the contention that her said husband and sister had destroyed or secreted the will. As the cause will be remanded for a new trial, we will not comment on the evidence further than to say that, in our opinion, it was not sufficient to overcome the presumption that Mrs. Buchanan during her lifetime revoked the will. *McElroy v. Phink*, 97 Tex. 155, 76 S. W. 753, 77 S. W. 1025; *Tynan v.*

Paschal, 27 Tex. 299, and note to same case in 84 Am. Dec. 628; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 826; *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; *Knapp v. Knapp*, 10 N. Y. 279; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 265.

In the case last mentioned the will was executed by Reeves, and by him delivered to Varner, the executor named therein. Afterwards it was returned to Reeves, and was not again seen by any one. A few days before he died Reeves stated to Varner that the will was in a chest, which he pointed to with his finger, and then further stated to Varner that he wanted him to see that the provisions of the will were carried out after his (the testator's) death. Reeves was in an unconscious condition for several days before his death, but the evidence did not show that he fell into that condition immediately after he made the statement to Varner referred to. After Reeves' death the will could not be found. The court held the evidence to be insufficient to overcome the presumption to be indulged in such a case that the testator had revoked the will, and therefore refused to admit it to probate. In *Knapp v. Knapp*, supra, evidence that Knapp a month prior to his death stated that his will was in a certain desk in his house, that his daughter lived with him as his house-keeper, and had an interest adverse to the will, and that the will could not be found when search was made therefor three days after Knapp's death, was held not sufficient to support a finding that Knapp had not revoked the will. In *Collyer v. Collyer*, 110 N. Y. 487, 18 N. E. 110, 6 Am. St. Rep. 405, it was said that "It is not sufficient for him (the proponent of the will) to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further and show, by facts and circumstances, that the will was actually fraudulently destroyed." Referring to the evidence relied upon to show that the will had been fraudulently destroyed, the court in the same case said: "The evidence simply shows that several of her (the decedent's) next of kin were about her for a short time before her death and in her house afterwards, and thus may have had opportunity to find and destroy the will. But all such persons were called as witnesses, and positively denied any knowledge of the will or any interference therewith, and thus there was not enough evidence even to raise a fair suspicion that the will had been fraudulently destroyed."

On the trial witnesses were permitted, over appellants' objection, to testify to declarations made by Mrs. Buchanan tending to show (1) that she had made a will as alleged; (2) that it was in existence until about 10 days before her death; and (3)

its contents. We think the testimony was admissible. While the declarations of a testator are not in themselves sufficient to prove the due execution of a will, they are admissible for that purpose, it seems. *Tynan v. Paschal*, 27 Tex. 300, 84 Am. Dec. 628; *McElroy v. Phink*, 97 Tex. 157, 76 S. W. 753, 77 S. W. 1025; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591. That such declarations are admissible to prove the continued existence of a will shown to have been executed seems to be established by the weight of the authorities. *Tynan v. Paschal*, supra; *Behrens v. Behrens*, 47 Ohio, 323, 25 N. E. 209, 21 Am. St. Rep. 820; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; and note to *Tynan v. Paschal*, 84 Am. Dec. 630. And it is as well settled that the declarations of the testator are admissible to show the contents of a will shown to have been executed and to have been lost or destroyed. See authorities cited above in this paragraph, and *Muller v. Muller*, 108 Ky. 511, 56 S. W. 803; *Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395; 1 *Underhill on Wills*, §§ 270-278.

Other proceedings in the court below assigned as error have not been considered by us, because in appellants' brief they have not been presented for review with regard to the requirements of the rules for briefing causes appealed to this court.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

GALVESTON, H. & N. RY. CO. v. OLDS et ux.

(Court of Civil Appeals of Texas. May 19, 1908. On Rehearing, Oct. 12, 1908.)

1. APPEAL AND ERROR—BRIEFS—COURT RULES—COMPLIANCE.

A reference in appellant's brief simply to the pages of the record is not a compliance with Court Rule 31 (67 S. W. xvi), requiring that to each proposition under each assignment there shall be subjoined a statement of the proceedings supporting the proposition, with a reference to the pages of the record.

2. SAME.

Where the giving or refusal of an instruction, which undertakes to apply the law to the facts, is complained of, it is not sufficient, within Court Rule 31 (67 S. W. xvi), to set out in appellant's brief the charge or its substance, but enough of the evidence on the proposition to explain and support it should also be given.

3. SAME.

Where complaint is made of the admission or rejection of evidence, enough of the evidence on the proposition to explain and support it must, under Court Rule 31 (67 S. W. xvi), be given in appellant's brief.

4. SAME.

Court Rule 31 (67 S. W. xvi), governing the preparation of briefs, is to facilitate the work of appellate courts, and must not be disregarded.

5. RAILROADS—INJURIES TO PERSON ON TRACK—NEGLIGENCE—PRESUMPTIONS.

The presumption that a child, 25 months old, will leave a railroad track in time to avoid

an approaching train cannot be indulged in, but the discovery by the trainmen of the child on the track is a discovery of its peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1281, 1282, 1388.]

6. SAME—INSTRUCTIONS.

An instruction, in an action for the death of a child struck by a train, which ignores the question of liability for negligent failure to discover the child sooner, and which seeks to direct a verdict for the railroad company if the operatives used all means at hand to avert the accident after they saw the child, is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1281, 1282, 1388.]

7. SAME.

An instruction, in an action for the death of a child struck by a train, that if the trainmen discovered the child in time to have prevented the accident by the exercise of ordinary care, and which they failed to exercise, and if such failure was the proximate cause of the accident the verdict should be for plaintiffs, was not erroneous for not distinguishing between the discovery of the child on the track and the discovery of its peril, and as imposing too great a burden on the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1281, 1282, 1388.]

8. SAME.

An instruction, in an action for the death of a child struck by a train, that if the child was discovered by the trainmen in time to have prevented the accident by the use of ordinary care, which they failed to exercise, and if such failure was the proximate cause of the accident the verdict should be for plaintiffs, did not mislead the jury to understand that, if the trainmen failed to exercise ordinary care in keeping a lookout on the track, plaintiffs could recover notwithstanding contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1281, 1282, 1388.]

9. TRIAL—INSTRUCTIONS—CONSTRUCTION.

All the instructions must be considered, and each of its parts construed, in connection with all its other parts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

10. SAME—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

The refusal to give a charge covered by the main charge is not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

11. RAILROADS—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

An instruction, in a parents' action for the death of a child struck by a train, that the failure of the trainmen to discover the child on the track by the use of ordinary care was actionable negligence, followed by the statement, unless the jury should find that plaintiffs were guilty of contributory negligence in failing to use ordinary care to prevent the child from going on the track, was not erroneous as authorizing a verdict notwithstanding the contributory negligence of plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1389.]

12. SAME—OBLIGATIONS OF TRAINMEN—DISCOVERY OF PERSONS ON TRACK.

Trainmen must use ordinary care to discover, not only those who have a right to be on the track, but trespassers as well, and, though trainmen are derelict in this duty, a recovery will be denied to a trespasser only where his own want of care intervened.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239.]

13. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.

A child, 25 months old, is not, as a matter of law, guilty of contributory negligence in going and remaining on a railroad track, notwithstanding the approach of a train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 347, 348.]

14. TRIAL—INSTRUCTIONS—SUFFICIENCY—"NEGLIGENCE."

Where the court defined "negligence" of a railroad company to be the failure to use such care as an ordinarily prudent person would use under similar circumstances, the refusal of a charge containing substantially the same definition, and the qualification that, in determining whether an act is negligence, the jury will take into consideration all the circumstances, and will not view the situation from a retrospective point of view, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

15. RAILROADS—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action for the death of a child struck by a train, the evidence showed that the child was intrusted by its mother to a boy 11 years old, who failed to keep the child from the track, instructions submitting the issue of the negligence of the boy must limit the care to be exacted of the boy to such care as a person of ordinary prudence of his age would exercise under similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1389.]

16. SAME—ISSUES—EVIDENCE.

Where, in an action for the death of a child struck by a train, the evidence showed that the child was intrusted by its mother to a boy 11 years old, who failed to keep the child from the track, and that the boy was good, bright, and obedient, and had previously taken care of the child in a satisfactory manner, the issue of negligence of the mother was not raised.

17. RAILROADS—ACTIONS FOR INJURIES TO PERSONS ON TRACK—EVIDENCE—ADMISSIBILITY.

In an action for the negligent death of a child 25 months old, struck by a train on a bright, clear day, testimony of witnesses that about a month after the accident, at the same time of day, a child a year old had been placed on the track, and had been seen at a distance of 450 yards, though the day was partly cloudy, was admissible to show at what point the engineer, with ordinary care, could have discovered the child on the track.

18. SAME—ISSUES—EVIDENCE—ADMISSIBILITY.

Where, in an action for the death of a child struck by a train, the competency of the engineer was not in issue, the exclusion of evidence of his competency was not erroneous.

19. DEATH—DAMAGES—EXCESSIVE DAMAGES.

In an action by a father and mother, 31 and 27 years of age, respectively, for the death of a child, 25 months old, mentally bright and physically sound, and of good disposition, a verdict for \$5,500 is not excessive, the parents being poor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 128.]

On Rehearing.**20. SAME—MEASURE OF DAMAGES.**

The measure of damages for the death of a child is the value of the pecuniary benefit of the child to its parents during minority, and the value of such benefits as it might confer on its parents after majority, after allowing the rea-

sonable expense of its maintenance and education.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 111-115.]

21. SAME—INSTRUCTIONS.

Where the court, in an action for the death of a child, failed to instruct the jury to deduct the cost of maintenance and education from the value of the expected pecuniary benefits, the refusal to give a requested charge embodying such idea was reversible error.

22. TRIAL—INSTRUCTIONS—DEFECTS IN ONE INSTRUCTION CURED BY ANOTHER.

The defect in an instruction, in an action for the death of a child struck by a train, that if the child was discovered by the trainmen, it was their duty to exercise ordinary care by using all the means in their power, consistent with the safety of the train, to stop it and prevent killing the child, and a failure to use ordinary care was actionable negligence, arising from the omission of the element whether the discovery of the child was so made that, by ordinary efforts, the accident could have been prevented was not cured by an instruction authorizing a recovery, if the child was discovered in time to have prevented the accident by the exercise of ordinary care, and if the trainmen failed to exercise ordinary care after such discovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

23. RAILROADS—INJURIES TO PERSON ON TRACK—EVIDENCE—ADMISSIBILITY.

Where, in an action for the death of a child struck by a train, the issues were whether the trainmen were negligent in not discovering the child sooner than they did, or whether they negligently failed to take proper precautions to stop the train, and whether the parents were guilty of contributory negligence, evidence that, if the whistle had been blown after the child was discovered, its mother would have gotten it off the track in time to have avoided the accident was inadmissible.

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Action by J. H. Olds and wife against the Galveston, Houston & Northern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood and Mott & Armstrong, for appellant. James B. & Charles J. Stubbs and I. H. Bowers, for appellees.

McMEANS, J. This is an appeal from a judgment in favor of appellees and against the appellant for \$5,500 for damages resulting from the death of Mary Olds, a child of appellees, who was run over and killed on appellant's railway track near Nadieu section house by a locomotive drawing a freight train. Appellees alleged that the engineer and fireman operating said train, had they used ordinary care and prudence in the discharge of their duty, which they did not do, could have seen the said Mary Olds from the time she first got on the track, at a beaten path which led on to the track, which itself was much used as a path, and which fact was known to the defendant, until she had walked about 50 yards, meeting the train, and was run over and killed by it, and said trainmen could have seen her at least 800 yards from where she entered upon said track, had they

used ordinary care and prudence in the discharge of their duties, and kept a proper lookout, and that it was negligence on their part in not discovering the said Mary Olds and her perilous condition in time to have avoided killing her; that the day was clear and sunshiny, and the roadbed was elevated and ballasted with gravel, and straight, level, and free from any obstruction whatever a mile either way from the place of the accident. In the alternative the plaintiffs alleged that the engineer and fireman did see the said Mary Olds and her peril on the track in time to have stopped the train and avoided killing her, which they negligently and carelessly failed to do; that the engineer and fireman negligently failed to ring the bell or sound the whistle for brakes, after discovering the said Mary Olds and her peril on the track, and, had they so sounded the whistle, the two brakemen on the train could have applied the brakes and stopped the train in time to have prevented the catastrophe. Appellant answered by special exception and by general denial, and further alleged that appellees were negligent in permitting the child, Mary Olds, to be upon the track, and in not keeping her off the track, and that they were further negligent in intrusting the care of the child to a boy 11 years of age, and that the boy was negligent in failing to care for the child, and in failing to keep her off the track. The Galveston, Harrisburg & San Antonio Railway Company was made party defendant to the suit, and under the charge of the court verdict was rendered in favor of that company, and judgment was accordingly entered.

The evidence justifies the following findings of fact: On or prior to March 1, 1905, J. H. Olds was section foreman for defendant, Galveston, Houston & Northern Railway Company, and he and his wife, the plaintiff Sallie Olds, and their children, one of whom, Mary Olds, was then 25 months old, lived in the section house near Nadieu station. The section house was on the railway right of way, and near the track. It was inclosed by a substantial fence made of planks, in which there was a gate fastened with a latch, which was placed too high on the gate to be reached by the child, Mary, and she unaided could not open the gate. On said date, while J. H. Olds was at work upon the track about three-fourths of a mile from the section house, and the mother was attending her household duties, the locomotive of a passing freight train of defendant ran over and instantly killed the child. The engineer saw the child on the track, and its peril, when about 450 feet from it, and thereafter used all the means at his command to stop the train and save the life of the child, but without avail. He testified on the trial that he saw an object on the track when a distance of 2,500 feet, and that he watched it, and not until he was within 700 or 800 feet from it did he recognize the object as a child. He fur-

ther testified that he had previously made a report of the accident to the railway company, in which he stated "that when he saw the object was a child on the track, he was not over 150 yards (450 feet) from where it was, and was running at 30 miles per hour. The engine moved about 25 feet after it struck the child." And, further: "I am sure I was not over 150 yards from the child when I first saw it, and it was a hard matter at that distance to distinguish it from the gravel." On the witness stand he stated that he had made this report, and that he made it to the best of his belief, and that his testimony on the witness stand that he recognized the object as a child when 700 or 800 feet away, and stopped practically in the same distance, was also to the best of his belief. We find that the child could have been distinguished as a child at about 1,000 feet from where she was on the track; and, in the absence of any explanation of the conflict in the two statements sworn to by the engineer, we conclude, and in deference to the verdict, find, that the engineer did not in fact see the child on the track until within 150 yards of it, and that he was negligent in not seeing it sooner, and that his negligence was the proximate cause of the child's death. We further find that the train, just before the accident, was running slower than the usual speed of such trains at that point, and that, even if it had been running at the rate of 30 miles per hour, it could have been stopped within 500 feet.

A short time before the train came, Mary Olds and her sister, 8 years of age, and Reuben Peck, a boy of 11 years of age, who lived at the section house, and to whose care the child, Mary, was at the time intrusted by Mrs. Olds, were playing in the section house inclosure. About 10 minutes before Mary was killed, Mrs. Olds, who was preparing supper, upon hearing the whistle of the train, called out to Peck to know where Mary was, and received the answer, "Here she is." Mary, it seems, thereafter evaded Peck's watchfulness, and, slipping between the parallel planks of the fence, went out upon the railroad track in the direction of the approaching train, and had walked on the track about 50 yards when run over. Mrs. Olds used ordinary care in her watchfulness of Mary to prevent her going upon the track, and was not guilty of negligence in intrusting her to the care of Peck, who was an intelligent and obedient lad, nor was Peck guilty of negligence in not preventing the child from going upon the track. Rule 31 (67 S. W. xvi), governing the preparation of briefs, requires that to each proposition under each assignment there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. A reference simply to the pages of the record will not suffice. The

rule further requires that the statement must be made in reference to the whole of that which is in the record having a bearing upon the proposition. Under this rule, where the giving or refusing to give a special charge is complained of, it is not sufficient to set out the charge or its substance; but, where it undertakes to apply the law to the facts proved, enough of the evidence bearing upon the proposition sufficient to explain and support it should also be given. And this is likewise the case when the complaint is made to the admission or rejection of evidence. This rule was made for the purpose of facilitating the work of appellate courts, and must not be disregarded. This court is of the opinion that appellant's assignments Nos. 15, 16, 17, 18, 19, 37, 38, 39, 40, 48, 49, 50, 52, and 55 are not presented in accordance with the rule, and they will not, therefore, be considered.

The first, second, third, and fourth assignments of error complain that the charge of the court was misleading, in that it induced the jury to believe that it was the absolute duty of the trainmen, as soon as an object was discovered on the track, to have stopped the train, whereas such duty did not devolve upon them as soon as they saw an object, but not until they saw it was a child and realized its peril.

Paragraphs five and seven of the charge are as follows: "(5) You are further charged that, if the child Mary Olds was discovered on the track by the agents and servants of the defendant company, it was their duty to exercise ordinary care in using all the means within their power, consistent with the safety of the train and those on it, to have stopped the train, or to have prevented the killing of the child after its presence was discovered on the track, if it was discovered, and a failure to use ordinary care in this respect would be negligence on the part of the defendant, rendering defendant liable, even though the parents of the child may have been guilty of contributory negligence. * * *

(7) If you believe from the evidence that, on or about the 1st day of March, 1905, Mary Olds, the child of the plaintiffs, J. H. Olds and wife, was run over and killed by a train operated by the defendant, the Galveston, Houston & Northern Railroad Company, and if you further believe from the evidence that the said child was discovered on the track of the defendant company, by the servants of said company operating said train, in time to have prevented said train from running over and killing said child, by the use and exercise of ordinary care on the part of said servants, and if you further believe from the evidence that after the discovery of said child upon the track (if you find it was discovered on the track in time to have prevented the injury), the servants of the defendant company failed to exercise ordinary care in using all means within their power to avoid running over the child, and that such failure

to use ordinary care, if any, was the direct and proximate cause of the death of said child, then you will find a verdict for the plaintiffs, even though you may believe from the evidence that the plaintiffs, J. H. Olds and wife, the parents of said child, may have been guilty of contributory negligence in permitting said child to be upon the track of the defendant company." We do not think the charge is subject to the objection urged. The charge quoted above referred explicitly to the discovery of the child, and could not have been understood as meaning any object. It instructed the jury that if the child was discovered on the track, and, again, if the presence of the child was discovered on the track, then the duty arose to use all means at command to prevent killing it. The jury could not have understood that anything else but a child could have been meant; nor could the charge have been understood as indicating liability for failure to try to stop the train and avert the injury at sight of an unknown object. The use of such expressions as "discovering the presence of the child" necessarily implied a realization that it was a child, and not some other object. And if the child was discovered in time to have avoided running over it, the mere fact that a child, of such tender age as Mary Olds was shown to have been, was discovered on the track in front of an advancing train, sufficiently disclosed its helplessness and peril, hence the court was not required to charge, in addition to the charge given, that not only its presence there must have been discovered, but its peril also must have been realized by the trainmen. The assignments are overruled.

Appellant's fifth, sixth, and seventh assignments are addressed to the refusal of the court to give special charges three, four, and five requested by it. These present substantially the same point indicated in the preceding assignments, to the effect that the duty of the trainmen to employ all the means at hand consistent with the safety of the train, in an endeavor to avoid injuring the child, did not arise until its peril was realized by the trainmen. We are of the opinion that paragraphs 5 and 7 of the court's charge, already quoted, sufficiently presented the issue of discovered peril; but, if they did not, the special charges requested should not have been given in the form in which they were asked, for they carry the intimation that the child might have been discovered on the track in front of an approaching train, and yet the trainmen might not have appreciated that it was in danger. An adult might have been presumed to leave the track in time to avoid being run over, but can such a presumption be indulged as to a child, which the evidence showed to be only 25 months old? We think not. When seen on the track under such circumstances its danger was at once known, and the discovery of its presence there was a discovery of its peril. The

charges were also properly refused because they ignored the question of liability, based upon the negligent failure to discover the child sooner, and sought to direct a verdict for defendant if the operatives used the means at hand to avert the disaster after they saw the child. *Railway v. Harby*, 28 Tex. Civ. App. 24, 67 S. W. 542; *Railway v. Adams*, 98 S. W. 222, 17 Tex. Ct. Rep. 59; *Railway v. Watkins*, 88 Tex. 20, 29 S. W. 232; *Olivares v. Railway*, 37 Tex. Civ. App. 278, 84 S. W. 248, 11 Tex. Ct. Rep. 751; *Railway v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 746; *Railroad Co. v. Hewett*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32. The assignments are overruled.

What we have just said disposes also of appellant's eighth and ninth assignments, which complain that paragraph 7 of the court's charge is erroneous because it does not distinguish between the discovery of the child on the track and the discovery of its peril; and that the charge imposed a greater degree of care, as applicable to the facts of the case, than imposed by law. *Railway v. Hewett*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

By its tenth and eleventh assignments appellant contends that the court erred in paragraph 7 of its charge, in that the charge is confusing and misleading, and that the jury could have understood therefrom, and probably did understand, that if those in charge of the train failed to exercise ordinary care in keeping a lookout upon the track, the plaintiffs could recover notwithstanding their contributory negligence. These assignments are without merit. The paragraph complained of related to discovered peril and the duty of the train operatives arising under that situation, and could not have been understood by the jury to mean that a failure to exercise ordinary care in not sooner discovering the child on the track would render the railway company liable, regardless of appellees' contributory negligence in failing to keep her away from the track.

The fifth paragraph of the charge is assailed by the twelfth assignment of error. It is complained that the jury was therein instructed, in effect, to find for plaintiffs, even though the use by the trainmen of all the means within their power after the peril of the child was discovered might not have resulted in stopping the train within the space and time to have avoided injuring her. It is a familiar rule of construction of charges, as well as other writings, that the whole instrument must be considered, and each of its parts construed, in connection with all its other parts. Paragraph 5 standing alone was probably susceptible to the construction placed upon it by appellant, and to have given it without qualification in any other portion of the charge might have been error. But in the seventh paragraph the court, in applying the law to the facts, clearly charged the jury that, if the operatives

discovered the child on the track in time, by the use of the means at hand, to have prevented killing her, and negligently failed to make use of such means, and that, if such failure was the proximate cause of the death of the child, to find for the plaintiffs. Reading these two paragraphs together, the jury must have understood its instruction to be that it was the duty of the train operatives to use all the means within their power, consistent with the safety of the train and those upon it, to stop the train if the presence of the child on the track was discovered in time, by the use of such means, to have prevented killing it.

The thirteenth special charge requested by appellant, the refusal of which is complained of by the thirteenth assignment of error, in so far as it was correct, was sufficiently covered by the main charge. In the form presented it should not in any event have been given, in as much as it erroneously charged that in addition to the discovery of the child on the track the duty did not rest upon the operatives to resort to extraordinary efforts to stop the train until its peril was likewise discovered. As we have heretofore said, in effect, the discovery of an infant of such tender years on the track was in itself the discovery of its peril.

The fourteenth assignment is directed against the eighth paragraph of the charge, the complaint being that the jury was instructed thereby that the failure of the defendant to discover the child upon the track by the use of ordinary care is of itself such negligence as to render the defendant liable. This objection is answered by the concluding sentences of the paragraph itself, "unless you should find from the evidence that the plaintiffs, J. H. Olds and wife, were guilty of contributory negligence in failing to use ordinary care to prevent the child from going out of the yard and on the track of defendant company. And if you find that said parents of said child were guilty of contributory negligence, as aforesaid, you will return a verdict for the defendants."

The fourth paragraph of the charge is as follows: "You are instructed that it was the duty of the servants and agents of the defendant company in charge of its train to use ordinary care to discover the child, Mary Olds, on its track, and a failure to use ordinary care would be negligence on the part of the defendant company." This charge is assailed by appellant by its twentieth and twenty-first assignments on the grounds (1) that it would not be actionable negligence in any event to fail to discover the child on the track unless the accident could and should have been prevented after the child and its peril was discovered; and (2) under the facts of this case it was error to charge that it was the duty of defendant to discover the child, and that a failure to perform such duty was negligence. The question last stated is also raised by the twenty-eighth and

twenty-ninth assignments. This charge was only a definition of what would constitute negligence on the part of the railway company, and must be read in connection with the rest of the charge, and especially with the concluding part of paragraph 8 above set out. There was no error in the charge as given. It is the duty of the operatives of a railway train to use ordinary care to discover, not only those who have a right to be upon the track, but trespassers as well; and, if the trainmen are derelict in this duty, a recovery will be denied to a trespasser, not because the railway company is acquitted of a wrong, but because the trespasser's own want of care intervened. *Railway v. Adams*, 98 S. W. 222, 17 Tex. Ct. Rep. 60; *Railway v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; *Railway v. Watkins*, 83 Tex. 20, 29 S. W. 232; *Railway v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 745. Mary Olds, being only 25 months of age, can be held, as a matter of law, not to have been guilty of negligence or contributory negligence in being on the track. *Evanisch v. Railway*, 57 Tex. 128, 44 Am. Rep. 586; *Cook v. Navigation Co.*, 76 Tex. 358, 13 S. W. 475, 18 Am. St. Rep. 52; *Railway v. Fletcher*, 6 Tex. Civ. App. 737, 26 S. W. 446; *Thompson v. Railway*, 11 Tex. Civ. App. 308, 32 S. W. 191; *Railway v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 745.

There was no error in refusing appellant's twentieth special charge. The court defined negligence, on the part of the railway company, to be the failure on its part to use ordinary care, that is, such degree of care as an ordinarily careful and prudent person would have used under the same or similar circumstances. The requested charge contained, substantially, the same definition, but added the unnecessary qualification that, "in determining whether an act is or is not negligence, you will take into consideration all the circumstances and considerations existing at the time, and will not view the situation from a retrospective point of view." This added nothing to the court's definition that was not embraced in the instruction that the care to be exercised was such as an ordinarily prudent person would use "under the same or similar circumstances." The appellant asked and the court gave a special charge defining negligence, which was in the language of the refused charge, except that the qualification above set out was omitted. Having presented two special charges covering the same point, appellant cannot complain that the court did not select the one which was refused.

Assignments 24 to 27, inclusive, submitted together, complain of the refusal of the court to give appellant's sixth, seventh, eighth, ninth, and eleventh special charges. The propositions under these assignments are (1) that it is a requirement of the law, and one upon which appellant had the right to rely, that ordinary care for the safety of the child should be observed, and that this right

cannot be denied defendant by the delegation by plaintiffs, to a third person, of the care of the child, and of the obligation that ordinary care should be taken for its safety; and (2) that the court, when requested, should have so charged the jury as to apply the law to the peculiar facts of the case. The seventh and eleventh special charges sought to submit the issue of the negligence of the boy, Peck, in failing to keep the child off the track. In the language in which these charges were couched they were improper, because ordinary care as applied to the boy was therein defined to be such care and prudence as would have been exercised by a person of ordinary care and prudence. As applied to children of immature judgment, we do not understand this to be the law. Peck was 11 years old; and, while the testimony shows he was bright and obedient, there was nothing in the testimony to show that he was of mature judgment and discretion, hence any charge on the quantum of care that he should have exercised should not have been given, except with the qualification that the care to be exacted of him was such care as a person of ordinary prudence of his age would exercise under the same or similar circumstances. The sixth, eighth, and ninth special charges sought to raise the issue of the negligence of the mother of the child in intrusting its care to the boy, Peck. In our opinion the evidence did not raise the issue of negligence on her part in that regard. The testimony shows that the boy was good, bright, and obedient, and had always theretofore looked after and taken care of the children in a satisfactory manner while playing in the yard. There was nothing in his previous conduct, so far as the evidence has been pointed out by the parties in their briefs, that shows that she should not have relied upon the faithfulness of the boy, or to have raised even a suspicion in the mind of Mrs. Olds that the boy would not take proper care of the child on the day it met its death.

Appellant's thirtieth, thirty-first, thirty-second, and thirty-third assignments relate to the measure of damages. The thirtieth complains of the refusal of the court to sustain its special exception to so much of the petition as alleged that plaintiffs had reason to believe that the child, had she lived, would have been of pecuniary benefit to them after she attained her majority, and that they were entitled to recover for such expected contributions, etc. The other assignments complain of the refusal of the court to give appellant's fifteenth, sixteenth, and seventeenth special charges. These charges sought to limit plaintiffs' right of recovery to the pecuniary value of the child's services during her minority, and ignored their right to recover for such benefits as it might have conferred on its parents after attaining its majority. The undisputed testimony shows that Mary Olds was a strong, healthy child, never

sick in her life, was bright and well disposed. Her parents were poor. We understand the law to be as stated in *Railway v. Sciacca*, 80 Tex. 355, 16 S. W. 31: "Damages would not be limited to the services of the child during minority, but would extend to such benefits as it might confer on its parents after majority. It was alleged and proved that its parents were poor, and on the testimony as to the age, sex, and healthy, robust condition of the child it was a question largely in the discretion of the jury as to what damage should be allowed, either up to the time the child would reach its majority or afterward." It follows, therefore, the court did not err in refusing to sustain the special exception, or to give the special charges requested.

On the trial of the case appellees offered certain evidence of experiments made to test at what distance an object seen on the track could be determined to be a child. The testimony shows that Mary Olds was killed on a bright, clear day. The testimony of the witness W. N. Ayres was that, about a month after the casualty, and about the same time of day, although partly cloudy, a child a year old was placed on the track at the same place where Mary was when run over, and was recognized by him to be a child, although sitting down, at a distance of 450 yards. J. H. Olds testified to the same experiment, in which he identified the child as such at a distance of about 5 telegraph poles, of which there were 30 to the mile. Appellant objected to the testimony, on the ground that it was immaterial, irrelevant, and incompetent, and not applicable to the facts of the case, and that the facts testified to were physical circumstances, upon which the jury were as well qualified to pass as the witnesses; and the refusal of the court to sustain the objections forms the basis of appellant's forty-fifth assignment of error. The testimony was admissible to show at what point the engineer, by the exercise of ordinary care, could have discovered the child on the track. Evidence of this kind is admissible when the experiment is made under circumstances similar in all material particulars, to those obtaining at the time of the occurrence with regard to which the evidence is offered. *Railway v. Ramsey*, 97 S. W. 1067, 16 Tex. Ct. Rep. 747; 12 Am. & Eng. Ency. of Law, 406, et seq., and cases cited. Under this rule we are of the opinion that there was no error in admitting the testimony.

The court did not commit error in refusing to allow appellant to prove the competency of its engineer, Evans, who was running the engine on the occasion in question. His competency had not been put in issue by any evidence offered by plaintiffs on the trial. The assignment raising the point is overruled.

By the fifty-fourth assignment the verdict and judgment is attacked as excessive. At

the time of the accident J. H. Olds was 31 and his wife 27 years of age. They were poor. The child was mentally bright and physically sound and of good disposition. Appellees were entitled to recover the reasonable pecuniary value of her services during minority, and such benefits as it might have conferred on her parents after majority. The case was not susceptible of more exact proof of damages than was produced on the trial. In such cases the jury must estimate the damages from the facts in proof, upon their own knowledge and experience. The law does not fix the amount of damages, and witnesses cannot be called to estimate them, and they must be left to the sound discretion and sense of the jury. *A. R. T. Ry. Co. v. Cullen* (Tex. Civ. App.) 29 S. W. 257; *Railway v. Sciacca*, 80 Tex. 350, 16 S. W. 31; *Railway v. Measles*, 81 Tex. 474, 17 S. W. 124; *Brunswick v. White*, 70 Tex. 511, 8 S. W. 85; *Railway v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 745; *Railway v. Watzlavzick* (Tex. Civ. App.) 28 S. W. 115. The judgment is large, but in view of the evidence, and in the light of precedent, we cannot say that it is so excessive as to manifest prejudice, passion, or other improper motive on the part of the jury in making the award.

The other assignments not specifically noticed in this opinion have been examined by us, and we are of the opinion that there are no reversible errors shown by any of them.

The judgment of the district court is affirmed.

Affirmed.

On Rehearing.

At the last term of this court the judgment of the district court was affirmed. As will be seen in our opinion, filed May 19, 1908, we declined to consider several assignments of error, presented in the brief of appellant, because we were of the opinion that they were not followed by statements, or by proper statements, as required by the rules. We are of the opinion that our conclusion in that regard was correct; except as to the thirty-seventh assignment, but as to that we now think the subjoined statement was sufficient to justify our consideration of it. The assignment complains of the refusal of the trial court to give to the jury its fourteenth special charge, which is as follows: "I charge you that it is the legal duty and obligation of the parents of a child to support and maintain a child during the period of minority; that is, up to the age of 21 years; and, in estimating damages, if any, that plaintiffs may be entitled to by reason of being deprived of the services of their child during her minority, you will take into consideration, as bearing upon the amount of damages, if any sustained, the cost and expense of rearing and maintaining the child during her minority."

On the measure of damages the court charged the jury as follows: "If you believe from

the evidence that the plaintiffs, J. H. Olds and wife, are entitled to recover damages, the measure of damages, if any, would be such sum of money as you believe from the evidence would be equal to the present money value (if paid now all at one time) of such aid as plaintiffs had reasonable expectation of receiving from the deceased, Mary Olds, after she was 21 years of age, if she had lived, and the reasonable value of the service of said Mary Olds until she arrived at the age of 21 years." The measure of damages, in a case of this character, is the value of the pecuniary benefit of a child to its parents during minority, after allowing all reasonable expense of its maintenance and education, and the value of such benefits as it might confer on its parents after majority. *Railway v. Sciacca*, 80 Tex. 355, 16 S. W. 31; *Railway v. Southwick* (Tex. Civ. App.) 30 S. W. 592. The charge of the court failed to instruct the jury that the cost of maintenance and education should be deducted from the value of the expected pecuniary benefits; but, in the absence of a special charge properly embodying this element, we would feel constrained to hold that the omission did not constitute reversible error. *Railway v. Yarbrough*, 73 S. W. 844, 7 Tex. Ct. Rep. 474. The appellant had the right, however, to have a proper charge correcting the omission; and, having submitted a proper special charge calling the attention of the court to the deficiency of the main charge in this regard, we think the refusal of the court to give the special charge constituted such an error as to require a reversal of the judgment.

Since the judgment must be reversed, we deem it proper, in view of another trial, to call attention to the charge relating to discovered peril.

In paragraph 5 the court instructed the jury, in effect, that if the child was discovered on the track by defendant's servants, it was their duty to exercise ordinary care in using all the means within their power, consistent with the safety of the train and those upon it, to stop the train or to have prevented killing the child after its presence on the track was discovered by them, and a failure to use ordinary care in this respect would be such negligence as to render defendant liable. It will be noted that this charge omits the very important element whether the discovery of the child was made within the space and time that, by the use of such extraordinary efforts, its death could have been prevented. In our former opinion we held that the omission was cured by paragraph 7 of the charge, which applied the law to the facts. We have now concluded that in this we were in error. *Railway v. Beard*, 34 Tex. Civ. App. 188, 78 S. W. 253; *Baker v. Ashe*, 80 Tex. 356, 16 S. W. 36; *Snyder v. Morris*, 14 Tex. Civ. App. 641, 38 S. W. 219.

Mrs. Olds testified that, if the whistle of the locomotive had been blown after the

train passed Nadieu siding, or after the child was discovered on the track, she would have gone out to see what was the matter, and would have seen the child, and would have gotten her off the track. The testimony was wholly immaterial to any issue in the case, and should not have been admitted over the seasonably opposed objection of appellant. While its admission was not, in our opinion, so prejudicial to appellant as to require a reversal, we deem it proper, in view of another trial, to call the trial court's attention to it.

The judgment of the district court is reversed, and the cause remanded.

Reversed and remanded.

DALLAS CONSOLIDATED ELECTRIC ST. RY. CO. v. MOTWILLER.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 10, 1908.)

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

On defendant's appeal on a judgment for plaintiff in a personal injury action, it will be presumed that plaintiff was entitled to recover in the absence of assignments of error, attacking the recovery on the ground that plaintiff was not injured through defendant's negligence.

2. DAMAGES—PERSONAL INJURIES—IMPAIRMENT OF EARNING CAPACITY—EVIDENCE—SUFFICIENCY.

Evidence held to show impairment of a woman's earning capacity caused by a personal injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 509.]

3. SAME.

Recovery can be had for impairment of earning capacity resulting from negligent personal injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 237-241.]

4. SAME.

One suing for personal injury could not recover for impaired ability as a stenographer in the absence of proof as to her salary before and after the injury, since, where diminished capacity to earn money in a particular occupation is alleged, it is necessary to prove facts from which the jury can determine the probable loss therefrom; but, where there is a general allegation that the injury caused diminished capacity to earn money in all ways and the evidence shows that plaintiff was injured, the jury can determine from their general knowledge and experience the amount of such damages.

5. SAME—INSTRUCTIONS.

It was not prejudicial error in a personal injury action to authorize the jury to consider plaintiff's impaired ability to "earn money," where she alleged impaired capacity to "earn money at her ordinary occupation or any other for which she is qualified," and where she showed injuries for the recovery for which the verdict is not excessive.

6. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

It was not prejudicial error, as not within the issues, in a personal injury action, to receive testimony that plaintiff had "claimed her head and arms hurt her some," and that she suffered some irregularity respecting her kidneys and digestive organs where she testified that she did not suffer from headache, the testimony respecting her "digestive organs" was substan-

tially withdrawn by the witness on further examination, and the verdict was not excessive for injuries alleged and proved.

Appeal from District Court, Dallas County; Thos. F. Nash, Judge.

Personal injury action by Mrs. Katie Motwiller against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

For opinion of Supreme Court on certified questions, see 109 S. W. 918.

Baker, Botts, Parker & Garwood and Finley, Knight & Harris, for appellant. W. T. Pace and Fitzhugh & Smith, for appellee.

RAINEY, C. J. The appellee, a widow, sued the street railway company, appellant, for personal injuries to her, caused by the negligence of the railway employes. Defendant answered by general and special exceptions, general denial, and contributory negligence. A trial resulted in a verdict and judgment for plaintiff in the sum of \$2,806.

The first error assigned is: "The court erred in the following paragraph of his charge to the jury: 'If you find for the plaintiff, you will find such an amount as you believe from the evidence will be a fair and just pecuniary compensation for her physical suffering and mental pain, if any, her impaired ability to earn money, if any, the reasonable amount incurred for medicine and medical attention, if any, made necessary as the direct and proximate result of the defendant's negligence, if any.'" This charge is complained of because it authorized the jury to find for pecuniary compensation for "impaired ability to earn money," because there is no evidence from which the jury could properly and intelligently ascertain the amount of loss sustained by reason of the impairment of her ability to earn money; that is, there was no sufficient basis in the evidence for such submission.

There is no assignment of error attacking the verdict or judgment on the ground that appellee was not injured, as claimed, by the negligence of the appellant's servants. We therefore conclude that she was entitled to recover. We will then consider whether the charge complained of as to impaired ability to earn money is such error as will cause a reversal of the judgment. On the issue of appellee's disability to earn money, we give portions of the testimony of several witnesses on this point that her condition may be fully understood.

Mrs. Motwiller, the plaintiff, testified: "I had gotten through work about 6 o'clock. When I fell, I lighted on this side [left side]. I was dazed. I stood up with my weight on the other foot. The other foot was a heavy weight, hanging to my body. It brought my monthly sickness on, and it was not time for it again. Ever since the accident I have had my monthly sickness every three weeks,

and now it is getting less than three weeks apart, and lasts me nearly all the time. I have to be prepared for it all the time. On one occasion at the office I left off my pads, and I had on four skirts, with a heavy black skirt, and it came through all of these and got on the cushion I was on, and I handed it to a girl down there, and she had to take it out and conceal it. It just comes most any time. Before the accident I was regular. I was considered very healthy. I would walk to my work and walk home, two miles from where I worked. The feeling I had in my leg was pain. It seemed to be heavy and stiff, and is that way now. I never before had a doctor with me, except when my two children were born. I could stand most anything before, but now I have a nervous trembling to my muscles. What flesh I have in my left leg quivers, and the muscles around my mouth quiver. I do not suffer with headache. I hardly ever have a headache. I take the car right at my door and ride to the transfer, and it is only a few steps to where I work, and that is all the walking I do. I never had any trouble with my kidneys before the accident. Now I have to take medicine every time they operate. Sometimes I go two days, and there is a fullness in my bladder all the time. I know my leg is shorter now than it was before the accident. I can take a few steps and stop and get about a short distance by holding to things, and I cannot walk more than a few blocks with a cane without stopping and resting and steadying myself. I have almost given up walking at all." On cross-examination she testified: "I work all the time, only I get off early. I have the best people in the world to work for. Yes, sir; during last week I cried in the office. They often ask me there what I am crying about. I cry there often. Yes, sir; I was on the witness stand about two hours last January, and I did not cry any then; but, Mr. Harris, my condition is worse. My working hours are 8 to 6. Sometimes I get there at half past 8. I do pretty much as I please. As a general rule I do not stay there full time. Some days I have only 12 letters to write. In the store we have cabinets and phonographs all along, and I can walk along holding to one cabinet, and then go along and hold to another. I always have to hold to something when I walk so as to prevent it from hurting me. Before the accident my standard weight was 140 pounds. In January this year, I weighed 105 pounds. I weighed last week, and weighed only 98 pounds."

W. T. Pace testified: "On the 5th of June last year, when I got home, plaintiff was lying on a couch and groaning, her face contorted and hands all cramped up. We got Dr. Poe. Three days after I called in Dr. Smart for consultation, and she was in such condition, if you touched her, moved, or manipulated the parts, she would halloo, and you could hear her across the street. She

remained two weeks confined to her bed. During the night I could hear her groaning. She had something the matter with her hip. I often assisted her in turning over, and moving her about the bed, and at those times she would scream out with pain. Her left leg was immovable. I have known her since 1900 intimately, and I have always known her to be a healthy woman before this accident. Her weight was 140 pounds, and she walked to town, a mile and one-half or two miles, without any complaint. Her face is thin. She has fallen off almost to a skeleton."

Mr. Newman testified: "Plaintiff could not move her leg. She would scream every time you started to move her. Before the injury, she was in good health, and walked everywhere she wanted to. Since the accident she has lost a great deal of weight, and is not the same woman at all. She cannot get about, even in the house, and suffers all the time. She is physically a different person. I don't believe now she would weigh over 100 pounds. She cannot get about hardly at all without a cane, and even catches to the furniture in passing. Her condition is worse than it was at the former trial. Her height is about 5 feet, 6 inches."

Dr. Poe testified: "I found her wrought up, nervous, and suffering injury to her hip joint. On examination I concluded it was an injury to the hip joint and the contiguous tissues thereto. I treated her two weeks. I saw her twice a day most of the time. Dr. Smart made a casual examination. I next saw her at her mother's house. The condition of the hip and soreness remained the same. The joint seemed to be limited in its motion, and lasted until the last time I saw her. The last time I examined her I found a shortening of the limb, about three-fourths of an inch. The acetabulum could be fractured. From the condition of soreness that seemed to be present, there might be an injury of that kind in this case. The principal result of an impaction of the femur and acetabulum would be inflammatory action. The motion would be limited, naturally, from inflammation. Ankylosis is limited motion and stiffness caused by inflammation. From the hypothetical question you put to me, I would attribute the lameness and that condition to some contusion of the tissues immediately surrounding the joint, or in the joint. Ankylosis would also be the result of such an injury. I would attribute the inflammation in the joints to the soreness and straining of the ligaments. When I was waiting on her, she seemed not to have any control over her left limb at all. I took it to be partial paralysis on account of lack of motion in that joint. I would consider, under the same statement of facts, that she would suffer with her spine. It would also cause a derangement of the menses, and I elicited from the patient that she suffered in this respect. If she suffered with her back and kidneys, and in passing her urine, I would attribute that to the fall and the gen-

eral shock caused to the nervous system. I would attribute the nervousness and hysterical condition to the effect produced upon the nervous system. I saw her to-day, and I think the injury to the joint is permanent. If she weighed 140 pounds, and was in good health, and received such a fall as you described and now weighs only 98 pounds, I would attribute the loss of weight to the general effect of the fall and the pain she suffered, and I think her nervous troubles would be of a lasting nature." On cross-examination he testified: "I know nothing of the kidney trouble except the symptoms she gave me. I discovered some swelling down the internal muscles. I was present when Drs. Allen and Duncan made their examination. They did not find her limbs the same length, but a degree of shortening. They found about the same degree I did. I treated her last, about two or three months after the accident. The limb would not move out from its fellow. Part of the neck of the femur might be broken and give inflammatory action, and still not affect the bone itself, and Dr. Duncan also examined her and reported a shortening. They made several examinations and reported a shortening. Dr. Allen asked her if she ever had her leg broken. Dr. Allen said there was an infallible way to measure for a shortening, and measured that way and found the same amount of shortening to the limb that I did. We all found a shortening. We did not agree that the two limbs were of the same length, because when I examined her the day before to my satisfaction, and in the examination of the bone itself, I found a difference of one-half inch that I could account for."

There was some conflicting testimony as to the shortening of appellee's limb, but the foregoing testimony shows upon what the jury could base their verdict. The foregoing evidence, we think, clearly shows that appellee's ability to earn money was impaired, which is a proper element of damages. But the question arises: Was it proper for the court to tell the jury to consider in determining the damages "her impaired ability to earn money"? The allegation of impaired capacity is to "earn money at her ordinary occupation, or any other for which she is qualified during the balance of her future life." At the time of trial, she was engaged as a stenographer, but the proof does not show what salary she received before and after the injury. This would preclude a recovery for any special damages for impaired ability in that particular avocation, but we see no reason why a recovery could not be had for general impairment to earn money. *Fordyce v. Withers*, 1 Tex. Civ. App. 545, 20 S. W. 766. We certified to the Supreme Court the question as to the correctness of the charge on this point, and it held there was no error under the facts shown. *Railway v. Motwiller*, 109 S. W. 918, 21 Tex. Ct. R. 68. Where a diminished capacity to earn money in a par-

ticular avocation is alleged to arise from a wrongful act, it is necessary to prove some facts from which the jury would be justified in determining the probable loss that would flow from such diminished capacity. *Railway v. Bird* (Tex. Civ. App.) 48 S. W. 756; *Railway v. Smith*, 38 Tex. Civ. App. 507, 86 S. W. 946. But, where there is a general allegation that the injury caused a diminished capacity to earn money in all ways and the evidence shows the party is so injured, is it not a proper element of damage to be submitted to the jury for them to determine from their general knowledge and experience the amount of such damages? To illustrate: Take a young man who has attended school up to his majority, and before he has time to pursue any avocation he is wrongfully injured to such an extent his ability to earn money is diminished, and that fact is fully established, could it be said that some particular facts should be further proven to form a basis from which the jury might reach a conclusion before the court would be authorized to submit such an issue? To do so it seems would deprive such a party of the benefit of an element of damages; that is, allowed by law. It is true that the evidence in this case does not show any basis for the recovery of any special amount for diminished capacity in the avocation of stenographer, but it did not show in a general way that appellee's capacity was diminished for that as well as for all other avocations.

But, aside from diminished capacity to earn money, the evidence shows injuries for the recovery of which the verdict is not excessive. In fact, there is no complaint that it is too large and excessive. Under the circumstances, and in view of the fact there is no assignment of error attacking the verdict as excessive, we do not think the verdict should be reversed on the ground urged. We understand that some of our courts have held the giving of such charge was error in somewhat similar cases to this, where it does not appear whether or not the verdict was attacked as excessive. In *Railway v. Bird*, supra, a case similar to this, the judgment was reversed on two assignments—one on the excessiveness of the verdict, and the other the giving of a charge on lessened capacity. The verdict appears large, but whether or not the assignment of excessive verdict was the controlling reason for reversal we cannot say, but in this case, the verdict not being excessive and there being no assignment to that effect, we do not think the charge harmful.

Another proposition is submitted under the first assignment of error, to the effect that the evidence showed that plaintiff had sustained certain injuries or endured physical pain or mental suffering not mentioned in the petition. The only testimony that forms the basis for this complaint is, first, a witness stated: "I believe she claimed her head and arms hurt her some, as well as I remember,

and another, a physician, stated she said she "suffered with some irregularity with reference to her kidneys and digestive organs." The plaintiff testified she did not suffer from headache, and, when the physician mentioned "digestive organs," plaintiff's attorney said: "He used the words 'digestive organs,' and we haven't alleged that, and we would like for him to mention the particular organs"; and then asked the question: "Mention the particular organs. You say the kidneys? A. Yes, sir; and the female organs." Under these circumstances, and in view of the testimony as to plaintiff's injuries and sufferings which conform to the pleading and size of the verdict, we think defendant was not affected to its prejudice.

Finding no reversible error in the record, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. FOSTER.

(Court of Civil Appeals of Texas. June 18, 1908. Rehearing Denied Oct. 8, 1908.)

1. RAILROADS—PASSENGERS—STATION ACCOMMODATIONS—EFFECT OF STATUTE.

The statute requiring railway companies to keep their waiting rooms open before and after the arrival and departure of trains is for the convenience of passengers beginning or completing a journey, and does not apply to through passengers stopping at junction points.

2. CARRIERS—PASSENGERS—PERFORMANCE OF CONTRACT—RIGHTS OF THROUGH PASSENGERS.

Through passengers with two small children, stopping at a junction station four hours for necessary change of cars on a rainy, cool night, had the right to occupy the waiting room until the arrival of their train, and for expelling them therefrom, the company is just as liable as if they had been ejected from a train.

3. SAME—WHO ARE PASSENGERS.

The relation of carrier and passenger continues until the end of the journey, unless sooner terminated by the passenger's voluntary act, and existed between a railway company and persons holding through tickets while waiting four hours at a junction point in making a necessary change of cars.

4. SAME—STATION ACCOMMODATIONS—CARRIER'S DUTY.

Though a carrier may establish its depots at such places as it may deem proper, and arrange its schedule and connections to suit its own business interests, it must, even in the absence of statutory regulation, allow passengers the use of its waiting rooms for a reasonable length of time before and after the arrival and departure of trains.

5. SAME.

A carrier's duty to permit through passengers to use its waiting rooms at junction points while awaiting their trains is not affected by the proximity of hotel and boarding houses to the depot, or other conditions in particular localities; the existence of such accommodations affecting only the damages recoverable from a carrier refusing to permit a passenger to occupy a waiting room.

6. SAME—ACTS CONSTITUTING EJECTMENT.

Through passengers, stopping at a junction point in making the necessary change of cars, were ejected from a waiting room, where they left it under the alternative of leaving it or being locked therein, until just before the arrival of their train four hours later.

**7. APPEAL AND ERROR—OBJECTIONS BELOW—
WAIVER—EXCEPTIONS TO PLEADING.**

The Court of Civil Appeals will not review a refusal to sustain exceptions to the petition, where it does not appear that the exceptions were called to the trial court's attention, or were acted upon; it being presumed that they were waived.

**8. CARRIERS—PASSENGERS EJECTED—DAMAGES
—RECOVERY NOT EXCESSIVE.**

A railway company ejected plaintiff and his wife from a waiting room at a strange place, on a rainy, cool night. They were accompanied by two small children, one of whom was sick, requiring nursing and administration of medicine. Plaintiff was without money to procure lodging for himself and family. The employes in ejecting them used rough language, and plaintiff and his family were humiliated by the presence of bystanders, and were forced to accept a stranger's gratuitous hospitality, extended to the wife and children, plaintiff being required to spend part of the night upon the street. *Held*, that a recovery of \$500 was not excessive.

Appeal from Bowie County Court; Sam H. Smelser, Judge.

Action by D. B. Foster against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Glass, Estes & King, for appellant. Hart, Mahaffey & Thomas, for appellee.

HODGES, J. This appeal is from a judgment for damages rendered in the county court of Bowie county in favor of the appellee against the appellant for the sum of \$500. The appellee alleges, and the proof shows, that on the 9th day of May, 1907, he and his family were residing at or near Lufkin, Tex., and desired to go to Texarkana; that on or about that date the appellee applied to the ticket agent of the appellant at Lufkin for information regarding the best route over which to travel in going to Texarkana. The testimony is conflicting as to what passed between the agent and the appellee on that occasion, but we think this is rendered immaterial by other facts, which appear to be undisputed. The appellee stated that there were two ways by which he could reach Texarkana; one from Lufkin to Shreveport and thence over two other routes, the other over the appellant's line from Lufkin to Tyler and from the latter place to Texarkana. He also stated that, in response to his inquiries concerning the connection made at Tyler, he was informed by the appellant's agent that close connection was made at that place, and that if the Texarkana train were not late, there would be only a delay of about 15 minutes at Tyler. This is disputed by the agent, who says that he informed the appellee that he would arrive at Tyler somewhere about 10 o'clock, and could not leave there earlier than 2 o'clock following. The facts show that the appellee decided to take passage over the appellant's road by way of Tyler; that his family consisted of himself and wife and two small children, aged five and seven years; that he purchased two tickets—one each for himself and wife—over the appellant's line

by way of Tyler; that he reached Tyler somewhere about 10 o'clock at night. He says that he expected to leave there within 15 minutes thereafter; that upon reaching Tyler he carried his wife and children into appellant's waiting room, and then immediately went a few yards distant to a lunch stand to purchase a sandwich for his little girl; that when he returned, and while he was in the act of unwrapping it, the agents of the appellant told him that he would have to leave the waiting room, as they had orders to close it until just before the arrival of the next train. He also says that he was then informed that the train on which he expected to continue his passage would not arrive at Tyler until about 2 o'clock in the morning, thereby necessitating a wait of four hours. The appellee also testified that his smaller child was sick at the time; that the streets were muddy, rain was falling, and the night was cool; that he was a stranger at that place, and was without money with which to secure lodging; that he protested against being compelled to leave the waiting room under those circumstances, and informed the appellant's employes of his situation; that they very roughly directed him to leave, and stated that if he did not, he would be locked in the waiting room. He says that against his wishes he was thus compelled to leave the waiting room, with his wife and family; that after getting outside a stranger, seeing his situation, offered some meager accommodations for his wife; that he spent the remainder of the night upon the street. The testimony further shows that the small child was sick during the interval they were required to wait, and medicine was administered for its benefit. Upon the arrival of the train the appellee took his wife and children again over to the depot, and they took passage for Texarkana. Some of the material portions of this testimony are disputed by witnesses for the appellant. It is not denied that the appellee and his family were directed to leave the waiting room. It is denied, however, that any harsh language was used, and it is also stated that they were given the option of remaining, provided they would permit the door of the waiting room to be locked; that they were informed that this was in compliance with the requirements of the railroad company. The case was tried before a jury, and from the verdict rendered this appeal is taken.

From the facts as stated it is apparent that the right of the appellee to recover in this case must depend upon whether or not he and his family, by reason of being through passengers over the appellant's line of railroad, were, as a matter of right growing out of the relation of carrier and passenger, entitled to occupy the waiting room at Tyler until the arrival of the train upon which they were to continue their journey to Texarkana. If they had such right, then, under those facts which are not disputed, the only

issue which was necessary to have been submitted to the jury was the amount of damages, if any, sustained by reason of the refusal of the appellant's servants to accord them that privilege. Those provisions of the statute concerning the duty of railroads to keep their depots and waiting rooms open a certain length of time before and after the arrival and departure of trains have no application to this case. They were enacted for the convenience of passengers who were either beginning a journey, or who had reached their destination. They could not be made to apply to through passengers, stopping at depots at intermediate points for the purpose of making railroad connections, unless it is held that such passengers have not the right to the continuous use of the waiting room in which to remain during that interval. The appellee does not complain that he was not allowed sufficient time to get ready to leave the depot after his arrival at Tyler, nor does he rest his right to action upon the fact that he was not permitted to remain and occupy the waiting room during the time allowed by law. He expressly says that he intended to remain there until his train came, which, it is shown, was not due till four hours later; and the refusal to permit him to do so is made the basis of his action for damages. This question is then presented: Has a through passenger, while stopping at an intermediate station for a necessary change of cars, the legal right, during that interval, to occupy the waiting room of the depot belonging to the railroad upon whose line he holds a through ticket, and upon which he is intending to continue his journey? So far we have failed to find an instance in this state, or in any other jurisdiction, where this precise question has been passed upon. Counsel on both sides seem to have prosecuted their work of investigation with much industry, but have not been able to refer us to any adjudication of the question. But while thus left without precedent, we have found but little difficulty in reaching the conclusion that this question should be answered in the affirmative, as applied to the facts of this case. That the appellee and his family were passengers of the appellant when ordered from the waiting room at Tyler we think admits of no controversy. They were at the time the holders of tickets which entitled them to passage upon the appellant's road to Texarkana, and had ridden a part of the way to their destination. They were compelled to stop at Tyler as an intermediate station, on account of the connections and changes which the appellant alone had made necessary, and according to a schedule which it had arranged. The interval between the connection and the time of day or night at which it occurred was of appellant's own selection. When the relation of carrier and passenger is once established it usually continues till the end of the journey, unless it is sooner terminated by the voluntary act of

the passenger. 6 Cyc. p. 541, and cases there cited. When the carrier undertakes to transport a passenger over two or more of its own lines, involving changes and waits at intermediate points of connection, we do not think the relation ceases because of such delays and waits, made necessary by the carrier itself. The transportation of the passenger is not the only duty imposed by law upon the carrier. There is a certain degree of care required to be exercised for the passenger's comfort and convenience, as well as for his personal protection against injury. This duty extends to protection from those having no connection with the carrier, as in cases of assault from strangers.

The carrier has the right to establish its depots at such places as it may see proper, and to arrange its schedules and connections to suit its own business interests. But the carrier owes the duty, even in the absence of any statutory regulation, of allowing passengers the use of their waiting rooms a reasonable time before and after the arrival and departure of trains. Upon the principle imposing that duty, it seems to us, the carrier would also be required to permit the use of its waiting rooms, between trains, by through passengers at junction points upon its own line when waiting for connections. The proximity of hotels and boarding houses in the vicinity of depots has nothing whatever to do with the duty imposed by law upon railroads in such instances. Those accommodations can only be considered in determining the amount of damages, if any, resulting from a wrongful refusal to permit the use of the waiting rooms by passengers under those circumstances. If a passenger should be ejected at a place where there are no hotels or other places in which he might secure lodging, and under circumstances that would cause great damages by reason of exposure, discomfort, or otherwise, naturally his damages would be greater than if, after ejection, he had only to walk a few yards and secure comfortable quarters for a small consideration. Let us suppose, for instance, that a change of cars was made necessary at a point where there are no hotels or other places where travelers could find lodging while awaiting the arrival of trains upon which to continue their journey. Will it be contended that the carrier would have the right, under such circumstances, to eject from the waiting room of its depot a through passenger whom it had contracted to convey to his destination over its own line, and whom it had compelled to await at such a place, the connection which the carrier itself had made necessary? Would it be contended, under such conditions, that the carrier had the right to close its waiting room and turn the traveler out in the dark, or inclement weather, during the interval which it had forced him to wait? This right, or the absence of it, cannot be made to depend upon conditions existing in a particular locality. The carrier

is not to be regarded as a dispenser of gratuitous hospitality, but its duties and liabilities are to be determined by its contractual obligations. If there was no legal right, under the conditions mentioned, by which the passenger could claim the privilege of occupying the waiting room during the interval, the carrier would not be liable for damages in refusing such permission, however strong might be the appeal upon other considerations. If the carrier did not have the right, in the first instance, to close its rooms and expel a waiting through passenger, that right would not be conferred by other people coming into that community and establishing hotels and boarding houses where such passengers might secure accommodations. The carrier, having made it necessary for the passenger to wait, must shelter him while he waits, unless he voluntarily seeks other accommodation. We think, under the facts of this case, that the appellee and his family had the legal right to occupy the appellant's waiting room till the arrival of their train, upon which they intended to and did continue their journey. It follows, therefore, that if they were expelled from the waiting room during the time they were entitled to its occupancy, the carrier is just as much liable for damages resulting from that ejection as if they had been ejected from the train itself. If the right belonged to them, it was a right which could not be violated without incurring liability for the consequences.

That the appellee and his family were compelled to leave the waiting room within a short time after arriving at Tyler, solely upon the ground that the servants of the appellant desired to close the room till a short time before the arrival of the next train, is not disputed. It is true, according to the testimony, that the appellee might have remained in the waiting room if he had consented for them to lock the doors upon him; but, according to his testimony, this was given more in the nature of a threat than a permission. In other words, he was told that if he did not leave, he would be locked in the room. Upon this issue there is some conflict in the testimony, the witnesses for the appellant testifying that he was given the alternative of remaining and permitting the doors to be locked or of leaving the room. We think it is immaterial which version of the facts be taken as true. If the appellee was entitled to use the room in the manner he was using it, he had the right to such use without being locked within it. If the servants of the appellant had locked him in the room for the length of time he was required to wait, against his will, they would have been guilty of false imprisonment. In offering him the alternative of leaving the room or of being locked within it they submitted to him necessarily two situations, both of which contemplated depriving him of the rights to which he was entitled. It can-

not be denied that they desired and directed him to leave the room, and that this was repeated more than once. Certainly they are in no attitude to complain that he obeyed their commands and wishes. He was not bound to remain there and resist them by physical force, nor was he bound to submit to confinement, before he would have a cause of action for a wrongful ejection. If the carrier's servants peremptorily ordered him from the premises wrongfully, it is no excuse for their wrongdoing to say that he should not have obeyed them.

There are several assignments of error complaining of the refusal of the court to sustain certain special exceptions urged to the appellee's petition, but the judgment does not show that these exceptions were called to the attention of the court, or were acted upon. Under those circumstances we must assume that they were waived, and for that reason they cannot be here considered.

There are various assignments of error attacking the charge of the court. We do not think it necessary to review those in detail. While some portions of the charge were inapplicable to the facts adduced upon the trial, and may be considered technically incorrect, yet we do not think they are such errors as were prejudicial to the appellant. As stated before, under our view of this case the only issue necessary to submit to the jury was the question of damage and the amount.

The verdict is complained of as being excessive. After a careful consideration of all the facts and circumstances surrounding the parties at the time, we have reached the conclusion that we cannot say as a matter of law, that such is the case. While the verdict may be considered a liberal one, its size does not indicate that it was the result of passion or prejudice on the part of the jury, or was more than might have been considered reasonable under the circumstances. It must be remembered that the husband was suing both for himself and his wife in this action, and had the right to recover damages which both sustained. They testified that they were at a strange place late in the night; that the weather was cool and the streets were in a very muddy condition; that one of the children was sick, requiring nursing and the administration of medicine; that the husband was without money to procure lodging for himself and family; that the language of the employes in ordering them out of the waiting room was very rough; that they were subjected to the gaze of the curious crowd of bystanders, and were ultimately forced to accept gratuitous hospitality at the hands of a stranger; that such accommodations were sufficient only for the wife and the two small children. All of the parties were before the jury, and it had the opportunity of determining from all those conditions the extent of the humiliation and annoyance which the plaintiff and his wife

probably suffered in consequence of the wrongful ejection. The suit was for \$1,000, the verdict being for half that amount.

Finding no error in the judgment of the court below, it is accordingly affirmed.

FIRST NAT. BANK OF PORTALES, N. M., et al. v. McELROY.

(Court of Civil Appeals of Texas. June 11, 1908. Rehearing Denied Oct. 8, 1908.)

1. CHATTEL MORTGAGES—REGISTRATION—NECESSITY FOR.

Under Rev. St. 1895, art. 3328, in the absence of actual transfer of possession of the property, a chattel mortgage must be registered to be valid against subsequent purchasers, creditors, and lienholders in good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 255-262, 267, 268.]

2. SAME—UNORGANIZED COUNTIES—LEGISLATIVE POWER—REGISTRATION OF INSTRUMENTS.

Though under Rev. St. 1895, art. 789, an unorganized county is not a subdivision of the state capable of performing legal and political functions, the Legislature can provide for the registration of deeds to and mortgages of realty and personalty situated in such counties, and designate the place for registering such instruments.

3. CHATTEL MORTGAGES—REGISTRATION—UNORGANIZED COUNTIES.

Rev. St. 1895, art. 4641, requiring all deeds, mortgages, or written contracts affecting land in an unorganized county to be recorded in the county to which such county is attached for judicial purposes, does not apply to chattel mortgages.

4. CRIMINAL LAW—UNORGANIZED COUNTIES—JURISDICTION—"JUDICIAL PURPOSES."

Under a statute attaching an unorganized county to an organized county for "judicial purposes," the grand jury of the organized county has jurisdiction to indict, and its courts can try and punish for offenses committed in the unorganized county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 233.]

For other definitions, see Words and Phrases, vol. 4, p. 3866.]

5. CHATTEL MORTGAGES—RECORDING.

Acts 1876, p. 242, c. 144, § 6, attaching an unorganized county to its parent county for "judicial, surveying, and all other purposes," attached it for all purposes of county government; the provision for "all other purposes" authorizing the registration in the parent county of instruments affecting land or personalty in the unorganized county.

6. SAME—STATUTES—REPEAL—COUNTY ORGANIZATION.

Acts 1876, p. 242, c. 144, § 6, attaching an unorganized county to its parent county for "judicial, surveying, and all other purposes," was not repealed so far as concerns the registration of instruments affecting property in the unorganized county by Acts 1881, p. 12, c. 18; Acts 1883, p. 40, c. 52; *Id.*, p. 63, c. 67; Acts 1887, p. 80, c. 98; Acts 1891, p. 36, c. 34; Acts 1893, p. 166, c. 110; Acts 1897, p. 85, c. 71; Acts 1901, p. 54, c. 39; or Acts 1903, p. 92, c. 67—changing the county's status for judicial and surveying purposes and repealing conflicting laws.

7. COUNTIES—UNORGANIZED COUNTIES—LEGISLATIVE POWER.

The Legislature can attach an unorganized county to several organized counties for different purposes, as exigency or convenience may suggest.

8. RECORDS—RECORDING OFFICERS—NATURE OF DUTIES.

The duties of a recording officer are ministerial.

9. CHATTEL MORTGAGES—REGISTRATION—UNORGANIZED COUNTIES.

That a chattel mortgagor residing in an unorganized county was qualified for jury service in the county to which that county was attached for judicial purposes did not constitute him a resident of the organized county so as to make it proper to register the mortgage in that county, where the unorganized county was attached to a third county for registration purposes.

10. SAME.

Registration of a chattel mortgage covering property in an unorganized county in the county to which that county was attached for judicial purposes was not constructive notice to subsequent purchasers and mortgagees, where the unorganized county was attached to a third county for registration purposes.

11. APPEAL AND ERROR—DUTY OF COURT ON REVERSAL—RENDITION OF JUDGMENT.

The trial court's conclusion of law on a trial before it being erroneous, the Court of Civil Appeals must render such judgment as the trial court should have rendered.

12. CHATTEL MORTGAGES—POSSESSION BY MORTGAGEE—EFFECT.

The rights of plaintiff chattel mortgagee in possession under an unregistered mortgage are superior to mortgages recorded after his taking possession, but inferior to those of a bona fide purchaser buying before plaintiff took possession, and to those of mortgagees under mortgages registered after plaintiff's was given, but before he took possession.

13. WORDS AND PHRASES—"JUDICIAL PURPOSES."

The registration of a chattel mortgage is not within the meaning of the term "judicial purposes" under a statute attaching an unorganized county to an organized county for "judicial purposes"; that term being defined as purposes of the courts in administration of justice.

Appeal from District Court, Midland County; James L. Shepherd, Judge.

Action by John F. McElroy against R. Conley and others. From a judgment for plaintiff, all defendants, excepting Conley, appeal. Reversed and remanded in part and affirmed in part.

S. J. Isaacks, for appellants First Nat. Bank of Portales, N. M., and Midland Nat. Bank of Midland, Tex. Douthitt & Littler, for appellants First Nat. Bank of Lubbock, Tex., and Harry M. Reed. Royal G. Smith, for appellant City Nat. Bank of Colorado, Tex. Camp & Caldwell, for appellee.

LEVY, J. By his petition the appellee sought a judgment against R. Conley on certain notes executed to him by Conley, with a foreclosure of two chattel mortgages given upon certain cattle to secure the notes. A recovery in the petition was sought against the appellant Reed for conversion of some of the cattle, on the allegation that he purchased some of the cattle having notice of appellee's lien. The petition further alleged that on or about July 27, 1905, Conley delivered to the appellee the possession of all of said cattle, to be held by appellee under and by virtue of his chattel mortgage, and which

actual possession he has held, open, and notorious, in the county where the cattle were situated. All the other appellants were made parties to the suit, and it was alleged in the petition that they were subsequent mortgagees, having at the time constructive notice of appellee's lien on the cattle. The appellant Reed answered by a general denial, and specially that the purchase by him of some of the cattle for the sum of \$504 was without notice, actual or constructive, of appellee's liens, and further answered that the said sum of \$504 was applied to part payment of a lien of the First National Bank of Lubbock on said cattle to secure the repayment to it of money advanced by the said bank to Conley for the purchase of these very cattle. The appellants the City National Bank of Colorado, Tex., the First National Bank of Portales, N. M., the First National Bank of Lubbock, and the Midland National Bank of Midland, Tex., each pleaded, respectively, existing liens upon said cattle taken at the time without notice, either actual or constructive, of the alleged liens held by the appellee, and each prayed that its said lien be declared superior to those of appellee. A trial was had before the court without a jury, and judgment was rendered by the court in favor of the appellee, decreeing a foreclosure in his favor of his said liens upon said cattle, and adjudging the liens of all the other appellant banks to be junior and inferior liens by reason of constructive notice of the liens of appellee, and adjudging a personal judgment for \$315 in favor of the appellee against the appellant Harry M. Reed. All of the defendants in the suit, except R. Conley, have appealed to this court from the judgment so rendered. The trial court filed his findings of fact and conclusions of law, and the same are in the record, with no complaint by appellants as to the same. There is no statement of facts in the record, except these findings. The findings of the court are adopted by this court.

The first assignment of error assails the first paragraph of the court's conclusions of law. Looking to the court's findings of fact as are involved in the first assignment of error, it was established in the case that on October 21, 1902, Conley executed to the appellee a chattel mortgage on certain cattle, and that on August 21, 1902, Conley executed to Robison a chattel mortgage on certain cattle (which mortgage the appellee acquired by transfer), and that both of these chattel mortgages were filed with and registered by the county clerk of Martin county, Tex., "in the chattel mortgage register for Terry county" kept by him in Martin county, on October 22, 1902, and August 21, 1902, respectively; that at the time of the execution and registration of the chattel mortgages Terry county was an unorganized county attached to Martin county for judicial purposes; that the mortgagor, Conley, resided, and the mortgaged cattle were situate, in Terry county;

that appellant Reed was a subsequent purchaser of some of the mortgaged cattle from Conley, and that all the other appellants were subsequent mortgagees of the said cattle mortgaged to the appellee; that Terry county became legally organized as a county government under the statute providing for such organization on June 28, 1904; that this suit was instituted August 4, 1905. The court entered the conclusion of law that, the depositing and registering of appellee's chattel mortgages in Martin county was constructive notice to all the appellants, and that their interest in the cattle was subordinate to and subject to the appellee's prior mortgage claim. It is contended by the appellants, in effect, that the court erred in this conclusion of law because the unorganized county of Terry was attached to Martin county by legislative acts for the definite and specified purpose of "judicial purposes" only, and the mortgaged cattle were situate in, and the mortgagor resided in, Terry county, and that, therefore, the registration of the appellee's mortgages on the personal property in Martin county, being neither permitted nor required by law, would not constitute legal or constructive notice to the appellants of the appellee's lien on the cattle.

It is provided by article 3328, Rev. St. 1895, that all chattel mortgages or liens upon personal property which shall not be accompanied by an immediate delivery and be followed by actual and continued change of possession of the property mortgaged or pledged by such instrument shall be absolutely void as against the creditors of the mortgagor, or person making the same, and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instruments or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated; or if the mortgagor, or person making the same, be a resident of this state, then of the county of which he shall at the time be a resident. The cases have so applied this statute that, in the absence of actual transfer of possession, a chattel mortgage must be registered as required by law, in order to be valid against subsequent purchasers, creditors, and lienholders in good faith. *Brothers v. Mundell et al.*, 60 Tex. 240; *Lewis v. Bell* (Tex. Civ. App.) 40 S. W. 747; *Smeltzer v. Baker*, 6 Tex. Civ. App. 751, 26 S. W. 905. But the registration of the chattel mortgages in Terry county, where the property was situated at the time, could not be accomplished under this statute, because at that time Terry county was unorganized for the purposes of county government of its own, and it was without means of doing things necessary to protect public or private interests within its borders. The effect of article 789, Rev. St. 1895, is to prescribe that, until the county becomes legally organized for purposes of its own county government, it shall not be considered

a subdivision of the state during the time, capable of performing legal and political functions. However, it is within the power of the Legislature to make provision for registration of deeds and mortgages relative to real and personal property situated in unorganized counties, and to designate the proper place for registration of such instruments. Whether the Legislature has made such designation for Terry county is the question in hand. The authority for registration of chattel mortgages on personal property situated in Terry county then must be sought from some specific provision of law. There does not appear any express general provision of law for the registration of mortgages on personal property situated in unorganized counties which have never been legally organized for county government. There is a provision, however, found in article 784, Rev. St. 1895, applicable to counties that have once been legally organized, and that have thereafter lost their county organization. By article 4641, Rev. St. 1895, it is provided that all deeds, conveyances, and mortgages, or deeds of trust or written contracts relating to real estate situated in an unorganized county, shall be recorded in the county to which such unorganized county is attached for judicial purposes. But this article mentioned could not be held to include chattel mortgages on personalty, because by its very terms it is limited to and applicable only to instruments conveying or affecting an interest in real estate. Referring, though, to the several acts of the Legislature relating and pertaining to Terry county, some provision may be found designating the place for registration. Terry county was established and its boundaries defined by Acts 1876, p. 238, c. 144. By the same act, in section 6, it was attached to the parent county, Young, "for judicial, surveying and all other purposes." By Acts 1881, p. 12, c. 18, in creating the Thirty-Fourth judicial district Terry county was attached to Throckmorton county "for judicial purposes." By Acts 1883, p. 63, c. 67, in rearranging the judicial districts of Texas and fixing times for holding courts therein, Terry county was attached to Howard county "for judicial purposes"; and by the same act (page 40, c. 52) it was made a part of the Howard land district for surveying purposes. By Acts 1887, p. 80, c. 98, in reorganizing judicial districts Terry county was attached to Howard county "for judicial purposes." By Acts 1889, p. 162, c. 138, in reorganizing judicial districts Terry county was attached to Martin county "for judicial purposes." By Acts 1891, p. 36, c. 34, in creating a new judicial district Terry county was continued to be attached to Martin county "for judicial purposes"; and so by Acts 1893, p. 166, c. 110, and by Acts 1897, p. 85, c. 71, when changing terms of court in the Thirty-Second judicial district. By Acts 1901, p. 54, c. 39, and Acts 1903, p. 92, c. 67, in rearranging the terms of the court in the judicial district

Terry county was attached to Howard county "for judicial and surveying purposes." This legislative history of the status of Terry county shows that at the time of its being created as a county, and its boundaries fixed, and before it was organized for its own county government, it was annexed to Young county "for judicial, surveying, and all other purposes," and that subsequently it was detached from Young county and attached to the several other counties specifically "for judicial and surveying purposes." By reference to these several amendatory acts, it is seen that the detachment was in connection with the creation of judicial districts, and in the one instance to the creation of a land district for surveying purposes. These several acts in each instance have the repealing clause: "All laws and parts of laws in conflict with this act are hereby repealed." A fair construction of the act creating Terry county and annexing it to Young county in the first instance would be that the Legislature intended to attach or annex it to Young county for all purposes generally of county government. The original act uses the broad language, "for judicial, surveying, and all other purposes." Under the power of "judicial purposes," the grand jury of Young county would have jurisdiction to indict, and its courts to try and punish, for crime committed within the borders of Terry county. All requirements of law as to surveying public lands situated within its territory could be performed by the proper officers of Young county under the authority of "surveying purposes." The full extent of such jurisdiction and control can be correctly measured under the phrase, "all other purposes," only by resort to all the various laws relative to county officers and their duties. It is therefore manifest that the Legislature intended the attachment of Terry to Young county to become complete and for its territory, to all intents, to be made practically a part of Young county, and to grant authority to the county officers of Young county to exercise control and jurisdiction over the unorganized county of Terry, the same as if it were a part of their own county of Young. To annex to Young county for "all other purposes" besides judicial and surveying purposes had the effect to confer and grant exclusive jurisdiction to Young county generally and without particular enumeration. So through the language of the act there is gathered the intention of the Legislature in the first instance to attach the unorganized county of Terry to Young county for all legal purposes generally in order to provide the means of doing those things necessary to protect public and private interests within its borders. It would follow as a fair and proper construction of the act and its purposes to include within the provision "all other purposes" the registration in Young county of instruments in writing relating to real and personal property situated in Terry county

required by terms of law to be recorded, and the authority of the county clerk of Young county to make such records.

The next question presented is: Has this act, so far as registration is concerned, been repealed by the subsequent amendatory acts? In the subsequent amendatory acts there is nothing in the language to indicate that the Legislature intended to change the original status of the county further than to rearrange and otherwise attach it to a different county for "judicial and surveying purposes." The amendatory acts in each instance specified the purposes of the attachment, and provided for the repeal of laws "in conflict with the act." "All other purposes" except judicial and surveying would seem not to be repealed because not in conflict with the specified purposes. These specified purposes of "judicial" and "surveying" under the general rule of construction would exclude "all other purposes," and leave and continue the original act in force and effect "for all other purposes" than those included in the topics specified. It is within the power of the Legislature to attach an unorganized county to several organized counties each for the different purposes as exigency or convenience might suggest. We do not think that the registration of a chattel mortgage would be within the meaning of "judicial purposes" as used and meant in the acts. The duties of a recording officer are ministerial. *Brockenbrough v. Melton*, 55 Tex. 493. "Judicial purposes" is defined in 23 Cyc. as "purposes of the court in administration of justice." The case of *Board of Commissioners v. Railway*, 10 Mont. 414, 25 Pac. 1058, was where Big Horn county was attached to Gallatin county "for legislative and judicial purposes"; and in construing the expression "judicial purposes" the court says: "We cannot doubt, in view of the meaning of the word 'judicial,' that the expression 'judicial purposes' as used in the statute means purposes of the courts in administration of justice." The language of the amendatory acts in the light of the wording of the repealing clause would not warrant the ruling that the "all other purposes" of the original act was repealed expressly or by implication. See case of *Alford v. Jones*, 71 Tex. 519, 9 S. W. 470.

A contention of appellee is that Conley, the mortgagor, though residing in Terry county, was legally qualified for jury service in Martin county, and that by reason thereof that would constitute him a resident of Martin county, and that consequently the mortgage was properly registered in Martin county. This contention could not obtain nor apply to the registration laws. Conley was qualified for jury service in Martin county because jury service is a part of, and necessarily incident to, judicial purposes. This ruling involves the decision that the trial court erred in its first conclusion of law that the depositing and registering of the chattel

mortgage of the appellee in Martin county was constructive notice to the appellants.

The appellants' second assignment of error is to the effect that the court erred in ordering a decree of foreclosure of the appellee's mortgage liens in priority to the appellants' liens and claims. Looking further to the court's findings, it was established that on July 28, 1905, R. Conley, the mortgagor, at the ranch of the appellee in Terry and Yoakum counties, delivered actual possession of all the cattle in controversy to appellee to be by him held under and by virtue of and for the purpose of his chattel mortgage, and that appellee, for the purpose of being a mortgagee in possession, took actual possession of the cattle at once, and placed same in a separate and distinct pasture from that in which they were being pastured by the mortgagor and has continuously ever since held the actual possession of the cattle under and by virtue of his mortgage. It was further found by the trial court that on the 26th day of May, 1905, the appellant Reed purchased from Conley 21 head of the said cattle, of the value of \$15 per head, without actual notice of any mortgage of the appellee upon the same. It was further found that on the 20th day of December, 1904, and on the 5th day of January, 1905, after the organization of Terry county on June 28, 1904, the First National Bank of Lubbock filed and deposited with the county clerk of Terry county its several chattel mortgages executed by Conley on the said cattle, and that each chattel mortgage was on the several days of deposit duly registered; that the chattel mortgages executed by Conley to the several appellants in this case were filed in Terry county on September 6, 1905. From these facts as found by the trial court, we are of the opinion that the appellants' contention should in part be sustained.

The appellee in his petition pleaded in the alternative that, if it should be held that the registration of his mortgages was not legal, he be allowed to recover in priority in this case to the other appellants because he was a mortgagee in actual possession of the cattle, setting out the facts in the petition of delivery by the mortgagor and his actual possession and change of possession of the cattle under the mortgage. The findings of the trial court in this respect are not challenged. The trial being before the court below without a jury, and the court having found as to the facts, and his conclusion of law as to the validity of the registration being erroneous, it becomes the duty of this court to render such judgment as the trial court should have rendered under the law. These findings by the trial court show, and are sufficient to show, appellee to have been in actual and continued change of possession of the mortgaged cattle, holding same under and by virtue of his chattel mortgages, from the date of July 28, 1905, and that his rights as a mortgagee in possession from that date be-

came fixed and were sufficient notice under the law. Jones on Chattel Mortgages, § 178; Luckett v. Townsend, 3 Tex. pp. 129-131, 49 Am. Dec. 723; Randolph v. Brown, 21 Tex. Civ. App. 617, 53 S. W. 825. Appellee would be entitled to recover in priority of the claims of the appellants the City National Bank of Colorado, the First National Bank of Portales, and the Midland National Bank of Midland, because each of the mortgages held by these appellants were legally subsequent, and not prior to appellee's liens. But the appellant Harry M. Reed was a purchaser without notice and prior to the time the appellee became a mortgagee in possession, and would be entitled to a judgment as against the appellee; and the First National Bank of Lubbock, having legally placed its mortgage of record in Terry County after its organization as a county and prior to the time the appellee became a mortgagee in possession, would be entitled to recover in priority to the appellee and all the other appellants except Reed.

The judgment of the district court is therefore in part reversed and here rendered that the mortgage liens of the First National Bank of Lubbock, Tex., be, and are hereby, decreed to be prior to and superior to the liens of the appellee, and that appellee have a foreclosure of his liens subject to the prior liens of the First National Bank of Lubbock, and that the appellee recover nothing of the appellant Harry M. Reed, and that he go hence, and that the appellants the First National Bank of Lubbock and Harry M. Reed recover of the appellee all their costs of both the District Court and this court, and that otherwise the judgment of the trial court in all things remain in force undisturbed and affirmed. The judgment as to each of the other appellants is affirmed. The appellants the City National Bank of Colorado, the Midland National Bank of Midland, and the First National Bank of Portales will pay three-fifths, and appellee two-fifths, of all costs of this appeal.

The case is reversed and rendered in part and affirmed in part.

TEXAS & P. RY. CO. v. BOLEMAN.†

(Court of Civil Appeals of Texas. July 3, 1908.
Rehearing Denied Oct. 8, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

That a passenger who was thrown from her seat and injured in coupling another car to the train was asleep at the time, it being between 11 and 12 o'clock at night, did not raise an issue of contributory negligence.

2. SAME—INSTRUCTIONS.

An instruction, in an action against a carrier for injury to plaintiff's wife, that if the train was backed to couple on another car, and in doing so such car was struck with "great" and "unusual" violence, to find for plaintiff, was not erroneous because of the use of the word "unusual."

3. SAME—PETITION—SUFFICIENCY—WAIVER.

Allegations in a petition against a carrier for injury to plaintiff's wife that she had sustained "great injury to her left shoulder and arm," and had lost "the entire use of her left arm," were sufficient as a basis for the introduction of evidence, and, if the carrier regarded them as lacking in detail or otherwise, it should have tested their sufficiency by proper exceptions thereto.

4. SAME.

Allegations in a petition against a carrier for injuries to plaintiff's wife that she had sustained "great injury to her left shoulder and arm," and had lost "the entire use of her left arm," were sufficiently comprehensive to permit of a recovery for a diseased condition of her shoulder joint resulting from the injury.

5. TRIAL—INSTRUCTIONS—ISSUES.

A charge, in an action against a carrier for injury to plaintiff's wife, permitting a recovery for the diseased condition of plaintiff's wife's shoulder joint, if the same resulted from the injury, was objected to on the ground that plaintiff must first show that he had done everything possible by medical skill to cure the original injury and prevent it from causing the diseased shoulder joint. *Held*, that it was a sufficient answer to the objection that the evidence did not raise an issue as to whether the injury suffered by plaintiff's wife was aggravated in any way by a neglect on her or plaintiff's part to have the same properly treated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

6. SAME—INJURIES TO PASSENGER—INSTRUCTIONS.

If the word "gently" in an instruction that, if the coupling which threw plaintiff's wife from her seat and injured her was made "gently," to find for the carrier, did not furnish a proper test to determine the degree of violence which would constitute negligence, the error was not reversible where the court not only so instructed, but also to find for the carrier if the coupling was made in the usual and customary way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

7. CARRIERS—INJURIES TO PASSENGER—MISLEADING INSTRUCTIONS.

In an action against a carrier, the jury were instructed that, if they found for plaintiff, the form of their verdict should be: "We, the jury, find for the plaintiff against the defendant and assess his damages at the sum of ——— dollars." The jury were not instructed in such event to insert before the word "dollars" the amount they might find. The jury returned a verdict specifying the amount plaintiff was entitled to recover. *Held*, on contention that the instruction was in effect a peremptory instruction to find for plaintiff, not the damages he had sustained, but "blank damages," that the jury had not been misled.

8. APPEAL AND ERROR—QUESTIONS OF FACT—VERDICT.

A verdict which there is evidence to support is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

9. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

Evidence in an action against a carrier for injury to plaintiff's wife *held* to support the finding of the jury that the carrier was negligent in making the coupling which threw plaintiff's wife from her seat, and that, as a result thereof, she was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1307.]

Appeal from District Court, Cass County;
P. A. Turner, Judge.

† Writ of error refused by Supreme Court.

Action by S. K. Boleman against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Hall, C. C. Hines, and W. T. Armistead, for appellant. Hill Stewart and H. F. O'Neal, for appellee.

WILLSON, C. J. This appeal is from a judgment in favor of appellee against appellant for the sum of \$1,000 as damages for injuries alleged to have been suffered by his wife while a passenger on one of its trains, as the result, as alleged, of negligence on the part of appellant's employes, in that in operating its said train at Queen City they suddenly ran it against a show car on a side track with such force as to throw Mrs. Boleman from the seat in the car she was riding in and against the side and a seat thereof, thereby injuring her shoulder and arm. In its answer, among other things, appellant alleged as a reason why appellee should not recover against it that the collision complained of occurred in coupling the show car to the train; that the coupling was made in a careful and skillful manner, and did not result in any unnecessary jarring or jolting of the train; and that Mrs. Boleman was guilty of negligence contributing to the injuries suffered by her, in that, instead of being at the time of the collision awake and in possession of her strength and senses, she was asleep. The testimony established that Mrs. Boleman was asleep as alleged. The court instructed the jury to find for appellee if they believed from the evidence that appellant's employes in charge of the train "backed the same on a side track for the purpose of coupling the same to a show car on said side track, and in so doing they struck said show car with great and unusual violence, so much so that the employes were guilty of negligence in the manner in which they struck said show car," and if they further believed that Mrs. Boleman thereby was thrown against the side of and a seat in the car she was riding in, and so was injured as alleged. The action of the court in so instructing the jury is assigned as error, on the ground (1) that the jury thereby were authorized to ignore the defense relied upon that, because asleep at the time the collision occurred, Mrs. Boleman was guilty of contributory negligence; (2) because the jury were required before finding for appellee to believe that the train in making the coupling struck the show car with "unusual" as well as with great violence; and (3) because the allegations in appellee's petition "did not describe or set out the injury to her left arm and shoulder." We do not think the portion of the charge complained of is objectionable on either of the grounds urged to it. The proof made that Mrs. Boleman was asleep at the time the collision occurred did not raise an issue as to whether she was guilty of contributory negligence or not. It was not in the least sugges-

tive of negligence on her part. The collision occurred between 11 and 12 o'clock at night. It is a matter of common knowledge that it is not an unusual occurrence for a passenger to be asleep while traveling at that hour of the night on a railway train. On the contrary, it is such a usual occurrence, in the absence of extraordinary circumstances, as to be one of the ordinary incidents of so traveling. In the absence of such circumstances, as was the case here, sleeping on railway passenger trains is indulged in by all classes of people, including the most careful and the most prudent. The trial court, therefore, properly assumed that proof merely that Mrs. Boleman was asleep when the collision occurred did not raise an issue as to lack of ordinary care on her part. The use of the word "unusual" in the portion of the charge complained of was not error. If the court in the connection in which the word was used had failed to use it or equivalent language, appellant would have a better right to complain. It required the jury, before finding in appellee's favor on the issue as to whether appellant had been guilty of negligence or not, to believe, not only that the train struck the show car with "great" violence, but also with "unusual" violence. The effect of this was to deny to the jury a right to find appellant to have been guilty of negligence, notwithstanding they may have believed the train struck the show car with "great" violence. However great they may have believed the violence to have been, they were required to find against the contention that appellant was negligent unless they believed that besides being "great" such violence also was "unusual." We think it hardly necessary to discuss the remaining ground of objection to the charge in question—that the allegations in appellee's petition "did not describe or set out the injury to her (Mrs. Boleman's) left arm and shoulder." The allegation in the petition was that appellee's wife as a result of the collision suffered "great injury to her left shoulder and arm" and had lost "the entire use of her left arm." These allegations were sufficient as a basis for the evidence admitted. If appellant regarded them as lacking in detail or otherwise, it should have tested their sufficiency by proper exceptions urged thereto.

The court charged the jury as follows: "Should you find for the plaintiff, you will assess his damages at such sum as will in your judgment reasonably compensate him for any injury he has sustained, taking into consideration the nature and character of the injury, if any, sustained by Mrs. Boleman, whether or not it is temporary or permanent, and any pain, if any, you find she has suffered from said injury, if any, if you find that Mrs. Boleman was injured in her arm or shoulder, and that this injury caused her shoulder joint to become diseased, and if you should find for the plaintiff, then you should consider the injury if any from such diseased shoulder joint and any pain, if any, such dis-

ceased shoulder joint has caused Mrs. Boleman in assessing the damages of plaintiff. However, if you should find for the plaintiff, and if you should find that the shoulder joint of Mrs. Boleman is diseased and thereby injured, and that she has suffered pain from such diseased shoulder joint, and if the evidence fails to show by a preponderance thereof that this diseased condition of said shoulder joint was caused by an injury done her by the defendant, then in assessing the damages of plaintiff you will not consider any damages, if any, from such diseased shoulder joint, nor any pain, if any, suffered by Mrs. Boleman from such diseased shoulder joint." The specific objections urged to the portion of the charge quoted are: "(1) There is no allegation in the plaintiff's petition claiming damages for the diseased shoulder joint, or that the injury complained of had caused such diseased shoulder joint. (2) Before the plaintiff could recover for such diseased shoulder joint even if the same had been alleged, the plaintiff would be required by law to show that he had done everything possible by medical art and skill to cure the original injury, and prevent it from spreading or causing the increased injury by diseasing the shoulder joint." As to the first objection specified, it may be said that, while it was not alleged in the petition that as a result of the injuries suffered by her appellee's wife's shoulder joint became diseased, it was alleged, as hereinbefore stated, that she suffered "great injury to her left shoulder and arm," and had as a consequence lost the "entire use of her left arm." The evidence was that, as a result of her injuries, Mrs. Boleman suffered from and was treated by her physician for "synovitis of the shoulder joint." "Synovitis," it seems from the physicians' testimony, is a diseased condition most often caused by a twist, strain, or blow. In *Railway Co. v. McMannewitz*, 70 Tex. 73, 8 S. W. 66, the petition alleged that the plaintiff had been injured "in his spine, chest, head, and limbs." The Supreme Court held this allegation to be sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood vessels situated in the chest, and that the trial court properly refused to instruct the jury that "it not being alleged in the petition that the heart disease, if any, or the aneurism of the heart or of the aorta, if any, was caused by the railroad accident, you cannot regard the same, and shall allow plaintiff no damages on account of the same." The reason given by the court for holding the instruction asked to have been properly refused was that it "would have excluded such diseases from the computation of the damages, although the jury may have believed that they were produced by the injury." If in that case the court did not err in refusing to exclude from consideration by the jury the disease there in question, certainly it should not be held error when the court in this cause authorized the jury to take into con-

sideration the disease, if any, shown by the evidence to have been "produced by the injury" suffered by Mrs. Boleman. *Railway Co. v. Pina*, 33 Tex. Civ. App. 680, 77 S. W. 979, and authorities there cited; *Railway Co. v. Leslie*, 57 Tex. 83. As to the other objection urged to this portion of the court's charge, it is sufficient to say that the evidence did not raise an issue as to whether the injury suffered by Mrs. Boleman was aggravated or increased in any way by a neglect on her or appellee's part to have same properly treated. There was nothing in the evidence indicating that Mrs. Boleman did not exercise the care she should have exercised to avoid aggravating the injury received by her; nor was there anything in the evidence indicating that she did not receive the skillful medical attention she should have received.

The court instructed the jury: "If you believe from the evidence that the coupling was made gently, or was made in the usual and customary way, and with no greater violence than is usual and customary under the same circumstances, then you will find for the defendant." The objection urged to this portion of the charge is that the court used the word "gently" in defining the manner of making the coupling which would relieve appellant of the charge of negligence. The point is made that some force and violence were necessary to be used in making the coupling. But, if there was merit in the contention that the word "gently" did not furnish the jury a guide to determine the degree of violence which would constitute negligence, the assignment should be overruled; for the court instructed the jury, not only to find for appellant if they believed the coupling was made "gently," but also to find for it if they believed it was made in the "usual and customary way and with no greater violence than is usual and customary under the same circumstances."

In the event they found for appellee, the court instructed the jury that the form of their verdict should be as follows: "We, the jury, find for the plaintiff S. K. Boleman against the defendant, Texas & Pacific Railway Company, and assess his damages at the sum of ——— dollars." The jury were not instructed, in such an event, to insert before the word "dollars" the amount of the damages they might find appellee had suffered. Because they were not so instructed, appellant contends the charge, in effect, was a peremptory instruction to find for appellee, not the damages they believed he had suffered, but "blank damages." That the jury was not misled by the omission in the charge is proven by the fact that they returned a verdict properly specifying the amount they had determined appellee was entitled to recover.

The first and seventh assignments of error question the sufficiency of the evidence to support the finding of the jury that appellant's employes were guilty of negligence in making the coupling between the train and the show

car; or, if they were, to support the finding that appellee's wife as a result thereof was injured. These assignments should be and they are overruled. On each of the issues specified the testimony was conflicting. On each the finding of the jury should be treated as conclusive, if supported by testimony in the record. There is, we think, evidence sufficient to support the findings. There was evidence that, in making the coupling, the train was propelled against the show car with such suddenness and force as to throw Mrs. Boleman from her seat. Another passenger was partially thrown from his seat. As a result to Mrs. Boleman, her shoulder was so wrenched or strained as to cause it to swell to twice its natural size, and afterwards to shrink to less than its normal size. She had suffered intensely from the effects of the injury, and at the time she testified—more than nine months after she received the injury—was still suffering from those effects. Her physician testified that he did not think she would ever entirely recover from the effects of the injury suffered by her.

The judgment is affirmed.

HOUSTON & T. C. R. CO. et al. v. KEELING. (Court of Civil Appeals of Texas. June 18, 1908. Rehearing Denied Oct. 8, 1908.)

1. MASTER AND SERVANT—INJURY TO THIRD PERSON—NEGLIGENCE OF SERVANT.

A railway mail clerk, injured while attempting to alight from the mail coach of one railway company, has no right of action against another railway company because of the failure of its employé, who was handling the truck on which the clerk had unloaded the mail, to warn him that the train from which he was attempting to alight was about to start.

2. CARRIERS—INJURY TO PASSENGER—DEGREE OF CARE REQUIRED—INSTRUCTIONS.

The expression "a high degree of care," in an instruction, defining the degree of care due one standing in the position of a passenger, is incorrect; and, to give clearness and definiteness, as well as the proper limitation, this degree of care should be described as the care "which a very cautious, prudent, and competent person would exercise under the same circumstances."

3. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

An instruction, which, as given, was misleading, is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

4. CARRIERS—CARRIERS OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

An instruction that the carrier owed a passenger the duty of using the "utmost care" for his safety was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1085-1106.]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action by G. A. Keeling against the Houston & Texas Central Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendants appeal. Reversed and rendered as to the Missouri, Kansas & Texas Railway

Company of Texas, and reversed and remanded as to the Houston & Texas Central Railroad Company.

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Wolters, for appellants. F. F. & E. T. Chew and Mark G. Fakes, for appellee.

LEVY, J. By his petition appellee sought to recover damages against the Houston & Texas Central Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas for an alleged injury, claimed to have been received by him while attempting to alight from the mail coach of a Houston & Texas Central Railroad Company's passenger train at Denison, Tex., having made the run as a railway mail clerk. In accordance with the verdict of a jury a judgment was rendered in favor of the appellee jointly against each appellant company. Each appellant has filed separate assignments of error, and the same will be here disposed of separately.

The appellant the Missouri, Kansas & Texas Railway Company of Texas in its seventh assignment of error complains of the refusal of the court to give a peremptory instruction to the jury to return a verdict in its favor. Looking to the petition and the evidence in the record, we are of the opinion that this contention should be sustained. There is no evidence in the record to show that the appellee occupied the position of a passenger, or that that relation had in any wise attached with reference to the Missouri, Kansas & Texas Railway Company of Texas. He was not on any of this appellant's trains, nor was he about this appellant's trains, but his own testimony shows that he was on the Houston & Texas Central Railroad Company's train, and was attempting to alight from this train at the time he received his alleged injuries, and that it was while thus attempting to alight that he claims to have been injured. It is not shown in the evidence that any of the employés of the Missouri, Kansas & Texas Railway Company of Texas had anything to do with this train. While Hubbard, the man who was handling the truck on which appellee had unloaded the mail, was an employé of the Missouri, Kansas & Texas Railroad, yet it is not shown that he had any control or charge of this Houston & Texas Central train in any way, or that he had any duty to perform. The allegation in the petition was that this employé Hubbard was negligent in failing to warn the appellee that the Houston & Texas Central train was about to move forward. Under this allegation and the evidence the judgment could not be sustained against the Missouri, Kansas & Texas Railway Company. Because the evidence fails to show any act of omission, by any servant of the Missouri, Kansas & Texas Railway Company of Texas, involving any breach of duty, or any negligence, for which it was liable to appellee, the case as to this

appellant is reversed, and here rendered in its favor, with all costs of the court below and this court.

The appellant the Houston & Texas Central Railroad Company, in its second, fourth, and sixth assignments of error, complains of the instructions given the jury. The court, in explaining to the jury the degree of care which the appellant and its employes owed the appellee at the time, stated: "In the discharge of his duty he had no control or management of said train, and the defendants, their agents, and employes owed him a high degree of care to prevent his injury in the operation of said train. A failure to use this high degree of care, in the operation of said train, so as to prevent injury to plaintiff would be negligence." In the succeeding paragraph, in applying the facts, the charge stated: "And if you find that the moving of said train was negligence, as hereinbefore defined, you will find for the plaintiff." At the request of the appellee the following special instruction was given to the jury: "You are further charged that as said mail clerk he stood in the position of passenger while traveling as said clerk on and over said defendant road, and the said defendant owed him the duty of using the utmost care for his safety and protection, while he was so traveling as said clerk over said road, as looking to his safety and protection." Until the passenger has alighted from the car the railroad company is bound to exercise, to the end of promoting his safety, the highest degree of care. *Ry. v. Finley*, 79 Tex. 85, 15 S. W. 266. The expression "a high degree of care," however, does not correctly express the rule. The essential part of the definition is omitted. To use the expression "the highest degree of care" as a formulated rule in instructing the jury, it would be lacking in definiteness and the proper limitation. By reason of its indefiniteness it might mean one thing to one juror and quite a different thing to another juror. To give clearness and definiteness, as well as the proper limitation, this degree of care has been described as the care "which a very cautious, prudent, and competent person would exercise under the same circumstances." *Railway v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Railway v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744; *Gary v. Railway*, 17 Tex. Civ. App. 129, 42 S. W. 576; *Fordyce v. Withers*, 1 Tex. Civ. App. 544, 20 S. W. 766. Because such instruction, as given, was misleading it constitutes reversible error. *Railway v. Welch*, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829. That the special instruction requiring "utmost care" was erroneous, see *Railway v. Welch*, supra.

The other errors assigned are not here considered, because not likely to occur upon another trial.

The case was ordered reversed and rendered as to the appellant the Missouri, Kansas & Texas Railway Company of Texas, and re-

versed and remanded for another trial as to the Houston & Texas Central Railroad Company.

McMINN v. COPE et al.

(Court of Civil Appeals of Texas. June 25, 1908. Rehearing Denied Oct. 8, 1908.)

1. GUARDIAN AND WARD—SALE OF REAL ESTATE—PASSING TITLE.

A guardian's contract for the sale of the ward's real estate does not pass title until the sale is confirmed.

2. SAME—REPORT OF SALE—PAYMENT OF PURCHASE MONEY.

Under Rev. St. 1895, arts. 2672, 2679, regulating sales of real estate by a guardian, article 2673, subd. 8, requiring the guardian to report in writing within 30 days after the sale whether the purchaser has complied with the terms of the sale, does not give the guardian authority to receive for the ward and his estate the consideration for the sale prior to confirmation, it being entirely optional with the purchaser whether he will pay or not, and, if he does so and the sale is not confirmed, the ward's estate is not liable for any part of the money not actually appropriated to the ward's benefit.

3. SAME—"COMPLIED WITH."

The words "complied with," as used in Rev. St. 1895, art. 2673, subd. 8, requiring a guardian on a sale of the ward's real estate to report to the court within 30 days thereafter whether the purchaser had complied with the terms of the sale, mean "perfected or carried into effect, completed," and convey the idea that the consideration of the purchase had been made complete [citing 2 Words & Phrases, p. 1370].

4. SAME—LIABILITY OF SURETY—SUBROGATION.

Where a sale of a ward's real estate was not confirmed, and a part of the proceeds was received by the guardian without authority and lost without being commingled with the other assets of the ward's estate, neither the estate nor the guardian's successor was liable therefor, and such successor paid a judgment recovered for the amount lost to the purchaser at his peril, and could neither recover over against the original guardian's sureties in his own right or by subrogation to the rights of the purchaser.

5. SAME.

Where a purchaser of a ward's real estate from the guardian paid a portion of the price to the guardian before confirmation which was denied, the ward's estate in the hands of a succeeding guardian was liable for so much of such purchase price as was directly used for the benefit of the ward or his estate.

Appeal from Smith County Court; J. A. Bulloch, Judge.

Action by H. T. Cope and others against Mary Broach and others. Judgment for plaintiffs against defendant A. J. McMinn, and he appeals. Reversed and rendered.

At the October term, 1899, of the county court of Smith county, Tex., Mary Broach and W. F. Broach, her husband, were appointed guardians of the person and estate of Henry Edison, non compos mentis. They qualified as such guardians, and gave bonds with appellant and S. T. Johnson as sureties, which was approved by the court. An inventory of the estate was returned and filed, duly appraised, consisting of real estate and a cow and two yearlings. W. F. Broach died

In February, 1902, and Mary Broach continued to act as sole guardian of the person and estate of the ward. Subsequently Mary Broach applied to the court for an order authorizing her as such guardian to sell 43 acres of land as shown in the inventory to be a part of the estate. On January 30, 1903, the court made the order prayed for, requiring that the land should be sold at private sale for cash. As such guardian Mary Broach sold the land to W. B. Beauchamp. Beauchamp at the date of sale paid Mary Broach the sum of \$100, and, before a report of the sale was made by Mary Broach, he had paid her as such guardian the total sum of \$240 in cash. The evidence does not show the particular day upon which the money was paid, but it was prior to April 7, 1903. On April 7, 1903, appellant, A. J. McMin, a surety on her bond, filed an application to the county court, asking that Mary Broach be required to give a new bond, and that he be discharged from all liability for her future acts as guardian of the person and estate of the ward. Upon the filing of the application, the county judge made an order requiring her to appear before him on April 15, 1903, and show cause why she should not be required to give a new bond as such guardian. On April 15, 1903, after a hearing, the county judge made an order requiring the guardian to give a new bond as such guardian, and which new bond was on April 16, 1903, given with W. B. Beauchamp and J. D. Stamps as sureties thereon. This bond was approved by the county judge on the same day, and duly recorded in the minutes. On same day of the approval of this new bond, such guardian filed with the county clerk her report of the sale of the 43 acres of land, and in her report represented that she had sold the land on February 11, 1903, at private sale to W. B. Beauchamp for \$300 cash. The report of the sale was contested by the brother and sister of the ward. The recital in the report that Beauchamp paid \$300 cash was false. Beauchamp, in fact, paid her only \$240 cash, and the balance of the consideration going to make up the \$300 was a debt of \$60 due and owing by her to Beauchamp. On the 16th day of January, 1904, the county court approved the sale. From this order, the contestants appealed to the district court, and that court on the 8th day of October, 1904, disapproved of the sale, and in the judgment, among other things, provided: "It also appearing that such sale is and was unnecessary, no further sale of said property is ordered." Mary Broach at the time appellant was released as a surety did not file an account of the condition of the estate of her ward, but in July afterwards she filed an annual account, in which it was shown that the money paid for the land by Beauchamp was cash belonging to her ward. Mary Broach never repaid to Beauchamp the \$240. On the 8th day of October, 1904, Mary

Broach was by order of the county court removed as such guardian, and H. T. Cope, the appellee, was appointed such guardian of the person and estate. After appellee had qualified as such guardian, Mary Broach turned over to him all the property that had come into her possession as guardian of the person and estate of the ward as shown in the inventory, including the 43 acres, the sale of which was not approved by the court. Of the sum of \$240 paid to Mary Broach by Beauchamp, she legally and regularly expended for the benefit of her ward the sum of \$115, leaving unaccounted for by her the sum of \$125. This \$125 was loaned out by her prior to April 7, 1903, without her being authorized to do so by the county court, and without her taking any security therefor, and has never been collected by her. At the time the money was paid to Mary Broach by Beauchamp, and at the time she made the loan, she was solvent. No money or property came into her hands as guardian after the execution of the new bond, and there was no misapplication after that time. After appellee had qualified as guardian, Beauchamp brought suit against him as such to recover the \$240 that had been paid by him to Mary Broach as purchase money on the 43 acres of land, the sale of which was disapproved by the district court on appeal. He alleged that, inasmuch as the sale had not been confirmed by the court, he was entitled to a judgment against Cope as guardian for the amount of money paid by him to Mary Broach as guardian. He recovered judgment against Cope as guardian on April 4, 1907, for the sum of \$240. No appeal was taken, and the judgment was final. Appellant was not a party to the suit. After the rendition of the judgment, appellee as guardian applied for and obtained from the county court an order authorizing him to sell to Beauchamp the same 43 acres of land for which he had paid Mary Broach in settlement of the judgment. After the order had been entered, he executed and delivered a deed to Beauchamp to said land in satisfaction of the judgment, and on his report to the court his act in so doing was approved. In a suit by appellee Cope, as guardian, against Mary Broach and the sureties on both the bonds given by her, to recover \$314.15 alleged to be due and owing by Mary Broach as former guardian, the county court, in a trial without a jury, rendered judgment in favor of appellee as guardian against Mary Broach and appellant and Johnson, the sureties on her first bond, for \$125, and in favor of the sureties on her second bond. Appellant brings the case on appeal.

Marsh & McIlwaine, for appellant. H. B. Lasseter, for appellees.

LEVY, J. (after stating the facts as above). Appellant's first assignment of error is to the effect that, under the circumstances of this case, it was error for the court to ren-

der judgment in favor of H. T. Cope, present guardian of the person and estate of the ward, against appellant for the \$125 of the consideration of the sale of the land paid over to Mary Broach, the former guardian, by Beauchamp. The contention urged against the right of the present guardian to recover against appellant wholly depends upon whether or not the estate of the ward acquired any interest in, or in any wise became legally liable for, the money received by Mary Broach, the guardian, from Beauchamp. Article 2660, Rev. St. 1895, provides that, in the decree ordering the sale of the ward's property, "It shall require the sale to be made and the report thereof returned to the court in accordance with law." Article 2672 requires the guardian to make report of the sale to the court within 30 days after the sale is made. By article 2673 it is provided that the report shall be in writing, and shall be subscribed and sworn to by the guardian before some officer authorized to administer oaths, and shall show, among other requirements, "(7) the terms of the sale; (8) whether or not the purchaser has complied with the terms of the sale." This report is required to be returned and filed with the clerk of the court, and the filing noted upon the judge's docket. Article 2675 provides that after the expiration of five days from the filing of the report of sale, and at a regular term of the court, it shall be the duty of the court to inquire into the manner in which such sale was made and to hear evidence in support of or against the report; and, if satisfied that such sale was fairly made and in conformity with law, the court shall cause to be entered upon its minutes a decree confirming such sale, and ordered the report of sale to be recorded in the minutes, "and the proper conveyance of the property sold to be made by the guardian to the purchaser upon compliance by such purchaser with the terms of the sale." By article 2676 it is provided that if the court is not satisfied that the sale was fairly made, and in conformity with law, an order shall be entered upon the minutes setting the sale aside and ordering the property to be again sold, if necessary. By article 2677 it is provided that "after the sale has been confirmed by a decree of the court, and after the purchaser has complied with the terms of the sale, the guardian shall execute and deliver to the purchaser a proper conveyance of the property purchased by him." It is obvious from these articles of the statute that, in performing the duties required of and imposed upon the guardian in the due exercise of the power of contracting a sale with the purchaser, such guardian must pursue the directions contained in the order of sale and the law. There is no provision by statute requiring or making it the duty of the guardian, as such, in undertaking to make the sale, to collect and receive into such guardian's possession the consideration passing for the sale prior to the time of the

confirmation of the sale, unless subdivision 8 of article 2673 so contemplates and authorizes. To properly construe this article just alluded to, it is to be borne in mind that the contract of sale made by the guardian with the purchaser does not pass the title to the property, but that the title to the property continues to remain in the ward unaffected by the contract of sale, and the sale is not complete and valid until confirmed by decree of the court. To that effect and force is *Harrison v. Ilgner*, 74 Tex. 88, 11 S. W. 1054.

In the light of the doctrine announced that the power of the guardian extends to contracting a sale with the purchaser, but not to the power of making a valid and completed and enforceable sale, and that the sale is not complete and valid until confirmed by the decree of the court, it would seem to follow that the requirement of subdivision 8 of article 2673 as to the guardian's report could not be properly construed as imposing upon the guardian the duty to collect and receive into such guardian's possession, on accountability of the ward and his estate, the consideration for the purchase. An interpretation of the article as meaning that it imposed the duty or conferred the authority upon the guardian to collect and receive the consideration into such guardian's possession for the ward, with accountability to the ward and his estate for the same, before the time it could legally become a part of the estate, and before the sale was completed by confirmation of the court, would make the article read inconsistent with the other provisions of the statute respecting the sale, and with the power of the guardian in respect to his authority over the sale. Article 2677 says: "After a sale has been confirmed by a decree of the court, and after the purchaser has complied with the terms of the sale, the guardian shall execute and deliver to the purchaser a proper conveyance of the property purchased by him." Article 2679 says: "No conveyance of real estate sold shall be executed and delivered by the guardian to the purchaser until the terms of sale have been complied with by such purchaser." The language of these articles would seem to undertake to prescribe the time when the guardian is clothed with the authority and power to legally receive the consideration from the purchaser, as such guardian, for and on account of the responsibility of the estate of the ward, which was after the confirmation of the report of sale by the court. Bearing in mind the extent of the legal powers of the guardian in contracting the sale, and the prescribed time when, in the exercise of the power of sale, the guardian is clothed with legal authority to receive into his possession for the ward and as his estate the consideration of the sale, then the purpose and meaning of the requirement of article 2673 is clear and in perfect harmony with the entire act. The phrase "complied with the terms of sale," as used in the article, in relation to a cash

sale, conveys the idea that the consideration of the purchase has been made complete. A sentence arranged to read, "the purchaser has complied with the terms of the sale," would signify that the purchaser had paid over the consideration passing for the sale. "Complied with" means perfected or carried into effect, completed. 2 Words and Phrases, p. 1370. There is no statute requiring the purchaser to pay over the money before the deed is executed, and it is entirely optional with the purchaser, under this article, to pay over the money before that time. This article so has in mind when it requires the report to state "whether or not" it has been done at the time of the report. The only object and purpose that the report could subserve in this respect, therefore, is to inform the court of what was done by the purchaser in this respect. The court would be without authority to treat the money so reported as being a part of the estate or as belonging to the ward after rejection of the report of sale, or before confirmation of the sale. It seems plain that neither the ward nor his estate would be accountable for the money so deposited by Beauchamp, and that this article could not be properly construed as warranting a judgment against the ward and his estate for the \$125 in controversy. In this view, the legal remedy of Beauchamp for the loss of the money in controversy was not in a suit against the estate of the ward, which was in no wise liable for the \$125 for which judgment was obtained in this case. The ward's estate not being accountable for the money, the present guardian, Cope, as guardian of the estate, would have no concern with the payment. Appellant was not a party to the suit against the estate, and he could not be held liable in this case. That Beauchamp sued the estate and recovered judgment, and Cope as guardian paid the debt out of the guardianship property, would not authorize a recovery against the appellant. There was no confusion of the \$125 with the other property of the estate, nor was there any conversion by the estate of the \$125 that would authorize Beauchamp to sue the estate. In fact, the \$125 was never carried into the estate as a part thereof. If Cope paid the judgment as to the \$125, the estate being without legal liability therefor, he did so at his peril and would have no right of subrogation to Beauchamp, but would be treated and regarded as having voluntarily paid the debt, for which he as guardian of the estate would have no right of recovery against the appellant. By this opinion above we mean to rule only that the estate in this case was not liable for the judgment rendered, and to decide no other question in this respect, because no other question is here now presented.

That the \$115 used for the benefit of the minor was a proper charge against the estate cannot be questioned, because it went directly to the use and benefit of the minor and for

which his estate was liable; but the principle of law that would apply to the \$115 being expended for his benefit would not be applicable to the \$125 in controversy, because the latter sum never passed to the use and benefit of the ward or into his estate for his use.

We are of the opinion that the appellant's contention should be sustained; and the cause is therefore reversed and here rendered in favor of the appellant, with costs.

NORTH AMERICAN ACCIDENT INS. CO. v. FRAZER.

(Court of Civil Appeals of Texas. June 18, 1908. Rehearing Denied Oct. 8, 1908.)

EVIDENCE—AGENTS—BINDING EFFECT OF DECLARATIONS.

Declarations by the local soliciting agent of an accident insurance company, as to the occupation of insured at the time the policy was applied for, that his duties as specified in the policy "would not conflict with the conditions in the policy," and that insured "wanted a \$5,000 policy, and he selected it for him," cannot be treated as admissions binding upon the company, where made after the death of the insured, and it not appearing that he had been expressly authorized to make them, or that in making them he was acting within the scope of his authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 930.]

Error from District Court, Panola County; Richard B. Levy, Judge.

Action by Mamie Alice Frazer against the North American Accident Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Geo. H. Plowman, for plaintiff in error. Brooke & Woolworth, J. C. Brooke, and Hogg, Gill & Jones, for defendant in error.

WILLSON, C. J. The suit was brought by defendant in error as the beneficiary named in an accident insurance policy for \$5,000 issued by plaintiff in error to Thomas Jackson Frazer, defendant in error's deceased husband, during his lifetime. At a time when the policy was in force, Frazer was accidentally killed by the falling of a brick-making machine from a wagon on which he was moving same from the railway depot to his brick manufacturing plant. On the verdict of a jury a judgment was rendered against plaintiff in error in favor of defendant in error for the sum of \$5,000.

Among other classifications of risks insured by plaintiff in error were the following: "Class A. Brick manufacturer, office duties and traveling only, \$5,000 death benefit. Class B. Brick manufacturer, superintending, not doing manual labor, \$4,000 death benefit. * * * Class D. Drayman, truckman, or driver, \$2,000 death benefit. * * * Class X. Including risks not otherwise classified, \$1,000 death benefit." In his application for the insurance, made through one Harrell, plaintiff in error's soliciting agent at Carthage, Frazer

stated his occupation and its duties to be: "Brick manufacturer, office duties and traveling only." In the policy issued to him he was so classed. The policy and documents by reference made a part of it, among many others which need not be mentioned, contained these stipulations: "The above risk is classified by the company on the above statement of duties as Class A. The word 'manufacturer' indicates 'proprietor,' as 'box manufacturer.' The owner of a small manufactory is, however, frequently engaged in operating machinery of various kinds or is personally superintending the work done, and must be rated accordingly. The term, 'office duties and traveling only,' is meant to designate the occupation of persons who do not for hire or profit perform manual labor of any kind or personally superintend manual labor of any kind. This term is also used in stating the occupation of the proprietor (or member of firm) or business manager of any concern in merchandising, manufacturing, or transporting, or engaged in the construction of public or private works or buildings, whose duties are limited to office duties and business management only, and do not include the incidental or even occasional personal supervision of the manufacturing process or physical operation of such concerns. A policy holder in this company does not forfeit his insurance by doing any act or thing pertaining to an act, occupation, or exposure classed in the company's manual as more hazardous than that named in this policy; but, in the event that a policy holder shall be fatally or nonfatally injured while in such more hazardous exposure, the indemnity will be in accordance with the hazard of the act, occupation, or exposure in which the insured is engaged at the time of such accident. If the insured is injured after having changed his occupation or duties to one classed by this company as more hazardous than that therein stated, or is injured while doing any act or thing pertaining to any more hazardous risk or occupation, the company's liability shall be only for such proportion of the principal sum or other indemnity as the premium paid by him will purchase at the manual rate fixed by the company for such more hazardous risk or occupation."

Plaintiff in error contended that Frazer was not engaged as a brick manufacturer, and as such performing "office duties and traveling only" at the time he was killed, but, instead, was engaged in a more hazardous occupation, or, if not, was performing other than "office duties and traveling only" in his occupation as a brick manufacturer, and that, therefore, if defendant in error was entitled to recover at all, she was not entitled to recover under the classification given in the policy. Defendant in error contended that Frazer was engaged in performing duties pertaining to his occupation as a brick manufacturer, and that, if moving the brick-making machine was not included in the description given in the policy of his duties as

a brick manufacturer, plaintiff in error nevertheless was liable, because its agent, at the time having a full knowledge of Frazer's occupation and its duties, solicited and received his application for the insurance, and classified him as specified in the application and policy.

After instructing the jury if they found from the evidence that the decedent "when injured had changed his occupation or duties to that of a drayman or truckman, or a brick manufacturer's superintendent not doing manual labor or driver, and that the act or thing done or performed by him, as such (that you may find) in moving a brick machine on a wagon from the depot to his plant, pertained to a more hazardous risk than the duties of brick manufacturer, office duties and traveling only," to return a verdict for defendant in error "for such amount as the premium paid by said Thomas J. Frazer would purchase at the manual rate fixed by defendant company in evidence before you for such occupation or risk," the court further instructed the jury as follows: "But if the jury shall find from the evidence that at the time the written application of Thomas J. Frazer for insurance policy was made the defendant's agent Harrell, soliciting such application on which the policy issued, had full knowledge of the character of business being done by Thomas J. Frazer, and knew the duties incident and pertaining to the business being done by Thomas J. Frazer, and told the said Thomas J. Frazer that his classification named in the application covered the business being done by him, and the said Thomas J. Frazer, acting on such information, performed the work he was doing at the time of his injury as work in and about his occupation as a brick manufacturer, then, if you so find, you will return a verdict for plaintiff for the full amount of the policy, although you may find he changed his occupation or risk, but, if you do not so find as above stated, you cannot find for the full amount of the policy." The complaint made by plaintiff in error that the part of the charge last quoted was without evidence to support it is, we think, well founded. It is true that defendant in error testified that after her husband's death, when one Rhodes, representing plaintiff in error, visited her for the purpose of effecting a settlement of her claim based on the policy, plaintiff in error's agent Harrell, who accompanied said Rhodes, with reference to her husband's occupation at the time the policy was applied for, stated that her husband's duties as specified in the policy "would not conflict with the conditions in the policy." It is also true that the witness Will Frazer testified that, after the death of defendant in error's husband, said Harrell stated to him that deceased "wanted a \$5,000 policy, and he selected it for him, and remarked that he did not think it would conflict with his business, and so explained to him." But there was no pleading to support such testimony, and it

appears that same was objected to on that ground, and on the further ground, among others, that Harrell's declarations made after the accident occurred were not binding on plaintiff in error, and it appears from the trial judge's statement allowing the bills of exception that it was admitted as evidence because Harrell had testified that he did not make the statements. The effect of the testimony was to show, not that Harrell had made the statements, but that he had said that he had made them. We doubt if the fact that he had or had not made them was material, so as to justify the admission of the testimony even for the purpose of impeaching him. But it is, we think, clear that, if it should be said that the testimony properly was admitted for that purpose, it should not have been treated by the court as competent to prove the estoppel claimed against plaintiff in error in favor of the defendant in error. There was no evidence showing that at the time the declaration was made, if made at all, Harrell in making it was acting within the scope of his authority as the agent of plaintiff in error. The only evidence as to the extent of his authority was that he acted for plaintiff in error as its local soliciting agent. The rule seems to be that "the admissions of an agent, not made at the time of the transaction to which they relate, and not specially authorized by the principal, are not competent evidence against the latter, although the relation of principal and agent still exists." 1 A. & E. Ency. Law (2d Ed.) p. 695; 1 Green Ev. (16th Ed.) §§ 184c, 184d; Laughlin v. Fidelity Mut. Life Ass'n, 8 Tex. Civ. App. 448, 28 S. W. 411; Railway Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Gaines v. Perry (Tex. Civ. App.) 102 S. W. 756; Lake Como Co. v. Coughlin, 9 Tex. Civ. App. 340, 29 S. W. 185; Railway Co. v. Ragsdale, 67 Tex. 24, 2 S. W. 515; Roberts v. Burke, Litt. Sel. Cas. (Ky.) 411, 12 Am. Dec. 325. In Laughlin v. Fidelity Mut. Life Ass'n, supra, in disposing of a complaint based on the action of the trial court in refusing to permit the plaintiff to prove by the company's local agent whether or not he had admitted just before Laughlin's death that the policy sued upon was valid, the court by Finley, J., said: "It is sufficient to say the insurance company would be affected in no way by the admissions of the local agent as to the liability of the company made after the death of the assured. The evidence was not admissible." It appearing that the declarations in question, if made, were made by Harrell after Frazer's death, when the rights of the parties under the contract had become fixed, and there being no evidence that Harrell had been expressly authorized by plaintiff in error to make them, or that in making them he was acting within the scope of his authority as its agent, the declarations could not be treated as admissions binding upon or in any way affecting plaintiff in error. It follows that the charge of the court in the particular

specified was erroneous, and that, because it was, the judgment must be reversed.

The assignments of error not directed to the matters we have discussed are, we think, without merit, and they are overruled.

The judgment of the trial court is reversed, and the cause is remanded for a new trial.

MCGOVERN et al. v. TALIAFERRO.

(Court of Civil Appeals of Texas. June 18, 1908. Rehearing Denied Oct. 8, 1908.)

1. HOMESTEAD—SALE—PROCEEDS—OTHER LAND—EXEMPTION.

A debtor owned a house and lot in which he conducted a saloon; he living on other rented property. He sold the saloon business and the house and lot for \$1,800, \$400 of which was paid by a conveyance to the debtor of the tract in controversy, which the debtor said was to be used as a homestead, though he never prior to the levy of an attachment thereon occupied it, or did any act indicating such intention. *Held*, that such land was not exempt under Const. art. 16, § 51 (Sayles' Ann. Civ. St. 1897, art. 2396), exempting the proceeds of a homestead for six months for reinvestment in another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 109.]

2. SAME—BURDEN OF PROOF.

Where land conveyed to a debtor as part consideration for a business homestead and saloon business conducted therein was conveyed by the debtor after attachment, the burden was on the debtor's grantee to show that the land was exempt as purchased with the proceeds of a homestead at the time the attachment was levied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 397.]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by W. G. Taliaferro against Sam McGovern and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jno. L. Little, for appellants. Dies, Singleton & Dies, for appellee.

WILLSON, C. J. The suit was brought by Taliaferro against Sam McGovern, Mrs. Irene McGovern, H. A. Hooks, T. R. Ogden, and Teague Wright to try the title to 35 acres of land in Hardin county. The petition was in the statutory form. As warrantors of the title to the land, W. M. Crow and his wife, M. B. Crow, at the instance of Hooks and Ogden, were made parties defendant. The defendants all answered by a plea of not guilty, except Mrs. Crow and Wright, who made default. The trial was before the court without a jury, and resulted in a judgment in Taliaferro's favor against all the defendants for the land, and in favor of Hooks and Ogden against Crow and his wife on the covenant in their deed to said Hooks and Ogden warranting the title. All the defendants joined in the appeal taken from the judgment.

As found by the trial court the facts were as follows:

"(1) Both parties claim the land in con-

troversy under W. M. Crow as common source.

"(2) The Brown-Forman Company sued W. M. Crow in the county court of Hardin county, and caused an attachment to issue in said suit on the 29th day of September, 1904, which was duly levied on said day on said land. Judgment was rendered in said suit in favor of plaintiff and against said Crow for \$207.25 on May 27, 1905, in which said attachment levy and lien was duly described and noted. Execution was issued on June 24, 1905, and levied on said land on June 28, 1905, and it was duly sold by the sheriff of Hardin county on the first Tuesday of August, 1905, to W. G. Taliaferro and a valid deed was made to him.

"(3) The land consisted of 35 acres, was situated about a mile from Kountze, was under fence, had a house, a well, and some fruit trees on it. There was no evidence that it had ever been occupied by Crow as a homestead, and the above improvements were not put there by Crow, but were there before Crow bought the premises.

"(4) Crow and wife conveyed the land on January 9, 1905, after levy of attachment, to defendants Hooks and Ogden for a consideration recited in deed of \$500.

"(5) About five years before the trial of this case, on the ——— day of April, 1907, W. M. Crow, who was married and had a wife and children, sold his homestead in Kountze, Hardin county, Tex., and about a year thereafter he invested the proceeds in a saloon business at Saratoga, in said county, and in the house (and lot) which he occupied as a place of business and in which he conducted his saloon. He continued in business about a year, and sold to Fuller & Salter. The house and lot was the only real property he owned at the time. His family lived in a rented house at Saratoga during the time, and did not occupy the house owned by him, or any part of same at any time.

"(6) On 26th day of June, 1905, Crow sold out his saloon business and conveyed this house and lot to Fuller & Salter for a consideration of \$1,800, \$400 of which was paid in the land sued for, which was conveyed to him by Fuller on that date. Crow and Fuller at the time of the trade went upon the land together, and Crow selected a right of way for a road around the premises, and stated to Fuller that he was buying the property to be used as his homestead. Nothing else was done by him at the time.

"(7) Crow did not go into possession of the land or occupy the same as a homestead, but continued to live at Saratoga and to fill the office of justice of the peace of the precinct in which Saratoga is situated, and on the day he acquired title to the land from Fuller he authorized D. F. Singleton to sell it for \$500, and requested him to find a purchaser for it.

"(8) Crow did not at the time of the levy

of attachment on said land or afterwards intend to occupy and use said land as his homestead, and did not act or acts at any time designating it as such."

We think the evidence in the record sufficient to support the court's findings as to the facts, including his finding that "Crow did not, at the time of the levy of the attachment on said land or afterwards, intend to occupy and use said land as his homestead, and did no act or acts at any time designating it as such." The judgment, therefore, should be affirmed, unless the court erred in his conclusion of law that "the land sued for was not the homestead of W. M. Crow, and he had no homestead right in same, and, the attachment by Brown-Forman Company having been levied and the lien of same fixed upon the land prior to the conveyance by Crow to the defendants Hooks and Ogden, the plaintiff acquired the title to same by his purchase of execution sale and the deed made to him by the sheriff." The land never having been used by Crow as his homestead, and he not having an intention at the time the writ of attachment was levied ever to so use it, the conclusion reached by the trial court as to the law was correct, unless the house and lot sold to Fuller & Salter on August 23, 1904, as shown by the evidence (instead of June 5, 1905, as found by the court), should be treated as Crow's homestead, and the proceeds thereof as exempt to him for a period of six months from the date of such sale within the meaning of the Constitution. Const. art. 16, § 51; Sayles' Ann. Civ. St. 1897, art. 2396. On the evidence in the record, we think it should be held that the house and lot sold to Fuller & Salter at the time same were sold constituted Crow's business homestead. So the question remaining is: "Was the land in controversy the 'proceeds' of a voluntary sale by Crow of said house and lot?" The judgment of the trial court should, we think, be regarded as including a finding that the land was not such "proceeds," and, unless the record shows the contrary to be the truth, we further think the judgment should be sustained. The evidence, so far as material to the question we are discussing, was that Crow sold the house and lot and the saloon business to Fuller & Salter for \$1,800, which was paid partly with money, partly with notes, and the remainder by a conveyance to him of the land in controversy at a valuation of \$400. The record does not show at what sum the house and lot alone, nor at what sum the saloon business alone, were valued. The proceeds of the sale of the saloon business were not exempt to Crow. They were not in any way shown by the record separated from the proceeds of the house and lot. They therefore must have constituted a part of the consideration for the conveyance to Crow of the land in controversy. Hence it can with no better reason be said that the land in controversy was paid for with or exchanged for the house

and lot than it can be said that it was paid for with or exchanged for the saloon business. In this state of the evidence, the burden being on appellants to show that the land was exempt to Crow at the time the attachment was levied, we think it cannot be said that the judgment rendered by the trial court is erroneous.

It therefore is affirmed.

INTERNATIONAL WATER CO. v. CITY OF EL PASO.

(Court of Civil Appeals of Texas. June 13, 1908. Rehearing Denied Oct. 14, 1908.)

1. MANDAMUS—PROCEEDINGS—PARTIES.

Where a city contracted with a person in terms of a franchise to supply the city and its inhabitants with water, the city, and not an inhabitant, was the proper party to maintain mandamus to compel performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 289.]

2. SAME—ADEQUACY OF OTHER REMEDY.

The legal remedy which will bar interference by mandamus must not only be adequate, but it must be specific and appropriate to the particular circumstances of the case, and must afford relief on the subject-matter of the controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 8-34.]

3. SAME.

Where a contract between a city and a person bound the latter to construct and maintain a waterworks system to supply water to the city and its inhabitants and to pay the cost of making necessary connections with customers, the city, on the refusal of the person to construct necessary connections, might maintain mandamus to compel performance; the remedy of compelling reimbursement, on the city making such connections, being inadequate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 8-34.]

4. WATERS AND WATER COURSES—WATERWORKS—CONSTRUCTION OF NECESSARY CONNECTIONS—OBLIGATIONS.

Primarily the duty of a company bound to furnish water to property owners on streets containing mains carried with it the duty to perform the work necessary to enable the company to furnish the owners with water, and the company could only be relieved from the obligation to construct, at its own cost, the necessary connections by some provision in the franchise or contract which unmistakably, or by fair implication, so operated.

5. SAME.

A contract between a city and a company possessing a franchise to supply the city and its inhabitants with water provided that it should furnish water to consumers having pipe connections at not to exceed a specified price. The contract was silent as to who should pay for such connections, and did not grant to the consumer the right to enter on and excavate the street for such connections, but that right was given solely to the company. *Held*, that the company was bound to construct, at its own cost, the necessary connections to supply consumers with water.

6. SAME.

A judgment requiring a company possessing a franchise to supply a city and its inhabitants with water, to lay pipes from the main in the street to the property line on streets where it has mains, is not objectionable as requiring the company to run and install connecting pipes for

every inhabitant, regardless of the distance from the mains to the property of the inhabitant.

7. MANDAMUS—PUBLIC SERVICE.

Where a company, possessing a franchise to supply a city and its inhabitants with water, repudiated the duty of constructing, at its own cost, the necessary connections to supply consumers with water, the city was not required to apply for necessary connections in each individual case as it arose, but might mandamus the company to compel performance of its duty to the inhabitants generally.

8. SAME.

Where a company, possessing a franchise to supply a city and its inhabitants with water, was required to construct, at its own cost, the necessary connections, contracts with the inhabitants constructing the connections at their own cost under an agreement to defray the cost of maintaining the pipes for a year were not binding, and did not deprive the city of the right to obtain a judgment in mandamus, ordering the company to maintain, at its own expense, all connecting pipes.

9. SAME.

Where a company, possessing a franchise to supply a city and its inhabitants with water, refused to construct, at its cost, a connecting pipe to supply a consumer with water, the city was the proper party to ask for mandamus to compel the company to perform its duty, not only in the interest of such consumer, but in the interest of other inhabitants as well.

10. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

Where a company, possessing a franchise to supply a city and its inhabitants with water, was required to construct, at its own cost, necessary connections to supply consumers with water, a judgment in mandamus by the city to compel the company to construct necessary pipes from its mains in the streets to the property line on the streets, was not objectionable, as the taking of its property without due process of law.

11. WATERS AND WATER COURSES—WATERWORKS—OBLIGATIONS OF WATER COMPANY.

Where the mayor of a city, while the council was in session, informed the attorneys of a water company, possessing a franchise to supply the city and its inhabitants with water requiring it to construct at its cost the necessary connections to supply water to consumers, that the company should thereafter prepare a bill to each applicant for water connections, but the council took no vote on the matter, there was no legislative act of the council, and the company could not justify its refusal to construct the necessary connections on the ground that the council permitted it to charge for the actual cost of such connections.

Appeal from District Court, El Paso County; James R. Harper, Judge.

Action by the city of El Paso against the International Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gregory, Batts & Brooks and Turney & Burges, for appellant. Coldwell & Sweeney and Denman, Franklin & McGown, for appellee.

JAMES, C. J. The petition of the city of El Paso alleged in substance, omitting allegations upon which no controversy arises: That, by ordinance of date November 3, 1902, the city of El Paso granted to W. J. Davis and his assigns the right, power, privilege, and franchise to construct, operate, and main-

tain in said city a waterworks system, for the purpose of supplying said city and its inhabitants and consumers of water therein with Mesa water, a copy of said ordinance being attached to the pleading. That on the same day Davis accepted said franchise, and entered into a contract with the city, wherein, for himself and his assigns, he agreed to do and perform all the things required of him and of his assigns by the terms of said ordinance, a copy of which contract was also attached. That by the terms of said ordinance said Davis and assigns were and are bound to furnish water to the city of El Paso, and to all inhabitants and to all consumers in said city, at the price and charge in said ordinance stated, which price and charge was and is based upon the amount of water consumed, and not upon the cost to said Davis and his assigns of connecting the consumers' premises with the system and mains. That prior to January 1, 1905, the said franchise granted to Davis was assigned to the defendant, the International Water Company, and it assumed all the obligations and duties imposed on said Davis. That prior to October 4, 1907, the defendant constructed and operated, and has continued to operate, in said city a waterworks system, but on said date, and ever since, it has failed and refused to furnish the said city and its inhabitants and consumers water at the price and charge stated in said ordinance and contract. That it is the duty of defendant, at its own cost and expense, wherever it has a water main in any street, in front of the premises of any inhabitant of said city, or of a person owning real estate in said city, where such inhabitant or owner desires to become a consumer of water, to lay a connecting or supply pipe from its said main to the premises of said inhabitant or owner who desires to become a consumer of water. That the water mains of defendant are almost invariably laid along the center of the streets of the city, and such connecting pipes from its mains to the premises of the inhabitant or owner will be entirely laid in the public street. That defendant has the right to lay and repair such pipes in the streets from its mains to private premises, but the inhabitants and owners of premises in the city have no right to lay or repair such pipes in the streets. That defendant wrongfully refuses to lay such connecting pipes unless the inhabitants or property owners will pay the expense thereof, and wrongfully refuses to maintain said pipes in good order for more than a year after they are laid. That, particularly on October 4, 1907, defendant wrongfully refused, though duly requested to do so, and though it had a water main on the street in front thereof, to lay a connecting pipe from said main to the premises of J. Hise Myers (describing two lots), though the said Myers was then and there an inhabitant of said city, and desired to become a consumer of water upon said premises, and de-

fendant still refuses to lay said connecting pipe, unless Myers would defray the cost thereof. That the various refusals herein mentioned are an unlawful attempt on its part to make the inhabitants and consumers of water pay a greater price and charge for water than is allowed by said franchise and contract. That by such refusal the danger of fire is greatly increased, and water closets cannot be connected with the city sewer, to the great danger of the public health, and, by failure to repair connecting pipes, the streets are rendered dangerous and unserviceable as thoroughfares, all in flagrant violation of the duties and obligations of defendant under its franchise. That defendant is a public service corporation, having a monopoly of the water supply in said city, and it is its duty, at its own cost and expense, to lay connecting pipes from its mains to the premises of consumers. That great and irreparable injury has been and is inflicted upon the city and its inhabitants by reason of the premises, for which it has no adequate remedy except by mandamus, which is prayed to compel defendant, at its own cost, wherever it has a water main in the street in front of the premises of an inhabitant or owner of property in the city, and such inhabitant or owner desires to become a consumer of water, to lay and maintain across the street, in good repair, a connecting pipe from the main to said premises, and to supply said person with Mesa water at the price and charge allowed and provided for by its franchise from and contract with the city, and that upon final trial the mandamus be made perpetual.

From defendant's brief we state its pleadings, substantially as follows: Besides general demurrer and denial, it pleaded several special exceptions to the petition, based upon the following grounds: A special exception that defendant is not obligated by law to supply water to the city or its inhabitants for any purpose or price. Another special exception, No. 4, is that the petition shows that plaintiff is not entitled to the writ of mandamus; and, if entitled to any relief, it consists in paying, or causing to be paid, the cost of connecting the premises of Myers with the main, and recovering from defendant the cost, if such cost should be borne by the defendant. Special exception No. 5, upon the ground that, if there was any inconvenience to the city or its citizens, it could be prevented by the expenditure of a small sum of money, and if defendant was liable therefore, the same could be compensated through an action for damages. Special exception No. 7 is that the petition as a whole showed no grounds for mandamus, and did not show that plaintiff did not have an adequate remedy at law, other than such writ, which would not meet all the matters and things demanded by plaintiff. Special exception No. 8 is that said ordinance and contract show the rates fixed and to be charged by defendant

were only for the benefit of those persons having pipe connections with the mains of the defendant, and the petition does not show that Myers, or any other applicant for water, wants the benefit of said fixed rates to persons having said connection, or demands connections independent of said fixed rates, and said petition is therefore vague, indefinite, and uncertain.

For special answer the defendant alleged that it was the duty of all persons desiring water to make the necessary connections with the mains at their cost; that the rate charged was lower than would have been if defendant had to make such connection at its own expense. That under said ordinance and contract defendant never intended, and does not now intend, to supply consumers, not having their own pipe connections with the mains, at the price fixed by said ordinance and contract. That the custom and practice of defendant is, and has always been, to furnish such connections at actual cost to persons desiring them, and after so made, the same are the property of the consumer, which custom and practice existed prior to the granting of the amended franchise, granted in August 26, 1907. That this was known to be the rule and custom by the city council at the time the amended franchise was granted, and the rates for water fixed thereby. That the rate fixed thereby was the very lowest that could possibly be maintained for supplying water. That it was in view of this practice that such rates were agreed on; and to compel defendant to furnish water at said rates and at the same time to assume the burden of paying for the connections, would make it impossible for defendant to operate its business without constant and continuing loss. That no such thing was in contemplation of either party to the franchise and contract, and that such requirement would amount to confiscation, and taking of property without due process of law, and an impairing of the obligations of the contract. Also that, long prior to the granting of the original franchise to Davis, it was the custom in El Paso, and elsewhere in the southwestern country and throughout the United States, for water companies to make a reasonable charge for all pipe connections between mains and property lines, which custom was well known to the city of El Paso, its mayor, and council when they granted the original franchise in 1902, and since granting same up to the granting of the amended franchise in August 1907, and that said amendment, as well as the original franchise, contained this provision: "That the said International Water Company, and its assigns shall furnish Mesa water to all consumers at the price and charge herein set forth as follows, to wit: Not to exceed the sum of twenty cents per thousand gallons for all purposes other than those herein, and in the original franchise to W. J. Davis, enumerated, provided a minimum charge of nine-

ty cents per month may be made to all consumers of water having pipe connections with the mains belonging to the said International Water Company and its assigns."

The court overruled all the demurrers, and upon a trial entered judgment for the city, granting the writ of mandamus, in substance requiring defendant to lay and maintain, at its own cost and expense, a connecting or service pipe from its mains to the premises of any and every inhabitant of the city of El Paso, and to those of any and every person owning property therein, when such inhabitant or owner desires to become a consumer of water to be furnished by defendant, and when there is no such pipe already in existence; said connecting pipe to be made and maintained when it has a main in the street, alley, or public ground in front of the premises of such inhabitant or owner, and shall extend from such main to the line dividing his premises from the street, alley or public ground. "But nothing in this judgment contained shall require said defendant to lay or to maintain any such service or connection pipe in any place that is not a part of the public streets, alleys, grounds, or squares of the city of El Paso. Also nothing herein contained shall require said defendant to lay or maintain such connecting or service pipe beyond its franchise limits." The judgment orders defendant to maintain at its own expense all such connecting pipes of the nature, and in the places aforesaid, which it now uses to supply consumers. And finally the judgment decrees particularly that defendant is to lay and maintain, at its own cost and expense, a connecting or service pipe from its main in front of Myers' premises to the line dividing said premises from the street. That nothing in this judgment shall bind defendant to maintain any service or connecting pipe, after the person occupying the premises supplied thereby ceases to be a consumer, or to lay any additional pipe to said premises of Myers, if the said connection has already been made.

Appellant's first assignment of error is presented as a proposition, but it embodies various propositions. However, what appellant contends for under it is found in a separate proposition, as follows: "Appellee's petition nowhere stated any facts authorizing the city of El Paso in its corporate capacity to institute and maintain any suit or action for the use and benefit of either J. Hise Myers or any other person, known or unknown, nor could said petition have been so framed as to state a cause of action in behalf of said J. Hise Myers, or any other person, growing out of the facts alleged, because a municipal corporation, such as is the city of El Paso, has no authority, expressed or implied, for the lending of its name for the bringing of any such suit, or for suing in its name, for the use and benefit of private persons, for the redress of their private wrongs; but, on the other hand, said city of El Paso, and cities

similarly situated, can, under the facts alleged, only bring and maintain a suit for the protection of a right to which the city, as such, is entitled, and as this action was in nowise for the benefit of the city of El Paso, as such, the same could not be maintained, and the general demurrer should have been sustained." The point is that a municipal corporation can, in its corporate capacity, maintain a suit only for the protection of a right to which the city, as such, is entitled, and this action is in nowise for the benefit of the city, as such, but for the benefit of private persons, for the redress of their private wrongs. The petition proceeds upon allegations which showed an ordinance and a contract in the terms of the ordinance, which, as construed by the trial judge, imposed upon the respondent company a public duty, to wit: the duty to lay, at its own expense, connecting pipes from its mains to the property line of abutting property owners, when requested to do so. The refusal to perform this duty is alleged. The question, upon which the case of *San Antonio Street Ry. Co. v. State*, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834, turned, is not involved here, because Davis and his assigns obligated themselves to do and perform all things provided for them to do in connection with the grant. The cases hold that, where a duty to the public is imposed and undertaken as a condition of the grant of this kind by a city, the corporation may be compelled by mandamus, at the suit of the municipality, to perform the duty. *San Antonio Street Ry. Co. v. State*, supra; *Kimberly v. Morris*, 87 Tex. 637, 31 S. W. 808; *City of Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1034; *Cleburne Water Co. v. City of Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 733.

The contract, based upon the ordinance, was with the city of El Paso, and the city was properly the plaintiff in suits relating to the enforcement of any duty imposed thereby upon the respondent of a public nature. The question of whether or not the duty of laying pipes at its own cost, to connect with property adjoining the streets containing mains, was imposed will be considered under the next assignments, which relate to the overruling of special demurrers. In this connection we may state that the difference between contracts of this nature and those made by a city that partake of the character of private contracts, and therefore not the subject of mandamus, is clearly pointed out in *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1034. These special demurrers were as follows: "Further excepting to plaintiff's original petition filed herein, this defendant says that the same is insufficient in this: That this defendant is not obligated by law to supply the city of El Paso, or the inhabitants thereof, with water for any purpose, at any price, and said petition does not show that

this defendant is obligated by contract to supply the city of El Paso and the inhabitants thereof with water, or the terms of said contract, if any exists, with such reasonable certainty as to show this defendant liable, either to the plaintiff, or any inhabitant of the city of El Paso, in the premises, and as to this, defendant prays the judgment of the court." "Further specially excepting herein, this defendant says that said petition is insufficient in this: That it shows upon its face that the plaintiff is not entitled to a mandamus, in that if it is entitled to any relief in the premises, it is not the relief of the extraordinary writ of mandamus, but that it could protect itself fully in the premises by paying, or causing to be paid, the costs of connecting the premises of J. Hise Myers with the mains of the defendant company, and recovering from the defendant the cost and value thereof, if the said costs should be borne by this defendant, and not by the said J. Hise Myers, and as to this it prays the judgment of the court." "Further specially excepting to plaintiff's said petition, this defendant says that it appears from the face of the petition that any inconvenience that this plaintiff, or any citizen of El Paso, is suffering at the hands of this defendant, or with which it is or they are threatened, could be prevented by the expenditure of a small sum of money, and full compensation and redress could be obtained by any person entitled thereto against this defendant in any action for damages, it not appearing that the defendant is insolvent, or is not amply able to respond in damages for any infraction of any right or duty owing by it to this plaintiff, and as to this it prays the judgment of the court." These demurrers were properly overruled, because the remedy or remedies suggested were not adequate in the sense they would afford the relief of the character sought by this proceeding. In *High on Extraordinary Remedies*, § 17, it is stated: "It is to be borne in mind, in the application of the principle under discussion, that the existing legal remedy relied upon as a bar to interference by mandamus must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the particular circumstances of the case; that is it must be such a remedy as affords relief upon the very subject-matter of the controversy, and if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy." The city of El Paso had the right and was the proper party to enforce the performance of the duties arising under the contract made with it, and to protect the right of its citizens thereunder. It had the right to have the respondent perform the specific duty which the latter had assumed in the interest of the public, and could not be required to construct such connections it-

self, and look to respondent for reimbursement, no such remedy having been provided in the contract.

Another special exception which was overruled reads as follows: "For further special exception this defendant says that plaintiff's petition shows no cause of action in this: That the said ordinance and the contract made thereunder show the rates, fixed by said ordinance and said contract to be charged by this defendant, were only for the benefit of those having pipe connections with the mains of this defendant, and said petition does not show whether the said Myers, or any other applicant for water, wants the benefit of said fixed rates to persons having said connections, or wants connections independent of said fixed rates, and said petition is therefore too vague, indefinite, and uncertain, and as to this the defendant prays the judgment of the court." This exception depends on the proper construction of the terms of ordinance and contract, which subject we shall deal with in connection with those assignments of error which complain of the court's conclusions of law.

The eighth, ninth, and tenth assignments complain of the first conclusion of law, which is: "That it is the duty of the defendant to lay and maintain, at its own cost, the service or connecting pipe between its mains and the premises of the consumer, when it has a main laid on the street in front of the premises of the consumer." This conclusion is attacked as being unsupported by and against the evidence, in view of the following provision in the ordinance and contract with Davis in 1902: "The said W. J. Davis and his assigns bind themselves to furnish said Mesa water to all consumers at a price and charge never to exceed the prices and charges herein set forth as follows, to wit: The sum of twenty cents per thousand gallons for all purposes other than those herein enumerated provided a minimum charge of ninety cents per month may be made to all consumers of water having pipe connections with the mains belonging to said W. J. Davis and his assigns." And the following provision in the contract and ordinance of 1907: "The said International Water Company and its assigns shall furnish Mesa water to all consumers at a price and charge herein set forth as follows, to wit: Not to exceed the sum of twenty cents per thousand gallons for all other purposes other than those herein and in the original franchise to W. J. Davis enumerated, provided a minimum charge of ninety cents a month may be made to all consumers of water having pipe connections with the mains belonging to said International Water Company and its assigns." Appellant's position is that the above fixed the charges for water, and applied said charges to consumers who had pipe connections, or who would make pipe connections with the mains, and, as no other rate had ever been fixed, then, in order for consumers to get the

benefit of the rate, they must be such as have, or are willing to have, at their own cost such connections; and, as neither Myers, nor any other person for whom the city complains, is in such position, the conclusion is wrong. The purpose of the provision quoted, which provision occurs in the contract in connection with the other provisions relative to the subject of charges for water furnished, was merely to fix a rate which the company would be allowed to charge consumers. It is true the rate fixed was declared to apply to consumers having pipe connections, from which the inference is drawn by appellant that the consumers were to furnish or pay for connections with the mains. The provision is silent as to who should pay for such connections, but states that those who are so connected shall be furnished water at the rate fixed. When the whole contract is looked to, it will be seen that the consumer was not granted the right to enter upon and excavate the street for any purpose whatever, but on the contrary this right or franchise was given solely to the respondent. The duty to perform this work and to lay the pipes was imposed upon it in connection with the positive duty to supply the consumer with water. The contract nowhere provides that the consumer shall pay for such work, but the only basis for any charge to the consumer is found in the rate fixed by said provision. We think the failure to provide that the consumer should pay said rates, and also the cost of making the connection with his property, rather indicates that he was not to bear the cost of the latter. However, if said provision be taken as indicating by inference that the consumer was to bear such cost, the contract in other respects is repugnant to giving it that construction. Primarily the duty to furnish water to property owners on streets containing mains carried with it the duty to do and perform what was necessary to be done to place the company in position to furnish the property with water. It could not do this without connection to the property lines. See *Pocatello Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518. We think, in order for respondent to be able to claim immunity for this consequence, there would have to be some provision in the grant or contract which unmistakably, or at least by fair implication, taking into consideration all the provisions of the contract bearing on the subject, would relieve it. There is this provision in the ordinance and contract: "And be it further ordained that all work of taking up pavements, excavating in or upon streets and sidewalks, or any public place, or any other excavations made by said Davis and his assigns, shall be done and performed in such a manner as to give the least inconvenience to the inhabitants of said city. And all such places shall be repaired and left in as good condition and the same condition as before being disturbed; and all such work or interference with the streets

and other public places shall be done and performed with all convenient speed by the persons representing the said Davis and his assigns, and under the direction and supervision of some person appointed by the city council of the city of El Paso. And all such work shall be done at the cost and expense of the said Davis and his assigns. And in the event said streets, sidewalks, or other public places be not speedily repaired and replaced as herein contemplated, then the city of El Paso may replace and repair same and charge the expense thereof to the said Davis and his assigns, which expense is to be paid and collected by the city out of any sum or sums of money which may be due or to become due to the said Davis and his assigns under this ordinance and contract to be hereafter entered into by the city of El Paso." It is not consistent with this express provision that the owner of property, or any one except the respondent, should bear the cost of excavating the streets, sidewalks, etc.; and, in view of this provision, the effect which appellant claims for the clause under consideration, by implication, cannot be reasonably given it.

The assignment 11 to 14 complain of the second conclusion of law, which is: "That the defendant, by the writ of mandamus at the suit of the city of El Paso, can be compelled to discharge the aforesaid duty." This we have already disposed of.

The fifteenth and sixteenth assignments complain of the third conclusion: "That the city of El Paso is entitled to the relief granted by the judgment of the court in this cause." Under these it is claimed that the judgment is erroneous in requiring the defendant company to run and install connecting pipes for every inhabitant of the city of El Paso, regardless of the distance from the mains to the property line of the inhabitant, and also erroneous because, under the pleading, the court was without authority to so order, and because the facts and circumstances surrounding any other application than that of J. Hise Myers were not before the court, and the court had no right to pass upon the same or enter any order relative thereto. It will be seen that the judgment only requires pipes to be laid from the main in the street to the property line on the street, and only upon streets where it has water mains. We think, upon the other question suggested, that the city had the right to mandamus respondent in reference to its duty to the inhabitants generally; and that the city was not required to apply for such in each individual case as it might arise. Respondent had repudiated the duty in general.

Another objection to the judgment is that the connecting pipes already installed were installed under contracts with the consumers, and the cost of same was paid for by the consumers, with the agreement and understanding that they should defray the cost of maintaining said pipes for one year; and the

effect of the judgment is to nullify said contracts, is retroactive, and places a burden on the defendant company not provided for in its agreement and ordinances and contracts with the city, and destroys private contracts and agreements made between it and the city. We fail to understand how the city would be deprived of the right to the mandamus sought and granted in this case, by the fact that respondent had such contracts with consumers. These contracts, if it was the duty of respondent to lay and maintain the pipes they refer to at its own cost, as we hold herein, were not binding, and they constituted no valid obstruction to that part of the judgment which reads: "The said defendant is further ordered to maintain, at its own expense, all such connecting pipes of the nature and in the places aforesaid, which it now uses to supply consumers with water in the city of El Paso."

The assignments 17 to 20 are overruled. The city was a proper party to ask for the mandamus in the interest of J. Hise Myers, as well as of its other inhabitants. The other matters suggested under these assignments have been sufficiently discussed.

The point made by the twenty-first assignment, in effect, that the judgment involves a violation of the constitutional rights of the defendant, by impairing the obligations of its contract with the city, and involves the taking of its property without process of law or compensation, must also be overruled.

The seventh assignment complains of the following finding of the court: "That some time about the middle of the year 1906 the former mayor of the city of El Paso, who was then mayor of said city of El Paso, did state to an agent of defendant, to wit, its attorneys, in the council room of the city of El Paso, when the council was in session, substantially as follows: 'You hereafter will prepare a written bill to each applicant for water connections, which bill must show in detail the material used and the labor expended, and whatever else is done, so that each man may know that he is paying the water company no more than the actual cost of making connection between the mains and the premises'; but that the said statement was the individual statement of the person making it, and was not the act or statement of the city council of the city of El Paso, and said statement did not influence defendant in entering into the contract required by the ordinance of August 22, 1907." The contention is that the above amounted to a construction by the parties of the contract as to defendant's right to charge consumers for pipe connections, and that defendant was, by such action of the council, permitted to continue charging for same the actual cost thereof. We think the court did not err in the finding. Reading the testimony of the attorney referred to in the finding, and who alone testified, it is clear that what was stated by the mayor was not made the act of

the council. The witness stated that the council was in session, with a quorum present, and were transacting business; that he did not remember that there was a vote of the council taken in this matter; that the mayor did all the talking, as he was in the habit of doing, and witness did not recollect that anybody else took part in the discussion; and that the mayor made the speech attributed to him. Nothing more was done, except that "we agreed to that, and the representatives of the company were told that the practice should be followed, and a bill should be made in each case to show each resident what the actual cost of that connection was, and I understand that has been the practice ever since." This evidence falls short of showing any legislative act, or any act at all, of the council upon the matter.

The judgment is affirmed.

HARDIN COUNTY v. NONA MILLS CO.

(Court of Civil Appeals of Texas. June 18, 1908. Rehearing Denied Oct. 8, 1908.)

1. DEEDS — DESCRIPTION OF LAND — SUFFICIENCY.

A deed reciting a purpose to sell land belonging to the county, and describing it as "lots Nos. 30, 31," etc., and "also all of the remaining town tract" not theretofore "sold in lots designated on the plat or survey of said town as revised by William Word by order of court, containing 160 acres more or less" is not void for uncertainty in describing the land, since it does not appear that the land cannot be identified through extrinsic evidence.

2. SAME—EXTRINSIC EVIDENCE—ADMISSIBILITY.

Where a deed contains an accurate, but general, description of land, extrinsic evidence is admissible to identify it.

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to identify land in suit as that intended to be conveyed by a certain deed.

4. SAME—EFFECT OF RECITALS—AUTHORITY TO CONVEY.

Authority of one to convey county land as agent for the county, as recited in the deed, will be presumed, where the county records have been destroyed, and where the deed was executed 38 years ago.

5. COUNTIES — DEEDS — ACKNOWLEDGMENT — FAILURE TO SIGN CERTIFICATE—EFFECT.

A deed to county land passed the beneficial ownership or equitable title, though the certificate of acknowledgment to the deed was not signed by the officer purporting to take the acknowledgment, if insufficient to pass legal title under Rev. St. 1895, art. 794, providing that the deed of a commissioner "duly acknowledged," etc., shall pass the county's title.

6. SAME — COUNTY LANDS — CONVEYANCE — METHOD.

Under Rev. St. 1895, art. 794, requiring county lands to be sold at public auction, a sale made in any other manner does not pass title.

7. ADVERSE POSSESSION—COUNTY LANDS—TITLE ACQUIRED.

Defendant, having been in actual, exclusive, and continuous possession of surplus and private land belonging to a county, claiming and enjoying it for 13 years, and having improved it and paid the taxes thereon, acquired good title thereto, under the statute of 10 years limita-

tion; the land never having been used for or dedicated to public purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 42.]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by Hardin county against the Nona Mills Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jno. L. Little and W. S. Parker, for appellant. Tallaferro & Nall, W. W. Cruse, and Greer, Minor & Miller, for appellee.

LEVY, J. In an action of trespass to try title the county of Hardin, Tex., as a municipality, sued the appellee, a private corporation, to recover the land in controversy. It was alleged that on July 29, 1859, the state of Texas patented to Hardin county 320 acres of land for public purposes, donated under authority of law for the purpose of a public court house. The appellee answered by general denial and plea of not guilty and the statutes of limitation of 3, 5, and 10 years. The case was tried before a jury, and a verdict was returned under a peremptory instruction from the court to find for the appellee. The appellant has brought the case on appeal, and seeks to have the judgment revised for errors assigned.

The appellant in its brief says: "The main issue in this case is whether or not the purported deed from Hardin county, by agent, to J. G. Sims, of date January 23, 1869, passed the title; if so, there are no other issues that need be considered." We adopt and follow this suggestion on the part of the appellant, because the decision of that question would successfully dispose of the case. The question is raised through a pertinent and direct assignment of error. Appellee's contention is to the effect that the deed from Hardin county by Taylor, agent, to J. G. Sims is invalid, and does not pass the title to the property, because (1) there is an insufficient description of the property conveyed, or data from which a description may be made certain; (2) it was not acknowledged; and (3) there was not proven any authority for the agent to sell, other than that expressed in the deed itself. The objections urged will be considered in the order stated.

Looking to the record, the appellant introduced and read in evidence a patent from the state of Texas to Hardin county, signed by H. P. Runnells, Governor of the state, of date July 29, 1859, conveying 320 acres of land in Hardin county, Tex., recorded in the deed records of Hardin county. The patent recites that it is in accordance with an act creating Hardin county, approved July 22, 1858. Upon the introduction of the patent the appellant rested its evidence. The appellee then began to introduce evidence, and, first in order, offered the following deed:

"The State of Texas, County of Hardin. Know all men by these presents, that I, Mur-

frey Taylor, of the county and state aforesaid, being duly appointed by the police court of Hardin county, state of Texas, agent within and for said county, do sell and make titles to real estate belonging to said county of Hardin and sold by order of said police court, as aforesaid (to wit) lots Nos. 30, 31, 32, 33, 34, 35, 36 and 37, also all of the remaining town tract that has not heretofore been sold in lots designated on the plat or survey of said town as revised by William Word by order of court, containing one hundred and sixty acres, be the same more or less. In accordance with the order of said court and by the authority in me vested by said order, after giving due notice of the same by advertising at three different places in the county aforesaid, one of which was on the courthouse door, I did, on the first Saturday in August, 1868, with the usual hours of said, proceeded to sell to the highest bidder the above described lots and land the same being struck off to J. G. Sims at sixty-five dollars, it being the highest and best sure bid. Now, therefore, as the agent as aforesaid, I do hereby covenant to and with the said J. G. Sims, his heirs and assigns, to have and to hold the above described lots and premises unto his own use, benefit, and behoof, and in his own right to use, occupy, and possess against all claims that the county of Hardin may have in and to said premises as aforesaid unto him the said J. G. Sims, his heirs and assigns, and against all others claiming under said county forever. In testimony of which I have hereunto set my name as agent for said county, with seal, using scroll for seal, at Hardin County, 23d day of January, A. D. 1869. Murfrey Taylor, Agent for Hardin County. [Seal.]

"The State of Texas, County of Hardin. Personally appeared before me, J. T. Sims, deputy county clerk, duly appointed and qualified, Murfrey Taylor, agent of the county of Hardin, duly appointed to execute titles to land estate sold by said county by said agent, and acknowledged to me that he signed the foregoing deed as said agent fully for the purposes and considerations therein set forth and expressed as his act and deed fully as said agent. To certify which I have hereto set my hand and seal of the county court of said county of Hardin, at office in Hardin, 23d day of January, A. D. 1869. [No signature of officer appears.]

"The State of Texas, County of Hardin. Filed in my office for record at 6 o'clock a. m., April the 23d, 1869, and by me duly recorded April the 24th, 1869, in Book E of Land Records, on pages 90 and 91. To certify which I hereto sign my name and the impress of the seal of the county court of Hardin county, at office in the town of Hardin, date last above written. J. G. Sims, Clk. County Court H. C."

In connection with the tender in evidence of this deed the appellee offered parol evi-

dence, as bearing upon and to prove (1) the authority of Taylor to make the sale and dispose of the land as agent for Hardin county; and (2) to identify the land in controversy. The evidence will be considered in the proper connection.

Looking to the description of the property given in the deed, in connection with the recitals of the deed, we do not think that the deed can be said to be void for uncertainty, because it cannot be said that it appears from the face of the deed that the land conveyed cannot be identified from the description given in the deed by the aid of extrinsic evidence. It is a settled question that, where a deed contains an accurate but general, description of land, extrinsic evidence may be introduced to clearly locate and identify the land passing by the deed. *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818. The deed recites as follows: "I, Murfrey Taylor, of the county and state aforesaid, being duly appointed by the police court of Hardin county, state of Texas, agent within and for said county, do sell and make titles to real estate belonging to said county of Hardin and sold by order of said police court, as aforesaid (to wit) lots Nos. 30, 31, 32, 33, 34, 35, 36 and 37, also all of the remaining town tract that has not heretofore been sold in lots designated on the plat or survey of said town as revised by William Word by order of court, containing one hundred and sixty acres, be the same more or less." It appears from the recitals in the deed that the purpose of the agent of the county was to sell and make title only to real estate belonging to Hardin county, and sold by order of its police court. His deed describes the land sold as specified lots, and "also all of the remaining town tract that has not heretofore been sold in lots designated on the plat or survey of said town as revised by William Word by order of court, containing one hundred and sixty acres, be the same more or less." Properly construed, it appears that the land referred to in the deed was land "belonging to said county of Hardin," and that it was "one hundred and sixty acres, be the same more or less," outside of the lots in the "town tract." In the case of *Wilson v. Smith*, 50 Tex. 365, the following description in a sheriff's deed was held not void for uncertainty: "One hundred and sixty acres of land, being a part of the homestead tract of James Bankstone, excluding two hundred acres exempt by law." In the case of *Vineyard v. O'Connell*, 90 Tex. 59, 36 S. W. 424, the deed contained the following description: "All my right, title and interest in the estate of James W. Byrne, purchased by me at an administrator's sale." It was ruled in these cases that the general description of the land given was not void for uncertainty, because it could not be said that it appeared from the face of the deed that the land could not be identified by the

aid of extrinsic evidence. In the case of *Rainboldt v. March*, 52 Tex. 251, it was held that the following description of the land could not be pronounced so insufficient that the land could not be identified by the aid of extrinsic evidence: "Two hundred acres of land, it being a part of the tract which I bought from Charles Vinzent, lying about one mile east of Mount Enterprise; said two hundred acres to be run off of the south end of said tract next to John Salmon's and extending across said south end." Looking to the evidence offered by the appellee in this connection, we are of the opinion that the proof clearly located and identified the land passed by the deed. By the witness Taylor it was proven that he had lived in the county of Hardin since 1859, with the exception of three years, and that he remembered when the county site was in the town of Hardin, and that the tract of land the county site was on was commonly called "Hardin county tract" or "town tract," and that it was a common designation in 1869; that the only other town in the county at the time was Concord, but that the land on which Concord was situated was not known and described in 1869 as "the town tract." By the witness Tebbs it was proven that he had lived in the county since 1878, and that the tract of land called "the town tract" is situated on the Hardin county survey of 320 acres, and that it has been called that ever since he knew anything about it; by the several other witnesses, one of whom was a lawyer and abstractor, and the other a surveyor of 32 years' residence in the county, that the 320 acres patented to Hardin county was where the old county site was, and that the land involved in this suit is in the east part of that survey, and that no other tract of land was patented to Hardin county at that time in Hardin county. It was proven that the parties claiming under J. G. Sims, the grantee, were in actual possession and enjoyment of this particular tract of land from 1880 to 1892, and that taxes were paid by them, and from the date of the deed to the filing of the suit no claim whatever has been set up to this land by Hardin county. There is no conflict in this evidence.

The patent recites that it was made in accordance with the act of January 22, 1858, creating Hardin county. Laws 1858, p. 58, c. 55. The act referred to in the patent creates various counties, including the county of Hardin. Section 8 defines the limits of the county of Hardin, and concludes: "And the county seat shall be located as herein provided, with all the rights herein granted the other counties in relation to lands for the county seat." Section 14 authorizes the several county courts to procure, for a county seat, "not to exceed three hundred and twenty acres in quantity by purchase, donation or otherwise; for if the point selected shall be public domain then the state hereby re-

linquishes the same, not to exceed three hundred and twenty acres, to such county; and upon presentation of the field notes of the same duly certified by lawful surveyor as correct to the General Land Office, a patent shall be issued to the county for the same. And when land may be patented for a county seat in either of the modes above named, if the same be more than be necessary for public purposes the county court shall lay the same off into town lots, blocks and streets, and after setting apart suitable public grounds for schoolhouses, churches and cemeteries, proceed to sell the remainder at such times and on such terms as said court may deem best for the interests of the county, and the proceeds of such sale shall be appropriated by the court to the erection of county buildings." The undisputed evidence shows that the 320 acres described in the patent was the only land at that time patented to the county of Hardin; and it does not appear that at that time Hardin county owned any other land, but it does appear that the county did own all of that survey, except so much as had previously been sold in lots. It further appears, without dispute, that from the date of the deed to the time of the trial the 320-acre tract has been known as the "Hardin county survey" or the "town tract." The evidence clearly identifies the land in controversy as the land intended to be conveyed by Murfrey Taylor, as agent, to J. G. Sims. In *Pierson v. Sanger*, 93 Tex. 160, 53 S. W. 1012, the rule is announced that: "It is the duty of the court to give effect to the intention of the parties, if that intention can be ascertained; thus a description of land conveyed, not in itself sufficient, may be supported by evidence of connected extrinsic facts making certain what was intended." This disposes of the contention arising on the question of description in the deed. In passing we rule that the court did not err on this ground in giving a peremptory instruction, because the evidence was undisputed and without conflict.

The next question is as to the sufficiency of the proof of the authority of Murfrey Taylor to make the sale and dispose of the land as agent for Hardin county. By article 794, Rev. St. 1895, which was the same act in force at the time the deed was made in 1869, it is provided that the commissioners' court may, by an order entered on the minutes of the court, appoint a commissioner to sell and dispose of any real estate of the county at public auction. Looking to the record in this case, it was proven that the courthouse of Hardin county and all the minutes of the county court were destroyed by fire in August, 1886. As circumstances bearing upon the appointment and authority of Taylor to sell and dispose of this land in controversy, the appellant read in evidence from the deed records of Hardin county three several deeds from the county of Hardin by Murfrey Tay-

lor, agent, dated April 5, 1867, conveying land in the town of Hardin, not involved in this suit, the deeds each reciting that Murfrey Taylor was "agent for the county of Hardin, duly appointed by the police court of said county, to make and execute deeds to purchasers of town lots in the town of Hardin." It was proven by the son of Murfrey Taylor that the signature to the deed in evidence was the signature of his father, which was signed, "Murfrey Taylor, Agent for Hardin County." After offering these circumstances, the original deed was offered with its recitals. We are of the opinion that, upon the proof of the destruction of the records and the consideration of the fact that 38 years had elapsed from the date of its execution, the existence of the authority of Taylor to make the sale and dispose of the land and execute the deed, as agent for Hardin county, as recited in the deed, would be presumed. *Giddings v. Day*, 84 Tex. 605, 19 S. W. 682.

The next point made by the appellant is with reference to the acknowledgment of the deed by Taylor, as agent, to J. G. Sims. The original deed is sent up in the record as evidence; and, it being clearly identified as the original deed, we shall regard and treat it as the evidence on that point in this case. The certificate of acknowledgment on the deed was not signed by the officer purporting to take the same. The deed was, however, recorded. The appellant insists that under article 794, Rev. St. 1895, a deed made by an agent of the county, in order to be valid must be duly acknowledged, and that as this conveyance is not signed by the officer who purports to take the acknowledgment, no title is shown out of the county. The statute provided that the deed of such commissioner "duly acknowledged and proven and recorded shall be sufficient, to all intents and purposes, to convey to the purchaser all the right, title and interest and estate whatever which the county may have in and to the premises." It might probably be contended that, under the requirements of the article, before a deed made by the commissioner of the county would be sufficient to pass the legal title to the land, the deed of the commissioner must be duly acknowledged and recorded. But we do not think that the article could be properly construed to mean and intend that, unless the terms of the article, in respect to acknowledgment and record of the deed, be complied with, the sale of the land at public auction by the commissioner duly and regularly appointed and the purchase at such sale, and the compliance with the terms of the sale by the purchaser, would be void and of no force or effect as between the county and the purchaser at such sale, and that such sale would pass no character of interest or title whatever to such purchaser. If it should be declared that the deed of such commissioner, because not acknowledged, was not sufficient to pass the legal title to the

land, yet by the sale, and on compliance with the terms of the sale by Sims, he nevertheless acquired a beneficial ownership or equitable title to the land, undoubtedly this equitable title so acquired by Sims would have entitled him to maintain a suit for specific performance. We think it plain that by the sale Sims acquired an equitable title to the land. The article authorizes county courts to divest the county of its title to land. It provides that the court may, by an order entered in the minutes, appoint a special commissioner to sell and dispose of any real estate of the county at public auction. The power to sell and dispose of the land is lodged in the county court, and the mode prescribed for the exercise of this power is at public auction. A sale made otherwise than at public auction does not pass any title out of the county, because the exercise of the power to sell is in violation of the mode prescribed, and the sale is therefore void. *Ferguson v. Halsell*, 47 Tex. 421. The duly appointed commissioner properly exercising the power to sell and dispose of the land at public auction, and a compliance with the terms of the sale by the purchaser at such sale, completes the sale and purchase of the land. The deed and acknowledgment of the deed are evidences of the sale, and the failure to properly execute the deed and acknowledgment would not render void and of no effect the sale and purchase of the land so made. If the sale was not void, then the purchaser under the sale acquired a beneficial or equitable interest in the land upon his compliance with the terms of the sale. In this case it appears that Taylor, the agent of the county, was duly appointed such agent of Hardin county to sell and dispose of the land at public auction, and that he exercised this power, in the proper and legal way, at public auction, and sold and disposed of the land in such manner to J. G. Sims, and that J. G. Sims complied with the terms of such sale. The execution of the deed was properly proven at the time it was offered in evidence. While the deed in this case was not, perhaps, admissible as a conveyance passing the legal title, still it was admissible, upon proof of its execution, as an instrument in writing, subscribed and delivered by the party authorized to dispose of the land, and was such instrument upon which the purchaser could found a beneficial ownership or equitable title to the land. We are therefore of the opinion that the appellee has successfully shown an equitable title from the appellant entitling it to recover on that ground as against the appellant.

Even if appellee did not have an equitable title, there is another ground upon which the case must be affirmed. The proof shows that the appellee is entitled to recover on the 10 years limitation, having been in actual, exclusive, and continuous possession and use of the premises, claiming and enjoying them

for 18 years, and, besides, paying taxes all the time on the land and having improvements on the land. The land was surplus and private land belonging to the county, and was never used for or dedicated to public purposes. That limitation would run, see *Johnson v. Llano County*, 15 Tex. Civ. App. 421, 39 S. W. 995.

The case was ordered affirmed.

JONES et al. v. GARDNER.

(Court of Civil Appeals of Texas. June 25, 1908. Rehearing Denied Oct. 8, 1908.)

1. PAYMENT—VOLUNTARY PAYMENT—RECOVERY.

A lawyer's partnership agreement provided that the members of the firm should share equally in fees received on account of business transacted by the firm, but that G., the incoming member, should not share the salary paid the other two as general attorneys for a railroad. J., one of the partners, was thereafter appointed receiver for the railroad, and employed G. as his attorney at \$200 per month. On the first salary being received, G., after consultation with his partners, paid each of them one-third thereof, and continued so to do until he died, at which time one month's salary was due. *Held*, that the payment so made was voluntary, and not the result of a mistake, and that G.'s executrix was therefore not entitled to recover from J. any part of the salary so received by him.

2. RECEIVERS—SERVICES OF FORMER RECEIVER.

Where a receiver employed his law partner as his attorney at a specified salary, the receiver, after he had been superseded, could not recover against his successor for services as an attorney in assisting his attorney so employed.

3. INDEMNITY—IMPLIED CONTRACT.

Where judgment was rendered against a receiver's successor for services rendered by the attorney of the original receiver, the successor was entitled to a judgment, over against the original receiver, for the amount so recovered.

4. PARTNERSHIP — ACCOUNTING — RIGHTS OF PARTNERS.

Where a deceased member of a firm was appointed attorney for another member, who was receiver of a railroad company, and the parties construed their partnership agreement to require such attorney to divide the compensation received among his partners, the right of one of the surviving members of the firm to recover a portion of a month's salary due such attorney, though unpaid when he died, could only be determined in an accounting of the partnership business.

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by Mrs. Hattie Gardner, as executrix, etc., against S. P. Jones and others. Judgment for plaintiff, and defendants appeal. Reformed and affirmed.

In February, 1904, S. T. Scott and appellant S. P. Jones, as partners under the firm name of Scott & Jones, were practicing law. As such partners, they were the general attorneys of the Texas Southern Railway Company. During the month mentioned John M. Gardner became a member of the firm, and the business thereof was continued un-

der the firm name of Scott, Jones & Gardner. When Gardner became a member of the firm, it was agreed between the parties that he should not share in the salary to be paid Scott and Jones as general attorneys for said railroad, but should share equally with them in all fees which might be received on account of business transacted by the new firm. July 11, 1904, Jones was appointed receiver of said railroad company. As such, on the same day, he contracted with Gardner to represent him as receiver at a salary of \$200 per month. At the time this contract was made, nothing was said between the parties about the disposition to be made by Gardner, who, it was contemplated, would continue to be, and who did continue to be, a member of the firm of Scott, Jones & Gardner, of the salary to be paid to him as attorney for the receiver. About the 15th day of August, 1904, a check covering the first installment of the salary to be paid to Gardner was delivered to him by the receiver's auditor. Shortly before, or shortly after he had the check cashed, Gardner asked Jones what he (Gardner) should do with reference to a division of the part of the salary received by him with Scott. Jones replied, as he testified, that it was a matter with which he had nothing to do, but that his opinion was that he (Gardner) should pay to Scott thereof a sum equal to the sum (\$75) Scott, prior to the appointment of a receiver, had been receiving as an attorney of the railroad company. Shortly thereafterwards Gardner gave to Jones one-third of the amount received by him on account of his salary as attorney for the receiver, and at the same time stated that he had "fixed it" with Scott by paying to him one-third thereof. Gardner continued to be the receiver's attorney until January 19, 1906, when he died. During the time he was such attorney he received, on account of his salary as such, sums aggregating \$3,400, which, as received, he divided equally between himself, Scott, and Jones. At the time he died there was due Gardner one month's salary, or \$200, as such attorney. In February after his death, of the \$200 due on his salary one-third was paid to his estate, one-third to Scott, and the remaining one-third was retained by Jones.

The suit was commenced June 2, 1906, by appellee, as executrix of John M. Gardner's will, against Jones as receiver, and as well against him as an individual, to recover \$1,200, that being the sum received by him from Gardner of the amount of the latter's salary as attorney for the receiver, including one-third of the \$200 paid on said salary after Gardner's death. The suit was on the contract, and in the alternative for the value of Gardner's services. October 1, 1906, Jones resigned as receiver, and appellant Taylor was appointed in his stead. October 20, 1906, Jones answered, alleging, among other things, that at the time Gardner commenced his

services as the receiver's attorney, there was a large number—about 500—of important suits pending against the railway company which the receiver, through his attorney, was charged with the duty of defending; that he rendered assistance of the value of \$10,000 to said attorney; that said Gardner voluntarily gave to him as a member of said firm of Scott, Jones & Gardner, one-third of the salary earned by him as the receiver's attorney each month as it was paid to him; or, if said Gardner did not so give same to him, then he paid same to him as compensation for his (Jones') services in assisting as an attorney at law in the defense of said suits, after the title and ownership of the sums representing said salary had been divested out of him (Jones) as receiver, and become fully vested in said Gardner; and that the transaction therefore was one between himself and Gardner in their private capacities, and not in their capacities as receiver and receiver's attorney, etc. He further alleged in his answer that the \$1,200 which appellee sought to recover of him had been in an adjustment, made by the court of his account as receiver, wrongfully charged against him, and prayed for judgment against the receiver (Taylor) who succeeded him as such. Taylor, as receiver, answering, alleged, among other things, that at the time Gardner was employed by Jones as attorney for him as receiver, it was understood between Jones and Gardner that the former was to receive one-third of the latter's salary as such attorney; and that Jones did receive one-third of said salary, to wit, the sum of \$1,200 thereof, which, because of said agreement between him and said Gardner, was in his hands a trust fund for which he should account to him (Taylor) as receiver, and for which, as receiver, he prayed judgment against Jones.

The case was submitted to a jury on special issues. The questions propounded to the jury and their answers were as follows: "(1) Was there any contract, agreement, or understanding, or any arrangement between S. P. Jones and John M. Gardner, at the time Gardner was employed to represent Jones as his attorney for the receiver, that the salary to be paid by Jones to Gardner was to be divided with Jones? Answer. There was no agreement at the time; only the agreement made when Gardner was admitted to the firm. (2) At the time Gardner was employed by Jones to represent him as attorney for receiver, was it understood by them that the salary of Gardner as said attorney was to be divided equally between S. T. Scott, John M. Gardner, and S. P. Jones? Answer. No. (3) State whether or not the services of John M. Gardner, as attorney for the receiver, were worth \$200 per month. If not, how much were they worth? Answer. Yes; \$200. (4) State whether or not the value of the services of S. P. Jones, in assisting John M. Gardner, and in attention

to the legal work of the receivership, was worth the sum of \$1,200. If not, how much was such services worth? Answer. Yes; \$1,200. (5) What was the amount and value of the services of John M. Gardner for the month of January, 1906, and what amount has been paid thereon? Answer. \$200; one-third paid to his estate. (6) How long did John M. Gardner serve as attorney for the receiver, S. P. Jones? Answer. Nineteen months. (7) What amount of money did S. P. Jones, receiver, pay to John M. Gardner, as attorney for receiver, up to January 1, 1906? Answer. \$3,600. (8) Did John M. Gardner pay to S. P. Jones any of the attorneyship money under the mistaken belief that such funds were partnership funds belonging to the firm of Scott, Jones & Gardner; and if so, what amount was so paid? Answer. No. (9) Was the money paid S. P. Jones by John M. Gardner paid as S. P. Jones' part of partnership funds belonging to the firm of Scott, Jones & Gardner, or was it a donation or gift from Gardner to Jones? Answer. Paid as partnership funds. (10) Was there any agreement, arrangement, expressed or implied, at the time Jones, receiver, employed John M. Gardner his attorney, by which Jones contemplated that he (Jones) was to receive a part of the salary of Gardner, and if you answer yes, then state how much he so received? Answer. None at the time; only the original agreement of the firm. (11) Has S. P. Jones been paid, or has he been allowed for his services as an attorney while Gardner was his attorney? Answer. Yes." On the findings of the jury the court rendered a judgment (1) declaring the contract entered into between Jones and Gardner, whereby the latter was employed to represent the former as receiver as his attorney, to be against public policy and therefore void; (2) in favor of Taylor, as receiver, against appellee, as executrix, for the \$2,400 received by Gardner under said contract, and against Jones for the \$1,200 received by him thereunder; (3) in favor of appellee, as executrix, against Taylor, as receiver, for the sum of \$3,600, less the \$2,400 adjudged in favor of the receiver against her, as the value of Gardner's services as attorney for the receiver, which Gardner was entitled to recover on a quantum meruit; (4) against Jones on his cross-action against Taylor, as receiver; and (5) against appellee for one-third the costs, against Taylor, as receiver, for one-third thereof, and against Jones for the remaining one-third thereof.

P. M. Young, for appellant Jones. M. P. McGee, J. W. Scott, and Scott & Lane, for appellant Taylor. C. E. Carter, for appellee.

WILLSON, C. J. (after stating the facts as above). We think the finding of the jury must be held in effect to be that, while there was no express agreement between Jones,

as receiver, and Gardner, at the time the latter was employed as the former's attorney, that the salary to be paid to Gardner should be treated as a part of the partnership funds of the firm of Scott, Jones & Gardner, the parties in fact, when the first installment of the salary shortly thereafter was paid, and ever afterwards, so treated it, and on the basis agreed upon when Gardner became a member of the firm, divided it equally among them. Whether this finding of the jury was sufficient to support the finding by the court that the contract was void, or whether, if the contract was merely voidable at the instance of Taylor, representing as receiver the trust estate, the finding was sufficient to support the judgment of the court declaring it to be void, in the view we take of the case need not be determined. For whether the recovery was on the contract or quantum meruit would not affect the disposition which we think must be made of the case. No question seems to be made by any of the parties about Gardner's right to compensation in the sum of \$3,600 (instead of \$3,800, as erroneously found by the jury) for services rendered the receiver as his attorney. Being entitled to demand the \$3,600 of the receiver, whether he was so entitled by reason of the contract or because, independent of the contract, he had performed services entitling him to demand and receive of the receiver that sum is of no importance. If his claim should be referred either to the contract or the quantum meruit, it should be treated as satisfied in so far as it was paid; and in so far as it was not paid, the receiver must be held to be liable therefor.

The practical question made by the record, therefore, is, how much of the sum due to Gardner was paid to him? The jury found that \$3,600, the entire sum due, had been paid by Jones as receiver. As to a part of the sum named, the finding is not supported by the evidence. It was undisputed that \$3,400 of the sum was so paid; but it also was undisputed that \$200, the remainder of the sum alleged to be due on the salary, had not been paid at the date of Gardner's death, and that of this \$200 only one-third thereof was ever paid to appellee, his legal representative. For the part remaining unpaid of the \$200 we think appellee's suit was maintainable as against the receiver. But we are of the opinion that she was not entitled to recover, as against the receiver, for any part of the remainder of Gardner's salary; and, further, that she was not entitled to recover as against Jones for any part of such remainder, unless it should be said that, after receiving the money, Gardner by mistake paid a portion of same to Jones. As to this the evidence was that when Gardner became a member of the firm of Scott, Jones & Gardner, it was agreed that all business which might be transacted by the new firm, other than that covered by the salary the old firm of Scott & Jones were receiving as general

attorneys for the Texas Southern Railway Company, should be equally divided between the members of the new firm. Afterwards, when Gardner was appointed attorney for the receiver, the business was treated by them—as, in effect, found by the jury—as business of the new firm, and during Gardner's lifetime the salary therefor paid to him, aggregating \$3,400, was divided on the basis of the partnership agreement, as was all other business, as lawyers, done by the new firm or its members. There is no evidence in the record, as we view it, suggesting that this division made of Gardner's salary was the result of a mistake, mutual or otherwise. On the contrary, the evidence, we think, supports the finding of the jury that the division was made because the parties construed the terms of their partnership contract as applying to a salary received by one of its members for services as a lawyer. In fact, we think, no other conclusion than that the parties so construed their partnership contract reasonably can be drawn from the evidence. We agree that, if the contract by the receiver, with a member of his firm as such, should be treated as void on grounds of public policy, a proposition we are not prepared to admit is true as a matter of law, no presumption should be indulged that the contract was intended to be with Gardner for the firm; but the evidence, it seems to us, forbids indulging a presumption one way or the other, because, while it doubtless is true that, at the time the partnership contract was entered into, the parties did not contemplate that the railroad would be placed in the hands of a receiver, or, if it should be, that Jones would be the receiver and Gardner his attorney, the fact remains that, when it happened that the road was placed in the hands of Jones as its receiver, and that Gardner was made his attorney, the terms of the partnership contract were applied to the attorney's salary, and it was divided as the proceeds of business transacted by a member of the firm, as a part and within the scope of the partnership business. This was done after consideration, by the members of the firm, as to the disposition to be made of the salary; for the evidence was that Gardner mentioned the matter to Jones when the first installment of the salary was paid; that he afterwards took it up with Scott, the other member of the firm, and then divided the same equally between himself, Scott, and Jones. The division so made reasonably could not have been the result of a mistake of the parties. If it could have been, reasonably the mistake would have been discovered by them within the 16 months following such division, and before Gardner's death, when from month to month, they made a like division of other installments of the salary. Evidently the salary was divided by Gardner, and equal parts thereof paid by him to his partners, because he regarded the partnership contract as requiring it. Evidently his part-

ners received of him the parts allotted to them because they believed properly they were entitled to same under their contract with him. There being an absence of anything in the evidence suggesting that the division was made as the result of a mistake, the payments by Gardner of parts of his salary to Jones therefore must be treated as voluntary, and within the rule "that money voluntarily paid under a claim of right, and with knowledge of the facts on the part of the person making the payment or affected by it, cannot be recovered back on the ground that the asserted claim was invalid or unenforceable." 22 A. & E. Ency. Law (2d Ed.) p. 609; Galveston City Co. v. Galveston, 56 Tex. 486; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757. It follows that appellee was not entitled to recover as against Jones, on account of the payments made to him by Gardner of parts of his salary.

We think the court did not err in refusing Jones a recovery against the receiver, on account of services performed as an attorney in assisting Gardner. On the contrary, we

think the receiver should have a judgment over against Jones for the sum adjudged against him (the receiver) in appellee's favor. If Jones is entitled, as against appellee, to a portion of the \$200, it would be in an accounting covering the partnership business of Scott, Jones & Gardner. As complained of by appellee in her cross-assignment, we think the court erred in adjudging the costs equally among the parties.

The judgment of the trial court will be so reformed as to adjudge a recovery in favor of appellee against the receiver for the sum of \$133.34, interest thereon at the rate of 6 per cent. per annum from January 19, 1906, and the costs incurred by her in the court below, and in favor of the receiver against Jones for a like sum and interest and the costs of his cross-action against Jones. Jones will recover as against appellee the costs incurred by him in defending against her suit, and the costs of this appeal will be adjudged against appellee.

As so reformed, the judgment will be affirmed.

SPARKS et al. v. BARBER ASPHALT PAVING CO.

(Court of Appeals of Kentucky. Oct. 15, 1908.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ORIGINAL CONSTRUCTION.

A city, ordering the grading and paving of a street, a part of which had been improved by an abutting owner at his own cost on his own initiative, orders the original construction of the street, and the abutting owners may be taxed for the cost thereof.

2. SAME—"CONSTRUCTED."

A street is not "constructed," within the law authorizing the original construction of a street at the cost of abutting owners, until its construction is prescribed by the city authorities.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, p. 1468.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the Barber Asphalt Paving Company against Nancy Sparks and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Gregory & McHenry, for appellant Sparks. James P. Gregory, guardian ad litem. Wm. Furlong, John L. Woodbury, A. E. Richards, and A. B. Bensinger, for appellee.

HOBSON, J. What is now Frankfort avenue in the city of Louisville was formerly the Louisville & Shelbyville turnpike. While the pike was still in the possession of the turnpike company, the town of Crescent Hill was formed, which included within its limits a part of the pike. While the road was the property of the turnpike company and within the town of Crescent Hill, the Louisville Water Company improved the part of the road with macadam along the front of the Louisville Water Company's property, extending westwardly to the intersection of Crescent avenue. The width of the improvement was 44 feet. A part of the road was raised 3 or 4 feet, to the level of the tracks of the Louisville & Nashville Railroad Company, which run parallel with the road. In addition to this gutters and curbs were put in. The entire cost of the improvement was borne by the Louisville Water Company. After all this had been done some years, the boundaries of the city of Louisville were extended so as to take in the town of Crescent Hill; and on April 7, 1905, the city passed an ordinance for the construction of a part of Frankfort avenue by grading, curbing, and paving with asphalt. The section so ordered to be improved included within it that part of the street which had been before improved by the water company voluntarily for reasons of its own. The only question necessary to be determined on this appeal is whether the making of the asphalt street under the ordinance was original construction as to this part of the street which had before been improved by the Louisville Water Company. The circuit court held that it was original

construction, and the property owners who were assessed for it have appealed.

The rule as declared by this court in a number of opinions is that until the street is improved as provided by the municipal authorities, and an improvement is made for which the property owners are charged, there is no original construction of the street; in other words, the abutting property may be taxed to construct the street, and this power of taxation is not affected until it is exercised. *McHenry v. Selva*, 99 Ky. 234, 35 S. W. 645; *Wymond v. Barbour Asphalt Paving Company*, 77 S. W. 203, 25 Ky. Law Rep. 1135; *Helm v. Figg*, 89 S. W. 301, 28 Ky. Law Rep. 396; *Catlettsburg v. Self*, 115 Ky. 677, 74 S. W. 1064; *Adams v. Ashland*, 80 S. W. 1105, 28 Ky. Law Rep. 184; *Lindsey v. Brawner*, 97 S. W. 1, 29 Ky. Law Rep. 1238; *Gast v. Minor*, 91 S. W. 251, 28 Ky. Law Rep. 1256; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964. The circuit court followed the rule declared in these opinions. The facts in many of these cases cannot be distinguished from the facts of this case. The cases differ in degree, but not in principle. The rule declared by the court rests upon the ground that until the abutting property has once been compelled to bear the burden the city has not constructed originally the street, which in justice to all other property within the city and upon an equal basis under the statute it should do. If appellant's contention were sustained, it would follow that Frankfort avenue might be constructed as an asphalt street at the cost of the adjoining landowners on certain squares, and could not be so constructed on other squares, although the city authorities had not before defined how the street should be constructed. If this were the rule, there could be no uniformity in the streets of the city, and persons who paid for the construction of an asphalt street in front of their property might not receive the benefits contemplated by law, because right by the side of them might be property owners who could not be required to pay, and either there could be no asphalt street constructed in front of them or it must be done at the cost of the city. If it was done at the cost of the city, the burden would in part fall on those who had already paid for the construction of their part of the street; and if it was not so done they would have no asphalt street. It is essential that the streets of the city must be uniform. To have uniformity, they must be regulated by the city authorities. There could be no uniformity if each property owner might improve the street in front of him, and thus forestall action by the city authorities, directing how the street shall be constructed. As the city authorities have control of the streets, a street, in the meaning of the law, is not constructed until its construction is prescribed by the city authorities; and until it is so prescribed, and the property holders are required to pay for constructing the

street, the cost of constructing the street as required by the city authorities may be assessed against their property.

Judgment affirmed.

EDGAR et al. v. GERTISON.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

1. INFANTS—DATE OF MAJORITY—EVIDENCE—WEIGHT.

Evidence in an action to cancel a deed *held* to show that grantor was of age when it was executed.

2. SAME—BURDEN OF PROOF.

In an action to cancel a deed on the ground the grantor was an infant when it was executed, the burden was on the grantor to show her minority at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 294.]

3. SAME—ESTOPPEL TO ALLEGE INFANCY.

Plaintiff, having conveyed land for a reasonable price, without being coerced or persuaded to trade, and having with her parents sworn that she was of age at the time of the conveyance, is estopped to sue for the land on the ground that she was a minor at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 9.]

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Action by Bertha Edgar and another against J. M. Gertison. From a judgment for defendant, plaintiffs appeal. Affirmed.

Sweeney, Ellis & Sweeney, for appellants.
Wilfred Carico, for appellee.

NUNN, J. On October 6, 1884, John F. Pate and wife, for the recited consideration of \$6,000, conveyed to W. T. Pate 120 acres of land situated about three miles from the city of Owensboro. This conveyance was made to W. T. Pate for life, and at his death it was to go to the children of his body. On the 2d day of September, 1902, W. T. Pate had a wife, Charlotte Pate, and four children living, named L. J. Pate, W. T. Pate, Jr., Ollie Pate, and appellant, Bertha M. Pate. The first two children named were over 21 years of age, and the other two were under that age. On the date last mentioned, September 2, 1902, W. T. Pate sold to appellee the land referred to for \$12,000, and his wife and two adult children joined in the conveyance. Appellee paid to them \$8,000 in cash, and executed a note to each of the two infants for \$2,000, bearing interest at 6 per cent. from that date. When Ollie Pate arrived at the age of 21 years he conveyed to appellee his one-fourth interest in the remainder, and appellee paid him the \$2,000, with interest to that date. On June 22, 1904, appellant, Bertha Pate (now Edgar) returned to Daviess county from Jonesboro, Ark., the place where the family moved to after the conveyance to appellee, and represented to appellee that she was 21 years of age and conveyed her one-fourth interest to him, and he on that date paid her \$2,219, which was the amount of the note and its interest to that date.

This action was brought by appellant to have the deed made by her to appellee canceled, upon the ground that she was an infant when it was executed. She alleged that she did not arrive at the age of 21 years until July 16, 1905; that she had been induced to execute the deed by the fraudulent conduct of appellee, who knew at the time that she was under 21 years of age; that her interest in the land was procured by appellee at a grossly inadequate price; that she had spent the money she received for it before she arrived at the age of 21 years; and that she was then unable to refund to appellee the money received from him. The allegations of the petition were controverted by appellee's answer, and a plea of estoppel interposed by reason of the fraudulent conduct of appellant, and upon a trial the lower court dismissed appellant's petition, and she has appealed.

Appellant testified that when she executed the deed to appellee she did not know her age, but represented to him that her father had told her that she was over 21 years of age and had given her the note to come and get the money on it; that she did not know the date of her birth as recorded in the family Bible, but after that time she found that the record kept in the Bible showed that she was not 21 years of age until the 16th day of July, 1905; that before she made the conveyance she was required by appellee to sign an affidavit with reference to her age, but she paid no attention to its contents; that appellee sent and obtained the affidavit of her mother and father with respect to her age; that she paid but little attention to any of the affidavits, and did not know what they contained; that she received from appellee a check for \$2,219 on an Owensboro bank, which she collected; that she did not remember whether she received cash or New York exchange. Appellee introduced her uncle, Samuel James, who testified that he knew her age; that she was born in the summer after her father became the owner of this tract of land in 1884. This witness also testified that when appellant was in Owensboro, trying to collect the note and its interest from appellee, and before the deed was made, he informed appellee that appellant was not 21 years of age, and referred him to the book of accounts made and kept by Dr. Simon Lockhart, who was the physician present with the mother when appellant was born, which was in the possession of Dr. Charles Lockhart, the brother of Simon, then deceased. Appellant also introduced Dr. Charles Lockhart, who testified that he was the administrator of his brother, Simon, and had the book of accounts kept by his brother in his possession, and that there was an entry made therein by his brother, showing that he made a charge against W. T. Pate of \$10 for services rendered at the birth of a child, which fixed the date as the 16th day of July, 1885. She also introduced her mother, who stated

that from her recollection and the record as kept in the family Bible her daughter was born on the 16th day of July, 1885. She stated that some time in June, 1904, she went with her husband to the clerk's office in Jonesboro, Ark., and they signed and made an affidavit with reference to her daughter Bertha, but she did not understand it at the time. She also testified that the dates of the births of the other four children were made at or near the time of their births.

Appellee testified that when appellant came to him in Owensboro to collect the note and interest she represented that she was over 21 years of age; that her father and mother had both told her that she was over that age; that she had examined the recorded date of her birth in the family Bible, and that it showed that she was over 21 years of age. Appellee admitted having the conversation with appellant's uncle, except that part referring him to the book of Dr. Lockhart, but testified that the conversation took place after the conveyance and the payment of the money to appellant. He says that he was referred to the book of Dr. Lockhart about the time that Ollie Pate came for his money, and that the administrator gave him a statement from the book which showed that a child was born to W. T. Pate and wife on July 16, 1885, and when appellant came to him for her money and offered to convey he was of the opinion that she was not 21 years of age, and so expressed himself to her. He says that he told her of the birth of a child to W. T. Pate and wife, as shown by the book of Dr. Lockhart to have been born on July 16, 1885. Appellee and another witness who was present stated that appellant said to this that the book of Dr. Lockhart was all right, but that it was the date of the birth of a younger child than herself, who had since died. Appellee then told her that, if she could convince his attorney that she was over 21 years of age, he would accept the conveyance from her and pay her the money for her interest in the land. To do this she made an affidavit that she was born on the 3d day of June, 1883, and became 21 years of age on the 3d day of June, 1904, and also presented the affidavit of her mother and father, which was sworn to before a clerk of a court of Arkansas, and which is as follows: "These affiants, W. T. Pate and Charlotte Pate, state that they are the father and mother of Bertha Pate. They say that the said Bertha Pate was born on the 3d day of June, 1883, and that on the 3d day of June, 1904, she attained the age of 21 years. They know the above statements are true from their own personal knowledge and memory, and also from a record made at the birth of said Bertha Pate in their family Bible, and which entry shows that she was born on said date, and that said Bible and entry have been in their possession ever since said date. This affidavit is made for the purpose of having J. M. Gertison accept

a deed of the said Bertha Pate to her interest in a certain tract of land in Daviess county, Ky., and that said Gertison may pay to the said Bertha Pate the price of said land. The affiants say that the foregoing statements are true. W. T. Pate. Charlotte Pate."

Appellee testified that these affidavits convinced him that she was over 21 years of age, and upon the faith of them he paid her for her interest in the land. Appellee introduced three witnesses, who professed to be experts on penmanship. They were shown appellant's admitted signatures to her affidavit and indorsement on the check which she received in payment of her land, and were also shown the entries contained in the family Bible, which was filed as an exhibit with her mother's deposition, of the dates of the births of all the children of W. T. Pate and wife. They testified that, in their opinion, the person who signed the affidavit and indorsed the check made the entries of births in the family Bible referred to, and, further, that all the entries of dates of births were made at the same time and with the same pen and ink, except the figure "7" in the year of Mary Pate's birth and the figure "5" in 1885, the year of the birth of appellant, which figures appear to have been changed by the use of an indelible pencil. We have this Bible before us; but it is impossible to tell with certainty whether or not this was a figure "5" when the date of birth of appellant was first entered. However, there are some indications that it was a figure "3." We also have the original affidavit which appellant signed and the check she indorsed, and it is reasonably certain that the entries of births in the Bible were written by the same person who signed the affidavit and indorsed the check. If appellant made the entries of births in the Bible, and it was a "5," then in June, 1904, when she made the conveyance, she must have known she was perpetrating a fraud when she stated to appellee that she was over the age of 21, and also when she swore to it in her affidavit. In June, 1904, according to the proof, appellant appeared to be a reasonably well educated young lady, and slightly above the average young lady of her age in intelligence; and it is not reasonable to contend that she did not know her own age, especially so when the record of it was made in the family Bible by herself.

The lower court denied appellant the relief sought for several reasons. The first was because it was not satisfied that she was under 21 years of age at the date she conveyed her interest to appellee, to wit, June, 1904. In this we agree with the lower court. The burden was upon her to show, by proof, that she was under age at the time of the conveyance, and she did introduce evidence in support of her contention that was reasonably convincing in its character; but we cannot say that it was sufficient to over-

come the sworn statements of herself, father, and mother by which they obtained the purchase price of the land from appellee, and the suspicion cast upon the record in the Bible of the date of appellant's birth; the indications being that the last figure in the year of appellant's birth has been tampered with or changed. Even conceding that the court erred in this matter, yet she cannot recover in this action; for it is shown by the proof that appellee did not do anything to induce her to make the trade. He had a suspicion that she was not 21 years of age, and would not receive a conveyance from her until she, her mother, and father all made sworn statements that she was over the age of 21 years. She left her mother and father in Arkansas, where the family record was kept, and carried the note executed by appellee to Owensboro, Ky., and there claimed to appellee that she had arrived at the age of 21 years, and he expressed a doubt with reference thereto, and referred to the entry in Dr. Lockhart's book, showing that a child had been born in July, 1885, to her mother and father. She claimed that that was a younger child, and that it died shortly after birth. Afterwards she, her mother, and father all swore that she was 21 years of age, and that the record of the births in the family kept in the Bible showed that she was born in 1883; thus removing all suspicion that appellee had that she was under 21 years of age. All this convinces us that she was the active agent in procuring this sale and conveyance. From the proof it is clear that no one induced her by fraud, or compelled her by force, or in any manner coerced or persuaded her, to enter into the trade. She was not deceived or overreached in any way.

Under the facts as they appear in this case she is estopped from recovering the land from appellee, for which, as it appears from the proof, she was paid a reasonable price. Appellant's counsel contend that the principle of estoppel does not apply to infants, and presents a list of authorities from other jurisdictions which tend to support his contention; but this court has established a different rule, and determined that infants are estopped when the facts are such as appear in this case. The case of *Schmithelmer and Wife v. Elseman*, 7 Bush, 298, was a case where Mrs. Schmithelmer and her husband, while she was an infant, conveyed a piece of land, which she inherited from her father, to Elseman, and after she arrived at the age of 21 she brought the action to have the deed canceled and to compel the purchaser to restore her to the possession of the property. She alleged that she was induced to join in the conveyance by reason of the "threats, persuasion, and influence" of her first husband, and her petition was dismissed. In that case the court said: "The allegation of infancy seems to be sustained by a preponderance of the testimony; but it ap-

pears that before Elseman could be induced to part with his money, or to accept the deed now sought to be vacated, Louisa and her then husband, for the purpose of satisfying him that she had attained her majority, made oath before a notary public that to the best of their knowledge and information she was then more than 21 years of age. Appellee, relying upon the truth of the statement thus solemnly made, concluded the trade theretofore negotiated by making the agreed payment and accepting the title." In the case of *Damron v. Commonwealth*, 110 Ky. 268, 61 S. W. 459, 96 Am. St. Rep. 453, an infant, for the purpose of qualifying another as surety upon a bond for one under indictment, executed a deed and made oath in court that he was 21 years of age, and afterwards sought to recover the land and avoid the deed by reason of his infancy. In that case this court referred to the case of *Schmithelmer v. Elseman*, supra, and then said: "We are aware that in some jurisdictions the contrary view is taken; but we believe in most of the jurisdictions the rule is as announced in the case above cited. However, it is unnecessary to review the opinions of the courts of other states on this question, as we will follow the rule of this court." See, also, the case of *Harris v. Ronk*, 107 S. W. 341, 32 Ky. Law Rep. 966.

The evidence as to the value of the whole survey of land at the time appellee purchased it was very conflicting. Appellant's evidence tended to show that it was worth, at that time, about \$18,000; and that of appellee tended to show that it was worth, at that time, about \$12,000. When appellant conveyed her interest to appellee, her father was living and about 55 years old, and owned a life estate in the whole of the land. She sold and conveyed her one-fourth interest subject to his life estate. Conceding that the land was worth \$18,000, when you deduct therefrom the value of her father's life estate, it will leave the value of her one-fourth interest about what she received for it.

For these reasons, the judgment of the lower court is affirmed.

SACKETT v. ASHER.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

ESTOPPEL — CLAIMS TO LAND — ACTS CONSTITUTING ESTOPPEL.

Plaintiff is estopped to claim land deeded to him by his father and reconveyed to the father, on the ground that he was under age when he reconveyed and that his father induced the reconveyance without consideration, where he was present when his father gave a title bond and when the land was conveyed under the bond, and did not object to the sale, nor claim the land, and stated that he was of age when he reconveyed.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by Abijah Asher against John Asher; F. M. Sackett intervening. From a

Judgment for plaintiff, intervenor appeals. Reversed, with directions to dismiss.

Cleon K. Calvert, for appellant. J. M. Bicknell, for appellee.

NUNN, J. Prior to May, 1891, John Asher was the sole owner of about 80 acres of land situated in Leslie county, Ky. During that month he conveyed this land to his two minor sons, Henry and appellee, Abijah Asher. There was no consideration passed from appellee and his brother to their father, other than love and affection. Henry Asher died in infancy and without issue. On the 21st of March, 1905, Abijah Asher conveyed his interest in the land back to his father for the same consideration recited in the deed from the father to him and his brother. After John Asher received this conveyance from his son, and on the 28th day of April, 1905, he sold this land to one G. W. Sproul, as agent for appellant, and executed a title bond, agreeing to convey the land to appellant upon the payment of the consideration of \$9 per acre. On the 30th day of September, 1905, in compliance with the bond, John Asher and wife conveyed it to appellant, F. M. Sackett, and J. H. Hart, as agent for appellant, paid the full purchase price. Appellee instituted this action on August 24, 1907, against his father, John Asher, for the purpose of canceling the deed he executed to his father on March 21, 1905, upon the ground, as alleged by him, that he was under 21 years of age at that date, and that his father persuaded and induced him to make and deliver to him a deed of general warranty for the land without any valuable consideration. His father, John Asher, answered the petition, and admitted that his son was under 21 years of age at the time the conveyance was made by his son to him; that he believed in good faith that his son was over the age of 21 at that time, but afterwards he obtained information that convinced him that his son was under that age. Appellant, Sackett, filed an intervening petition and was made a party defendant to the action. By his petition, which was made an answer to the petition of appellee, he controverted all the allegations of the petition. He pleaded affirmatively that John Asher conveyed to his sons, Henry and appellee, Abijah Asher, this land, without any valuable consideration and for the purpose of defrauding his creditors. He also pleaded that appellee and his father had combined to cheat him out of the land or the purchase price; that appellee was present at his father's house when Sproul purchased the land from his father and prepared and took the bond for title; that he understood then that his father was selling this land for \$9 per acre, which was a fair price therefor, and he made no claim to the land nor any objection to the selling of it by his father; that he was present when the conveyance was made

in September thereafter, and the purchase price paid, and made no objection thereto, and then announced, before the purchase price was paid, that he was 21 years old at the time he made the conveyance of the land to his father; and averred that appellee was estopped from setting up claim to the land and recovering it from appellant. Appellee, by reply, put in issue these allegations. The lower court rendered judgment in behalf of appellee for the land, and Sackett appeals.

Appellant failed to sustain by proof the allegation of the fraudulent conveyance by the father to the sons; but, in our opinion, he sustained his other averments by a preponderance of the evidence. The evidence is conclusive that appellee was present at his father's house when Sproul purchased the land and wrote the title bond; that he made no objection to the sale of the land, nor did he pretend then to own an interest in the land. It appears that between that date and the conveyance to Sackett in September it was rumored that appellee was claiming that he was under age at the time he conveyed the land to his father. On the day that the conveyance was made all the parties assembled in Hyden, and Hart, the agent of appellant, approached appellee and called his attention to the rumor, and asked him if it was correct. He said: "No; I was 21 years old, and it is all right." Hart approached the father and son together, and they both stated the same in substance, and then Hart accepted the deed and paid the purchase price to John Asher. Appellee and his father testified this did not occur in Hyden, for the reason that appellee was not in the town on that day; but appellant showed by a preponderance of the evidence that he was there upon that occasion. Appellee did not claim, when testifying, that he was ignorant of his rights, or that he was placed under duress by his father or any one else. There was no reason presented why appellee did not make known his claim to the land before the purchase money was paid, nor why he consented thereto. Under these facts appellee is estopped from recovering this land from an innocent purchaser. To sustain his claim the court would have to sanction a fraud committed by him and his father upon appellant. In the case of *Schmitthelmer v. Elsemann*, 7 Bush, 298, this court decided that neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice fraud upon innocent persons. See, also, the cases of *Damron v. Commonwealth*, 110 Ky. 268, 61 S. W. 459, 96 Am. St. Rep. 453, *Harris v. Ronk*, 107 S. W. 341, 32 Ky. Law Rep. 966, *Bertha Edgar v. Gertison* (the opinion in which is this day delivered) 112 S. W. 831, and *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

For these reasons the judgment of the lower court is reversed, with directions to the lower court to dismiss appellee's petition.

**FARMERS' BANK OF WICKLIFFE v.
CITY OF WICKLIFFE.**

(Court of Appeals of Kentucky. Oct. 8, 1908.)

MUNICIPAL CORPORATIONS—WARRANTS—DEMAND FOR PAYMENT—PREREQUISITE TO SUIT.

Suit does not lie on warrants drawn on a municipal treasurer without allegation and proof of their presentation to him with demand for payment, or of facts excusing presentation and demand.

Appeal from Circuit Court, Ballard County.

"To be officially reported."

Action by the Farmers' Bank of Wickliffe against the city of Wickliffe. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

J. B. Wickliffe, for appellant. Reeves & Sharp, for appellee.

BARKER, J. The appellee, city of Wickliffe, is a municipal corporation of the fifth class, and the appellant, Farmers' Bank of Wickliffe, is a banking corporation doing business therein. The municipality had become indebted to various parties, to each of whom a city warrant had been issued for the amount due him. All of the warrants, aggregating the sum of \$6,892.05, had been purchased by the bank from the respective owners, who had regularly assigned the claims to it. Alleging that its debt was due and unpaid, the bank instituted this action in the Ballard circuit court for a judgment. The city did not in its own name make a defense to the action against it, but the court permitted divers citizens and taxpayers to interpose a general demurrer to the petition. This demurrer was sustained by the court, and, the appellant declining to plead further, the petition was dismissed, from which judgment the bank has appealed.

The following sections of the Kentucky Statutes of 1903 are pertinent to the question to the sufficiency of the allegations of the petition:

"Sec. 3640. All demands against such city shall be presented to and audited by the city council, in accordance with such regulations as they may, by ordinance, prescribe; and upon the allowance of any such demand, the clerk shall draw a warrant upon the treasurer for the same; which warrant shall be countersigned by the mayor, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

"Sec. 3626. It shall be the duty of the treasurer to receive and safely keep all moneys which shall come into his hands as city treasurer, for all of which he shall give duplicate receipts, one of which shall be filed with the city clerk. He shall pay out said moneys on warrants signed by the clerk and countersigned by the mayor, and not otherwise. He

shall make quarterly settlements with the city clerk, and when approved by the council, shall be spread at large upon the record."

Dillon, in his work on Municipal Corporations (3d Ed.) § 501, says: "A creditor of a town is not bound to receive an order on the treasurer, but may sue upon his original cause of action. But if he does receive it, he is charged with the duty of presenting it to the treasurer, upon whom it is drawn, or of alleging facts which excuse presentment, before he can maintain an action upon it. As such an order is, in effect, an order by the debtor on himself, if presented and payment be refused, the town is liable instantly, and without notice of nonpayment." And in support of this text he cites from the opinion in *Varner v. Nobleborough*, 2 Greenl. (2 Me.) 121, 11 Am. Dec. 48, the following excerpt: "No sound reason can be given why a town should be subjected to the perplexity of costs of an action before the payee of an order will do his duty and request the payment."

* * * There is an implied engagement to conform to established usage and present the order for payment." An action cannot be maintained on warrants drawn on a municipal treasurer without allegation and proof of their presentation to him, or of facts which will excuse the presentation. *Central v. Wilcoxon*, 3 Colo. 566; *East Union v. Ryan*, 86 Pa. 459. The petition in this case shows that the appellant accepted and held city warrants or orders on the city treasurer for payment, and there is no allegation that it ever presented the warrants to the city treasurer, or demanded payment thereon; nor does it allege any facts which would tend to excuse presentation and demand. For aught that appears to the contrary, there may have been, at the time this action was brought, sufficient money in the treasury to pay all the claims of the appellant.

It follows, from the foregoing authority and on principle, that the petition was bad on demurrer, and therefore the judgment dismissing the petition must be affirmed; and it is so ordered.

CLAYPOOL v. CONTINENTAL CASUALTY CO.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. INSURANCE—APPLICATION—FALSE STATEMENTS—EFFECT.

A false statement in an application for an accident policy insuring against the loss of a hand in a specified sum, and against less severe injury by payment of a weekly indemnity, as to the amount of the applicant's weekly earnings, does not defeat a recovery for the loss of a hand.

2. SAME—EXISTENCE OF CONTRACT—EVIDENCE.

In an action on an accident policy stipulating that it should not be in force until delivered, and issued on an application stipulating that the insurance should not take effect until the application had been accepted and a policy issued, evidence held to fail to show that the application was received by insurer and acted on before insured was injured.

3. APPEAL AND ERROR—HARMLESS ERROR.

Where, in an action on an accident policy, the evidence failed to show a contract of insurance at the time insured received the injury, the error in transferring the cause to the equity side of the docket, and in failing to permit the jury to try all the questions raised by the pleadings, was not prejudicial, and must be disregarded under Civ. Code Prac. §§ 134, 756, requiring the disregard of errors not affecting the rights of the complaining party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4540-4545.]

Nunn, J., dissenting.

Appeal from Circuit Court, Warren County.
"To be officially reported."

Action by Clarence C. Claypool against the Continental Casualty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Sims & Grider, for appellant. Manton Maverick, Jno. E. Du Bose, and John B. Rhodes, for appellee.

LASSING, J. Appellant, Claypool, in the summer and fall of 1905 was living in Dyersburg, Tenn., where he was the local agent of the Provident Savings Life Insurance Company on a salary of \$50 per month. In addition to this employment, he represented the Continental Casualty Company of Chicago as its local agent. In September of the same year he took out with the said casualty company a policy known as an "Industrial" policy, by the terms of which the liability of the company was limited to \$700 for loss of life by accident, and one-half of this sum for the loss of a hand. On the 9th of November of the same year he wrote a letter to the Continental Casualty Company, in which he made application for a policy with said company on what is known as the "commercial" plan. The liability of the company on this policy was limited to \$5,000. At the time this last application was made out, he had a policy of accident insurance on his life for \$5,000 in the Aetna Insurance Company. The application for the commercial policy, which was dated November 9th, was received by the home office of the company in Chicago on November 11th. As the applicant already had a policy in force with their company on the industrial plan, it declined to accept the application on the commercial plan during the life of the policy on the industrial plan, and so wrote the applicant, Claypool, telling him that they would not issue another policy, but suggested that, inasmuch as the policy he then had would expire on December 1st following, the matter should lie over until that time; that they would hold his check for \$3.75, which he had sent with his application on November 9th, in their "suspense account." Claypool testifies that he received this letter, in which his application was returned to him, on the 14th of November, and that on that day, in the early morning, he wrote another letter to the company, in which he returned the application which

he had originally made, and notified the company that he understood that, when he made the application for the commercial policy, in so doing he canceled the industrial policy, according to its terms, and that the company could, therefore, either return his check or issue its policy under the commercial plan, as he had indicated he desired. On the 15th of November, about 4 o'clock in the afternoon, while attempting to unbreach a gun with which he had been hunting, in order that he might clean it, Claypool had his hand shot off. Notice of the accident was, in the course of time, brought home to the company and payment of \$2,500 was demanded by Claypool, according to the terms of the commercial policy, which had been sent to him after the accident. This was refused by the company on the ground that the application which Claypool testified he mailed to them on the 14th of November was not received by them until the morning of the 16th, and that the policy was not issued until the 18th, and, as at that time the injury had already occurred, no liability existed on the part of the company therefor. Being unable to effect a settlement, Claypool sued the Continental Casualty Company for \$2,500 for the loss of his hand, to which he was entitled, if anything, under the terms of the policy. The answer of the defendant denied liability, and set up several defenses, among others that the policy or contract was obtained by plaintiff through fraud and misrepresentations, intentionally made, in the following particulars: First, that the plaintiff was at the time the defendant's agent, and was guilty of fraud in delivering to himself the policy after he knew he was injured; second, that he fraudulently represented his weekly earnings as exceeding his weekly indemnity; third, the application when it was returned by the plaintiff was not received by the defendant until November 16th, the day after the plaintiff was hurt; fourth, after receiving the injury plaintiff made proof of his claim under the industrial policy; fifth, that the plaintiff in handling the gun as he did voluntarily exposed himself to an obvious risk of danger. Upon the filing of this answer, the case was, on motion of the defendant, transferred to equity. The allegations of fraud in the answer were traversed by appropriate pleading. Thereafter the plaintiff moved the court for a new trial before a jury upon certain issues of fact. The motion was granted, a jury was impaneled, and plaintiff and defendant each submitted certain questions for the determination of the jury, proof was heard, and, the jury having answered said questions, the defendant moved for a new trial, thereupon the court, on its own motion, entered a judgment in favor of defendant, and dismissed plaintiff's petition.

The questions submitted to the jury and the answers thereto are as follows:

Plaintiff's Questions.

"(1) Did the gunshot wound alleged in the petition necessitate the amputation of plaintiff's right hand at or above the wrist, and was his right hand so amputated? Yes.

"(2) Did the plaintiff at the time he received said injury unnecessarily expose himself to obvious risk of such danger? No.

"(3) Did the plaintiff's weekly earnings at the time he applied for policy No. 834133 exceed his weekly indemnity under the policy sued on and all other policies (exclusive of No. 930916, surrendered by him)? Yes.

"(4) Had the defendant at the time of plaintiff's injury received from plaintiff the first installment of the premium for policy sued on? Yes.

"(5) After application for policy No. 834133 had been returned by the defendant to plaintiff, when did plaintiff mail same back to the defendant? November 14, 1905, between 6:30 and 7 o'clock a. m."

Defendant's Questions.

"(1) When, under the evidence in this case, was the letter of C. C. Claypool to the Continental Casualty Company, of date November 14, 1905, returning the application, received at the office of the Continental Casualty Company, at Chicago, Ill.? We believe this letter was received at company's office by noon November 15, 1905.

"(2) When and by what officer, or agent, of the defendant company, was the application inclosed in said last-mentioned letter of date November 14, 1905, accepted, and when was policy sued on written and issued? We believe that this application was accepted by defendant company when plaintiff complied with company's conditions in giving the required amended application, when said plaintiff remailed application on November 14, 1905, and by such officer as passed upon it before the application was returned to plaintiff.

"(3) What was the income or money plaintiff received from all sources from May 15, 1905, to November 15, 1905, six months' time? We believe it was over \$50 per week."

Conceiving that the court erred to his prejudice, appellant prosecutes this appeal.

A great deal of testimony taken in this case bears upon the question of the weekly earnings of appellant; it being the contention of appellee that appellant had intentionally stated in his application that his weekly earnings exceeded his weekly indemnity, when, as a matter of fact, they were not nearly equal to it; but, as this court in the recent case of *Aetna Life Insurance Company v. Claypool*, 107 S. W. 325, 32 Ky. Law Rep. 856, held that the amount of income could only be considered upon the question of the weekly benefits to be paid under the policy, that evidence has no bearing upon the question at issue in this case. The real question is, was this commercial policy in force when

plaintiff was injured? The application therefor, and upon which it was based, contains the following: "I understand and agree that this proposed insurance shall not take effect until this application has been accepted by the company, and the policy issued. [Signed] Clarence C. Claypool, Applicant." The policy, by its terms, provides that it is not to be in force until it is duly signed and delivered by the policy writer of the company. Claypool testifies that on the morning of the 14th of November he wrote the appellee company, returning the application with his letter. Clearly at that time no contract of insurance existed. He heard nothing further from the application, and knew nothing concerning it until the policy of insurance which the company issued thereon was received by him several days after the accident occurred. The appellee company introduced a witness, Miss Mary E. Heffron, who testified that she was in the employ of the appellee company in November, 1905, and that this particular letter and application was received by her on the morning of the 16th of November, and she sent it, with other applications received on that day, to Clarence W. Brown, another employé of appellee company. Clarence W. Brown testifies that he received this application some time during the day of the 16th of November, 1905, examined it, and directed a policy to be written upon the application, and that he sent the said application, with his directions, to James E. Munson, another employé of appellee company. Munson testifies that, in obedience to the directions received from Mr. Brown, he wrote the policy and signed it on the 18th of November, 1905, and marked the application, showing the date the policy was written. As opposed to this testimony as to when the application was received by the company and the policy written is the testimony of appellant that he mailed the letter with the application inclosed on the morning of the 14th of November, and that letters usually took not more than 12 hours to go from Dyersburg to Chicago, although other letters were in the record which showed that they took from 24 to 36 hours in passing from Dyersburg to Chicago. But, under the terms of the contract as set out in the application and in the policy, the case is not made to turn upon when the application was mailed at Dyersburg, nor when it reached Chicago, nor when it arrived at the office of the appellee company; but, according to the policy of insurance, and the terms of the application upon which it was issued, the insurance was not to take effect until the application was received, examined, and approved, and the policy written and delivered. According to the overwhelming weight of all of the testimony in the case bearing upon these questions, they were all done after appellant received his injury on the afternoon of November 15th. The appellee company not having received or

passed upon the application, much less issued the policy, at the time appellant received his injury, is certainly in no wise liable therefor under the contract sued on, unless the retention by it of the net premium, which appellant had forwarded with his application on the 9th, would have the effect of making it liable, even though no application had been accepted by it or policy issued. Appellant insists that, as his check for \$3.75 was cashed by the company, this is evidence that the application was in fact received and acted upon favorably, and that, therefore, the company is liable. The answer to this contention is found in the letter which the company wrote appellant when it returned his application on the 13th. At that time it cannot be contended that the company was acting in any other than the best of good faith. In that letter the company said: "We herewith return you the application, and would suggest that you favor us with a new one, dating the same, to become effective December 1st [the time when the industrial policy then held by appellant expired]. Awaiting your reply and a new application, we are holding the amount received in our 'Suspense Account,' etc. [Signed] H. G. V. Alexander, 2nd V. P., and General Manager." There is nothing in this letter which would support the theory of appellant that the company had appropriated to its own use the \$3.75, but, on the contrary, it shows conclusively that the application in the form in which it then was was not acceptable to the company, and they, in returning it, suggested how it could be made acceptable to the company, and at the same time notified appellant that the money which he had forwarded with the application would be held in the "suspense account." The proof shows that this check was not passed into the general fund account of the company until after the satisfactory application was received by the company on the 16th of November, and the company, not knowing of the accident or injury to appellant, issued to him a policy on the "commercial" plan according to the terms agreed upon in the amended application which it received on the 16th.

The second ground relied upon by appellant is that it usually takes mail trains 12 hours to run from Dyersburg to Chicago, and that a letter mailed on the morning of the 14th would arrive in Chicago some time during the night, and be delivered on the morning of the 15th, and that the letter containing the amended application must have been received at that time. This might be true if the letter was promptly forwarded from Dyersburg, properly handled by the mail agents, the train proceeded on time, and the mail handled expeditiously at the Chicago end of the line; but there is nothing in the record to show the existence of any of these necessary prerequisites in order to support appellant's conclusion. He is building up a

theoretical case, proceeding along speculative lines. While, as above stated, it is true that the letter mailed in Dyersburg on the morning of the 14th could have been delivered in Chicago on the morning of the 15th, it is equally true that it might not have been delivered until the morning of the 16th, and in the light of the positive evidence to that effect it was not. The failure of the company to preserve the envelope which inclosed this letter containing the amended application while a circumstance to be considered cannot militate against it; for it appears that all used envelopes were consigned to the waste basket, and only the letters preserved in the files. It may be added that such is the usual course of business concerns in regard to the preservation of their letters.

Appellant also complains that the lower court erred in transferring the case to the equity side of the docket. As the evidence in the case utterly failed to show the existence of a contract of insurance between appellant and appellee on the policy sued on, it would have been immaterial on which side of the docket the case stood, for, had it remained on the ordinary docket, it would have been the duty of the judge at the conclusion of the testimony to have instructed the jury to find for appellee. Conceding that the case should have remained on the ordinary side of the docket, appellant was not prejudiced by its transfer, for he was given ample opportunity to present his entire case. On his motion certain questions were submitted to the jury for their finding and determination, and, although every question submitted to the jury was answered in favor of appellant, yet the finding of the jury upon all points submitted by appellant failed to make out his case, and the answers to the questions submitted by the defendant were mere conclusions, based upon no evidence, but, on the contrary, were in direct conflict with the direct and positive evidence of the four witnesses introduced by appellee, who testified concerning matters bearing upon two of the three questions submitted.

The third question submitted by appellee bore upon the weekly earnings of appellant, and consequently has no bearing upon the case. Hence, even though the court erred in transferring the case to equity, the substantial rights of appellant have in no wise been prejudiced by reason of such transfer. There was not the slightest evidence showing that the application which appellant mailed at Dyersburg on the 14th was received or acted on before the time of the accident; for, giving to the testimony of appellant its full weight, it would only go to show that the letter containing the application which was mailed at Dyersburg on the 14th reached Chicago 12 hours after it left Dyersburg, and should have been delivered on the morning of the 15th. He does not pretend that the letter was received by the appellee company one moment earlier than the time its wit-

nesses say it was received, to wit, about 8 o'clock on the morning of the 16th. This being true, his case must fail; for, in the absence of a showing on his part that this application was received and acted upon before the time he received the injury, under the plain terms and provisions of the application itself, there was no contract of insurance whatever.

There being no contract of insurance, appellant had no cause of action, and any errors that the court may have made in the transfer of the case to equity, or in the failure to permit a jury to try all of the questions raised by the pleadings, in no wise prejudiced his substantial rights, and, under the provisions of sections 134 and 756 of the Civil Code of Practice, which provide that "the court must in every stage of the action disregard any error, or defect, in the proceedings, which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect," the judgment of the lower court must be affirmed.

NUNN, J., dissents.

WILLIAMS v. GRIMM et al.

(Court of Appeals of Kentucky. Oct. 7, 1908.)

1. DEEDS—CONSTRUCTION—ESTATE CONVEYED.

A father's deed to a daughter recited that, whereas the grantee was the grantor's lawful heir, to secure her and her heirs, he conveyed the land in consideration of natural affection to the use and behoof of the daughter, her heirs and assigns, free from his heirs and assigns, forever, on condition that the conveyance was made as an advancement; that she should be charged with it at \$500 upon a final distribution of his estate, and that "for this" he retained control of the land during his lifetime "in any particular whatever"; that at his death she should have control of it to "work upon but nothing further," as he desired "the same for her lifetime"; that, if she sold or leased the land, his deed should be void; that, if he outlived her, the land should go to her children living at her death. *Held*, that the daughter took a life estate, with a vested remainder in her children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 361-364.]

2. SAME—RULE OF CONSTRUCTION.

A deed should be construed as a whole with endeavor to give effect to every part of it; the grantor's intent when apparent, and not repugnant to any rule of law, controlling technical terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 236.]

3. LIFE ESTATES—CONVEYANCE BY LIFE TENANT.

A deed gave a life estate with remainder to the life tenant's children, but provided for a forfeiture of the life estate and immediate vesting of title in the children on any attempt by the life tenant to sell or lease the land. After the grantor's death, the life tenant gave defendant a warranty deed. The children sued to annul it, defendant claiming it gave her a fee-simple title. The trial court adjudged that the first deed gave grantor's daughter a life estate, that it was not void because of the conveyance to defendant, and that such conveyance gave

defendant the life estate. *Held*, that defendant cannot complain of the judgment, since in deciding that the life estate passed to her it gave her all the relief to which she was entitled.

Appeal from Circuit Court, Johnson County.
"Not to be officially reported."

Action by William Grimm and others against Malissa Williams. From a judgment for plaintiffs, defendant appeals. Affirmed.

Vaughn, Howes & Howes, for appellant.
L. D. Kennard, for appellees.

SETTLE, J. This appeal presents for construction the following deed, viz.: "This indenture made and entered into this 9th day of January one thousand, eight hundred and sixty five, by and between John Brown of the county of Johnson and the state of Kentucky, of the first part, and Francis Grimm of the same county and state of the second part witnesseth: That whereas the said Francis Grimm is my child and lawful heir, now for the purpose of securing to her and her heirs I do by these presents give, grant, bargain, sell and convey in consideration of natural love and affection, the following boundary of land: Lying and being in the county of Johnson, state of Kentucky, and on the head waters of George's creek just above where the said John Brown now lives on the left hand fork. Beginning on top of the ridge between the left-hand fork and the right-hand fork at the head of the branch that runs in at the home of John F. Grimm where the land of W. W. Brown and John Brown join, rather north of the ridge to the top of the big point that comes down below the branch that runs in at John Grimm's home; thence down said point between the fences of the said John Brown and John F. Grimm to the creek being a marked line from the beginning; thence up the branch with its meanders to a beech on the left-hand side upon the bank; thence up the point to the top; thence about the top of said point around the dividing ridge; thence with the dividing ridge to the line of W. W. Brown; thence with his line to the beginning. Said line being marked from the beginning to where it strikes W. W. Brown. Together with all and singular the appurtenances thereunto belonging or in any wise appertaining, to the sole use and behoof of the said Francis Grimm, her heirs and assigns, free from my heirs and assigns forever. Now, the conditions of this deed are as follows: The party of the second part is my child and lawful heir and I make this as an advancement to her and she is to be charged with it at the price of \$500.00 upon a final distribution of my estate, and for this I retain the control of said land during my lifetime in any particular whatever, and at my death the party of the second part takes control of the same and shall have control of it to work upon, but nothing further, as I desire the same for her lifetime, and then to go to her living children. She shall have no power to sell or

lease said land and in case she does this deed is void. It is further understood that I have leased the mineral privileges upon said land for 20 years from a date some months prior to this, which lease is hereby reserved to, for that time. I reserve the right to control the timber upon said land so long as I live; at my death the land and appurtenances pass to her, if living; if not, to her living children at her death, and should she not outlive me, then at her death the same shall immediately pass to her then living children." After John Brown's death Frances Grimm sold and conveyed the land described in the above deed to the appellant, Malissa Williams; the deed containing a covenant of general warranty, and purporting to invest her with the fee-simple title.

This action was brought by Wm. Grimm, B. F. Grimm, two of the children of Frances Grimm, and Jeff Brown, to set aside the deed from Frances Grimm to appellant, and quiet their alleged title to the land therein described; it being their contention that the deed from John Brown to Frances Grimm conveyed the latter only a life estate in the land with remainder to her children, of whom there were then and are now six living; that the clause in the deed from John Brown to Frances Grimm providing for the forfeiture of her life estate in the land in the event she should sell or lease it renders void the deed she executed to appellant, and at the same time forfeited the life estate of Frances Grimm in the land, and caused the title and right of possession to vest immediately and absolutely in her children, the remaindermen. Appellees Wm. and B. F. Grimm therefore claim to be the owners and entitled to the immediate possession of one-sixth each of the land, and the appellee Jeff Brown to the remaining four-sixths by purchase and deeds of conveyance, respectively, from the other four children of Frances Grimm. John Brown died before the execution of the deed from Frances Grimm to the appellant. The answer of appellant admitted the due execution and delivery of the deed from John Brown to Frances Grimm, and set forth her purchase of the land from the latter and its conveyance by deed to her (appellant), but denied that the deed from John Brown to Frances Grimm conveyed the latter a life estate in the land with remainder to her children, or that the forfeiture provision of that deed divested Frances Grimm of title, or rendered void the deed executed by the latter to her (appellant). The answer contains the averments that the deed from John Brown to Frances Grimm passed to her a fee-simple title to the land which she had a legal right to convey, and did by proper deed convey, to appellant. The affirmative matter of the answer was controverted by reply, and, the pleadings containing all the essential facts, the case was submitted in the circuit court, without proof, for trial and judgment. That court was of opinion, and such was its judgment, that

Frances Grimm took under the deed from John Brown a life estate in the land thereby conveyed, and her children a vested remainder; that the deed Frances Grimm executed to appellant was not void, and did not by virtue of the forfeiture provision in the deed from John Brown operate to forfeit her Frances Grimm's life estate in the land, but, on the contrary, conveyed such life estate to appellant, leaving the remainder in Frances Grimm's children as fixed by the deed from John Brown. The judgment further provided, however, that the children of Frances Grimm will at her death be entitled to the possession of the land in question, upon the happening of which event appellant will have to deliver it to them or their vendees. The appellant, being dissatisfied with that judgment, asks its reversal of this court.

In our opinion the circuit court properly adjudged that the deed from John Brown to Frances Grimm conveyed her only a life estate in the land in question with remainder to her children. The deed was evidently written by an inexperienced draftsman, as many of its provisions are so inartistically expressed as to make them confusing to the reader; but, considering the instrument as a whole, we think its language fairly manifests a purpose on the part of the grantor to give his daughter, Frances Grimm, a life estate and her children a vested remainder interest in the land. He evidently wished to make an advancement to the daughter, as recited in the deed, and at the same time have it ultimately inure to the benefit of her children. This intention being apparent from the deed as a whole, it is the duty of the court in construing it to give it that meaning; for, as said by Judge Kent in *Jackson v. Meyers*, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504: "The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with the endeavor to give every part of it meaning and effect." In the interpretation of deeds, it has been and is the policy of this court to adhere to the above rule which it has in effect applied in the following and many other cases. *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129; *Smith v. Smith*, 119 Ky. 899, 85 S. W. 169, 1094; *Adams v. Adams*, 47 S. W. 335, 20 Ky. Law Rep. 655; *McFarland v. Hatchett*, 118 Ky. 423, 80 S. W. 1185; *Bowe v. Richmond*, 109 S. W. 359, 33 Ky. Law Rep. 173.

As appellees did not except to the judgment of the circuit court, and are not prosecuting a cross-appeal therefrom, we are not called upon to declare whether the deed from Frances Grimm to the appellant, Malissa Williams, put into effect that clause contained in the deed from John Brown to Frances Grimm which provides for the forfeiture of her life estate and the immediate vesting of

the title to the land in her children in the event of any attempt upon her part to sell or lease it. Hence that question is left undecided. Appellant, however, cannot complain of the judgment, for in deciding that the life estate of Frances Grimm in the land passed to her by the deed from the latter it gave her all the relief to which she was entitled.

Wherefore the judgment is affirmed.

DUNN et al. v. GARNETT et al.

(Court of Appeals of Kentucky. Oct. 13, 1908.)

1. MARRIAGE—PROOF—REQUISITES.

Proof of a marriage occurring over 50 years ago, especially as between slaves, need not be as strong as is required to establish more recent marriages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 79–89.]

2. SAME—EVIDENCE—DECLARATIONS.

Declarations of persons who knew the parties are admissible to establish a marriage between slaves before the Civil War.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 75.]

3. BASTARDS—EVIDENCE—PRESUMPTION OF LEGITIMACY.

The law presumes one's legitimacy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, § 4.]

4. EJECTMENT—RIGHT TO RECOVER.

No question as to decedent's title to land sued for being raised, and there being no effort to show that he left children other than plaintiffs, his wife being dead, or that he disposed of the property, plaintiffs are entitled to recover from those claiming under a tax sale.

Appeal from Circuit Court, Barren County.

"To be officially reported."

Action by C. F. Garnett and others against H. F. Dunn and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Porter & Sandidge, for appellants. Harlin & White, for appellees.

HOBSON, J. Jordan Garnett died about 20 years ago, a resident of Barren county, the owner of a lot in Glasgow, Ky., on which he resided. After his death, his wife, Ann Garnett, lived on the lot. She died a few years ago. After her death, the appellees, C. F. Garnett and his two sisters, claiming that they were the children and heirs at law of Jordan Garnett, brought this suit to recover the land from H. F. Dunn and Edmonia Dunn, who had claimed the property under a tax sale, made while it was in the possession of Ann Garnett, and had taken possession of it. The circuit court entered a judgment in favor of the plaintiffs, and the defendants appeal.

The plaintiffs' case rests upon the ground that they are the children of Jordan Garnett by his first wife, Eva, born while he and Eva were both slaves, and when they had been married after the manner customary among slaves at that day. The proof shows that Jordan Garnett at the time belonged to Rob-

ert Garnett, and that Eva belonged to Ambrose McDaniels, that she died before the war, and that the plaintiffs were the children of Jordan Garnett by her. There is no express proof of the marriage; but the proof is that, among those who knew them, they were reputed as husband and wife, and these people told this to the witnesses who testified in the case. The proof also shows that, after the children were freed, one of them lived with her father and his second wife; and that Ann, after her husband's death, said that the property would go to these children after her death. It is earnestly insisted that this proof is not sufficient to make out the plaintiffs' case. But it is now nearly 50 years since the war began, and it is perhaps over 50 years since Eva Garnett died. Proof of a marriage as far back as that must necessarily be less exact than one in later times, especially a marriage among slaves. It has been uniformly held by this court that a liberal construction should be given the act of 1866, making valid customary marriages between negroes, and we have sustained the admissibility of hearsay evidence in matters of pedigree in a number of cases. After a great length of time, the declarations of those who knew the parties are necessarily admitted in cases of this sort. *Birney v. Hann*, 3 A. K. Marsh. 322, 13 Am. Dec. 167; *Chiles v. Drake*, 2 Metc. 146, 74 Am. Dec. 406; *Talbott v. Owen*, 93 S. W. 658, 29 Ky. Law Rep. 550. The law presumes legitimacy, and the proof here sustains the legal presumption. *Dannell v. Dannell*, 4 Bush, 51; *Botts v. Botts*, 108 Ky. 414, 56 S. W. 677, 961. No question is raised as to the title of Jordan Garnett to the property, and there is no effort to show that he left any other children, or that he disposed of the property. We therefore conclude that the court properly adjudged the plaintiffs entitled to it.

Some complaint is made that the court did not adjudge to the defendants as large an amount as it should have adjudged them on account of the taxes they had paid on the land and a lien for an assessment made by the city of Glasgow on account of an improvement of the street in front of it. But upon an inspection of the whole record we cannot say that there was any substantial error of the court in these matters. The record does not show that the city of Glasgow had a lien upon the property—that is, the record is not sufficient to show the creation of a lien—and so far as the record shows anything, it would appear to have been only a claim against the life tenant, Ann Garnett. Judgment affirmed.

LONG v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. HOMICIDE—EVIDENCE—INSTRUCTIONS.

Where, on trial for murder, the defense was that the killing was due to the accidental discharge of a pistol, and there was some evi-

dence tending to show that the shooting was not accidental, but intentional and also that it was an accident, pure and simple, the court erred in failing to instruct on the subject of involuntary manslaughter and accidental shooting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 650-653.]

2. SAME—SELF-DEFENSE.

If decedent, who was much larger than accused, sought and brought on the difficulty resulting in his being shot, and assaulted accused, accused can be acquitted on the ground of self-defense, though the shooting was not accidental.

3. SAME.

One's right to kill another in self-defense is based upon threatened danger, real or to him apparent, and not upon the question whether there is any real or apparent danger; one being justified in protecting himself and warding off impending or apparently impending danger, where he has reasonable grounds to believe, and in good faith, believes, that his life is in danger, or that some great bodily harm is about to be done him.

Appeal from Circuit Court, Davless County. "Not to be officially reported."

Barney Long was convicted of murder, and he appeals. Reversed and remanded.

La Vega Clements and R. L. Allen, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Appellant was tried and convicted under an indictment which charged him with the murder of Steve Clayton. The facts connected with the homicide, briefly stated, are as follows: Some time during the summer of 1905, at a country dance in the evening, several young men, including appellant and deceased, became engaged in a series of quarrels. Appellant, just prior to the difficulty which resulted in the killing of Clayton, had an altercation with some of his companions on the dancing platform, and, after it was over, he went out on to the public road and was conversing with a man named Trogden, when the deceased came up. At that time appellant had a pistol in his hand. It is not clear from the evidence whether appellant addressed deceased or deceased addressed him first, but, whoever spoke first, the passage of words between them resulted in deceased rushing upon and grabbing appellant. During the scuffle which followed the pistol was discharged and deceased shot. When they were separated, deceased had the pistol, having taken it away from appellant. Clayton died on the following Monday from the effects of the wound which he received at the hands of appellant during that struggle. The motion for a new trial was based upon several grounds, but upon this appeal appellant's counsel rely chiefly for reversal upon the failure of the court to properly instruct the jury.

The defense of appellant was that the killing was due to the accidental discharge

of the pistol, and he asked the court to give an instruction on involuntary manslaughter and accidental killing. The court refused to do either. There was some evidence offered which tended to show that from statements made by appellant before and after the killing the shooting was not accidental, but was intentional, while, on the other hand, he testifies positively and directly that it was an accident, pure and simple. Under this state of case he was entitled to have his defense presented to the jury by appropriate instructions, and the court erred in failing and refusing to instruct the jury on the subject of involuntary manslaughter and accidental shooting. *Blanton v. Commonwealth*, 103 S. W. 329, 81 Ky. Law Rep. 800. We are of opinion that the court did not err in giving to the jury an instruction authorizing them to acquit appellant if they believed that the shooting was done by appellant in self-defense, for the evidence was conflicting upon this point. Deceased was shown to have been a much larger man than appellant, and, if the jury believed that the deceased sought and brought on the difficulty and assaulted appellant, then, even though they believed that the shooting was not accidental, they might acquit appellant on the ground that he acted in his own necessary, or to him apparently necessary, self-defense. Hence it was proper to give such an instruction, but the instruction, as given by the court, was faulty, in this: that in it the jury was made the judge as to whether or not the accused was in danger, real or apparent, when he shot deceased. Whereas, this court has repeatedly held that the right of the accused to act is based upon the threatened danger, real or to him apparent, and not upon the fact as to whether or not there existed at the time any real or apparent danger. The accused might be in no danger whatever, and yet, if the jury believed from the evidence that at the time he acted he had reasonable grounds to believe, and in good faith did believe, that his life was in danger, or some great bodily harm was about to be done him, he would be fully justified in having taken steps to protect himself and ward off the impending or to him apparently impending danger. In other words, the right of the accused to act in his own defense is based upon what the appearances were to him at the time and under the circumstances, and not what the jury might think of them, from the evidence as introduced on the trial. Upon another trial the instruction upon self-defense will be made to conform to this idea, and the court will give an instruction on the subject of involuntary manslaughter and accidental shooting.

The case is reversed and remanded for further proceedings consistent with this opinion.

RECK & RIEHL v. CAULFIELD.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. LANDLORD AND TENANT—NOTICE TO QUIT—WAIVER.

Notice to a tenant to quit is waived by the landlord giving a subsequent notice, fixing a later date for a surrender of the premises.

2. FORCIBLE ENTRY AND DETAINER—NOTICE TO QUIT.

A tenant under an indefinite tenancy, the term beginning the seventh day of the month, was not guilty of forcible detainer until June 7th, though 30 days' notice to quit was given April 15th, since a landlord cannot change the rental day nor the terms of the tenancy.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Forcible detainer action by Reck & Riehl against C. I. Caulfield. From a judgment of the circuit court for defendant, on appeal from justice court, plaintiffs appeal. Affirmed.

B. F. Gardner, N. A. Richardson and Franklin Chappell, for appellants. O'Connor & O'Connor and D. Moxley, for appellee.

BARKER, J. On the 7th day of February, 1907, the appellants, as agents of the owner of the property, by a written lease rented a storeroom on the north side of Market street, between Eleventh and Twelfth streets, being No. 1147 West Market street in Louisville, Ky., "for the space of one month from Feb. 7/07, and by the month"; in consideration of which the appellee agreed and bound himself to "pay for the same ten dollars at the first of each and every lease month, being at the rate of one hundred and twenty dollars per annum." Appellee took possession of the premises under the lease, and opened up therein an ice cream parlor. On the 7th day of April the appellants claim that they gave the appellee oral notice to vacate the premises on May 7, 1907. The giving of this notice is one of the disputed questions in the case; but it is not disputed that, on April 15, 1907, the appellants gave appellee a written notice, which is as follows: "Mr. C. I. Caulfield—Dear Sir: You are hereby notified that 30 days from and after this date we want possession of the premises you now occupy, known as #1147 W. Market St. Yours truly [Signed] Reck & Riehl." Failing to vacate the premises on May 15, 1907, in pursuance of the terms of the written notice above set forth, on the 16th day of May, 1907, a writ of forcible detainer against him was sued out by appellants, returnable before R. O. Dorsey, a justice of the peace of Jefferson county. A trial of this writ before the justice and a jury resulted in a verdict of guilty, the truth of which the appellee traversed, and took an appeal to the Jefferson circuit court, where a trial de novo resulted in a verdict of not guilty, and from the judgment based upon this verdict, the appellants are here on appeal.

The conclusion we have reached in regard to this case renders it unnecessary to discuss the alleged errors complained of by the appellants. On their own evidence the appellee was entitled to a peremptory instruction to the jury to find him not guilty. Under the lease the term was an indefinite one, but it is immaterial to inquire whether or not, under it, the tenant was entitled to 30 days' notice to quit before the premises could be recovered of him; nor is it material to ascertain whether it was true, as claimed by appellants, that they gave appellee a 30 days' oral notice to quit on the 7th day of April, 1907. They admit that, on the 15th day of April, 1907, they gave the tenant the written notice to vacate the premises 30 days thereafter. The oral notice was waived by the written notice, and by the very terms of the latter the tenant was permitted to remain in the leased premises after the next rental day, which was the 7th of the month, the lease commencing on that day and running from month to month. So that by the terms of the notice the tenant was informed that he might retain the premises after May 7, 1907, and he was not a wrongdoer in so remaining. It was not within the province of the landlords to change the terms of the tenancy or the rental day. If they consented to the tenant's remaining in the premises beyond the next rental day after the notice, they could not force him to leave until the succeeding rental day. In the case of *David v. Hall*, 6 Ky. Law Rep. 444, the superior court thus stated the rule on this subject: "Under a tenancy from month to month, the term beginning on the first day of the month, the tenant is not guilty of a forcible detainer until the first of the next month after one month from the service of notice to remove. Under such a tenancy, where notice was served August 27th to give possession in one month from the service of the notice, it is held that the tenant was not guilty of a forcible detainer until October 1st." Applying this principle to the case at bar, when the landlords, on the 15th day of April, 1907, gave the tenant 30 days' notice to quit, the tenant was not guilty of forcible detainer until the next rental day after the expiration of the 30 days' notice. In other words, the appellant would not have been guilty of forcible detainer until June 7, 1907.

Assuming that appellants gave the oral notice on the 7th day of April to the tenant to quit the premises on the 7th day of May, they waived all rights thereunder by giving the second notice in writing. In 2 *Taylor on Landlord and Tenant* (9th Ed.) § 485, it is said: "After the landlord has given notice, and the time limited by it has expired, he may do some act which amounts to a waiver of it, and so recognize a new or subsisting tenancy." And in section 486 it is said: "Notice may be waived by giving a subsequent notice to quit, because the latter notice is an acknowledgment that the tenancy

still subsists after the expiration of the former one." And even if it be assumed that the tenant, under the lease, was not entitled to any notice at all, which is the most favorable position that appellants can occupy, the written notice, given on the 15th day of April, to vacate in one month thereafter, was a permission to the tenant to remain in the premises after the expiration of May 7th, the rental day; and, this being true, they could not require him to remove before the next rental day, which, as said before, was June 7, 1907.

It results from this view of the case, that the tenant was not guilty of forcible detainer on May 16, 1907, and he was, therefore, entitled, at the conclusion of appellants' testimony, to a peremptory instruction to the jury to find him not guilty.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. TAYLOR.

(Court of Appeals of Kentucky. Oct. 14, 1908.)

TELEGRAPHS AND TELEPHONES—ACTION FOR DAMAGES—MISTAKE IN TRANSMISSION OF MESSAGE—QUESTION FOR JURY.

Plaintiff's brother wired him that their father was dead; but the message as delivered stated that their mother was dead. Plaintiff replied that he could not come for three days. Two days afterwards another brother wired plaintiff, "Father was buried yesterday." Held, in an action against the telegraph company to recover for mental anguish resulting from the belief that both parents were dead, that the question whether, under the circumstances, plaintiff exercised reasonable diligence to ascertain whether both parents were dead was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 76.]

Appeal from Circuit Court, Fulton County. "Not to be officially reported."

Action by Oscar M. Taylor against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

For former report, see 101 S. W. 969, 31 Ky. Law Rep. 240.

Richards & Ronald, Geo. H. Fearsons, and Robbins, Thomas & Tyler, for appellant. Herschel T. Smith, for appellee.

BARKER, J. This is the second appeal in this case. The opinion on the first will be found in 101 S. W. 969, 31 Ky. Law Rep. 240. After the petition was filed in the circuit court, the defendant interposed a general demurrer to it, which was sustained, and, the plaintiff declining to amend, it was dismissed, and the plaintiff appealed. The opinion, in reversing the judgment of dismissal, sets forth the facts contained in the petition so fully as to obviate anything but a very general statement here, because, when the case returned to the lower court, the plaintiff upon the trial introduced evidence which

fully sustained the allegations of the petition, and the defendant introduced no testimony at all. Therefore the evidence adduced at the trial, for all practical purposes, is the same as the allegations of the petition, which the demurrer admitted to be true. We refer to the opinion on the first appeal for a complete statement of the facts of the case, contenting ourselves here to restate only such an outline as is necessary to understand the question of law which, in our opinion, requires that the judgment should be reversed.

On May 5, 1906, there was filed with defendant at its office in Fulton, Ky., addressed to plaintiff at Farmersville, La., the following message: "Father dropped dead to-day about one o'clock. Answer. [Signed] John Taylor." This message was promptly transmitted and received by the plaintiff at 5:40 p. m. on the day it was filed, but was so changed in transmission that when delivered it read as follows: "Mother dropped dead to-day about one o'clock. Answer." To the message so delivered plaintiff sent the following answer, directed to John Taylor, the sender of the first message: "Will take three days for me to come; therefore will write." On May 7, 1906, another brother, Lynn Taylor, sent plaintiff the following message, namely: "Father was buried yesterday. Expect Fanny on 12:30 train a corpse." Plaintiff testified that, upon the receipt of this last message, he became convinced that both his parents were dead, and remained under this impression until he could make the journey from Farmersville to Fulton, or from about 1 o'clock on Tuesday until noon on Thursday. It is for the mental anguish he claims to have suffered for a period of two days from the belief that both his parents were dead, when in fact only his father was dead, and the expenses of the journey, that the jury awarded him \$1,000 in damages.

In the opinion upon the former appeal it was said: "Appellee's counsel contends that the last message to appellant had the effect to apprise him of the mistake of the first, or at least it was sufficient to put him upon inquiry or notice that the first telegram was an error. This is a question of fact that might properly be submitted to the jury, if an issue should be made upon this question in the pleading. It is certain the last message he received does not, as a matter of law, on its face support appellee's claim." When the case returned to the lower court, the defendant pleaded the negligence of the plaintiff in failing to inform himself as to whether or not it was true that both his parents were dead, in order to bring its case within the advantage of the suggestion contained in the above excerpt, and upon the trial it tendered to the court the following instruction, with the request that it be given to the jury: "The court instructs the jury that although they might believe from the evidence that the defendant was negligent in the transmission

of the first telegram mentioned in instruction A, and likewise negligent in delaying the delivery of the third telegram mentioned in instruction A, yet if they should further believe from the evidence that when the plaintiff received the telegram, 'Father buried yesterday,' a reasonably prudent man in the exercise of ordinary care would have believed or been put upon inquiry as to whether or not there had been a mistake in the transmission of the first telegram announcing that his mother had dropped dead, and that a reasonably prudent man in the exercise of ordinary care would have believed or could in the exercise of ordinary care have discovered that his 'mother' was not buried yesterday, but that his 'father,' then in that event the law is for the defendant, and the jury should so find."

We think there was sufficient evidence to require the giving of substantially the foregoing instruction to the jury. We held, upon the formal appeal, that under a proper showing the defendant would be entitled to such an instruction. The answer, as said before, was made to conform to the suggestion of the opinion, and upon the trial the plaintiff himself admitted that he had reason to doubt that both his parents were dead, and to suspect the error in the first telegram. On cross-examination he was asked if, when he got the last telegram, he did not then think "there was a mistake, and that your father was the one that had dropped dead. A. When I got the last one? Q. Yes, when you got the last one, didn't you say awhile ago that you thought there was a mistake there? A. Yes, sir. Q. Did you wire back up here to Lynn Taylor, or John Taylor, or any of the Taylors, or anybody up here, to find out whether that was a mistake? A. No; I asked the agent to have it confirmed, if there could be any mistake. I says, 'I will pay the message fee, and if you think there is any doubt about it I will wire.' Q. But I am asking you, did you send a telegram, to which you signed your name, to John Taylor, or Lynn Taylor, or any other Taylor, or anybody else? A. No, sir; I did not. I wired him that I would come here as soon as I could get here." It is true, he states that he asked the agent to confirm the correctness of the first telegram, and was assured by him it was right; but this only went to the correctness of the transmission of the telegram actually given the defendant, and would have no effect in clearing up any mistake that had been made in writing the telegram. It seems to us that it was for the jury to say whether or not he should have telegraphed to his family for assurance of the truth of so extraordinary an occurrence as the death of both his father and mother on the same day, or within so short a time; and, as said in the opinion upon the first appeal, the question as to whether or not, upon this occasion, the plaintiff exercised the reasonable diligence of an

ordinarily prudent person under the circumstances should have been submitted to the jury under a proper instruction. The trial court, therefore, erred in refusing to give an instruction along the line of that presented by the defendant.

Our conclusion on this question obviates the necessity of examining any other of the errors urged by appellant.

Judgment reversed, for further proceedings consistent herein.

LEUCHT v. LEUCHT.

(Court of Appeals of Kentucky. Oct. 8, 1908.)

1. HUSBAND AND WIFE—ALIENATING AFFECTIONS—ACTIONS—EVIDENCE.

In an action for the alienation of a husband's affections, evidence of statements by the husband to the wife and third persons, in the absence of defendant, indicating that defendant was trying to separate the wife from her husband, are hearsay and inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1124.]

2. SAME.

In an action for the alienation of a husband's affections, the wife may show by the declarations and conduct of her husband, and by third persons, who could testify from their knowledge or from statements by the husband, the affectionate relations between them before the estrangement, and his conduct and declarations indicating a loss of his affection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1124.]

3. SAME.

In an action for the alienation of a husband's affections, declarations by defendant in the presence of the wife or other persons, manifesting a purpose to alienate the affection of the husband, or to cause a separation, are admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1124.]

4. WITNESSES—COMPETENCY—COMMUNICATIONS BETWEEN HUSBAND AND WIFE—ADMISSIBILITY—"COMMUNICATION."

In an action for the alienation of a husband's affections, statements to the wife by the husband in the absence of any other person, indicating that defendant was trying to separate the wife and the husband, are within Civ. Code Prac. § 606, forbidding either husband or wife to testify as to any communication between them during the marriage; the word "communication" embracing all knowledge on the part of one or the other, obtained by reason of the marriage relation, and which but for the confidence growing out of it would not have been known to the party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 737-741.

For other definitions, see Words and Phrases, vol. 2, p. 1342; vol. 8, p. 7608.]

5. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—ACTIONS—EVIDENCE.

In an action for the alienation of a husband's affections, evidence that plaintiff had made a disrespectful remark about her husband was competent to prove the state of her feeling towards her husband, to illustrate the extent of her affection and the part she took in causing the loss of his affections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1124.]

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by Minnie Leucht against Barbara Leucht. From a judgment for defendant, plaintiff appeals. Affirmed.

F. M. Tracy, for appellant. M. H. McLean, for appellee.

CARROLL, J. This is an action by appellant, who was plaintiff below, to recover damages for the alienation of her husband's affections by the appellee, defendant below, who was his mother. There was a judgment in favor of appellee upon the verdict of a jury who found in her behalf.

A reversal is asked for alleged errors of the court in admitting and rejecting evidence. The rulings chiefly complained of are, first, the exclusion of evidence offered by appellant relating to statements made to her by her husband in the absence of his mother or other persons, which statements indicated that his mother was endeavoring to cause a separation between her son and his wife; and, second, the competency of statements of a similar character said to have been made by the husband of appellant in the absence of his mother to third persons, who gave evidence concerning them in behalf of appellant. In admitting the statements to third persons, the court instructed the jury in respect to them as follows: "The jury is instructed that the declarations of Louis Leucht to third persons as testified to by said parties, not made in the presence of the defendant Barbara Leucht, were admitted, and are to be considered, solely for the purpose of showing the state of mind and feeling of the said Louis Leucht, if they do show such state of mind and feeling, and for the purpose of disclosing or explaining the motives influencing his action or conduct, if they do disclose or explain such motive; and they are to be considered by the jury for no other purpose." In our opinion the court correctly excluded the statements made to appellant by her husband, and erred to the prejudice of appellee in admitting the statements made by him to third parties, although the effect of this evidence was limited by the instruction. The statements made to appellant by her husband were incompetent, first, because they were made in the absence of his mother, and come under the head of what may be called "hearsay" evidence; second, because they are forbidden by subsection 1 of section 606 of the Civil Code of Practice, reading in part as follows: "Neither a husband nor his wife shall testify while the marriage exists or afterwards, concerning any communication between them during marriage." The statements made by the husband to third parties also come under the head of "hearsay" evidence, and for this reason should have been excluded. It was attempted by the statements, not made in the presence or hearing of appellee, to fasten up-

on her the offense of alienating the affections of her son from his wife. She may or may not have made to her son the statements he repeated to his wife and other persons as coming from her. If she had been present when they were told to the wife or others, she would have had an opportunity to admit or deny them, and, of course, have been bound by her declarations and actions. We know of no reason why an exception should be made in cases of this character to the general rule excluding "hearsay" evidence. It was competent for the wife to prove by the declarations and conduct of her husband and by third persons, who could testify from their knowledge or from statements made by the husband, the affectionate relations that existed between them before the estrangement; and his conduct and declarations indicating a loss or withdrawal of his affection. And also proper to introduce evidence of acts and declarations made by the defendant to or in the presence of the plaintiff or other persons manifesting a purpose upon her part to alienate the affections of the husband or bring about a separation between them. But there is a wide difference between this evidence and that excluded and introduced in this case. The injustice of permitting the plaintiff and third persons to relate statements alleged to have been made to them by the husband in the absence of the defendant, and that purported to have been made by the defendant to the husband, is apparent. The defendant had no opportunity to deny nor explain them, as she was not present when they were made, and could not have known anything about them, or whether they were, in fact, related by the husband to these parties. It seems to us that it would be a flagrant violation of the established rules of evidence to permit the plaintiff to make out a case against the defendant under circumstances like these. If evidence of this character was admissible, a defendant would be helpless, in fact, almost denied the right to make a defense. Here the plaintiff's cause of action was rested upon the proposition that the defendant by her acts and declarations had alienated the affections of the plaintiff's husband, and she undertook to make out her case by relating statements purporting to have been made by the defendant to the husband and repeated by him to her in the absence of the defendant, and by declarations of third parties who related statements purporting to have been made to them by the husband that he said were made to him by the defendant. This is as striking an example of hearsay evidence as could be imagined. It would be difficult to conceive a case in which justice to the defendant more strongly demanded the exclusion of all this evidence. If a case could be made out upon evidence of this character, it would be an easy matter for designing or unscrupulous persons to present to a jury a state of facts that might induce them to return a verdict

against the defendant. As said by Greenleaf in his work on Evidence, § 90, in speaking of this class of evidence: "Its extrinsic weakness, its incompetency to satisfy the mind of the existence of a fact, and the frauds which may be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible." The reason that would exclude this evidence when offered by the wife applies with equal force to the statements of third persons, who testified as to what the husband said to them. In neither case would the defendant deny that the husband made the statements.

The Code provision forbidding either the husband or wife from testifying as to communications between them has been often construed. Among the cases holding that evidence of the character attempted to be made by the wife in this case was incompetent, we may notice as directly in point *Manhattan Life Insurance Co. v. Beard*, 112 Ky. 455, 68 S. W. 35, where the court said: "On the trial the widow of the deceased, the beneficiary under the policy, was permitted to testify to numerous conversations with her husband of facts learned from him and to the contents of letters written from one to the other. Under subsection 1 of section 606 of the Civil Code of Practice providing 'neither a husband nor a wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage,' all the foregoing testimony was incompetent." To the same effect is *N. Y. Life Ins. Co. v. Johnson*, 72 S. W. 762, 24 Ky. Law Rep. 1867; *Buckel v. Smith*, 82 S. W. 235, 26 Ky. Law Rep. 494.

If the testimony offered by the wife as to what her husband told her, when no one else was present, was not a "communication" between them, we are at a loss to know what would be a "communication." It will be noticed that the Code prohibition is not against the disclosure of "confidential" communications; but, although the word "confidential" is not used, it was evidently the purpose to exclude only such communications as would naturally grow out of the marriage relation. As was said in *Commonwealth v. Sapp*, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405: "The word 'communication' therefore as used in our statute should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or vice versa, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which but for which the confidence growing out of it would not have been known to the party." There might be communications between the husband and wife that it would be competent for either to testify concerning, as when they were made in the presence or hearing of third parties; thus making it plain that they were not that character of communications that the law will protect and prohibit either

party from disclosing. So third parties may testify as to conversation overheard by them between husband and wife. *Commonwealth v. Everson*, 96 S. W. 480, 29 Ky. Law Rep. 760. Another exception to the rule is made in the *Sapp Case*, supra, where it was held that either could testify in a prosecution against the other for an assault or attempt to do violence; and yet another exception is made in cases where the husband or wife may testify to facts known to the witness from other means of information than such as result from the marriage relation or that come to either of them independent of it. *Elswick v. Commonwealth*, 13 Bush, 155; *English v. Cropper*, 8 Bush, 292. Again, other exceptions are made in *Shepherd v. Commonwealth*, 119 Ky. 931, 85 S. W. 191, and *Shipp v. Commonwealth*, 99 S. W. 945, 30 Ky. Law Rep. 904, 10 L. R. A. (N. S.) 335. But here the communication concerning which the wife offered to testify was manifestly made to her by the husband because she was his wife, and solely by virtue of the marriage relation. It does not fall within any of the exceptions mentioned, nor those specified in the Code of Practice.

Another error complained of is in permitting a witness to testify that he heard the plaintiff make a slighting or disrespectful remark about her husband. We think this evidence was competent. It was admissible to prove acts and declarations of the plaintiff that tended to show the state of feeling of plaintiff towards her husband, for the purpose of illustrating the extent of her affection for him, and the part she took, if any, in contributing to sever the marital relations, or in causing her husband's affections to be alienated from her.

The other errors complained of are of minor importance; and, as they did not prejudice the substantial rights of the plaintiff, we do not deem it necessary to extend this opinion in discussing them.

The judgment of the lower court is affirmed.

DAYLIGHT ACETYLENE GAS CO. v. HARDESTY et al.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

1. SALES—MISREPRESENTATIONS BY SELLER.

Where a contract for the sale of an acetylene gas plant was made directly with the seller, and at that time no representations were made as to the relative cost of acetylene gas and electricity, and the contract was silent on the subject and there was no fraud or mistake in the contract, the contract could not be rescinded for a misrepresentation by an agent of the seller some time before as to the relative cost of gas and electricity.

2. EVIDENCE—PAROL EVIDENCE—ORAL STIPULATIONS.

Where, at the time of the execution of a contract for the sale of an acetylene gas plant, no representations were made, and there was no fraud or mistake in the contract which was executed after the details had been agreed on, the contract as reduced to writing measured the liability of the parties, notwithstanding pre-

vious oral representations by an agent of the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2035.]

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

Action by W. H. Hardesty and another against the Daylight Acetylene Gas Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

John McChord and Gifford & Steinfeld, for appellant. Leo Russell and W. H. Spragens, for appellees.

HOBSON, J. W. H. and J. D. Hardesty own a hotel in Lebanon, Ky. They made a contract with the Daylight Acetylene Gas Company, by which it installed an acetylene gas plant in the hotel at a cost of \$323.21, the Hardestys paying \$33.28 in cash, and executing notes for the remainder. About a month after the plant was installed, the Hardestys brought this suit, asking the court to cancel the written contract made with the gas company and the notes they had executed to it, and praying judgment against the gas company for the amount they had paid on the plant, charging that the contract had been obtained from them by fraud, in this: that the agent of the gas company had represented to them that the hotel could be lighted with acetylene gas at less than half the amount they were paying for electricity, and that the acetylene gas plant was dangerous. The gas company filed an answer, denying the allegations of the petition, and made its answer a counterclaim praying judgment upon the notes. Upon the final hearing the circuit court entered judgment as prayed by the plaintiffs, and the defendant appeals.

The plaintiffs testify that the agent of the gas company who came to see them told them that they could light the hotel with acetylene gas at less than half of what they were paying for electricity, and in this statement they are confirmed by a third person who was present and heard the conversation. On the other hand, they show that they began the correspondence with the gas company by writing the gas company a postal card, asking it to send a man out to them, and that this card was written because one of them had seen one of the defendant's plants at Munfordsville, and had heard a good report of it from the hotel keeper using it there. It also appears that, after the agent came out to Lebanon had talked the matter over with the Hardestys, no final trade was made, and that one of them shortly afterward went up to Louisville, and there saw the vice president of the company, and closed the trade with him. No representations were made by the vice president, and nothing was said at the time the trade was made and the contract drawn up as to the relative cost of acetylene gas and electricity. The written contract which was entered into between the parties is silent on the subject. There is

nothing in the proof to show that the safety of the plant was in any way misrepresented, or that there is any more danger in it than in the ordinary acetylene gas plant. It is manifest from the proof that the agent who went to Lebanon perpetrated no fraud upon the Hardestys. What would be in Lebanon the relative cost of acetylene gas and electricity was a matter of opinion depending on a number of circumstances, such as the cost of electricity, the quantity of each light used, the care taken to husband the gas, and the like. Acetylene gas plants are in familiar use. It is a cheap light, and there is nothing in the evidence to show that this plant furnishes a more expensive light than ordinary acetylene gas plants. After the plant had been installed and operated a week, the Hardestys had the company to get for them a larger generator, which was ordered from Buffalo. When it came, the company paid the freight, but the Hardestys refused to receive it. Under all the facts we think that the rights of the parties must be determined by the written contract between them; and that there being no fraud or mistake in the written contract, and nothing having been said at the time the contract was drawn, or to the officer of the company with whom the contract was concluded, the contract cannot be rescinded for a misstatement by the agent at Lebanon on his visit there some time before as to the relative cost of acetylene gas and electricity. In *Worland v. Secrest*, 106 Ky. 711, 51 S. W. 445, the court said: "It is a well-settled rule that, where parties have deliberately put their contract in writing, it is conclusively presumed that their whole engagement was reduced to writing, unless from the form of the instrument this does not appear to have been the intention of the parties. Parol evidence of previous or contemporaneous negotiation will not be admitted to vary the terms of the written agreement, in the absence of fraud or mistake, for the previous verbal negotiations are merged in the writing. The written contract in this case, above quoted, and the formal deed which was afterward made, must be presumed to have been intended by the parties to embrace the contract between them, and, as neither of these contains a warranty, none can be implied, and proof of verbal representations previously made not amounting to fraud, cannot be received."

The sale of the plant was not made at Lebanon. The contract under which it was sold was made in Louisville by Hardesty some days after the visit of the agent, Warren, to Lebanon. The parol negotiation between the Hardestys and Warren at Lebanon cannot invalidate the written contract subsequently fairly made. It is shown by the Hardestys that the acetylene light the month they used it cost about double what the electric light was costing them. But the cost of light in a month would depend on the number of guests and the extent the

lights were used. During the first month's use of any plant there is likely to be more waste of material than after its operation is better understood, and a new light is often used more lavishly than after its cost is shown. One object in making the change was to secure a certain light available at all times, as the electric light at times went out, and at other times when it was needed could not be used. The cost of lighting a hotel will depend on a number of circumstances, and, if the Hardestys wished a warranty as to the cost of the acetylene light, this should have been incorporated in the written contract. Manifestly if such a warranty had been demanded, it would have been put in some definite form. The company, when the contract was reduced to writing and signed by the parties in Louisville after the details were there agreed on, had the right to regard the writing as the measure of its liability.

Judgment reversed and cause remanded for a judgment in favor of the defendant upon the counterclaim.

BENNETT et al. v. KNOTT et al.

(Court of Appeals of Kentucky. Oct. 9, 1903.)

1. DRAINS—ESTABLISHMENT—PROCEEDINGS ON APPEAL—REVIEW.

The court on appeal from a judgment of the circuit court in proceedings to establish a drainage ditch at the cost of the land benefited cannot consider errors of the county court not properly brought before the circuit court, but can only determine whether the circuit court, trying the case anew, committed error.

2. SAME.

Where, when a proceeding to establish a drainage ditch reached the circuit court, no objection was made to anything done in the county court, and the parties announced ready and went to trial before a jury, motions to quash the reports of the viewers, and to file a report offered to be filed in the county court by the reviewers, came too late, they being matters in abatement waived by going into trial on the merits without objection.

3. ABATEMENT AND REVIVAL—OBJECTIONS—TIME TO MAKE.

Matters of abatement must be presented before the trial is begun on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 507.]

4. DRAINS—ESTABLISHMENT—REPORT OF REVIEWERS.

Under Ky. St. 1903, § 448, providing that words giving authority to three or more persons shall be construed as giving such authority to a majority of them, a report by two of three reviewers appointed by the county court in proceedings to establish a drainage ditch is valid.

5. SAME—PROCEEDINGS—HARMLESS ERROR.

Where the county court appointed three reviewers in proceedings to establish a drainage ditch, and directed them to act on a designated date and file their report before the next term of court, the refusal to allow two of the reviewers to file on the first day of the next term an adverse report made by them did not affect the substantial rights of the parties, since the report would have been merely advisory, and the question remained whether on the evidence the ditch should be opened.

6. SAME—QUESTION FOR JURY.

Whether a proposed drainage ditch will be a public utility and a benefit to the lands as-

sessed for the construction thereof is for the jury.

7. TRIAL—INSTRUCTIONS—UNDUE PROMINENCE TO EVIDENCE.

Undue prominence should not be given in the instructions as to any single fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577-581.]

8. DRAINS—ESTABLISHMENT—EVIDENCE—INSTRUCTIONS.

In proceedings to establish a drainage ditch, it is not error to refuse to charge the jury to consider, in reaching their verdict, the fact that the parties liable for the cost of the construction would have to be at the expense of keeping the ditch open.

9. SAME—APPEAL—REVIEW.

Where a proceeding to establish a drainage ditch was dismissed as to an individual in the county court, and the record showed that he was not a party either in the circuit court or to an appeal, the court on appeal could not pass on any question as to him.

10. APPEAL AND ERROR—DECISIONS REVIEWABLE—FINAL ORDERS.

Ordinarily no order is final which may not be enforced by rule or execution.

11. DRAINS—ESTABLISHMENT—APPEALABLE ORDERS—FINALITY.

A provision in a judgment establishing a drainage ditch which declares that plaintiff's attorney is entitled to a reasonable fee to be taxed as costs is not a final judgment, not being enforceable without further action by the court.

12. SAME—COSTS—ATTORNEY'S FEES.

Where the parties in proceedings to establish a drainage ditch are represented by attorneys of their own employment and are litigating at arm's length, it is improper in the absence of a statute authorizing it, to tax in favor of plaintiff's attorney a fee as costs against defendant.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Proceedings by W. C. Knott and others against H. R. Bennett and others for the construction of a drainage ditch. From a judgment of the circuit court establishing the ditch, defendants appeal. Affirmed.

G. B. Likens, for appellants. J. S. Glenn, M. L. Heavrin, and C. M. Crowe, for appellees.

HOBSON, J. W. C. Knott and others begun this proceeding in the Ohio county court to open a ditch, and have the cost of the ditch assessed against the land to be benefited. H. R. Bennett and others were made defendants to the petition. The court made an order appointing viewers. The viewers filed their report July 28, 1903. They reported that the ditch was of public utility and necessary for the reclamation and proper cultivation of the land assessed. The total cost of the ditch according to their report was about \$1,700, and this was assessed to the lands benefited; the ditch being nearly two miles long. The defendants filed a remonstrance to the viewers' report, and the court made an order appointing three persons as reviewers. They were directed to act on the 23d day of October, and to file their report before the next term of court. Two of the reviewers on the first day of the next term tendered a report signed by two of them

alone. The court refused to allow the paper to be filed. These two reported that the ditch was not of public utility, and would not benefit the land assessed. The court thereupon appointed three other men as reviewers, who reported as the viewers had done, except that they released J. A. Williams from paying any part of the cost of the ditch, and assessed the amount charged to him by the viewers to an adjoining proprietor. The case was then tried in the county court. On the first trial one of the jurymen was taken sick, and the trial was not completed. On the second trial the jury failed to agree. On the third trial the jury found a verdict in accordance with the report of the reviewers; that is, in favor of the ditch and releasing J. A. Williams. The petition was then dismissed as to Williams, and a judgment was entered pursuant to the verdict of the jury against the lands of the other proprietors. They appealed to the circuit court. In the circuit court the case was submitted to a jury who found in accordance with the viewers' report. Judgment was entered upon their verdict, and the defendants appeal.

It is insisted that the judgment should be reversed because it is said that the viewers' report does not sufficiently show the beginning point of the ditch, and does not show that all of the persons whose land is benefited by the ditch are not infants, married women, or nonresidents of the state. Ky. St. 1903, § 2380, subsec. 2. It is also insisted that the county court erred in refusing to allow the two reviewers to file the report which they tendered. We cannot consider any of these objections. The appeal before us is prosecuted from the judgment of the circuit court. The case is tried anew in the circuit court. It is not material here what the county court did or failed to do; but the question before us is: Did the circuit judge err in its rulings? If the county court errs, the matter must be presented to the circuit court; and, if the circuit court does not correct the error, then it may be brought before us on appeal. But no complaint can be made here on account of an error of the county court which was not properly brought before the circuit court. No exceptions were filed to the viewers' report in the county court, but only a remonstrance; and this did not point out any defects in the report in matter of form. When the case reached the circuit court, no objection was made to anything that had been done in the county court; but the parties announced ready, and went to trial before the jury. After the case was stated to the jury, the court sent the jury in charge of the sheriff to view the land, and continued the case until the next morning. On the next day the defendants moved the court to quash the report of the viewers, and also moved the court to file the report offered to be filed by the two reviewers. These motions were overruled. They came too late. These were simply matters in abatement

which were waived by going into trial on the merits in the circuit court without objection. It was too late to make objections of this sort which went mainly to the form of the proceeding after the jury was sworn and the trial before the jury was begun. It is a universal rule that matters of abatement must be presented before the trial is begun on the merits.

We deem it proper to add, however, that no substantial error was committed by the county court in refusing to allow the report of the two reviewers to be filed. Under the statute a report by two of the reviewers was a valid report. Ky. St. 1903, § 448, provides: "Words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons." The reviewers should have filed their report as directed by the county court, but, as it was tendered on the first day of the term, the court might properly have allowed it to be filed; but, if it had been filed, it would simply have been advisory to the court. The question would still have been on all the evidence whether the ditch should be opened at the cost of the adjoining proprietors; and so the failure to file this report in no wise affects the substantial rights of the parties. In *Lancaster v. Leaman*, 107 Ky. 39, 52 S. W. 963, the court said: "The remonstrance to the reviewers' report was simply in the nature of an exception to it, and raised a question for the court to determine. When the viewers had reported that the proposed ditch was not a public benefit, the court seemed to be without power to proceed further in the matter. However, when they reported that the construction of it would be of public benefit, then the proceedings must be had as we have indicated; and, although the reviewers might report that it was not of public benefit, still the question must be tried by the court, and by it adjudged whether or not the ditch should be constructed," etc. The viewers' report does show definitely the location of the ditch; and, when taken as a whole, it leaves no doubt where the beginning corner is. The report shows that none of the parties through whose land the ditch runs are infants, married women, or nonresidents of the state, except as therein set out. It also sets out the parties whose lands are benefited by the ditch, and they were brought before the court; so the record discloses all the facts required by the statute.

There was no substantial error in the admission or rejection of evidence. The court allowed the evidence to take a wide range; and all the facts were brought before the jury who also saw the land itself. The instructions which the court gave admirably submitted the issues to the jury. The instruction which the defendant asked was properly refused by the court. Whether the ditch was of public utility and a benefit to

the lands of the parties was a question to be decided by the jury on all the evidence; and undue prominence should not have been given in the instructions to any single fact. The jury would know that the ditch would be valueless unless kept open; and they would also know that a private ditch on private property would have to be kept open by the parties, and not by the public. The court, therefore, did not err in refusing to tell the jury that they should take into consideration in arriving at their verdict the fact that the parties would have to be at the expense of keeping this ditch open.

The proceeding had been dismissed as to J. A. Williams in the county court. So far as the record before us shows, he was not a party to the proceeding in the circuit court. He is not a party to the appeal before us, and therefore we cannot pass upon any question as to him.

The circuit court in his judgment provided that the plaintiff's attorney was entitled to a reasonable fee to be taxed as cost. The rule is that no order is final ordinarily which may not be enforced by rule or execution. So much of the judgment as declares the plaintiff's attorney to be entitled to a reasonable fee to be taxed as cost cannot be enforced without further action by the circuit court, and is, properly speaking, only an expression of opinion by the court, not a final judgment. There can be, therefore, no reversal of the judgment complained of for this matter. We do not find, however, in the statute any authority for the allowance of an attorney's fee to the plaintiff's attorney to be taxed as cost; and, where the parties are each represented by attorneys of their own employment and are litigating at arm's length, as in this case, we see no more reason why the plaintiff's attorney's fee should be taxed as cost here than in any other action in which the plaintiff is seeking to impose on the defendant a liability which he resists.

As the record is presented, we perceive no substantial error to the prejudice of the appellants, and the judgment complained of is therefore affirmed.

HOLTMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

1. CRIMINAL LAW — APPEAL — DISMISSAL IMPROPER — PLEA OF GUILTY.

One appealing to the circuit court from a conviction of disturbing the peace on a plea of guilty had the right to introduce evidence to mitigate the punishment without attempting to withdraw the plea; the magistrate having fixed the punishment at the maximum limit.

2. SAME — PLEA OF GUILTY — EFFECT.

A plea of guilty in justice court of disturbing the peace did not prevent accused from appealing to the circuit court, nor deprive her of the right to a trial de novo expressly provided for by Cr. Code Prac. §§ 174, 366; she having the right to withdraw her plea at any time during her trial in the circuit court.

3. SAME — EVIDENCE — DURESS.

Where, in a trial de novo in the circuit court, on accused's appeal from a conviction in justice court, the commonwealth introduces as tending to show guilt a plea of guilty in justice court, accused can show that the plea was obtained through duress.

Appeal from Circuit Court, Jefferson County; Criminal Branch.

"To be officially reported."

Louise Bullock Holtman was convicted in justice court of a breach of the peace, and she appeals from an order of the circuit court dismissing her appeal. Reversed and remanded.

D. Moxley, for appellant. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Pryor, Sapinsky & Castleman, for the Commonwealth.

SETTLE, J. Appellant appears to have been arrested under a warrant from the court of Ed Meglenary, a justice of the peace for Jefferson county, charging her with a breach of the peace. The trial took place in the justice's court without the intervention of a jury, and, upon her plea of guilty, that court rendered a judgment of conviction whereby her punishment was fixed at a fine of \$100 and 50 days imprisonment in jail. The judgment recites that its execution would be suspended 10 days "upon the request and motion of the defendant." Below the judgment are these words and signature: "I have read the above judgment, and it meets with my approval. Louise Bullock Holtman." Shortly after the rendition of the foregoing judgment appellant prosecuted an appeal therefrom to the circuit court. In the latter court appellant, upon or before the calling of the case for trial, moved to withdraw the plea of "guilty" made by her in the magistrate's court, and offered to enter the plea "not guilty." At the same time counsel for the commonwealth moved for a judgment against her on the face of the papers. The circuit court overruled both motions, and, upon its own motion, dismissed the appeal. Appellant thereupon entered motion to set aside the order of dismissal and for a trial of her appeal, filing in support thereof her affidavit to the effect that she would, if afforded the opportunity, prove that she did not voluntarily enter in the magistrate's court the plea of guilty; and that such plea, as well as the entry on the records of that court expressing her approval of the judgment rendered by the magistrate, was made under fear and duress. Her motion, however, was overruled by the circuit court, and, from the order dismissing the appeal in that court, she prosecutes the present appeal.

The dismissal of the appeal by the circuit court was error. Even if the appellant had not attempted to withdraw the plea of guilty after the case reached that court, she nevertheless had a right to introduce evidence to mitigate the punishment; the magistrate hav-

ing gone to the maximum limit in fixing it, both as to fine and imprisonment. As said in *Cornellson v. Commonwealth*, 84 Ky. 592, 2 S. W. 236: "When the plea of guilty has been entered, the commonwealth to increase, and the defendant to mitigate the punishment, has the right to introduce testimony to enable the jury (or court) to render a true verdict (or judgment) when making the inquiry as to the extent of the punishment." *Mounts v. Commonwealth*, 89 Ky. 277, 12 S. W. 311. We are of opinion, however, that appellant's plea of guilty entered in the justice's court did not prevent her taking an appeal to the circuit court, or deprive her of the right to a trial in that court upon the charge contained in the warrant originating in the justice's court; and, if entitled to a trial in the circuit court, she had the right at any time during the trial, and before judgment was rendered in that court, to withdraw the plea of guilty previously entered in the justice's court, and in lieu thereof enter a plea of not guilty. Cr. Code Prac. § 366, provides: "Upon the appeal the case shall be tried (in the circuit court) anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed if judgment for any amount be rendered against the defendant, and thereupon he shall be adjudged to pay the costs of the appeal." If there can be in the circuit court a trial de novo, it necessarily follows that the defendant (appellant) upon or before entering into the trial in that court should and must enter his plea to the warrant, which in the instant case could only have been a plea of "guilty" or "not guilty." The right of appeal in such a case as this is conferred by section 362, Cr. Code Prac., which provides: "If a judgment against a defendant on a trial before a county judge, or in a justice's court, or in a city or police court, unless otherwise provided in the Statute, creating or regulating it, be for imprisonment or for a fine of \$20.00 or more, he shall have the right to appeal to the circuit court of the county in which the judgment is rendered." The manner of taking the appeal is regulated by section 364, but neither in that section, those *supra*, or any other of the Criminal Code of Practice or Kentucky Statutes of 1903, have we been able to find a provision restricting a defendant's right of appeal to the circuit court from a judgment of conviction for a misdemeanor rendered in the county, police, or a justice's court to cases in which the plea in such inferior courts was "not guilty." In other words, the law does not seem to forbid an appeal to the circuit court by the defendant where his conviction in the court of inferior jurisdiction resulted from a plea of "guilty."

Assuming the law to be as stated, and the appellant, by reason of the appeal, to be entitled to a trial de novo of her case in the circuit court, that court should have sustained her motion to withdraw the plea of guilty which had been made in the justice's court,

and allowed her to enter the plea of "not guilty"; for her right to enter that plea might have been exercised at any time during her trial in the circuit court and before judgment, even had she first entered in that court a plea of guilty; but in the latter case it would have been necessary to first withdraw the plea of guilty. The right of a defendant to change his plea as we have indicated is given by section 174, Cr. Code Prac., which provides: "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Instead of restricting the right conferred by this section, it seems to have been the policy of this court to enlarge it; for in *Mounts v. Commonwealth*, *supra*, it was held that "a plea of guilty may be withdrawn even after verdict, a new trial being granted for that purpose, if it appear that the defendant was induced to enter the plea by the threats or promises of the court or attorney for the commonwealth, and thereby overreached or deceived."

We omit consideration of appellant's complaint that the plea of guilty entered by her in the justice's court was made under circumstances of duress, as we think she was entitled, independently of that contention, to change her plea in the circuit court. If, however, on the trial that may follow the return of this case to the circuit court, the commonwealth should introduce as evidence, tending to prove her guilty of the offense charged in the warrant, the plea entered by appellant in the justice's court, she should be permitted to prove the facts, if any, constituting the alleged duress under which the plea of guilty was obtained from her.

For the reasons indicated, the judgment of the circuit court is reversed and case remanded, that appellant may, as contemplated by her appeal and directed by this opinion, have a trial in that court under the charge contained in the magistrate's warrant.

CUNNINGHAM v. CLAY'S ADM'R.

(Court of Appeals of Kentucky. Oct. 13, 1908.)

1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT.

The order appointing an administrator, without giving the next of kin opportunity to accept the position, is not void, and so may not be collaterally attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 178-182.]

2. APPEAL AND ERROR—HARMLESS ERROR.

Admission in evidence, in an action by an administrator to recover property of deceased, of a statement of deceased's husband to the administrator that he did not desire to recover the property for his own benefit, but for the daughter of himself and deceased, was harmless; the question being whether deceased owned the property at her death, and the administrator being entitled to recover it, if she did then own it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

Appeal from Circuit Court, Bourbon County.
"Not to be officially reported."

Action by Estelle C. Clay's administrator against L. E. Cunningham. Judgment for plaintiff. Defendant appeals. Affirmed.

Grant E. Lilly and Hazelrigg, Chenault & Hazelrigg, for appellant. H. Clay Howard, for appellee.

NUNN, J. This action was instituted by N. C. Fisher, as administrator of Estelle C. Clay, for the recovery of the following articles or their value, to wit: A silver service, of the value of \$100; one dozen after-dinner cups and saucers, of the value of \$10; an upright piano, of the value of \$300; a Singer sewing machine, of the value of \$40; diamond earrings, of the value of \$300; a side saddle, of the value of \$20; a rug, of the value of \$5; and a large leather trunk, of the value of \$20. Appellant answered, denying that her daughter, Estelle C. Clay, was the owner of the property at her death, and alleged that she was the owner. Appellee's testimony conduced to show that appellant and her husband made their daughter, Estelle C. Clay, a present of the silver service and diamond earrings upon her marriage to B. J. Clay; that they made her a present of the piano several years prior to her marriage; and that the other articles named were purchased by Estelle and her husband after marriage. The evidence also showed that Estelle and her husband had all the articles described in their possession for more than five years after their marriage; that Estelle's health failed, and she took a trip to Hot Springs, Ark. Just before leaving they broke up housekeeping and carried the articles to her mother's for safe-keeping, where they remained until the bringing of this action. Several demands had been made upon appellant for the articles; but she refused to surrender them, claiming that they were hers, and that she intended to hold them for her grandchild, the daughter of Estelle C. Clay. Appellant's testimony conduced to show that she had never given her daughter the silver service, earrings, or the piano; that she loaned these articles to her daughter; and that her daughter had given her the other articles when she left for Hot Springs for her health. Upon the trial the jury rendered a verdict for appellee for all the articles or their value.

Appellant contends that the judgment is void for the reason that N. C. Fisher, the alleged administrator, had no right to prosecute the action, and that the order appointing him administrator is void. The facts with reference to this matter are about these: After Estelle Clay's death the court appointed her husband, B. J. Clay, as administrator and he resigned on the 14th day of January, 1905, when the court made an order appointing appellee the administrator. Appellant claims that under the statute the next of kin had the right of appointment, and the appointment was made by the county court without

giving any one of them an opportunity to accept the position. This action of the court was not void, but, at most, was only erroneous. The case of Buckner's Adm'r v. Louisville & Nashville Railroad Company, 120 Ky. 600, 87 S. W. 777, involved the same question as in the case at bar. The court in that case said: "As the judgment of the county court appointing Lucinda Buckner and Frank Rice as administrators was not void, but merely erroneous, they, until their office was terminated by a reversal of the county court's order appointing them, or was otherwise ended, had all the authority that would have been possessed by the administrator rightfully appointed. Consequently they could bring a suit in behalf of the decedent's estate, and could bind the estate in any matter in which a legally appointed administrator could bind it. The sureties upon their bond would be liable for their maladministration." There was no motion in the county court to set aside the order appointing appellee, nor was it appealed from to the circuit court; and appellant cannot attack the order collaterally. It is binding upon the parties until vacated.

The only other question of importance raised by appellant's counsel is the alleged admission by the court of incompetent testimony. It appears from the evidence that B. J. Clay, at or before the bringing of the action, stated to appellee that he had no desire to recover this property for his own benefit; that he wanted it for his daughter, the child of deceased; and while the suit was pending he executed and delivered a writing to appellee to that effect. This writing was permitted by the court to be introduced as evidence for the purpose, as the court stated at the time, of going to the credit of the witness. Even if this was error, it was not materially prejudicial to appellant. The question at issue is whether or not the property sued for belonged to Estelle at her death. If so, the administrator had the right to recover it. Appellant offered to introduce a writing, signed by herself, in which she admitted the property belonged to her daughter at the time of her death, and that she (appellant) agreed to keep it for her granddaughter; and there was other evidence to the same effect. It appears from this record that there was more ill feeling involved in the controversy than real interest. Appellant claims that she was holding the property for her grandchild, and B. J. Clay, the father of the child, released his claim in favor of the child.

The judgment, in effect, accomplishes the purpose of the parties, and places the property in the hands of a person who has, presumably, executed a good bond for the protection of the child's interests. If the property should be left in the hands of a person without bond, it might be wasted, and the child lose it.

Perceiving no error materially prejudicial to the rights of appellant, the judgment is affirmed.

OWEN COUNTY v. GREENE.

(Court of Appeals of Kentucky. Oct. 14, 1908.)
COUNTIES—PUBLIC BUILDINGS—FORCIBLE DETAINER ACTION—RIGHT TO MAINTAIN.

Ky. St. 1903, § 3948, requiring the jailer to institute actions in the name of the county for the possession of county property, does not deprive the fiscal court of the power, conferred by sections 127, 1834, 1840, to regulate and control county buildings and institute such actions with reference thereto as it may deem necessary; and the fiscal court may maintain forcible entry for the recovery of a room in the courthouse.

Appeal from Circuit Court, Owen County.
 "To be officially reported."

Action by Owen county, by its fiscal court, against F. C. Greene. From a judgment for defendant, after sustaining the demurrer on the ground of want of legal capacity to prosecute the action, plaintiff appeals. Reversed and remanded.

J. G. Valandingham, for appellant. J. H. Settle, for appellee.

CLAY, C. This is an action of forcible detainer against appellee, in which the appellant seeks to recover a certain room in the courthouse used by him. The writ was issued by W. E. King, a justice of the peace of Owen county, and cited appellee to answer and defend the same on February 8, 1908. On that date the appellee appeared by attorney and filed a special demurrer to the writ, on the ground that Owen county, acting through its fiscal court, did not have legal capacity to prosecute the action. The demurrer was overruled by the court, and judgment entered in favor of Owen county. Thereupon by proper proceedings the matter was brought before the Owen circuit court. Appellee again filed a special demurrer, relying upon the same ground. This demurrer was sustained by the court, and judgment rendered against appellant for costs. Of this judgment Owen county complains.

The only question involved is the capacity of the appellant to prosecute this action. Appellee insists that it has no authority, and cites in support of his contention section 3948 of the Kentucky Statutes of 1903. That section is as follows: "The jailer of each county shall be superintendent of the public square, court-house, clerk's office, jail, stry-pen and other public county buildings at the seat of justice. He shall have the power, and it shall be his duty, to institute and carry on the appropriate civil procedure, in the name of the county, to recover possession of, and for any injury, or intrusion, or trespass which may be committed on any of the county property named in this chapter. The net proceeds of any such recovery shall be paid to the county court in aid of the county levy." Appellee contends that, under this section, the jailer is the only party authorized to institute an action of forcible detainer against a party wrongfully occupying one of the rooms of the courthouse. In this connection it will be

necessary to notice the provisions of the statutes with reference to the powers and duties of the fiscal courts:

"Sec. 1834. Unless otherwise provided by law, the corporate powers of the several counties of this state shall be exercised by the fiscal courts thereof respectively."

"Sec. 1840. The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county, to make provisions for the maintenance of the poor, and provide a poor house and farm, and provide for the care, treatment and maintenance of the sick poor, and provide a hospital for said purpose, or contract with any hospital in the county to do so, and provide for the good condition of the highways in the county, and to execute all of its own orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court of levy and claims."

"Sec. 127. He [county attorney] shall attend to the prosecution of all cases in his county in which the commonwealth or the county is interested; and, when so directed by the county or fiscal court, institute or defend, and conduct actions, motions and proceedings of every description, before any of the courts of this commonwealth in which the county is interested, and shall in no instance take a fee or act as counsel in any case in opposition to the interests of the county. He shall also attend the circuit courts held in his county, and aid the commonwealth's attorney in all prosecutions therein, and in the absence of an acting commonwealth's attorney, he shall attend to all commonwealth's business in said courts."

It will be seen from the foregoing provisions that the corporate powers of the various counties of the state are to be exercised by the fiscal courts thereof, respectively; that these courts are given the power to erect and keep in repair the necessary public buildings, and the further power to regulate and control the fiscal affairs and property of the county. By section 127 the fiscal court is given the power to direct the county attorney to institute or defend and conduct actions, motions, and proceedings of every description before any of the courts of the commonwealth in which the county is interested. Construing section 3948 along with the foregoing provisions relating to the powers of fiscal courts, we think it is manifest that section 3948 is not exclusive. While it gives the jailer the power and makes it his duty to institute actions to recover possession of public county buildings, it was not intended to deprive the

fiscal court of the power to regulate and control these buildings and institute such actions with reference thereto as it might deem necessary.

For the reasons given, the judgment is reversed, and cause remanded, with directions to overrule appellee's special demurrer.

OTTER CREEK LUMBER CO. et al. v. MARRITT.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

COURTS—APPELLATE COURT—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.

A judgment for \$55, rendered on a verdict allowing plaintiff \$55 in an action for the possession of saw logs, or their value, \$500, and \$100 damages for their detention, involves only a judgment for \$55, and the Court of Appeals has no jurisdiction on appeal therefrom.

Appeal from Circuit Court, Estill County.
"Not to be officially reported."

Action by Yancey Marritt against the Otter Creek Lumber Company and another. From a judgment for plaintiff, defendants appeal. Dismissed.

J. B. White, for appellants. Riddle & Friend, for appellee.

NUNN, J. This action was instituted in the lower court by appellee, Yancey Marritt, for the possession of 152 saw logs, or for their value, \$500 and \$100 damages for their detention. Appellant answered, denying the ownership of the logs by appellee, and alleged that it was the owner of them. A trial was had, and the jury returned the following verdict: "We, the jury, find for the plaintiff, allowing him \$55.00. Tandy Centers, Foreman." And the court entered thereon the following judgment: "It is therefore adjudged by the court that the plaintiff, Yancey Marritt, recover of the defendants, the Otter Creek Lumber Company and W. F. Fielder, the sum of \$55.00, with 6 per cent. interest thereon from the 19th day of December, 1907, until paid, and his cost herein expended."

It appears that neither the verdict of the jury nor the judgment of the court found for appellee the logs sued for or their value. Consequently the only matter in contest upon this appeal is the judgment for \$55. Therefore this court has no jurisdiction of the appeal, and the same is dismissed.

PRICE et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

1. BURGLARY—STATUTES—CONSTRUCTION.

Ky. St. 1903, § 1163, punishing any person forcibly breaking and entering into any railroad car with intent to steal, etc., does not authorize a conviction for the breaking of a car with intent to steal, but the prosecution must show an entry for that purpose, though an entry, however slight, such as putting the hand through an opening with intent to steal, is sufficient, but proof that accused cut the seal on the car door and slid it back a little, and then pushed the

door back in place and walked away, is insufficient.

2. INDICTMENT AND INFORMATION—INCLUDED OFFENSES—STATUTES.

Under Cr. Code Prac. § 264, providing that, where an indictment charges an offense to have been committed with particular circumstances as to time, place, or intent, the offense without the circumstances or with part only is included, the court on the trial for a violation of Ky. St. 1903, § 1163, punishing the forcibly breaking and entering into a railroad car with intent to steal, on evidence that accused cut the seal on the car door, slid it back a little, then pushed the door back in place, and walked away, should instruct the jury on trespass as defined in section 1256.

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Preston Price and another were convicted of breaking and entering into a railroad car, and they appeal. Reversed and remanded.

Lavega Clements, Watkins & Birkhead and Peyton Whittinghill, for appellants. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellants were indicted, convicted, and sentenced to serve two years in the penitentiary for the violation of section 1163 of the Kentucky Statutes of 1903, which is as follows: "Any person who shall forcibly break and enter into any railroad depot, car factory, station house, railroad car, or express car, with intent to kill or rob any person therein, or to steal property, money, or anything of value therefrom, shall be deemed guilty of felony, and punished by confinement in the penitentiary not less than two nor more than ten years." From the evidence of the commonwealth it is reasonably certain that appellants broke the seal of the car with the intention of entering and stealing some whisky therefrom; but it is not intimated that they or either of them entered the car. The statements of the witnesses for the commonwealth upon this point were to the effect that they saw appellants break or cut the seal on the car door and slide it back a little, when they heard a train coming and pushed the door back in place, walked away 15 or 20 feet, and then were arrested. The statute is: "Any person who shall forcibly break and enter into any railroad depot," etc., "with the intention to steal property," etc., "therefrom." The statute does not authorize a conviction for the breaking of the car with the intent to steal therefrom, but there must also be an entering of the car for that purpose. However, we do not construe the statute as meaning that there should be an entering of the whole body into the car, but an entry into the car, however slight, such as putting the hand through the opening with the intent to steal property, etc., therefrom, would be an entry in the meaning of the statute; but the evidence for the commonwealth fails to show the slightest entry of the car.

The Attorney General cites the cases of

Darter v. Commonwealth, 5 S. W. 48, 9 Ky. Law Rep. 277, and **Cunningham v. Commonwealth**, 13 S. W. 104, 11 Ky. Law Rep. 783, as sustaining the action of the lower court. The question under consideration in the case at bar was not considered in the cases referred to. There are some careless expressions in those opinions that seem to sustain appellee's contention. In the **Darter Case** the indictment failed to allege the place where the car was broken and entered, and also failed to allege to whom the car belonged; and these were the only questions considered in that case. In the **Cunningham Case** the indictment failed to allege that the person forcibly broke and entered the car. The allegation was that he "willfully" broke and entered the car. The only question considered in that case was whether the use of the word "willful," instead of "forcibly," made the indictment insufficient. We have found no case where the question in the case at bar has been considered by this court. The statute requires both a breaking and entering with the intention to steal to constitute the offense; and in our opinion, under this language, the failure to prove the entering is just as fatal as a failure to prove the breaking. The offense charged is a statutory one, and the indictment must follow it and the proof sustain it to authorize a conviction.

On another trial, if there is a failure of proof as to the entering of the car, the court will instruct the jury for the offense of trespass as defined in section 1256 of the Kentucky Statutes of 1903. See section 264 of the Criminal Code of Practice and the case of **Commonwealth v. Willie Wells**, 112 S. W. 568 (the opinion in which was delivered the 23d day of September, 1908).

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent, herewith.

MORRIS v. RANDALL et al.

(Court of Appeals of Kentucky. Oct. 9, 1908.)

1. COURTS—INFERIOR COURTS—STATUTES—CONSTITUTIONAL PROVISIONS—"CITY AND TOWN."

Const. §§ 109, 135, 143, vesting the judicial power in designated courts, and authorizing the establishment of a police court in each "city and town," and declaring that all laws inconsistent with the Constitution shall cease on its adoption, repeal so much of the charter of the district of Clifton as provides for a police court thereof; the words, "city and town," referring to cities and towns classified by section 143.

2. PROHIBITION—OFFICE OF WRIT—"WRIT OF PROHIBITION."

Under Civ. Code Prac. § 479, defining the "writ of prohibition" as an order to an inferior court to prevent the usurpation of jurisdiction, and Cr. Code Prac. § 25, authorizing the circuit court, by writ of prohibition, to restrain other courts of inferior jurisdiction from exceeding their criminal jurisdiction, the circuit court may issue the writ of prohibition to prevent one, claiming to be police judge of a district, from executing a judgment of his court for a fine and

costs, where the provision creating the police court has been repealed.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5668-5674; vol. 8, p. 7767.]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Prohibition by Cora Randall and another against J. R. Morris, police judge of the district of Clifton, to prevent defendant from executing a judgment against Cora Randall. From a judgment granting the writ, defendant appeals. Affirmed.

C. L. Raison, Jr., for appellant. Aubrey Barbour, for appellees.

SETTLE, J. This is an appeal from a judgment of the Campbell circuit court granting a writ of prohibition to prevent appellant, J. R. Morris, claiming to be police judge of the district of Clifton, from executing a judgment against appellee Cora Randall, rendered in his court, for a small fine and costs, imposed on account of a misdemeanor, for which she was tried and convicted under a warrant. The petition for the writ was filed by the appellee Cora Randall and her husband. The answer of appellant sets forth his election and qualification as police judge of the district of Clifton, and averred that the office of which he is the incumbent was created, and is yet existing, by virtue of sections 3 and 5 of an act of the General Assembly, entitled "An act to incorporate the district of Clifton, in Campbell county, approved February 1, 1888" (Laws 1888, pp. 256, 257, c. 158), and further averred that appellant, as such alleged police judge, had jurisdiction of the person of appellee Cora Randall, and of the offense of which she was charged, and that her trial and conviction were legally had and effected. A demurrer was sustained to the answer by the circuit court, and, the appellant failing to plead further, the writ of prohibition was granted upon the ground that the office and court of which appellant claims to be the incumbent and judge have no legal existence, the provisions of the act establishing them having been repealed by the present state Constitution. Is it true that the present Constitution has repealed these provisions of the act incorporating the district of Clifton, whereby a police court of that district was established? This is the principal question presented by the appeal, and its solution involves careful consideration of the several provisions of the Constitution bearing upon the subject.

Section 109 of the Constitution declares:

"The judicial power of the commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

Section 135 provides:

"No courts save those provided for in this Constitution, shall be established."

The Constitution then proceeds to provide for the establishment of the Court of Appeals, circuit courts, quarterly courts, justice's courts, fiscal courts, and police courts. The provisions of the Constitution, with respect to the establishment of police courts are to be found in section 143, which is as follows:

"A police court may be established in each city and town of this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within said limits as justices of the peace have. The said courts may be authorized to act as examining courts, but shall have no civil jurisdiction: Provided the General Assembly may confer civil jurisdiction on police courts in cities and towns of the fourth and fifth classes, and in towns of the sixth class having a population of 250 or more, which jurisdiction shall be uniform throughout the state, and not exceed that of justices of the peace."

It is patent that the Constitution makes no provision for creating police courts, except in cities or towns, as specified in section 143. If, therefore, the district of Clifton cannot be held to be a city or town within the meaning of that section, no constitutional provision is made for the establishment of a police court in that district, nor for the retention or continuation of one therein already established. Obviously, the words "city and town," as used in section 143, do not embrace a district or quasi municipality, such as the district of Clifton, unless their meaning as used in section 143 differs from that given the same words appearing in section 156 of the Constitution, providing for the classification of cities and towns. The words "city and town" found in section 143, refer to the cities and towns classified by the Constitution. This we know, not only from the general rule of construction "that like expressions used in the same instrument are given the same interpretation, unless the contrary is manifest from the entire context," but also from the reference, in the latter provision of that section, to cities and towns of the fourth, fifth, and sixth classes.

While the district of Clifton is one of the "other municipalities" mentioned in various provisions of the Constitution, relating to taxation, it is not a town. It is of like character to the district of Highlands, of which it was said by this court, in *City of Covington v. District of Highlands*, 113 Ky. 612, 68 S. W. 669: "The district is not a town, and therefore could not be properly classified as such, as the Legislature was required by the Constitution to do." Again in *Dyer v. City of Newport*, 94 S. W. 25, 29 Ky. Law Rep. 656, the court, in speaking of a similar district, said: "It is a municipality,

created by an act of the Legislature prior to the adoption of the present Constitution. Its legal autonomy has not since been changed." But the fact that the autonomy of the district has been upheld does not prove that every provision of its charter is now in force, and such of those provisions as are inconsistent with the present Constitution must be treated as abrogated or repealed. In the case of the *City of Covington v. District of Highlands*, supra, the right of the district to levy and collect taxes was sustained, the court basing its conclusion principally upon the fact that the provisions of the Constitution relating to taxation, in using the terms "towns, cities, taxing districts and other municipalities," contemplated the continued existence of certain municipalities in the commonwealth, which could not be classified as cities or towns, but are embraced by the phrase "other municipalities." Constitution, §§ 157, 159, 161, 164, 165, 179-181. In *Commonwealth v. Petri*, 122 Ky. 20, 90 S. W. 987, this court decided that certain provisions of the charter of the district of Highlands, relating to the granting of liquor license, were still in force, citing the previous case of *City of Covington v. District of Highlands* to the effect that the autonomy of the district had been upheld, and then proceeded to hold that the provisions of the charter of the district of Highlands respecting liquor licenses were not in conflict with the Constitution, or subsequent legislation. The question before us is not as to the validity of the charter of the district of Clifton as a whole, but as to the particular provisions thereof respecting the police court and judge, and it may be here remarked that, where the Constitution refers to courts in connection with cities and towns, the phrase, "taxing districts, and other municipalities" nowhere appears. In other words, under the present Constitution a police court cannot legally exist outside of a city or town. This we think plain, in view of the wording of sections 109, 135, which limit the judicial department of the commonwealth to the courts established by the present Constitution; and the language of the schedule of that instrument, which declares that "the provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws, which are inconsistent with such provisions as require legislation to enforce them, shall remain in force until such legislation be had, but not longer than six years after the adoption of this Constitution, unless sooner amended by this present Assembly," clearly shows that this was the intention of the framers of the Constitution. Section 109 of the Constitution is obviously mandatory, and was so declared by this court in the case of *Roberts v. Hackney*, 100 Ky. 265, 58 S. W. 810, 59 S. W. 328, wherein it is held that judicial power cannot be exercised by any officer, unless by some provision of the Constitution.

While it may be a hardship to the citizens of the district of Clifton to deprive them of a police court, this argument cannot stand as against the imperative provisions of the Constitution, which were intended to provide a uniform judicial system as to the establishment of courts, and as to their respective jurisdictions. However, it may be said that the abolition of the police court in the district of Clifton should not prove disastrous, as law and order can be maintained in the district through the magistrates and peace officers of the county of Campbell. Moreover, if this district has become so populous as that the welfare of its people require fuller municipal power than the district at present possesses, the district, or a portion of it, may by proper proceedings become one of the classified cities.

We are clearly of opinion that a writ of prohibition was the proper remedy in this case. It is a preventive, rather than a corrective, remedy, its office being to prevent the usurpation or excess of jurisdiction by judicial tribunals, and to keep the courts within the limits to which the law confines them; and we do not doubt that, in the absence of any other adequate remedy, it lies to prevent unauthorized individuals from usurping judicial power. Civ. Code Prac. § 479; Crim. Code Prac. § 25; *Ex parte Roundtree*, 51 Ala. 42; *Walcut v. Wells*, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478.

For the reasons indicated, the judgment of the lower court is affirmed.

MOORE v. PENNINGTON et al.

(Court of Appeals of Kentucky. Oct. 14, 1908.)

1. VENDOR AND PURCHASER—CONTRACT—MISTAKE—EVIDENCE.

Evidence, in an action by a purchaser of land to recover land other than that conveyed to him, but included in the description in the contract of sale, held sufficient to show it was included by mistake.

2. SAME.

As a circumstance tending to show that the land for which plaintiff sues, as included in defendant's contract of sale, but not in the deed made pursuant thereto, was included in the contract by mistake, the fact may be shown that when previously plaintiff was sued on his purchase-money notes, he asked for a rebate and made a compromise, based on the contract having included other land to which he did not get title, and then made no claim on account of the land in controversy.

Appeal from Circuit Court, Jackson County.

"Not to be officially reported."

Action by Ed Moore against Elizabeth Pennington and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Pleas Isaacs, for appellant. A. W. Baker, for appellees.

CLAY, C. Appellee Elizabeth Pennington owned a tract of about 440 acres of land in Jackson county, Ky. Portions of this land she sold off to her sons-in-law. On September 30, 1885, she executed a title bond to

appellant, Ed Moore, by the terms of which she, in consideration of \$1,000, agreed to convey to him the tract of 440 acres with the exception of four tracts sold to certain parties named in the bond. In the year 1907 appellant, Moore, instituted this action to recover of appellee a tract of land consisting of about 20 acres, which it appears was included in the description of the land embraced within the title bond, and which he claims appellee had refused to convey to him by deed. Appellee defended on the ground that the 20 acres in controversy was not intended to be embraced in the boundary set forth in the title bond, but that, by mistake of the draftsman, it was not excluded therefrom. Appellee made the further defense that she gave two of the purchase notes of \$100 each to her daughters, Martha Dunagin and Rachel Dunagin; that when these two notes became due, her daughters instituted an action against appellant, Ed Moore, asking for judgment on the notes and a sale of the land to pay same; that appellant filed his answer in said action, alleging that when appellee Elizabeth Pennington sold the land to him, she failed to except therefrom the portion she had previously sold to Samuel E. Johnson, which tract was reasonably worth \$300, and asking a rebate from the purchase price to the extent of said sum of \$300; that during the progress of the trial the suit was compromised by appellant agreeing to pay \$125, and by appellee making a deed to him of the land she had contracted to convey; that this deed was accepted by appellant in full satisfaction of all land which appellee had contracted to convey to him. Depositions were taken, and the case submitted to the court, and judgment rendered in favor of appellee. From that judgment Ed Moore prosecutes this appeal.

The testimony of the appellant is to the effect that he purchased all the tract of 440 acres owned by Elizabeth Pennington, with the exception of the four tracts which were excepted in the title bond. The tract in controversy in this case is not one of the four tracts excepted. The testimony for appellee conduces to show that the 20 acres in controversy in this action did not lie adjoining the tract intended to be conveyed to appellant; that before the sale was effected, certain parties, whose depositions are given in this case, went out upon the farm and showed appellant the lines of the tract which he purchased, and he said he was satisfied, as he had seen enough. If the evidence in this case consisted only of the testimony of appellant on one side, and of appellee on the other, we might hesitate to conclude that any mistake was made in the title bond. In addition to the testimony of appellee, however, two or three other witnesses testified that the 20 acres in controversy did not adjoin the tract sold to appellant, and were not embraced within the lines which they point-

ed out to appellant as the lines of the tract which he intended to purchase. While the compromise effected in regard to the balance of the deferred payment did not relate to the tract of land in controversy, and may not be good as a plea of estoppel, yet it is a circumstance that must be considered in determining whether or not a mistake was made in the title bond. If, as appellant claims, there was a deficit of land, and there should therefore be a rebate from the purchase price, we cannot understand why he did not at that time make claim to the whole amount of the deficit. His asking a rebate on account of the Johnson land, and thereafter accepting a deed from appellee which did not include the land in controversy in this action, conduces to show that he actually received, by the deed which appellee made to him, all the land which he purchased and which she contracted to convey.

For the reasons given, the judgment is affirmed.

CHESAPEAKE & O. RY. CO. et al. v. MORGAN.

(Court of Appeals of Kentucky. Oct. 13, 1908.)

1. CARRIERS — CARRIAGE OF PASSENGERS — PLEADING.

The original petition, in a passenger's action against a carrier, alleged generally that plaintiff's injuries were received because of negligence in operating the train, whereby it was wrecked and the car in which she was riding derailed. An amended petition was filed, which did not change the allegations of the original petition, but alleged the additional grounds that the carrier negligently equipped the railroad with small iron rails, about one-third the size and weight of those used on its main track; that it negligently permitted the rails to become insecure, and the track to become dangerous. *Held*, that plaintiff was not precluded from relying on the negligent operation of a car with a defective axle on the ground that the amended petition stated the particular acts of negligence, and omitted to state the negligent operation of a car with a defective axle.

2. APPEAL AND ERROR—REVIEW—SUBSEQUENT APPEAL—PREVIOUS DECISION AS LAW OF THE CASE.

Where, on the second trial of an action against a carrier for injuries to a passenger, the pleadings were the same as on the first trial, and on appeal from the judgment on the first trial it was held that the pleadings presented the question of the right to recover because of a defective axle, such former decision settled the question, and precluded the right to raise it on a second appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368.]

3. CARRIERS—INJURY TO PASSENGERS—SAFETY OF APPLIANCES—DUTY OF CARRIER.

Where a passenger is injured by a breakdown in one of the cars of the train, the carrier to defeat recovery must show, not only that it was due to a cause which the exercise of the utmost human skill and foresight could not prevent, but that, if the accident was due to a latent defect in the material or construction of the car, it could not have been discovered either by the carrier or the builder in the exercise of such care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1177.]

4. SAME—ACTION FOR INJURIES—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a carrier for injuries to a passenger, *held* to warrant a verdict for the passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1307-1314.]

Appeal from Circuit Court, Lewis County.
"To be officially reported."

Action for personal injuries by Mary J. Morgan against the Chesapeake & Ohio Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Wadsworth and Le Wright Browning, for appellants. Allen D. Cole, for appellee.

NUNN, J. This appeal is from a judgment for \$600 in favor of appellee. Appellant asks a reversal of the judgment for two reasons: First, because the verdict of the jury was flagrantly against the evidence; second, on account of error in instruction No. 1 given by the court to the jury. We will consider the last proposition first. The instruction complained of is as follows: "The court instructs the jury that the defendants, in undertaking to carry plaintiff as a passenger on their train, did not insure her absolute safety, but it was their duty to exercise the highest degree of practicable care and diligence, consistent with the operation of the train on which she was a passenger, to safely convey her to her destination. And if the jury believe from the evidence that the defendant negligently suffered the track and roadbed of the Kinniconick & Freestone Railroad to become out of repair, or negligently operated on said road a large and heavy locomotive engine and train of cars over small iron rails not adapted or suitable for the operation of such locomotives or train of cars, or negligently suffered such rail or rails to become loose or insecure, or negligently operated on said road a car with a defective axle, and shall further believe from the evidence that, by reason of such negligence, the coach in which plaintiff was riding was derailed or wrecked, and that she, while in the exercise of ordinary care for her own safety, was thereby jarred or thrown down to said car or against a seat in same, and thereby bruised, made sore, or sick, they will find for her, and fix the damages as in instruction No. 3, not exceeding the sum of \$2,000." Appellant's contention is that the insertion of the words "or negligently operated on said road a car with a defective axle" was erroneous. It concedes that, under the allegations of appellee's original petition, in which the allegation of negligence was general, she would have been entitled to rely upon the matter complained of in the instruction. But it is claimed that under the amended petition filed by her she stated definitely the particular acts of negligence by reason of which she received her injuries, and in enumerating them she omitted to state the negligent operation on the road of a car with a de-

fective axle. Appellant's contention cannot be sustained for the reasons first, that in the original petition it was alleged that her injuries were received on account of the negligence and want of due care on the part of the officers and servants of appellant in operating the train, and by reason thereof the train was wrecked and the car in which she was riding was thrown off of the track, etc. The amended petition did not modify or change the allegations of the original petition, but alleged additional grounds, to wit, that the defendant, now appellant, negligently equipped the said Kinniconick & Freestone Railroad with small iron rails, about one-third the size and weight of those used on the main track of defendant; that it carelessly and negligently suffered the rails on the track in question, at the place where appellee was injured, to become loose and insecure, and the track thereat to become defective and dangerous, etc. The second reason is that this question was considered by this court on the former appeal of this case. See *Morgan v. Chesapeake & O. R. Co.*, 105 S. W. 961, 32 Ky. Law Rep. 330. On the first trial the court gave an instruction, which is, in substance, the same as No. 1, but failed to insert in it the words complained of in instruction No. 1 given on the last trial, and refused to give an instruction allowing the jury to consider the question at all. Appellant succeeded on that trial, and Mary J. Morgan appealed, and the main ground for reversal was the failure of the court to let the jury consider the question of a defective axle. Appellant's counsel, in their brief in that case, contended that the instruction, as given by the lower court, was correct, and the question of a defective axle should not have been submitted to the jury, for the reason that by her amended petition she eliminated all grounds for recovery on that point. The same argument was made then as upon this appeal. It will be observed that the opinion on the former appeal deals almost entirely with the question of defective axle and latent defects therein; and in response to the criticism made by appellant's counsel of appellee's pleadings this court said: "The pleadings sufficiently present the questions discussed." The former opinion, therefore, settles this question, and precludes appellant from raising and having it again adjudicated in this case, as her pleadings were the same in the first as in the second trial.

Appellant's claim that the verdict of the jury was flagrantly against the evidence is based solely upon its contention that on the second trial it presented testimony showing conclusively that the sand hole in the axle could not have been discovered by the exercise of the utmost human skill and foresight, and therefore it was entitled to a peremptory instruction. In addition to the testimony produced by appellant upon the first trial, it introduced its car inspector, located

in Covington, Ky. He stated that he went down both sides of the cars when they were in the yard, and examined them carefully by looking at them, and remedied any defects that he could discover; that he examined about 100 cars in this way on each day. Appellant also introduced the superintendent of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, which company was the owner of the car on which the axle broke. This superintendent testified that he managed the construction of this company's cars, and that the axle when put into car appeared to be perfect. But it developed upon his examination that he was not connected in any way with the foundry that molded the axle. He gave his information as the method of testing the strength of the axles by the foundry people. In the former opinion this court said: "When the passenger has proved his injury as the result of a breakage in the car, or the wrecking of the train on which he was being carried, whether the defect was in the particular car in which he was riding or not, the burden is then cast upon the carrier to show that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent. And the carrier in this connection must show, if the accident was due to a latent defect in the material or construction of the car, not only that it could not have discovered the defect by the exercise of such care, but that the builders could not, by the exercise of the same care, have discovered the defect or foreseen the result. This rule applies the same whether the defective car belonged to the carrier or not." Under the testimony the jury had a right to conclude that the builders or makers of the axle might have, by the exercise of the kind of care referred to in the above quotation, discovered the defect in the axle or foreseen the result; and the jury had a right to determine that there was not sufficient evidence upon this point to overcome the presumption in favor of appellee. Suppose, however, that we are mistaken in this conclusion; appellee introduced testimony showing the defective condition of the roadbed, the ties, the rails, and their fastenings, as stated in appellee's amended petition, and the jury had a right to conclude that her injuries may have been received as a result of this defective condition, which may have caused the axle to break.

Finding no error prejudicial to appellant, the judgment is affirmed.

COMMONWEALTH v. MORRELL REFRIGERATOR CAR CO.

(Court of Appeals of Kentucky. Oct. 18, 1908.)

1. CORPORATIONS — PENALTIES — PENAL ACTIONS — STATUTES.

Under Cr. Code Prac. § 11, providing that a public offense punishable by fine only may be prosecuted by a penal action, and Ky. St. 1903, § 4028, authorizing an action for a penalty, a

penal action lies for the penalty imposed by section 4087, declaring that a corporation refusing to make reports required by law shall be guilty of misdemeanor, and shall be fined.

2. VENUE—ACTION FOR PENALTY.

Under Ky. St. 1903, § 4087, making a corporation refusing to make required reports guilty of a misdemeanor, the offense is committed when it fails to make the report to the auditor at his office in Frankfort, and under Cr. Code Prac. § 11, providing that proceedings in penal actions are regulated by the Code of Practice in civil actions, and Civ. Code Prac. § 63, providing that actions must be brought in the county where the cause of action arose, a penal action against the corporation must be brought in Franklin county.

Nunn, J., dissenting.

Appeal from Circuit Court, Carlisle County.

"To be officially reported."

Action by the commonwealth, by T. C. Halteman, revenue agent, against the Morrell Refrigerator Car Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Nichols & Son, for the Commonwealth. John E. Kane and Humphrey, Davie & Humphrey, for appellee.

HOBSON, J. The Morrell Refrigerator Car Company is a Kentucky corporation, having its principal place of business in Carlisle county. On July 24, 1905, in accordance with section 561, Ky. St. 1903, it went into liquidation, and turned over all its property to William H. Foster, in trust to pay off all just demands against the company and to distribute the remaining assets among the stockholders. On September 18, 1905, this action was instituted in the Carlisle circuit court by T. C. Halteman as revenue agent in the name of the commonwealth and of himself against the car company. It was charged in the petition that the defendant had willfully failed and refused between the 15th day of September, 1904, and the 1st day of October, 1904, to make and deliver to the Auditor of Public Accounts the statement and report required by section 4078, Ky. St. 1903, and that it willfully failed to make that report every day since the 1st day of October, 1904, for the period of 343 days, by reason of which it had become liable to the commonwealth for a fine of \$1,000 and a penalty of \$50, for each day of the time, amounting in all to the sum of \$18,150, for which judgment was prayed, with a penalty of 20 per cent. thereon, and cost. A special demurrer was filed to the petition on the ground that the court had no jurisdiction of the action. The demurrer was sustained by the court and the proceeding dismissed. From this judgment, the appeal before us is prosecuted.

The statute under which the proceeding was instituted is as follows: "Whenever any penalty is provided for in this chapter, it may, unless otherwise especially stated, be enforced either by indictment in the circuit court of the county, or by action in any court having competent jurisdiction." Ky. St. 1903,

§ 4028. "Any corporation or officer thereof, willfully failing or refusing to make reports as required by this chapter shall be deemed guilty of misdemeanor, and for each offense shall be fined one thousand dollars, and fifty dollars for each day the same is not made after October the first of each year." Ky. St. 1903, § 4087. Section 11 of the Criminal Code of Practice provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation. If the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions." The punishment for the offense for which the defendant was prosecuted was a fine, and therefore the proceeding is covered by this section. Section 63 of the Civil Code of Practice, which regulates the jurisdiction of courts in cases of this character so far as material, is as follows: "Actions must be brought in the county where the cause of action, or some part thereof, arose, for the recovery of a fine, penalty or forfeiture, imposed by statute." It follows that the action must be brought in the county where the cause of action, or some part of it, arose. The proceeding is based upon the allegation that the defendant has failed and refused to make a certain report to the Auditor. The Auditor's office is in Frankfort. It is contemplated by the statute that the report shall be made to the Auditor at his office. The offense was committed when the defendant failed to make the report to the Auditor and the cause of action then arose. It is not material where the defendant signed the report, or where it was sworn to. The offense was committed when the report was not filed with the Auditor at his office in Frankfort; and therefore the cause of action arose in Franklin county. In several cases where corporations had their office in Jefferson county it was insisted that the Franklin circuit court had no jurisdiction; but this court uniformly held that the cause of action arose in Franklin county, and that the proceeding was properly instituted there. *Louisville, etc., Ferry Co. v. Commonwealth*, 104 Ky. 726, 47 S. W. 877; *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S. W. 1069, 57 L. R. A. 33. A contrary rule was not laid down in *Commonwealth v. Grand Central Building & Loan Co.*, 97 Ky. 325, 30 S. W. 626. In that case the defendant was fined for carrying on business without having complied with the provisions of the statute. The business was carried on in the county in which the proceeding was instituted. The offense consisted in thus carrying on business, and therefore the proceeding was properly instituted in the county in which the business was done. In cases of this sort the cause of action of the commonwealth accrues when the act is done which entitles it to demand the

penalty, and it accrues in the county where the act is done. The act here which entitled the commonwealth to demand the penalty was the omission to file the report with the Auditor. This omission having occurred in Franklin county, the cause of action arose there, and the proceeding could only be instituted in that county. This conclusion makes it unnecessary for us to consider the other questions discussed by counsel.

Judgment affirmed.

NUNN, J., dissenting.

**RAWLINGS' GUARDIAN et al. v.
RAWLINGS.**

(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. EXECUTORS AND ADMINISTRATORS COMPELLING ACCOUNTING—SUFFICIENCY OF PETITION.

In an action by children of a deceased son, who died without having settled his account as administrator of his father's estate, to require the administrator de bonis non to settle the estate, a petition which does not aver that any estate came into the hands of the administrator de bonis non, nor that at the time the petition was filed there was any estate left by the grandfather undistributed, is insufficient.

2. SAME—PARTIES.

Where children of a deceased administrator of an estate in which they have an interest bring an action against the administrator de bonis non for a settlement, the original administrator's estate should be administered, and his administrator made a party to the action.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Petition by Alson Rawlings' guardian and others against J. W. Rawlings for a settlement of the estate by one Kirkland, administrator de bonis non of Alson Rawlings. Judgment of dismissal, and plaintiffs appeal. Affirmed.

H. P. Cooper, for appellants. H. W. Rives, for appellee.

CARROLL, J. The petition, to which a demurrer was sustained, was filed by the children of R. W. Rawlings, and charged in substance that Alson Rawlings died intestate in 1889, leaving surviving him his widow and four children; that in January, 1900, his son R. W. Rawlings was granted letters of administration on the estate of the decedent, and continued to act until 1903, when he died without having settled his accounts as administrator or having administered the estate of the decedent; that thereafter one Kirkland was appointed administrator de bonis non, and that he has never filed an inventory of the estate or made any settlement as administrator; that Alson Rawlings owned considerable real and personal property at the time of his death; that, excepting his son R. W. Rawlings, Alson Rawlings had made advancements to his children, the amounts of which are not stated. It was asked that the case be referred to a commissioner, and that the administrator, Kirkland,

make a settlement of the estate, and for all other proper relief.

There is no averment that any estate came into the hands of the administrator de bonis non; nor is there any averment that at the time the petition was filed there was any estate left by Alson Rawlings undistributed. Nor does it appear that any administration was granted upon the estate of R. W. Rawlings. An averment that there was some estate of the decedent to be distributed was indispensable to the maintenance of the action. If there was no estate to be distributed, we are unable to perceive the reason for the institution of an action to settle the estate. Aside from this, R. W. Rawlings, the father of appellants, the person under and through whom they claim an interest in the estate of Alson Rawlings, their grandfather, was administrator of Alson Rawlings' estate for some three years; and the presumption is that, if Alson Rawlings left any personal estate, it was taken into possession and disposed of in some way by the administrator. And so it would seem that administration on the estate of R. W. Rawlings was necessary, and that the administrator should be a party to this action. But it does not appear that any person administered on the estate of R. W. Rawlings.

The petition did not state facts showing plaintiffs entitled to any relief, or state any cause of action, and it was properly dismissed.

**CITY OF COVINGTON v. CHESAPEAKE &
O. R. CO.**

(Court of Appeals of Kentucky. Oct. 15, 1908.)

JUDGMENT—RES JUDICATA.

A judgment of dismissal without prejudice of an action by a city for the removal of piles from land claimed as a street was a nuisance, because the city did not bring the proper action, which judgment was affirmed on appeal by the city without a cross-appeal by defendant, is not a bar to a subsequent suit by the city for the land.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by the Kentucky Baptist Educational Society against the Chesapeake & Ohio Railroad Company and the city of Covington, in which the city filed a cross-petition for judgment for the real estate in controversy. From a judgment dismissing the cross-action, the city appeals. Reversed and remanded.

F. J. Hanlon, for appellant. Galvin & Galvin, for appellee.

HOBSON, J. The trustees of the Kentucky Baptist Educational Society sold and conveyed to the Chesapeake & Ohio Railroad Company a lot in Covington, and brought this suit to enforce the payment of the purchase price, making the railroad company and the city of Covington defendants, and alleging in the petition that the city of Covington was setting up claim to the property. The city filed an answer in which it alleged that the

lot was a part of one of its streets and was its property, making its answer a cross-petition, and praying judgment for the property. The railroad company pleaded a judgment rendered in a former action instituted in the year 1890 in bar of the cross-petition of the city. The circuit court sustained the plea of former judgment and dismissed the cross-action. The city appeals.

In the spring of 1890, when the railroad company had taken possession of the lot under its deed from the Kentucky Baptist Educational Society and was inclosing it with a fence, the city brought a suit against the railroad company to obtain an injunction restraining the defendant from laying piles or otherwise obstructing the public use of the strip. An answer was filed on August 4, 1890, denying the dedication of the strip of ground or the right of the city to control it, and asserting ownership and possession of the strip in the defendant. The city by its reply admitted the possession by the defendant of the strip. In this condition of the pleadings, the case was submitted, and the court entered the following order on November 5, 1890: "The steps show that the cause is under submission on the motion by the plaintiff, and it does not appear that the defendant objected. The submission would be set aside if the defendant had objected. The plaintiff has not prayed for the possession of the strip of land, and it admits the possession of the defendant. It might otherwise have sent its street commissioner to remove obstructions. There is nothing in the driving of piles to injure the plaintiff, if it has a right to the possession. If it can get a judgment for the possession, it may thereby gain the piles. Its remedy is not by injunction, which is the only relief sought. The injunction is dissolved, and it is adjudged that the defendant recover of the plaintiff its costs in that behalf. The action is not dismissed, and the plaintiff may amend and claim possession. Then this cause will stand as an action of ejectment, with the issue made."

The city did not amend its petition as suggested by the court, and entered a motion that the court set aside its order. This motion on November 10th was overruled; the order reading as follows: "The original reply denies that the defendant has any right to the strip of land in controversy, but does not deny the alleged possession of the defendant, and goes on to allege facts to show a dedication of the strip of land to the public as a street. It is not clear that these allegations show a dedication; but they are entirely unnecessary inasmuch as the petition contained sufficient averments of dedication. In the conclusion of the reply it is argued that a plat made in 1857 vested the strip in the city of Covington as and for a street, and that it has been ever since so held open and used. This does not amount to a denial of the possession alleged by the defendant.

There is nothing in the judgment and order of November 5th to injure the plaintiff. All it has to do is to amend the prayer of its petition and ask for possession. If it can succeed in showing that defendant has no right to hold the strip of land, it will gain the possession and the piles or splies the defendant may have put there, or any building, even if made of ingots of gold."

The city still refused to file an amended petition, and on February 16th the court entered an order in these words: "The plot of Rickey made in 1842 was not a dedication of the strip of ground in contest, which was not then in the city. If the Baptist Institute had sold a lot calling for the map, the vendee might have claimed that all the streets laid down on the map were dedicated as public ways. In 1857 the strip was in the city, but the sale to Walker of the whole plat was not a dedication of the streets to the city. By the sale of lot No. 370 by Walker to Johnson in 1859, Johnson had the right to claim the strip as a highway, but he did not insist on the right; on the contrary, he conveyed back to Walker in 1865, and put things in the status of 1857. The deed to Johnson was the only conveyance by Walker, according to these papers. It did nothing indicating that the strip was claimed as a street until it brought this action in June, 1890. Its two witnesses did it more harm than good. One of them testified that he was the impersonation of justice to all men. No dedication has been established. The plaintiff found the defendant in possession in June, 1890—as a trespasser it may be, but in possession. The Baptists made a deed to the defendant in August, 1890. Then, in an amendment, the defendant claimed the strip and all the land adjoining it as its own. The Baptist Institute has no interest in the strip since 1857. The lease of the Kentucky Central Railway Company is of no use. It is not connected with the Baptists, nor with Walker. Neither side in this contract has shown a right to the strip. They should be put where they were. It is adjudged that the injunction is dissolved and the petition dismissed without prejudice, and that the defendant recover of the plaintiff its costs herein. The plaintiff excepts, and prays an appeal to the Court of Appeals, which is granted."

The city prosecuted its appeal to this court, and the judgment of the circuit court was affirmed. See *City of Covington v. C. & O. R. R. Co.*, 20 S. W. 538, 14 Ky. Law Rep. 488. This court, after setting out the condition of the record, said: "The reply denied that the appellee owned the strip of land, but it did not deny the appellee was in possession of it, and upon the admission that the appellee was in possession of the strip the court held that an action of ejectment was the proper action, and not an action for nuisance, and gave the appellant leave to amend the prayer of its petition to that effect;

but, instead, it offered an amended reply, attempting to deny that the appellee was in possession of the strip of land, not changing the action. But the court refused to allow the amended reply to be filed, and we cannot say that the court, under the circumstances, abused its discretion in rejecting the amendment. So, as the pleadings stand, the appellant is seeking to have the piles removed, etc., notwithstanding the appellee is in the possession of the land. It seems to us, in this condition of the record, the proper remedy was by an action of ejectment."

After saying this the court went on to discuss the evidence, and to show that, as the record was presented, there was no evidence sufficient to sustain the city's claim that the lot had been dedicated as a street or belonged to it; but this part of the opinion was only added to show that the city had not manifested its right to the property, and had no ground for complaint of the judgment of the circuit court, which dismissed its petition without prejudice. While the circuit judge said in his opinion some things of the same sort, he wound up his judgment by simply dismissing the plaintiff's petition without prejudice, and he did this because the city had misconceived its remedy, and had brought an action in equity for an injunction to restrain a trespass upon the property, when its remedy was an action of ejectment to recover the property. Taking all of the orders of the circuit court together, no one can doubt that the circuit judge dismissed the plaintiff's petition as he did without prejudice, not on the merits of the case, but because the city had not brought her action in the proper way. The rule is well settled that a judgment which does not go to the merits, and only dismisses the plaintiff's petition without prejudice, is not a bar to another suit. In 2 Black on Judgments, § 715, it is thus stated: "A judgment given against the plaintiff on the single ground that he has mistaken his remedy or form of action is no bar to his subsequent action brought in the proper form." See, to same effect, 1 Freeman on Judgments, §§ 260, 265, and Rice v. West, 42 S. W. 116, 19 Ky. Law Rep. 832.

The city appealed to this court from the judgment of the circuit court dismissing its petition without prejudice. There was no cross-appeal. The only question before this court on the appeal of the city was whether the circuit court did right in dismissing its petition without prejudice; and in affirming the judgment of the circuit court this court simply decided that the circuit court had properly dismissed the petition without prejudice. The affirmance added nothing to the judgment of the circuit court. If the railroad company had conceived itself aggrieved by the form of the judgment, it might have taken a cross-appeal; but, when it acquiesced in the judgment as it was written, it cannot demand for it a greater effect than its terms warrant.

The judgment of the circuit court is therefore reversed, and cause remanded for further proceedings consistent herewith.

HOME SAVINGS FUND CO. BLDG. ASS'N v. DRIVER et al.

(Court of Appeals of Kentucky. Oct. 14, 1908.)

1. BUILDING AND LOAN ASSOCIATIONS—RIGHT TO ACQUIRE REAL ESTATE NECESSARY FOR CARRYING ON BUSINESS.

The charter of a building and loan association, as originally granted, gave it the power to buy and hold real estate. Ky. St. 1903, § 573, repeals all charter provisions inconsistent with the provisions of the chapter including that section, and all powers which could not be obtained under the provisions of that chapter. Section 870 authorizes a building and loan association to purchase real estate upon which it may have a mortgage, lien, or judgment, and to dispose of the same within five years after it has acquired title. Const. § 192, and Ky. St. 1903, § 567, each forbid a corporation to hold any real estate, except that necessary for its business, for a longer period than five years. Held, that section 870, when read in connection with the charter provision of the association, as originally granted, and section 567 cannot be construed as a limitation on the right to acquire and hold real estate, but rather grants an additional power to the association to protect itself in the collection of debts; and hence the association could acquire and hold such real estate as might be necessary to carry on its business, to be held without limitation as to time.

2. SAME—REASONABLE EXERCISE OF POWER.

The purchase of a plot of ground 22½ feet by 97 feet cannot be said to be an unreasonable exercise of the power of a building and loan association to acquire and hold real estate necessary to its business, but on the contrary is quite reasonable.

3. SAME.

The power of a building and loan association to acquire and hold real estate necessary to its business carries with it the right to pay therefor from its accumulated moneys.

4. SAME—"NECESSARY EXPENSE."

The acquisition of a place or home by a building and loan association for the conduct of its business is a "necessary expense," within Ky. St. 1903, § 863, making provision for the allowance of necessary and proper expenses from moneys accumulated.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4715, 4716.]

5. SAME.

A building and loan association, in erecting or owning a building of more than sufficient capacity to accommodate its own business, and leasing the unused portions thereof for the time being, or until such time as they may be needed by the association, does not engage in another business than that authorized by its charter, in violation of Const. § 192, or Ky. St. 1903, § 567.

Appeal from Circuit Court, Jefferson County.

"To be officially reported."

Action between the Home Savings Fund Company Building Association and H. B. Driver and another. From the judgment, the association appeals. Affirmed.

Thos. A. Baker and John Manly, for appellant. Davis W. Edwards, L. A. Hickman, Boyce Watkins, and Frank Withers, for appellees.

LASSING, J. The four questions involved in this appeal are: First, the right of a building association to acquire such real estate as may be necessary and proper for carrying on its legitimate business; second, the right of such a building association to use the money accumulated, or any part thereof, in paying for such real estate; third, can such building association purchase more real estate, or erect or remodel a building thereon, so that the same shall contain more space or room than is sufficient for carrying on its legitimate business, and if it did so build more room than was necessary for the legitimate and proper conduct of its business, would it have the right to rent out such unused or unoccupied space? and, fourth, if it so acquired real estate, could it hold it for a longer period than five years? These questions were raised by the Home Savings Fund Company Building Association of Louisville, Ky., when negotiating with appellees for the purchase of a lot 22½ feet front by 97 feet deep on Green street, east of Fifth street, in the city of Louisville. Said association was chartered by an act of the Legislature in 1889, under the corporate name of "Home Savings Fund Company." Laws 1889, p. 477, c. 1426. Among the powers conferred upon it by its charter is the right to "have, purchase and receive, possess, enjoy and retain, sell, convey or otherwise dispose of lands," etc. On September 27, 1897, the said association amended its articles of incorporation by adding thereto the words "Building Association" to comply with the provisions of section 856 of the Kentucky Statutes of 1903.

Section 573 of the Kentucky Statutes of 1903 provides that: "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law which are inconsistent with the provisions of this chapter, concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation, which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897," etc. This section expressly repeals any privilege or right conferred by the charter of the said association which is in conflict with the statutory provisions regulating corporations, as found in chapter 32 of the Kentucky Statutes of 1903. It is argued that section 870 of the Kentucky Statutes of 1903, which provides as follows: "Any such corporation may purchase at any sale, public or private, any real estate upon which it may have a mortgage, lien or judgment, or in which it may have an interest, and may dispose of the same at pleasure, but within five years after it has acquired title thereto"—only authorizes a building association to purchase real estate upon which it may have a mortgage, lien, or judgment; that it has no right to purchase except as expressly authorized by this section of the statute. That

this section restricts its right in the purchase and ownership of real estate, and, that while section 192 of the Constitution, which is as follows: "No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its business, for a period longer than five years, under penalty of escheat"—does not prohibit a corporation from owning real estate for business purposes, still, where the Legislature, for the purpose of advancing and protecting the interests of such persons as are interested in and do business with a particular corporation, has enacted such laws as are best calculated to advance and protect their interests, and in such laws expressly forbid such corporations from acquiring, owning, or dealing in real estate, except in a particular way and for a particular purpose, it necessarily follows that the right to acquire, purchase, hold, or possess real estate for any other purpose is forbidden. As above stated, the charter of the appellant association, as originally granted, gave it the right to acquire, possess, enjoy, retain, etc., real estate, and there is nothing in chapter 32 which deprives it of this right, unless it can be said that section 870, above referred to, so operates. This section is clearly dealing with a class of real estate which it could not, in any event, claim was being purchased for the purpose of enabling the association to transact and carry on its legitimate business. Hence, when section 870 is read in connection with the charter provisions of the association, as originally granted, and section 567 of the Kentucky Statutes of 1903, it cannot be construed to be a limitation on the statutory right of the association to purchase, acquire, possess, or hold real estate, but is rather an enlargement of its right so to do—the creation of an additional power, as it were, for the purpose of enabling the association to protect itself in the collection of its delinquent debts, which, according to the provisions of its by-laws, are in the main secured by mortgage upon real estate.

Considering all three of these sections together, the association has the right to acquire and hold such real estate as may be necessary to enable it to properly carry on its legitimate business; that is, as may be necessary to furnish sufficient space upon which to build the house in which the business of the association may be carried on. Such property it may hold without limitation as to time. In addition to this right, it may purchase, at either public or private sale, any real estate upon which it has a mortgage, lien, or judgment, and acquire title thereto in order to facilitate the collection of its debts. But such real estate, so acquired, may not be held by the association more than five years from the date of its purchase. The exercise of such powers and rights on the

part of the building association are in perfect harmony and accord with section 192 of the Constitution, above cited. Hence we conclude that the appellant association has a right to acquire title to so much real estate as may be necessary and proper for carrying on its business, and the purchase of a plot of ground $22\frac{1}{2}$ feet by 97 feet cannot be said to be an unreasonable exercise of this power on the part of the association. On the contrary, it is quite reasonable. It is argued that the association could rent a place in which to carry on its business, still, if those charged with the conduct of its affairs considered it more economical, and more to the interest of the stockholders in said association, to own its place of business rather than to rent, it would be their duty to purchase the necessary real estate, and make such improvements thereon as the best interests of the association require.

The next question is, has the association the power to use any part of its accumulated moneys for the purchase of such real estate? Clearly the power or right on the part of the association to purchase carries with it the right to pay for the real estate; otherwise the right to purchase would become a nullity. Section 863 of the Kentucky Statutes of 1903, provides: "The moneys accumulated, after due allowance made for all necessary and proper expenses, and for the withdrawal of shares, shall, at each monthly or weekly meeting, be offered to the members according to their priority or right to a loan as fixed by the by-laws. Each member whose bid is accepted shall be entitled, upon giving proper security and complying with the by-laws, to receive a loan equal to the par value of each share held by him, or such fractional part thereof as the by-laws allow. If a balance of money remains after monthly loans, the directors may invest the same in good and safe bonds or real estate securities." It will be observed that in said section provision is made for the necessary and proper expenses incurred in the conduct of the association's business. A part of the necessary expenses is the furnishing of a place or home in which the business may be conducted. The character of the place or home in which this business is conducted must, of necessity, depend upon the size of the association and the nature and extent of its business. A small association, with little capital and little business, must necessarily accommodate itself to, and conduct its business in, small and frequently inexpensive quarters; whereas an association heavily capitalized, and conducting an immense business, would necessarily require more commodious and expensive quarters, and those in charge of its affairs, the directory, would have to determine, in each particular case, whether or not it would be a matter of economy on the part of the association to own its own home. If they considered that it would, it would be their duty to make the necessary

provisions therefor. The appellant association in the case at bar is shown to be capitalized at \$7,000,000, has a large number of stockholders, and necessarily lends a great deal of money. Several people are necessarily engaged in the conduct of its business. To such an institution it would, no doubt, be quite an advantage, from an economical standpoint, to own the building in which its business was carried on. But it is argued that to purchase the necessary ground and erect thereon a building of the character which appellant would be required to erect in the business center of a city like Louisville would require an outlay of a considerable sum of money. This is true, but as the expanding business of the association increases, the expenses of operating must necessarily increase, and in the end the expenditure of this sum of money would prove an economical move on the part of the association. If, in the opinion of the directory, it would not be so, they certainly would not be warranted in making the outlay.

The third question is, has the association the right to erect, remodel, or own a building of more than sufficient capacity to accommodate its own business and to rent out the excess? There is nothing in the Constitution, charter of the association, or statutes placing any limitation upon the character of a building which a corporation may erect as a home in which to conduct its business. A corporation conducting a business of the character of that in which appellant is engaged naturally expects its business to grow and expand from time to time, and, in building a home, it would be exercising but a short-sighted judgment if it did not make provision for the future by building a home large enough to take care of its expanding business, and hence, even if it should build a house larger and roomier than its present needs or interests require, it would be acting clearly within the exercise of its corporate right and power. The limitation which the statute imposes is that it shall not own more real estate than is necessary for the proper conduct of its business, but it does not attempt to place any restriction or limitation upon the right of the corporation or association as to the character of building it shall erect on said real estate; and, while the Constitution and the statutes provide that no corporation shall engage in any business other than that expressly authorized by its charter, we are of opinion that, in renting out the unoccupied and unused portions of the building so erected, the association could not be said to be engaged in any other business than that authorized by its charter. The renting of the unused portions of the building is a mere incident in the conduct of its real business. We would not say that a building association might embark in the business of building houses and renting or leasing them, but there is quite a difference in building or renting a house in which to

conduct its own business and leasing the unused portions thereof for the time being, or until such time as they may be needed by the association, and in building houses for the purpose of renting or leasing them. The one might properly be said to be the proper exercise of a power incident to the conduct of its legitimate business, whereas the other would be a clear violation of that provision of the statute which denies to any corporation the right to conduct any business other than that authorized by its charter. To hold otherwise would be to charge most of the banking institutions, trust companies, and other corporations, such as title guaranty companies, etc., doing business in the state, and especially in the large cities, with violating the law; for it is well known that there are few of such institutions that do not, at times, rent out or lease the unneeded portions of the building occupied by them as homes. We do not think that in so doing they are violating any provisions of the law, but that the renting out of the unused and unoccupied portions of their buildings is but an incident in the conduct of their business.

For the reasons indicated, the judgment of the lower court is affirmed.

MEAD et al. v. MEAD.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

JUDGMENT—RES JUDICATA.

A judgment of the Court of Appeals, affirming a judgment in partition confirming the report of commissioners appointed to divide the land, precludes a subsequent action by parties to the proceeding to enjoin the execution of a deed to another party for his share and the issuance of a writ of possession, on the ground of alleged inequality in the division; such judgment foreclosing every complaint involved on the appeal or which should have been involved therein.

Appeal from Circuit Court, Letcher County.
"Not to be officially reported."

Action by J. M. Mead and others against Albert Mead. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

R. O. Brashears, for appellants. Salyer & Baker, for appellee.

BARKER, J. This is the third appeal of this case. The opinion on the first is to be found in 82 S. W. 598, 26 Ky. Law Rep. 777; that delivered on the second, in 101 S. W. 330, 31 Ky. Law Rep. 70. The first appeal was from a judgment of the Letcher circuit court establishing the interests of the children of Thomas Mead, deceased, in a tract of land in Letcher county, Ky., and partitioning the land among those whose rights were established by the judgment. This judgment was affirmed. When the case returned to the lower court the parties in interest by agreement selected three commissioners to divide the land according to the judgment of the court theretofore rendered. Exceptions were filed to the report of the commissioners

for alleged inequality of division. The court overruled the exceptions and confirmed the report. From that order the second appeal was prosecuted, and the judgment of the trial court affirmed. When the action again returned to the lower court the appellee moved the court to cause a deed to be made to him of his share as theretofore established by the commissioner's report and the judgment confirming it, and also for a writ of possession against appellants to be put in possession of that which had been adjudged to him. Thereupon these appellants, who were the appellants on the former appeals, instituted this action in equity in the Letcher circuit court for an injunction to prevent the deed being made and the writ of possession being executed. A general demurrer was interposed to the petition and sustained by the court, and thereupon, the plaintiffs declining to amend their petition, it was dismissed; and from that judgment the appellants are here complaining.

Manifestly the court was correct in sustaining the demurrer. The appellants are merely seeking here to revise the judgment confirming the report of the commissioners above referred to. When this court affirmed the judgment of the trial court, that foreclosed every complaint which was involved on the appeal, or which should have been involved therein. The appellants, being dissatisfied with the report of the commissioner, should have shown every reason or cause which existed for setting it aside in the lower court, and, if the judgment of the lower court was erroneous, for its reversal by this court. The whole complaint of the report of the commissioners is its alleged inequality of division. That question was decided adversely to appellants, and they cannot now be heard to allege any reason for setting aside the report which existed when the second appeal was prosecuted. The appellants cannot split up their causes of complaint and prosecute them one by one in this court. *Davis v. McCorkle*, 14 Bush, 746; *Hardwicke v. Young*, 110 Ky. 504, 62 S. W. 10.

Judgment affirmed.

BURDEN v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Oct. 14, 1908.)

NEGLIGENCE—USE OF PREMISES—OBSTRUCTIONS—LIABILITY.

An individual built a walk from the grade of the main line of a railroad to his store, 40 feet away. Two feet from the end of the walk, and about 6 inches above it, the railroad company maintained a signal wire as a necessary appendage of the railroad. A pedestrian, who knew of the existence of the wire, was injured by coming in contact therewith. *Held*, that the company was not liable for the injuries sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 42.]

Appeal from Circuit Court, Ohio County.
"To be officially reported."

Action by Harrison Burden against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Heavrin & Woodward, for appellant. H. P. Taylor, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

CLAY, C. Appellant, Harrison Burden, instituted this action against appellee, Illinois Central Railroad Company, to recover damages for personal injuries. At the conclusion of plaintiff's testimony the trial court gave a peremptory instruction in favor of appellee. Of this ruling of the court, Harrison Burden complains.

It appears that in the town of Horse Branch one Walker Myrtle, a druggist, had built a plank walkway from the grade of the Illinois Central's main line to his storehouse, a distance of about 40 feet. This walkway had been used by Myrtle's customers for a great many years. Two feet from the end of the walkway, and about 6 inches above it, the appellee had stretched a signal wire, which was a necessary appendage of the railroad at that place. On the 13th day of December, 1906, appellant, who lived on the opposite side of the railroad's right of way, crossed its track and proceeded to the drug store to get medicine for a sick child. As he returned with the medicine his foot caught in the signal wire, causing him to fall and thereby injure his hand. Appellant testified that he lived near Horse Branch about 26 years. On the occasion in question he had a sick boy and went to Myrtle's drug store to get some medicine for him. After procuring the medicine he started back, and in some manner got tangled up in the wire and injured his hand. The wire was drawn tight, was about 6 inches above the platform, some $2\frac{1}{2}$ feet above the ground, and about 2 feet from the end of the platform. Large numbers of people went across the track at that point and traveled the platform to and from the drug store.

After testifying to the above facts, appellant testified as follows: "Q. How long has that wire been placed across the edge of the platform? A. Why, I think it has been there something near a year; a little over a year. Q. How long had it been there before the injury happened? A. I don't know exactly how long it had been there; had not been there a great while, though. Q. You knew that it was there before the injury happened? A. Yes, sir. Q. You had seen it time and again? A. Yes, sir. Q. You had seen it when you went into the store to get the medicine on the occasion of your injury? A. Yes, sir. Q. You knew it was there on the occasion of your coming out of the store? A. Yes, sir. Q. You knew it was there all the time? A. Yes, sir. Q. Whether you saw it or not, when

you stumped your toe on it and fell, you knew it was there? A. Yes, sir. By the Court: Mr. Burden, do I understand you to say that you had seen this wire there before this day? A. Yes, sir. Q. And you knew it was across there? A. Yes, sir; I knew it was across there. Q. And knew who put it there? A. Yes, sir." Again, on cross-examination, he was asked: "Q. You just forgot about the wire being there and started across—that is all there is to it? A. I didn't see it. Q. You remembered it was there, but didn't see it? A. Yes, sir; I knew it was there."

There are authorities holding that, while the owner of private property is not obliged to make it safe for trespassers, or even for mere licensees, yet, if the circumstances have been such as to amount to a devotion of the property temporarily to the public use, care must be taken not to make it unsafe until proper notice of the change has been given. Note to Lepnick v. Gaddis, 28 L. R. A. 686. So, too, it is said to be a sound and just conclusion that an owner or occupier of land, who has given to the public, or to a particular person or corporation, a license to come upon or to cross his premises, or to establish a private way, or even a railway, thereon, must, before exercising his power to revoke such license, anticipate that danger may accrue therefrom to those who have been accustomed to use the license, and is, therefore, bound to notify them of such revocation, and to warn them of any fence, obstruction, or other dangerous means to which he may have resorted to exclude them from his premises. So, if the public have been accustomed to drive, though without right, across the land of a proprietor, who, in order to stop them from doing so, stretched across the traveled way, without any warning to the public, a barb-wire fence which is invisible after dark, and, not knowing the existence of the obstruction, a traveler drives upon it, injuring his horse, he will have an action for damages against the landowner. Thompson on Negligence, vol. 1, § 1016. We have not been able to find any authority holding that, where a landowner puts an obstruction on a right of way across his premises, he is liable in damages for the injury to the licensee who had actual notice of the obstruction.

The evidence in this case shows that the signal wire, the obstruction complained of, had been across the platform for about a year, and that appellant knew it was there. He not only knew it was there, but saw it on the occasion that he went into the drug store to get the medicine. He was not, therefore, entitled to notice of a fact which he well knew. In such cases there is no liability for injuries to persons who have actual knowledge of the obstruction. We therefore conclude that the trial court properly instructed the jury to find for appellee.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. VEACH'S
ADM'R.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. APPEAL AND ERROR — REVIEW — VERDICT —
CONCLUSIVENESS.

A verdict will not be disturbed, as flagrantly against the weight of evidence, where the testimony of several witnesses on each side conflicts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. RAILROADS—TRAINS—LOOKOUT—COMPANY'S
DUTY.

A lookout for persons on a track must be kept on the engine when it leads the train; but where a train is backing, with the engine 130 to 150 feet from the front end, towards a narrow street crossing, where the view of persons approaching the track was obstructed, the company was bound to have some one on the cars in such position that he could give warning of their approach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 988.]

3. SAME—INSTRUCTIONS.

An instruction, in an action against a railway company for a death at a street crossing caused by a backing train, that the company was bound to warn "all" persons approaching the crossing and to "give all reasonable signals," while not reversible error, is objectionable.

4. TRIAL — INSTRUCTION NOT SUPPORTED BY
EVIDENCE.

In an action against a railway company for killing one on its track, it was error to qualify the company's right to a verdict, if defendant was guilty of contributory negligence, by instructing that if the company's employees saw his peril, or by ordinary care could have seen him, in time to have averted the accident, and negligently failed to do so, plaintiff could recover, where there was no evidence to sustain such qualification.

Appeal from Circuit Court, Christian County.

"To be officially reported."

Action by Thomas Veach's administrator against the Louisville & Nashville Railroad Company for negligent death. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fred P. Caldwell, Joe McCarroll, Charles H. Bush, and Benjamin D. Warfield, for appellant. Hanbery & Fowler and W. P. Winfree & Son, for appellee.

CLAY, C. On the 24th day of September, 1907, Thomas Veach was run over and killed by one of appellant's trains in Hopkinsville, Ky. This action was instituted by his administrator to recover damages on account of his death. The trial resulted in a verdict for appellee in the sum of \$5,000. Appellant seeks a reversal on the following grounds: First, the verdict is flagrantly against the evidence; second, the court erred in giving and refusing instructions.

The deceased, Thomas Veach, was at the time of his death a truck gardener. His farm was situated on the east side of the city of Hopkinsville. On the day of his death the deceased drove his market wagon into the city for the purpose of selling and

delivering vegetables to his customers. Having disposed of his stock, he started toward home. He was struck by appellant's train at a point where its tracks cross Eleventh street. Appellant's tracks run almost due north and south through the middle or center of the city of Hopkinsville. Eleventh street runs almost due east and west, crossing the main track and switches of appellant at right angles. The space immediately west of the railroad tracks, between Tenth and Eleventh streets, is occupied by the Trice warehouse, and the space immediately west of the track, between Eleventh and Twelfth streets, is occupied by the Ellis cold storage and the Ellis ice plant; the cold storage being situated immediately south of Eleventh street and west of the railroad track. The Trice warehouse is a one-story and two-story brick structure, the latter part of which is next to the railroad track. On the east side of this warehouse there is a platform, covered by a shed, which extends out to within 4½ feet of the west rail of appellant's side track, and to within 17 feet of the west rail of the main track. The warehouse itself extends to within 23 feet of appellant's main track, and to within 10 feet of its side track. On the south side of Eleventh street and on the west side of the railroad the Ellis cold storage extends to within 10 or 12 feet of the west rail of appellant's side track, and to within 23 feet of its main track. Eleventh street is 35 feet wide, and near the place of the accident is crossed by one of appellant's main tracks and two of its side tracks. At the time of the accident, which occurred at 11 o'clock in the morning, appellant's train consisted of five cars and the engine. The cut of cars was pushed by the engine from the north; the engine being behind all the cars.

Will Harris, a witness for the plaintiff below, testified that at the time of the accident he was unloading a coal car for the Ellis Ice Company. This car was standing on the west or Ellis siding, south of Eleventh street crossing. He was in plain view of the train when it was being backed south and as it approached Eleventh street crossing; saw it when and before it collided with decedent. There was no one on or about the cars, which were being pushed south. After the collision he saw Mr. Cotton Grau come running on the ground to decedent from the direction of the engine; saw another brakeman come, running on the ground from the engine also. About that time he saw Charlie Jackson, the other brakeman, running up to the place of the accident and pull Veach out. At the time of the accident the train was "almost flying." "They were just coming down the road lickety split." There were no signals given, either by ringing the bell or blowing the whistle.

Clem Wright, another witness for plaintiff below, testified that he saw the accident, and saw the train before it struck deceased. At

the time it struck deceased it was moving something like 20 to 25 miles an hour. He was in plain view of the train, and saw no one on top or side of the cars before it struck Veach. After the accident he saw a brakeman come down from towards the engine. If any signals were given, he did not hear them.

Jesse Peacher, another witness for plaintiff below, testified that he saw decedent driving towards the track when only 40 feet away, and he was driving in a walk. Witness was driving behind decedent, and as the latter got on the crossing some one hallooed, at which time he saw the car strike decedent. When he approached the crossing he heard no signals; was within 30 feet of decedent when he was struck, and thought the train was going fast.

Bob Buckner, another witness for plaintiff below, testified that at the time of the accident he was at Tenth street crossing. The train was going pretty fast, and he did not hear any signals. The bell was not ringing.

W. H. Jenkins, another witness for plaintiff below, testified that at the time of the accident he was standing on the platform near the passenger depot. The train of cars was being pushed south with the engine in the rear at a rapid rate of speed for a yard engine. The rate was 15 miles an hour when it passed him, between Ninth and Tenth street and immediately before it struck decedent. He had a clear view of the train, and there was no one in sight on the train.

There was also proof to the effect that the decedent was born on August 29, 1843, and had a life expectancy of 12.43 years; that he was an industrious, hard-working man, and made from \$500 to \$700 per year.

For the defendant below the testimony was as follows:

S. M. Fleming, the yard engineer, testified that he was on the engine which was backing the cars that struck the decedent. His purpose was to place the cars about four lengths further back into the switch south of Eleventh street. When he saw Veach driving on the track the engine was running 4 to 6 miles an hour. The leading car was about a car length and a half from the crossing when he first saw Veach. Was keeping a lookout, and when he saw Veach he was about 20 feet from the track and his horses were trotting. He immediately reversed the engine and put on the air brakes; did all that he could to stop the train. Two men of the crew, Grau and Jackson, were on the leading car—Grau on top of the car and Jackson on the side ladder of the car—and they commenced hallooming back to him; but he had already seen Veach and was doing everything in his power to stop the train. The bell was ringing automatically. The bell was started ringing when the engine was first put in motion, and when witness came back to the engine after the accident it was still ringing. He had stopped the train at

Ninth street which is only 400 feet from Eleventh street, and had only about 130 feet further to go. Veach was lying under the first truck of the second car.

John E. Millen testified that he was yardmaster of Hopkinsville at the time of the accident; that he was riding on the middle car of the cut which struck Veach; that Jackson was on the head car, and Grau was on top of the same car at the end, with his feet hanging down; were going 4 miles an hour, and the bell on the engine was ringing automatically; saw Veach through the corner of the porch as his horses came from behind the warehouse. Veach was then about a car length and a half away. He (Millen) dropped off, as he was riding on the side of the car. He and Jackson signaled the engineer. When he first saw Veach, the latter's horses were trotting faster than the train which struck him.

Claude Grau testified that he was a member of the crew handling the cut of cars. At the time of the accident he was sitting on the running board on top of the first car and at the front end of it. The train was going at the rate of 4 miles an hour. When he saw Veach come in sight on Eleventh street crossing, he was only 35 or 40 feet from him. He hallooed at him and tried to stop him. Jackson also jumped off and ran across, and gave the signal to stop the train, and tried to stop Veach. The latter was going at a pretty good gait. The bell on the engine was ringing automatically.

Charles W. Wilkins testified that he was the fireman on the engine in question. The bell was ringing on the engine. Did not see Veach, but saw the horses. As soon as he saw the horses, the engine went into emergency and was reversed as quickly as possible. The engine extended out on the sides further than the car, so that the engineer and fireman could look down the track on each side and see "plumb outside of the cars and down the track."

Charles Jackson testified that he was a switchman and was riding on the side of the leading car. When he was within 15 or 20 feet of Eleventh street he saw Veach. He hallooed at Veach, who jerked his horses when he was right in the middle of the track. He jumped off, as he thought he might beat the train to the crossing. Grau also hallooed at Veach, as Grau was sitting on the head end with his feet hanging over. He (witness) signaled the engineer as he jumped off; was within about a car length of Veach when he first saw him, and Veach was within about 20 feet of the track. The bell on the engine was ringing automatically. Veach was driving at a pretty good trot. He was found lying under the first truck of the second car.

The only real points at issue in the case are the rate of speed, the question whether or not there was any one on appellant's cars to give warning of its approach to Eleventh street crossing, and the further question

whether or not any signals were being given. At least two witnesses for plaintiff testified that the rate of speed was from 15 to 20 miles per hour, that there was no one upon any of the cars, and that no signals of any kind were given. On the contrary, the employes of appellant—three or four in number—all testified that the rate of speed was from four to six miles an hour, that the automatic bell was ringing, and that there were from two to three men in position on the cars to give warning, and who actually did give warning, to deceased. Where there are two or three witnesses on each side whose testimony is diametrically opposed, we are unable to say that the verdict of the jury, who were present and heard all the witnesses, is flagrantly against the weight of the evidence.

The court instructed the jury as follows:

"No. 1. The court instructs the jury that it was the duty of defendant and its employes, in charge of the engine and train of cars that struck and killed Thomas Veach, to handle same in a reasonably safe and prudent manner in and through the city of Hopkinsville, and that it was the duty of defendant to place some one on the moving cars in such position that he could give warning of its approach, and to give all reasonable signals of the approach of such cars at the public crossings in said city, by the ringing of the engine bell or by the whistle, to warn all persons approaching said crossings; and if the jury should believe from the evidence that the defendant and employes, in backing said train of cars, failed to place some one on said moving cars in such position as to give reasonable warning of the approach of said train, and to keep a lookout and to give warning of its approach, or failed to discharge the duty imposed by the reasonably safe and prudent handling of said train, and by the ringing of the bell or sounding of the whistle to warn persons approaching Eleventh street crossing in the city of Hopkinsville, and by reason of such failure plaintiff was struck and killed by defendant's train, then the law is for the plaintiff, and the jury should so find, not exceeding the amount claimed in the petition of \$25,000.

"No. 2. The court instructs the jury that, if they shall find for the plaintiff, the measure of recovery is limited to such fair and reasonable sum of money as will fairly and reasonably compensate his estate for the loss of his power to earn money, with due regard to his age and expectancy of life, as shown by the evidence.

"No. 3. The court instructs the jury that it was the duty of the deceased, Thomas Veach, at the time and place of his injury and death, to use all ordinary care and to take all reasonable precautions for his own safety, and to prevent injury to his own person, before crossing or attempting to cross defendant's tracks and after entering upon same; and if the jury believe from the evi-

dence that he negligently or without ordinary care failed to ascertain whether said train was approaching said Eleventh street crossing, or entered upon said tracks without exercising ordinary care for his own safety, or if they believe from the evidence that after he had entered upon said tracks he failed to exercise ordinary care to get out of danger, after discovering said train (if he did discover it), and that, but for such failure on his part to use ordinary care for his own safety, his injury and death would not have occurred, the law is for the defendant, and they must find for the defendant, unless they shall further believe from the evidence that the defendant's agents and employes saw his peril, or by the use of ordinary care could have seen his peril, in time to avert his injury, and negligently failed to do so, in which case they may find for the plaintiff, as instructed in instruction No. 1.

"No. 4. The court further instructs the jury that ordinary care, as used in these instructions, means such care as ordinarily prudent persons would exercise under circumstances similar to those proven in this case. Negligence is the failure to exercise ordinary care.

"No. 5. Nine of the jurors may return a verdict in this case; but, if all do not agree, those agreeing must all sign the verdict."

Instruction 1 is vigorously attacked upon the ground that it places too great a responsibility upon the railroad company. Counsel contend that the duty of placing some one on the cars to control their movements applies to those cases where the cars can be controlled only by those who are on them; that in this case the cars were controlled absolutely by the engine; that the proof shows that the engineer saw the decedent just as soon as those who it is claimed were on the cars saw him; furthermore, that there was no evidence that the crossing in question was so dangerous as to require any extra precaution on the part of the railroad company. It must be admitted that the ordinary place in which the lookout must be kept is in the engine. That applies, however, to cases where the engine is leading the train, and those in the engine are naturally placed in a proper position to keep a lookout. But where the engine is in the rear of the train, and from 130 to 150 feet away from the front end of the train, it cannot be said that the engine is the proper place in which to keep a lookout. While those keeping a lookout on the cars might not be able to control the movements of the cars, they would at least be in a position to give warning to persons approaching the track, and to signal to the engineer to stop the train when necessary. If the duty of having additional persons on the cars to keep a lookout should devolve only in those cases where the crossing is shown to be exceptionally dangerous, as claimed by counsel for appellant, then we are of the opinion that the facts of this case bring it within that rule. The narrowness

of the street, the number of tracks that cross it at that point, the location of the buildings, which obstruct the view of those approaching the track, make it a dangerous place. We do not think, therefore, that the court erred in instructing the jury that it was the duty of the defendant to place some one on the cars in such position that he could give warning of their approach.

It is further contended that instruction No. 1 is erroneous in that it requires appellant to have on the cars some person in a position to warn "all" who approach said crossing, and also in using the language, "to give all reasonable signals." While we would not reverse on this account, it is nevertheless true that the instruction is subject to criticism because of the expression complained of. Upon the next trial the court will eliminate the word "all."

Counsel for appellant further contend that the court erred in qualifying instruction No. 3 by the following language: " * * * Unless they shall further believe from the evidence that the defendant's agents and employes saw his peril, or by the use of ordinary care could have seen his peril, in time to avert his injury, and negligently failed to do so, in which case they may find for the plaintiff, as instructed in instruction No. 1." We have carefully examined the testimony in this case, and are of the opinion that there was no testimony to the effect that Veach's peril could have been discovered sooner than it was, or that the accident could have been averted by any action on the part of the train operators. Until Veach emerged from behind the buildings, no one on the train could have seen him. All the testimony shows that he was seen as soon as he emerged and that every effort was then made that could be made to stop the train. There was no evidence upon which to base the qualification complained of in instruction No. 3, and we are therefore of the opinion that the language employed was misleading and necessarily prejudicial. Louisville & Nashville R. R. Co. v. Joshlin, 110 S. W. 382, 33 Ky. Law Rep. 513. On the next trial the language complained of should be omitted from the instruction.

For the reasons given, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

BOGARD et al. v. PLANTERS' BANK & TRUST CO.

(Court of Appeals of Kentucky. Oct. 14, 1908.)

1. TRUSTS—LIABILITIES ON BONDS—BREACH—FAILURE TO PAY OVER FUND TO SUCCESSOR.

A trustee, who fails to pay over to his successor as trustee all of the trust fund received from his predecessor, is liable on his bond for the deficit to his successor.

2. SAME—ACTION ON BOND—BURDEN OF PROOF.

While a trustee is not an insurer of the safety of the trust fund, he must use at least

reasonable diligence to preserve it; and, if any part of it is lost, in an action on his bond therefor he must show affirmatively that the loss was despite reasonable diligence on his part to prevent it.

3. SAME—MISAPPLICATION OF FUND BY TRUSTEE—PAYMENT TO BENEFICIARY OF LIFE ESTATE.

Where the trustee of a fund, the net interest on which belonged to a life tenant and the principal to remaindermen, paid part of the principal to the life tenant, in addition to the interest, the trustee was personally liable for the part of the principal so paid.

4. APPEAL AND ERROR—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—SETTING ASIDE JUDGMENT.

In an action on the bond of a trustee for a part of the trust fund wrongfully paid out by him, he could not complain of the setting aside of a judgment against the administrators of one of the sureties on the bond, who had died pendente lite, because the claim sued on had not been presented to the administrators for payment, verified as the statute directs; but, if erroneous, plaintiff, who was entitled to the judgment, alone could complain of it.

Appeal from Circuit Court, Trigg County.
"Not to be officially reported."

Action by the Planters' Bank & Trust Company against Z. T. Bogard and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Max Hanberry and Denny P. Smith, for appellants. John D. Shaw, for appellee.

BARKER, J. On and prior to the 20th day of February, 1896, there was pending in the Trigg circuit court an action of L. Bryant's administrator against Virginia K. Blakeley and others. Among other matters set out in the petition, a construction of L. Bryant's will was asked. The court, in construing the will, held that by the third clause thereof Virginia K. Blakeley, a devisee, only took a life estate in that which was devised to her, and that a trust fund was created, in the net proceeds of which she was the beneficiary for life. No one offering to qualify as trustee, the chancellor ordered the fund into the hands of John D. Shaw, the then master commissioner of the Trigg circuit court, with directions to lend it out and pay the net income to the beneficiary. On February 20, 1896, the appellant, M. M. Hanberry, was appointed master commissioner, succeeding John D. Shaw. Hanberry was succeeded by John W. Kelley, and on the 14th of September, 1903, the appellee, Planters' Bank & Trust Company, was appointed trustee and directed to take charge of the fund upon the same trust as theretofore. Immediately after J. W. Kelley qualified as trustee as aforesaid, he made a settlement with his predecessor, the latter turning over to him in money and securities the sum of \$7,716.18, and thereupon he instituted this action against Hanberry on his bond as trustee. In his petition he alleged that John D. Shaw, Hanberry's predecessor, as trustee, paid over to the latter the sum of \$8,201.15 as the principal of the trust fund in his hands; that Hanberry received this sum from Shaw, and undertook

to keep it and lend it out during the time of his trusteeship—a period of nearly two years; that when he resigned as trustee he only accounted for \$7,716.18 of the principal of the trust fund, and thereby became indebted to his successor in the sum of \$484.97—the difference between the amount of the principal of the trust fund paid over to Hanberry by Shaw and that paid over to Kelley by Hanberry. The answer, as amended, placed in issue all of the allegations of the petition. After Kelley resigned as trustee, the action was continued in the name of his successor, and was tried in the lower court while the Planters' Bank & Trust Company was trustee. The trial of the action resulted in a verdict and judgment in favor of appellee against appellants, Hanberry and his sureties, for the amount of \$484.97, that being the sum claimed in the petition.

The issue before us is comparatively a simple one, although counsel for appellant, by confusing the real issue with facts which have no place in the record, have somewhat obscured it. It will greatly simplify the question for adjudication to announce two obvious propositions, the first of which is that this is an action to recover a part of the principal of the trust fund, and has nothing to do with the interest which accrued and was collected by the trustee during his term. The beneficiary of the trust is entitled to all of the interest during her life, and after her death the principal of the fund goes to others. It is therefore immaterial whether the trustee loaned the principal for as high a rate of interest as he might have done or not. That question would be between him and the life tenant, and not between him and the remaindermen, for whose ultimate benefit this action is prosecuted. The simple question here is: Did Hanberry turn over to his successor, as trustee, all of the trust fund which he received from John D. Shaw? If not, then he is liable upon his bond for the deficit. The second proposition is that the burden is upon the trustee to show that any loss or diminution of the principal of the trust fund was not occasioned by his negligence or fault. He is not, of course, an insurer of the safety of the fund; but he must use at least reasonable diligence to preserve it, and, if any part of it is lost, he must show affirmatively that the loss was despite reasonable diligence on his part to prevent it.

In the case before us the evidence shows that Hanberry received from his predecessor, Shaw, \$8,201.15, and that he paid over to his successor only \$7,716.18. We speak now of the principal of the fund only; the question of interest being entirely eliminated. This showed a diminution of the trust fund of \$484.97, of which he gave no legal account. The trial judge had the correct idea of the issue involved in the action, and his instructions to the jury embody the correct rule for their guidance. The instructions are as follows:

"No. 1. The court instructs the jury that if they shall believe from the evidence in this case that John D. Shaw, as master commissioner of the Trigg circuit court, turned over to M. M. Hanberry, his successor in office, in money, notes, and securities, the sum of \$8,201.15, and that said sum was the principal of the trust fund belonging to Mrs. V. K. Blakeley, and shall further believe from the evidence that M. M. Hanberry failed to turn over that sum in principal to John W. Kelley, his successor, they will find for the plaintiff and against the defendants the sum said Hanberry failed to turn over to said Kelley of the principal of said trust fund, not exceeding \$484.97, with interest at 6 per cent, from February 15, 1898.

"No. 2. The court further says to the jury that if they shall believe from the evidence that the money, notes, and securities turned over by John D. Shaw to M. M. Hanberry, as given in the report of settlement filed herein, dated 20th day of February, 1896, in addition to the principal, embraced the accrued interest on the securities, and shall further believe from the evidence that M. M. Hanberry turned over to John W. Kelley in money, notes, and securities \$7,716.18, and that said sum of \$7,716.18 was all of the principal of said fund that was turned over to him by John D. Shaw in money, notes, and securities, then the law is for the defendants, and the jury will so find."

The verdict of the jury in favor of the plaintiff for the amount claimed in the petition is fully sustained by the evidence. We do not think that any part of the trust fund was lost or misapplied by the trustee with a corrupt intent. His own evidence shows that he allowed the life tenant, who was entitled only to the net interest of the trust fund, to persuade him to pay over to her from time to time largely more than he afterwards realized from the fund in his hands. In other words, when he had no interest to pay over to her, he advanced her sums of money out of the idle principal, and in this way by loose business methods he lost the sum which is sued for herein. This is clearly shown by the following excerpt from his testimony, which we have taken from the bill of exceptions:

"Q. Mr. Hanberry, I will get you to state whether or not, during the time you were handling this fund for Mrs. Blakeley, you paid her all she was entitled to, or more than she was entitled to? A. I paid her more than she was entitled to. Q. Explain that to the jury. A. In other words, I paid her more than the net earnings of the fund during the time it was in my hands. Under the order of the court, I was directed to pay to her the net earnings of this fund during the time it was in my hands. I find on June 15, 1896, several months after this fund came into my hands, I gave her a check for \$250. I then find that on April 30, 1897, I gave her check for \$300. I find on January 13, 1898, I gave her a check for \$125. Q. Now, when

you say you overpaid her, what do you mean by that? A. I mean, gentlemen, that this money was to be loaned out on real estate security at 6 per cent. interest, which I did as fast as I could, and, after paying the taxes out of this interest for two years, and paying myself \$75 a year, making \$150 for two years, that I paid Mrs. Blakeley considerably in excess of what I should have paid her Q. You mean she did not have that much money in your hands coming from that fund? A. That is what I mean exactly."

The trustee had no right to take the money from the principal of the trust fund, which belonged to the remaindermen, and pay it over to the beneficiary of the life estate therein. Having done so, it was at his own peril, and if he cannot recover it from her he must bear the loss.

The setting aside of the judgment against the administrators of one of the sureties on the bond, who had died pendente lite, because the claim herein sued on had not been presented to them for payment, verified as the statute directs, did not injure the principal, Hanberry. If this was an error at all (and that we do not now decide), the plaintiff alone can complain that a judgment to which he is entitled has been wrongfully set aside.

Judgment affirmed.

SMITH v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PLEADING—REPLY—NECESSITY.

Where no reply was filed to defendant's plea of contributory negligence, a verdict for defendant was properly directed; defendant being entitled to judgment on the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 198.]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by Henry Smith against the Louisville and Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. S. Rose and J. K. Watkins, for appellant. Chas. H. Moorman, Benjamin D. Warfield, H. H. Tye, and J. W. Alcorn, for appellee.

CARROLL, J. In this action, brought by appellant to recover damages for personal injuries sustained by him in being struck by one of the appellee's trains in the nighttime at a point where a county road crossed the railroad track, the jury was directed, upon

tiff, to return a verdict in favor of the defendant, to return a verdict in favor of the defendant. Of this ruling the appellant complains.

He averred in his petition as amended that the negligence of the appellee company consisted in failing to have a light on its engine or to give any warning of its approach to the crossing by sounding the whistle or ringing the bell. In its answer, after traversing the averments of the petition, the defendant company affirmatively set up that the injuries sustained by the plaintiff were due to his contributory negligence. To the plea of contributory negligence no reply was filed. The evidence of the plaintiff, who was the only witness who knew anything about how the accident happened, is so vague and unsatisfactory that it is doubtful if it authorized a submission of the case to the jury. In fact, our opinion is that it showed the appellant to be guilty of such contributory negligence as to justify the court in the instruction given.

But it is not necessary to consider the evidence, because the failure to deny the plea of contributory negligence authorized the court to take the action it did. This question is conclusively settled in a number of cases, but especially may we call attention to *L. & N. R. Co. v. Paynter's Adm'r*, 82 S. W. 412, 26 Ky. Law Rep. 761. The pleadings in that case are identical with those in this. There the petition stated a cause of action, and in addition negatived by anticipation the plea of contributory negligence by alleging the exercise of ordinary care by the decedent at and before the time he was killed. The answer placed in issue all the material allegations of the petition, and in addition pleaded contributory negligence. To this no reply was filed. Subsequently an amended petition was filed, reiterating all of the statements of the original, with additional allegations of negligence. This was controverted of record. At the conclusion of the evidence for the plaintiff the court instructed the jury to find a verdict for the defendant. This court, after stating that the conclusion reached as to the pleadings rendered it unnecessary that the evidence be examined, held that under the pleadings, regardless of the evidence, the defendant was entitled to the peremptory instruction upon the ground that the plea of contributory neglect stood admitted. The necessity for a traverse of this plea, and the several cases declaring the practice, are fully stated in the opinion, and it is not necessary to repeat them here.

It follows that the judgment of the lower court must be affirmed, and it is so ordered.

CHATFIELD v. IOWA & A. LAND CO.
(Supreme Court of Arkansas. Sept. 21, 1908.)
APPEAL AND ERROR—TRANSCRIPT—OMISSIONS—AMENDMENT.

Under Supreme Court rule 25 (56 S. W. v), providing that defects or omissions in the transcript may be cured by amendment, when counsel on both sides consent and certify that the amendment is in accordance with the record, it must appear that the amended matter was in the record and that the omission was merely in the transcript.

Appeal from Cross Chancery Court; Edward D. Robertson, Chancellor.

Action between A. H. Chatfield, as trustee, etc., and the Iowa & Arkansas Land Company. Judgment for the latter, and the former appeals. On stipulation for amendment of record. Stipulation returned.

R. W. Balch and T. E. Hare, for appellant. Jno. B. Jones and O. N. Killough, for appellee.

PER CURIAM. This is a stipulation purporting to be an amendment of the record under rule 25 (56 S. W. v). The stipulation does not show affirmatively that all the matters omitted from the transcript were in fact in the record. Before a transcript can be cured by amendment under this rule, it must affirmatively appear that the omitted matter, or amended matter, was in the record in the lower court as thus agreed upon, and that the omission is merely from the transcript, and not from the record. To hold otherwise would be to permit parties to make up a case which was not the case tried in the lower court, which is never tolerable. This rule is intended, and it plainly shows its intention in its language, to enable parties to amend transcripts of the record so as to make them to speak the truth, in order to save them the trouble, delay, and expense of having transcripts returned to the clerks of the trial courts and the omitted or erroneous matter there corrected. It may be that the matters sought to be corrected by this stipulation are within the rule; but the stipulation fails to make that clear, and for that reason the record is not now amended.

The stipulation is returned to the parties with the privilege of renewing it when in conformity to rule 25.

CHICAGO, R. I. & P. RY. CO. v. SIMPSON.
(Supreme Court of Arkansas. Sept. 21, 1908.)

1. CARRIERS—CARRIAGE OF PASSENGERS—VESTIBULE COACHES—DUTY OF CARRIER.

While a railroad company is not bound to provide vestibuled coaches on its passenger trains, yet where it does so passengers may presume that they are safe for the purpose intended, and for negligence in these particulars, resulting in injuries to passengers, the company is liable.

2. SAME.

Where plaintiff, a passenger on a vestibuled rear coach of defendant railroad's train, was not led by defendant to believe that the rear plat-

form could be used to ride on for observation or other purposes, but stood thereon, and fell through an open vestibule door, and was injured, defendant was not liable.

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by A. J. Simpson against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

Charlie Simpson, a boy 16 years and 11 months of age, was riding on the platform of the back coach of appellant's passenger train from Hot Springs, Ark., to Little Rock. He fell from the platform and was severely injured. The coach was provided with a vestibule, but the door and vestibule platform or floor, on the side next to the station platform at Hot Springs, were left open, so that passengers might enter. This door and vestibule floor on one side continued open until the accident occurred. The door and floor on the other side were closed. When the train had gone about 16 miles, Simpson, while standing on the platform, according to his testimony, fell down through the opening to the ground. Simpson was a passenger. He and some other passengers were using the platform, instead of going into the coach. There was plenty of room in the coach for passengers. Appellee, the father of young Simpson, sued the appellant for damages because of the injury, alleging that appellant negligently left open and unclosed the gate and door leading to and from said vestibule to the platform at depots through which passengers enter and depart at stations, and knowingly permitted the same to remain open until after the said Charlie Simpson was injured. Appellant denied negligence. The evidence on behalf of appellee, so far as it is necessary to state it, showed substantially the above facts on the question of appellant's negligence.

Among other requests for instructions, the appellant asked the following: "(1) You are instructed that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your verdict will be for the defendant." "(10) You are instructed that it was not negligence in the defendant to leave the vestibule door open at the rear end of the rear coach of its train." These the court refused, but gave, among others, the following: "(8) Where a railroad company provides its cars with vestibule doors, it is not only answerable for the negligent acts of its servants in opening and permitting them to remain open, but it is also responsible for its failure to exercise a high degree of care, to the end that such doors shall be closed and the vestibule rendered reasonably safe." The verdict and judgment were for \$700.

Buzbee & Hicks and Geo. B. Pugh, for appellant. Bullock & Davis and J. T. Bullock, for appellee.

WOOD, J. (after stating the facts as above). As is said in *Wagoner v. Wabash R. Co.*, 118 Mo. App. 239, 94 S. W. 293, "the purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another." While railway companies are not bound to provide vestibuled coaches on their passenger trains, yet where they have done so passengers will have the right to assume that they are convenient and safe for the purpose intended and that they will be prudently managed. Any negligence upon the part of railway companies in these particulars, resulting in injury to their passengers, will render them liable in damages. 2 Hutch. Carr. 927. The uncontroverted proof in this case shows that appellant was guiltless of any negligence in the management of its vestibule appliances that resulted in injury to young Simpson. The vestibule in question, being at the rear end of the rear coach, could not be used for crossing from one car to another. There was, therefore, no duty upon the part of the appellant to have the rear end of the last coach in the train vestibuled, in order that passengers might pass from car to car in safety. Appellant had not led young Simpson to believe that a vestibuled platform could be used to ride on for observation, conversation, or other purposes. See *Crandall v. Minneapolis, St. Paul, etc., Ry. Co.*, 96 Minn. 434, 105 N. W. 185, 2 L. R. A. (N. S.) 645, 113 Am. St. Rep. 653. Appellant was under no duty to provide a vestibule for such purposes, and was therefore not liable for its failure to do so.

Having found that there was no actionable negligence on the part of appellant, under the undisputed evidence, it follows that the court erred in its refusal to grant the prayers of appellant, supra; also in giving the instruction No. 8 set forth in the statement. This conclusion renders it unnecessary to pass upon the question of contributory negligence.

The judgment is therefore reversed, and the cause is remanded for new trial.

ST. LOUIS, I. M. & S. RY. CO. v. HAMBRIGHT.

(Supreme Court of Arkansas. Sept. 21, 1908.)

JUDGMENT—ASSIGNMENTS—FILINGS IN THE SUPREME COURT.

Kirby's Dig. § 4457, providing on the sale of a judgment or any part thereof, written transfer shall be entered on the records of the court where the judgment is recorded, etc., refers to the filing of the assignment of a judgment in the court wherein the judgment is rendered, and not in the Supreme Court, to which the case has been appealed.

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by W. O. Hambright against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and

defendant appeals. His attorneys offer an assignment of one-half of such judgment for filing in the Supreme Court. The clerk directed to return it to the attorneys.

T. M. Mehafty and J. E. Williams, for appellant. L. A. Byrne, for appellee.

PER CURIAM. Hambright recovered judgment in the Miller circuit court against the St. Louis, Iron Mountain & Southern Railway Company in the sum of \$5,000, and said cause has been appealed to this court, and is now pending. Hambright executed an assignment of one-half of said judgment and one-half of his interest in the cause of action to his attorneys, and duly acknowledged the same; said assignment being made in conformity to the act of April 4, 1899 (Acts 1899, p. 154; section 4457, Kirby's Dig.). The attorneys offer said assignment for filing in this court. This act evidently refers to the filing of assignments of judgments or causes of action in the court wherein the judgments are rendered or the cause pending, and not in this court. Provision is made for a transfer to be entered on the record of the court where the judgment is recorded, or on the docket where a suit is pending, if it has not proceeded to judgment. That record may properly be included in the transcript to this court, and in that way notice is given in this court as well as in the lower court, and the object of the statute fully attained.

Questions of fact may well arise in regard to these assignments; and the trial courts, and not appellate courts, are the proper place to determine them. There is nothing in the language or purpose of the act that would indicate that it was intended that these assignments be filed in the Supreme Court. The assignment will not be filed in this court, and the clerk is directed to return it to the attorneys who presented it.

ST. LOUIS, I. M. & S. RY. CO. v. STELL.

(Supreme Court of Arkansas. Sept. 21, 1908.)

1. CARRIERS—INJURIES TO PASSENGERS—NEGLECT—PRESUMPTIONS.

Where a passenger fell and was injured while entering a train by the moving of the train, the presumption is that the injury was due to the negligence of the carrier, provided the passenger was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283, 1286.]

2. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

Where, in an action for injury to a passenger while boarding a train, the main charge correctly stated the relative duty of carrier and passenger, the refusal of a charge on contributory negligence was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

3. DEPOSITIONS—ADMISSION IN EVIDENCE—DISCRETION OF COURT.

It is within the discretion of the trial court to permit the reading of a deposition, as

against the objection that some of the interrogatories are leading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 66.]

4. DAMAGES—PERSONAL INJURIES—MEDICAL SERVICES.

Where, in an action for personal injuries, plaintiff testified what services a physician rendered on account of the injury, that the physician had not presented his bill, and that he did not know what he would charge, it was proper to permit the jury to determine, from their common knowledge and experience, what the services would cost him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Damages, § 510.]

Appeal from Circuit Court, Chicot County; H. W. Wells, Judge.

Action by McSawyer Stell against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McSawyer Stell brought suit for personal injuries against appellant railroad company. Appellee's statement of how the injury occurred is as follows: He was at Collins, a station on appellant's road, where he had been doing some dental work. He carried his two grips over to the depot, and set them down close to where he thought the train would stop. While waiting for the train to arrive, he stood there talking to some acquaintances. When the train arrived, he waited for the passengers to get off before he started to get on the train. Just as he got on the box, put there for the use of passengers in getting on and off the train, and had put one foot on the first step of the coach, the train started up, and pitched him on the step and wrenched his back. The train did not stop at Collins any more. He went on in the train with his two valises, which were heavy. As soon as he got in the coach, he began to suffer severe pain. When he arrived at Dermott, his home, he went out on the platform and called a negro to carry his grips to his house. He walked to his home, laid down on a couch, and could not speak for five minutes. He had Dr. Barlow telephoned for. He was in bed three days and nights, suffering constant pain. After he got up, he was confined to his house for a week or two. He suffered time and again after he got up, and still suffers, from the effect of the injury. He suffers now at times in the lumbar regions of the back. He was tolerably strong at the time he was hurt, and had never suffered any pain. He has not been strong since he received the injury. Dr. Barlow treated him for three weeks after he was hurt, visiting him at his home three or four times. After that he went to the doctor's office for treatment. The doctor has not yet rendered him a bill for his services, and he does not know how much he will charge him. He expects a bill to be rendered. On cross-examination, he stated that he is not a very good jumper, but had jumped a little bit at Holley the day before the trial; that he does not know how long the

train stopped, but that he got on it just as soon as the people got out. Dr. E. E. Barlow testified that he treated appellee for the injury complained of; that he was suffering from severe pain in the lumbar muscles of the back, and was unable to walk, stand, or move himself without increasing pain. Thomas Smith testified that as appellee stepped off the footstool that was on the ground, the train started up, that there were a couple of grips in his hand, and that "the train jerked him right smart." Appellant adduced testimony tending to show that the train remained at the station a sufficient length of time for all passengers to get on and off the train with perfect safety; that after the conductor had given orders for the train to pull out, after announcing "all aboard," appellee, who had two suit cases in his hands, boarded the train just as it was pulling out; that the train stopped at Collins on the day appellee was hurt one minute; that the accident occurred on the 11th day of May, 1907; and that on the 14th day of November, 1907, the appellee was in a jumping match with several persons, and outjumped all of them. There was a jury trial and a verdict for appellee in the sum of \$1,000. The case is here on appeal.

T. M. Mehaffy and J. E. Williams, for appellant. R. A. Buckner, for appellee.

HART, J. (after stating the facts as above). The principal contention of appellant is that the trial court erred in instructing the jury that, if it should find from the evidence that appellee fell while entering appellant's train, by reason of the running or moving of said train, and was injured thereby, then the presumption is that the appellee received said injury on account of the negligence of appellant, provided appellee was not guilty of contributory negligence himself. There was no error in this. A like instruction was approved by this court in the case of Choctaw, Oklahoma & Gulf Rd. Co. v. Hickey, 81 Ark. 579, 99 S. W. 839. That was a case where the injury was caused by a sudden jerk of the train, which threw the passenger from the steps of the coach while he was attempting to board the train. In the case of Kansas City Sou. Ry. Co. v. Davis, 83 Ark. 217, 103 S. W. 603, the court said: "The principal attack is made on the first instruction, which is copied in the statement of facts. Appellant argues that this instruction is only proper when the negligence of the company is a failure to obey the lookout statute. Section 6607, Kirby's Dig. But counsel are in error in this, for it has been held that under section 6773 of Kirby's Digest, placing responsibility upon railroads where injury is done to persons or property by the running of trains, a prima facie case of negligence is made out against the company operating the train, by the proof of the injury. This was a case where the passenger was injured

while getting off the train. But there is no difference in the principle as applied to passengers embarking or debarking from a train. The reason of the rule is that the railroad company has sole control of the movement of its trains, and in that respect the passenger can do nothing to insure his personal safety."

Appellant also complains that the court did not give the instructions on contributory negligence asked by it, but the instructions given by the court fully covered that phase of the case. The relative duty to each other of common carriers and of passengers about to embark on railroad trains was correctly given to the jury by the court, in accordance with the rule announced by this court in the case of *Barringer v. St. Louis, Iron Mountain & Southern Ry. Co.*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814.

Appellant assigns as error the reading of the deposition of Dr. Barlow to the jury, for the reason that some of the interrogatories propounded to him were leading questions. This was a matter within the discretion of the trial court, and besides an examination of the record does not disclose that any prejudice resulted to appellant therefrom.

Appellant also objects to the testimony of appellee in regard to his expenses for doctor's bill, because he was unable to testify what amount he had or would have to pay out therefor. Appellee stated that his physician had not presented his bill, and that he did not know what amount he would charge. He testified what services the physician rendered; and, in the absence of any knowledge on his part of the amount that would be charged, the jurors were as competent as he to determine from their common knowledge and experience what such services would cost him.

There was sufficient testimony to submit the issues to the jury, and its finding will not be disturbed.

Judgment affirmed.

CAPITAL FIRE INS. CO. v. SHEARWOOD et al.

(Supreme Court of Arkansas. July 6, 1908.)
INSURANCE—FORFEITURE—WAIVER.

An insurer, having no knowledge of the violation by insured of the policy until after the loss, does not waive the forfeiture occasioned by the violation, by the mere failure to return the premium before suit on the policy, nor is he precluded from setting up the forfeiture.

Appeal from Circuit Court, Olay County; Frank Smith, Judge.

Action by J. M. Shearwood and another against the Capital Fire Insurance Company.

From a judgment for plaintiffs, defendant appeals. Reversed and cause dismissed.

This is a suit on a policy of fire insurance. The policy was for \$1,000 on a certain barn and its contents. The premium was paid when the policy was issued. The policy con-

tained this provision: "If the buildings be on land which now is or shall become incumbered by mortgage or otherwise, or shall become any other or less than a perfect legal and equitable title and ownership, free from all liens whatever, * * * this policy shall be absolutely null and void." The defense was that the plaintiff, without the knowledge or consent of the defendant, after the policy was issued and the premium was paid, mortgaged the property insured to the amount of \$800. The fire occurred March 10, 1906. Suit was begun on the policy July 26, 1906. The appellee concedes that there was a forfeiture of the policy, by reason of an incumbrance of the property insured, after the issuance of the policy and payment of the premium, but contends that appellant waived the forfeiture by retaining the premium and not offering to return same until after the suit was brought. Appellant in its answer tendered the premium to appellee, and set up that it had no knowledge of the forfeiture until some time after the loss occurred, and contends that its failure to return, or to offer to return, the premium paid does not preclude its defense of forfeiture on account of the breach of the conditions of the policy alleged and conceded by appellee. A judgment was entered against appellant in the sum of \$900, from which this appeal was duly prosecuted.

C. S. Collins, for appellant. J. L. Taylor and G. B. Oliver, for appellees.

WOOD, J. (after stating the facts as above). Where a fire insurance policy is issued, and the premium is paid, and afterwards the assured violates the provision of the policy against incumbrances, which creates a forfeiture, the insurer, having no knowledge of the forfeiture until after the loss occurs, does not waive same by merely failing to return the premium before suit is brought to recover the amount of the policy; nor is it precluded by such failure from setting up the forfeiture in defense of the suit. *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. O. A. 121; *United States Life Ins. Co. v. Smith*, 92 Fed. 503, 34 C. C. A. 506; *Ga. Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; 16 Am. & Eng. Ency. L. P. 939 and cases cited. See *Titus v. Ins. Co.*, 81 N. Y. 410; *Gibson El. Co. v. Liverpool L. & G. Ins. Co.*, 159 N. Y. 418, 54 N. E. 23. In such cases the insurer has done no affirmative act recognizing the validity of the policy, notwithstanding the forfeiture, and has done nothing to deceive or to increase the burdens of the assured. Therefore the doctrines of waiver and estoppel cannot be invoked against the appellant, under the conceded facts of this record. *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *State Mutual Assurance Co. v. Long Clothing & Shoe Co.*, 123 Ala.

667, 26 South. 655. See, also, *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539.

The judgment for the error indicated is reversed, and the cause is dismissed.

BIGGER v. ACREE.

(Supreme Court of Arkansas. Sept. 21, 1908.)

1. LIVERY STABLE KEEPERS—HORSES—CARE REQUIRED.

A livery stable keeper for hire is only required to use ordinary care of animals committed to his charge, and is liable for injuries to them only when occasioned by his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Livery Stable Keepers, § 6.]

2. NEGLIGENCE—"ORDINARY CARE."

Ordinary care is that degree of care which a person of ordinary prudence would take of the property under the same circumstances if it were his own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 6.]

For other definitions, see Words and Phrases vol. 6, pp. 5029-5042; vol. 8, pp. 7739-7740.]

3. LIVERY STABLE KEEPERS—INJURIES TO ANIMALS—NEGLIGENCE.

Plaintiff brought his team to defendant's livery stable to be kept for hire, and tied them in the stalls himself. Defendant's stableman watered the horses during the afternoon, and returned them to the stalls, tying them in the same manner in which plaintiff had tied them. During the night one of the horses was found loose and standing in another stall, when he was tied with the same rope that he had been previously tied, and the next morning it was discovered that the horse had been kicked. Held insufficient to establish the livery stable keeper's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Livery Stable Keepers, § 6.]

Appeal from Circuit Court, Randolph County; Jno. W. Meeks, Judge.

Action by J. R. Acree against B. F. Bigger. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Witt & Schoonover, for appellant. Hender-son & Campbell, for appellee.

HILL, C. J. Acree ran a hack between Maynard and Pocahontas, arriving each day at Pocahontas about 11 o'clock in the forenoon and departing at about 1 o'clock in the afternoon. He had two teams, and alternated in the use of the same, leaving one in the livery stable of Bigger at Pocahontas while he was using the other. Pittman was hostler for Bigger, and was in charge of the stable. When Acree came in each day, he tied the horses in the stalls himself, or Pittman did so. At the time in question Acree brought in his team and tied them in their stalls himself. In the afternoon of that day Pittman took the team out to water them, and returned them to the stable, and tied them in the same manner that Acree had tied them. In the night Pittman heard a noise, and, going in the stable, found that one of Acree's horses was loose and standing in another stall. He tied it in that stall with the same

rope that it had been previously tied with in the other stall. He did not at that time discover that the horse was injured; but the next morning he discovered that it had been hurt, apparently kicked on the leg, and he felt sure it had been kicked by its mate, as it was the only other horse in the stable. He and Acree treated the horse for several days, when it died. Acree brought suit against Bigger for the value of the horse, alleging that it had been injured, and died as a result thereof, through the negligence of Bigger in permitting the horse to run loose in the stable among other horses confined therein, as a result of which it had been kicked and injured, from which injuries it died. Bigger denied negligence, and the case was tried upon this issue, resulting in a verdict for Acree, and Bigger has appealed.

The only testimony as to the care of the animal was that of Pittman, called by the plaintiff. He testified that he tied the mare in the stall with the same rope and in the same manner that the owner had tied it earlier in the same day, and that this was the usual way that it had been tied theretofore; that this mare had been in the habit of breaking loose at night, and he used a small rope with which to tie her, for the reason that, if a larger rope had been used, she might have broken her neck, or choked herself to death; that he had not tied a rope or chain at the rear of the stall to prevent her from backing out, for the reason that he did not think it necessary, nor was it customary in the livery business, with which business he testified he was familiar. The rope with which she was tied was either half-inch or three-quarter inch rope, and was sufficient to hold any ordinary animal.

A livery stable keeper for hire is required to use ordinary care of the animals committed to his charge. And he is liable for injuries to horses placed in his charge when, and only when, such injuries are occasioned by negligence on his part. "The ordinary care required, according to the familiar definition, is that degree of care which a person of ordinary prudence would take of the property, under the same circumstances, if it were his own." 19 Am. & Eng. Enc. 432. See, also, where the same principles were announced, *Swann v. Brown*, 51 N. C. 150, 72 Am. Dec. 568; *Weick v. Dougherty*, 90 S. W. 966, 28 Ky. Law Rep. 930, 3 L. R. A. (N. S.) 348 and note; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211; *Hunter v. Ricke Bros.*, 127 Iowa, 108, 102 N. W. 826; 25 Cyc. 1512. In the case of *Lockridge v. Fesler*, 37 S. W. 65, 18 Ky. Law Rep. 469, the Court of Appeals of Kentucky had before it a case quite similar to this one. A horse, intrusted to a livery stable had slipped his halter and escaped, and was killed. The defense was that the horse was hitched in the usual and customary manner in the stable; that the owner saw the manner in which the horse was hitched and placed, and

did not object thereto; and that the horse was properly hitched, but, being breachy and restless, slipped its halter and escaped, without any carelessness or negligence on the part of the defendant or his employes. It was held that these facts constituted a defense. This case cannot be distinguished from that one, and the principle of it is correct and in consonance with all the authorities on the subject. Under the undisputed evidence in the case, the horse was cared for in the usual and customary manner of caring for horses in livery stables; and in the same manner that the owner cared for this horse in this stable. To hold the livery keeper liable under this evidence would be to make him an insurer of the safety of animals in his stable; and that is not the law.

Judgment reversed, and cause remanded.

WOOD, J., is also of opinion that the evidence is insufficient to show that the death of the animal resulted from the injury received.

LITTLE ROCK BRICK WORKS v. HOYT. (Supreme Court of Arkansas. Sept. 21, 1908.)

1. COURTS—JUSTICES OF THE PEACE—NATURE OF JURISDICTION—PROCEEDINGS.

Justices of the peace possess only a special and inferior jurisdiction, so that their proceedings must show the facts bringing a case within their jurisdiction, or the whole proceeding is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 135-136.]

2. JUSTICES OF THE PEACE—SOURCE OF JURISDICTION.

The jurisdiction of a justice of the peace over the subject-matter is derived from the Constitution, but the mode of proceeding is prescribed by statute.

3. SAME—STATEMENT OF CLAIM.

Where an order for the payment of a portion of a servant's wages to plaintiff was directed only to M., who was a timekeeper for the employer, and made no reference to any claim against the employer, the filing of such order with the justice was insufficient to authorize the issuance of a summons, under Kirby's Dig. § 4565, providing that, before a summons shall be issued by a justice of the peace, the plaintiff shall file with the justice the account, written contract, or short written statement of the facts on which the action was founded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 807-823.]

4. SAME—APPEAL—JURISDICTION.

The circuit court on appeal from a justice of the peace can have no jurisdiction if the justice had none.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Joseph Hoyt against the Little Rock Brick Works and another. From a circuit court judgment, affirming a justice's judgment in favor of plaintiff, defendant Little Rock Brick Works appeals. Reversed and remanded.

This action was commenced before a justice of the peace for Pulaski county against Arch Reddick and the Little Rock Brick

Works in July, 1905, upon the following paper, which was filed as the plaintiff's cause of action:

"Little Rock, Ark. Feb. 17, 1905.

"Arch Reddick, in Account with Hoyt
Merc. Co.

June 28, '05. To Mdse.....\$13.15.

"Little Rock, Ark. Feb. 21, 1905.

"Mr. Geo. Mobbs: Please pay to Fred W. McDonald the sum of two (\$2.00) dollars each week out of my wages until above account is satisfied in full, beginning with this week as indicated in date above. I hereby assign and transfer said amount.

"[Signed] A. Reddick."

Indorsed:

"Filed July 15, 1905, and summons issued against Arch Reddick and Little Rock Brick Works, and summons issued returnable July 25, 1905. A. A. Brown, J. P."

Thereupon the justice of the peace issued a summons, which was duly served, which summons and return are as follows:

"State of Arkansas, County of Pulaski.

"The State of Arkansas to Any Constable of Pulaski County—Greeting:

"You are commanded to summons Arch Reddick and Little Rock Brick Works to appear before me, A. A. Brown, a justice of the peace in and for the township of Big Rock, in the county of Pulaski at my office in said township on the 25th day of July, 1905, at 10 o'clock of the said day to answer the claim of Jos. Hoyt, proprietor of the Hoyt Mercantile Company, acct. amounting to twelve and 15-100 dollars and notify the said Arch Reddick, and Little Rock Brick Works of the time and place of trial, and have then and there this writ with due return upon it.

"Witness my hand as such justice, this 15th day of July, A. D. 1905.

"A. A. Brown, J. P."

Returned duly served.

Upon these proceedings the justice of the peace rendered judgment by default against both defendants for \$13.15, from which judgment the brick works appealed to the circuit court. And thereafter the action proceeded against the brick works alone.

In the circuit court the appellant filed the following demurrer and motion to dismiss the cause:

"In the Pulaski Circuit Court.

"Hoyt v. Little Rock Brick Works. Nos. 1,743 and 1,744.

"As no pleadings are required in cases coming from a justice of the peace, yet the defendant in each of said cases demurs to the cause of action set forth in the statements filed, because neither of them state facts sufficient to constitute a cause of action against this defendant, and because of a defect of parties plaintiffs and defendants, as

neither the payee nor the drawee of the order sued on is made a party to either of said cases. The defendant also moves the court to dismiss both cases, because neither state a cause of action against this defendant"—which demurrer and motion to dismiss were both by the court overruled, and to each of which rulings the brick works at the time excepted, and its exceptions were allowed. Thereupon the case was submitted to the court sitting as a jury, for trial, and the court rendered judgment for the appellee Hoyt and against the Little Rock Brick Works for \$13.15. At the trial the appellee, to sustain his issues, offered in evidence the paper writing above set forth, which was his cause of action upon which he brought this suit. The plaintiff then read the following written notice in evidence, which was at its date delivered to George A. Lelper:

"Little Rock, Ark., March 23, 1905.

"Messrs. Lelper & Apperson, Little Rock, Ark.—Gentlemen: We have an assignment of two dollars (\$2.00) each week out of whatever may be owing from you to Arch Reddick until the sum of \$13.15 is paid. This assignment of Arch Reddick, which is in writing, is dated Feb. 21, 1905, and has been in possession of your agents out at the brickyard, and they have paid the money each week to the assignor regardless of the assignment, completely ignoring our lawful rights, and say that they will continue to pay the money which is our money to the assignor. We have an assignment in writing of the wages of Harrison Henderson to the amount of eight dollars (\$8.55) and fifty-five cents to be deducted, two dollars each week, beginning with the week commencing March 19, 1905. So two dollars of whatever you owe Harrison Henderson each week belongs to us until the stated amount is liquidated. We hold you responsible on these assignments.

"Yours respectfully, Fred McDonald.

"Address as indicated in letterhead."

The plaintiff then introduced as a witness, Fred W. McDonald, who testified: "That Joseph Hoyt was the proprietor of the Hoyt Mercantile Company, and that Arch Reddick owed Hoyt the amount of said account, \$12.15, when said order was given to him; that he was employed by Hoyt to collect this claim for him, and wrote the order above set out; that he took it to Mobbs at the brickyard of the defendant, who was the foreman of the workmen there, and left it with him for several weeks, when he went for it, and Mobbs refused to pay it, or any part of it; that he then took it to Mr. Dunlap, who was paymaster of the workmen at the brickyard, and he refused to touch it; that he sent the notice above set forth to Messrs. Lelper & Apperson, who paid no attention to it; that he had seen Mobbs pay the men at the brickyard. When I showed the assignment to Dunlap, he said he was

not running a collection agency. This bill has never been paid." The defendant then introduced Hugh Dunlap as a witness, who testified: "That he paid off the hands at the brickyard. That Mr. McDonald came to him one day, and said he had a bill against these niggers, and I want you to collect it. I said, 'Do your own collecting. I am not a collecting agency.' Mobbs' only duty was to oversee the workmen and to see that they worked, and to keep their time." George A. Lelper testified: That he is president of the Little Rock Brick Works. That he never saw this order sued on, nor heard of it until he saw it in court. That he was the manager of the brick works. That neither Mobbs nor Dunlap had any authority to make any contract for the brick works or to bind it in any way. That he and Mr. Apperson were not partners, and that they nor either of them owed Reddick anything whatever. He did not know Reddick, nor that he worked for the brick works. That he alone had the authority to make contracts for the brick works. The case is here on appeal.

Eben W. Kimball, for appellant.

HART, J. (after stating the facts as above). Justices of the peace possess only a special, limited, and inferior jurisdiction, and their proceedings must show such facts as constitute a case within their jurisdiction; otherwise the law regards the whole proceeding as coram non iudice and void. *Levy v. Shurman*, 6 Ark. 182, 42 Am. Dec. 690; *Latham v. Jones*, 6 Ark. 373; *Everett v. Clements*, 9 Ark. 478. The jurisdiction of a justice of the peace over the subject-matter of the controversy is derived from the Constitution, but the mode of proceeding adopted in the case is prescribed by statute. Section 4565, Kirby's Dig., regulating the practice before justice of the peace, provides that ordinary actions shall be commenced by summons, but, before the summons is issued, the plaintiff shall file with the justice the account, or the written contract, or a short written statement of the facts on which the action is founded. In the present case appellant is required by the summons to appear and answer the claim of the plaintiff against it. The statement of facts filed, on which the action is founded, makes no reference whatever to any claim or demand against appellant. Not having alleged any claim or demand against appellant, such fact was therefore not in issue. The order of its codefendant, A. Reddick, on Geo. Mobbs to pay Fred W. McDonald a certain sum out of his wages did not serve in any manner to apprise appellant that it was an assignment of wages due by it to appellee. The judgment of the justice of the peace in this case in favor of Joseph Hoyt would not have protected appellant from a subsequent suit by Reddick or by Fred McDonald on the same cause of action. Hence we must conclude that the plaintiff below did not

sufficiently comply with the statute, and that the justice acquired no jurisdiction of the case. The justice having no jurisdiction, it necessarily follows that the circuit court could acquire none by appeal, and should have sustained appellant's motion to dismiss the case for want of jurisdiction.

The judgment is therefore reversed, and the case remanded, with directions to dismiss for want of jurisdiction.

**MT. NEBO ANTHRACITE COAL CO. v.
MARTIN et al.**

(Supreme Court of Arkansas. Sept. 28, 1908.)

**1. APPEAL AND ERROR—REVIEW—DISCRETION
OF TRIAL COURT.**

Costs in equity are within the discretion of the chancellor, to be exercised upon a full consideration of all the circumstances, and appellate courts are slow to disturb his exercise of that discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3882.]

**2. SAME—JUDGMENT—CORRECTION — CLERICAL
ERRORS.**

Where the clerk of the Supreme Court, in writing up a judgment of affirmance, by mistake directed a recovery of all the costs in the lower court, as well as on appeal, and the mistake was not detected when the record was approved, the judgment will be corrected to conform to the opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4636, 4640.]

**3. LIMITATION OF ACTIONS—COMPUTATION OF
PERIOD—MUTUAL ACCOUNTS.**

Where a joint account of a husband and wife with defendant contained items on both sides running for a number of years down to December, 1904, an action thereon was not barred in 1905.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 295-298.]

On motion to retax costs and modify decree. Judgment corrected to conform to opinion, and motion otherwise overruled.

For opinion on merits, see 111 S. W. 1002.

HILL, C. J. 1. Appellants ask that the costs be retaxed and the decree modified in so far as the claim of Mrs. Minnie C. Martin is concerned. The giving of costs in equity is within the discretion of the chancellor, to be exercised upon a full consideration of all the circumstances of the case and the situation of the parties, and appellate courts are slow to disturb his award of the costs, when he has exercised that discretion. *Williams v. Buchanan* (Ark.) 110 S. W. 1025; *Temple v. Lawson*, 19 Ark. 148; *State v. Fort*, 18 Ark. 202; *Jones v. Graham*, 36 Ark. 383. The chancellor adjudged that all of the costs of the suit, including the fees of the master, be paid from cash in the bank belonging to the defendant corporation. There is nothing in the circumstances of this case which would call for a reversal of this award of the costs.

The opinion heretofore delivered announced that this decree was affirmed, but the clerk made a mistake in writing up the judgment of affirmance, making it a recovery

from the appellants of all the costs in the chancery court, as well as in this court, and this mistake was not detected by the court when the record was approved. Attention has been called to it by this motion, and the order will be that the judgment be corrected, so as to affirm the decision of the chancellor in this respect, and the judgment for costs against the appellants be for the costs of this court only; the costs of the chancery court to be paid as provided in the order of that court, which was not intended to be disturbed.

2. Appellants point out that the statute of limitations was pleaded against the claim of Mrs. Martin, and show that in the final decree of the chancellor, after some other motions had been disposed of, the coal company "interposed the plea of the statute of limitations against plaintiff's claim for salary, and the court doth find that said claim is not barred by limitation." When this question was raised on rehearing, the pleadings were searched in order to find wherein the statute of limitations was pleaded, and the court orders were searched in order to find if the court had accepted an oral plea, as contended by counsel; and, none being found at these places, where it should have been, the statement was made in the opinion overruling the motion for rehearing that the record did not contain such plea. But this was a mistake, as it is found in the final decree; and attention was called to it in the original brief. It is doubtful whether it is proper for the court to consider the plea of limitations, raised orally when the final decree was being rendered, as properly raising that issue, even though the chancellor ruled upon it; but, as the facts require an overruling of the plea upon the merits, it is not necessary to go into this question of practice.

The record shows that it was the joint account of Mr. and Mrs. Martin that was sued on. It contained items of debit and credit between them and the coal company running over a number of years, and contained items of debit and credit as late as December, 1904 (this suit was brought in 1905). Some of these credits were for salary of Mr. Martin, and some for salary of Mrs. Martin. It is insisted that the last item of Mrs. Martin's salary is August 1, 1902. The plea of limitation is to the joint account of the two, and did not in any way separate the two claims. If the claims were separated, and the plea interposed to the separate claim of Mrs. Martin, the result is the same. The record shows that the court submitted to a master the duty of stating the account of Mr. and Mrs. Martin with the coal company. The fifth item of the master's statement is as follows: "I find in the account that Mrs. Minnie C. Martin has taken credit January 25, 1904, for \$250. The defendants admit there is no contest over this item." Exceptions were filed to this account on other matters by both parties, and in ac-

cordance with the instructions from the chancellor the account was recast; but there was no change upon this item, as it appears in the restated account: "January 25, 1904. By cash, Mrs. Minnie O. Martin, \$250." This was evidently payment on the account. From these facts, the court concludes that Mrs. Martin's salary was not barred when this action was begun.

The order is that the judgment be corrected, so as to conform to the opinion; and in other respects the motion for retaxation of costs and modification of the decree is overruled.

ROBERTSON et al. v. ROBINSON

(Supreme Court of Arkansas. Sept. 28, 1908.)

1. ESTOPPEL—ACTS CONSTITUTING ESTOPPEL.

A husband, claiming title under a conveyance to himself and wife as tenants by the entirety, is not estopped, after the death of the wife, from disputing her title under a deed executed by one having no title.

2. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

A finding, not against the preponderance of the testimony, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

3. HUSBAND AND WIFE—CONVEYANCES—ESTATES BY ENTIRETIES—RIGHT OF SURVIVOR.

Where land is conveyed to husband and wife as tenants by the entirety, the entire estate by the right of survivorship vests in the husband on the wife's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 78-79.]

Appeal from Jefferson Chancery Court; Jno. M. Elliott, Chancellor.

Suit by Mary A. Robertson, prosecuted after her death by Joseph Robertson and another, against David A. Robinson. From a decree for defendant, plaintiffs appeal. Affirmed.

Taylor & Jones, for appellants. Austin & Danaher, for appellee.

McCULLOCH, J. This is a suit in chancery, instituted originally by Mary A. Robertson against David A. Robinson, the husband of her deceased daughter, Hannah T. Robinson, to cancel a conveyance of certain lots in the city of Pine Bluff, Ark. The conveyance was executed after the death of Hannah T. Robinson, and the plaintiff claimed title by inheritance from her said daughter. She alleged in the complaint that by reason of extreme age she was infirm in body and mind and was mentally incapable of executing the conveyance, and also that there was no consideration for the conveyance. She died during the pendency of the suit, and it was revived in the name of her two children. The lots in controversy were formerly owned by one Jennie Winstead, who died many years ago, leaving surviving her husband, S. L. Winstead, and child, who died without issue. After the death of his wife, Jennie, S. L. Winstead executed two deeds purporting

to convey the property in controversy to Hannah T. Robinson; but there was testimony tending to establish the fact that Jennie Winstead executed and delivered a deed to David A. and Hannah T. Robinson, conveying the property to them jointly as tenants by the entirety. This deed was never recorded, and it is claimed that it was accidentally destroyed by fire. The chancellor found that this deed was duly executed and delivered by said Jennie Winstead, and we cannot say that this finding is unsupported by the testimony. Appellee himself testifies that Jennie Winstead executed and delivered the deed just before her death, and his testimony is not contradicted, though its force is weakened by his subsequent conduct in accepting a conveyance of the same property to his wife from S. L. Winstead after the death of his wife, Jennie. As S. L. Winstead had no title to convey, appellee is not estopped to dispute his wife's title under those deeds. *Walker v. Helm*, 84 Ark. 614, 106 S. W. 1170.

The finding of the chancellor is not against the preponderance of the testimony, and we will therefore not disturb it. Under this conveyance the title passed to appellee and his wife, Hannah T., as tenants by the entirety, and by the right of survivorship the entire estate vested in him at the death of his wife. *Branch v. Polk*, 61 Ark. 388, 33 S. W. 424, 30 L. R. A. 324, 64 Am. St. Rep. 266. It is therefore unnecessary for us to pass upon the question of Mary A. Robertson's capacity to execute a conveyance to appellee. The title being already vested in him, nothing passed by the conveyance. Nor is it important to consider what estate in the property—whether for life or in fee simple—Mary A. Robertson would have inherited from her daughter, Hannah T. Robinson, if the latter's estate had been in fee, instead of in entirety, under the deed from Jennie Winstead to her and her husband.

Decree affirmed.

BRADDOCK v. ENGLAND et al.

(Supreme Court of Arkansas. Sept. 28, 1908.)

VENDOR AND PURCHASER—PRICE—NONPAYMENT—FORFEITURE—WAIVER.

Where a vendor of land, to be paid for in installments, habitually permitted payments to be made after default, he thereby waived his right in equity to enforce a forfeiture for nonpayment of installments when due; and, such waiver having continued until after levy as the property of the vendee, no forfeiture could then be enforced, but the purchaser under the execution was entitled to the land on paying the balance due the vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 158-160.]

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by J. E. England and another against E. B. Braddock. Judgment for complainant England, and defendant appeals. Affirmed.

C. P. Harnwell, for appellant. J. W. Blackwood, for appellees.

HILL, C. J. On March 12, 1902, Braddock sold to William Luckett, a negro, the west half of lot 1, block 32, Braddock's Boulevard addition to the city of Little Rock, for the sum of \$400, \$15 being paid in cash, and the balance evidenced by 77 notes, for \$5 each, payable monthly. The agreement stipulated that upon the payment of the purchase price a deed would be made to the purchaser, and that upon default in the payment of any of said notes the remaining notes should become due and payable, the obligation resting upon Braddock to make a deed should become void, and the money theretofore paid on account of said purchase should be considered as so much rent paid by Luckett for the use of the property from the date of the instrument to date of such default in payment. Luckett went into possession of the property, but was irregular in making his payments. Braddock, however, was lenient with him, and took wood and groceries as credits upon said notes, and accepted small payments from time to time; the last payments being on June 3, 1905, July 29, 1905, and August 3, 1905. At the time of these payments several notes were past due. In all, he paid 36 notes. Doyle obtained judgment against Luckett and others in the Pulaski circuit court on April 4, 1905, which judgment was assigned to J. E. England, Jr., on the 23d of August; and on the 29th of August execution was levied upon the lot in controversy in favor of England, and the property was advertised for sale. Thereafter, on the 18th of September, Braddock notified Luckett to vacate the property, which he did; Braddock taking possession of it. On October 12th England bought the property at his own execution sale; Braddock at the time notifying the purchasers at the sale that England had no interest in the property.

The evidence falls to show any offer by Braddock to surrender the notes and contract of sale until after these transactions, although during the progress of the final argument he asked leave to introduce evidence showing that he had made such offer at the time he notified Luckett to vacate; but this was refused by the chancellor, evidently because coming too late. There is some controversy as to whether England made tender of the amount due Braddock after he purchased the land at the execution sale; but he claims that he understood that his attorney had made tender to Braddock. At any rate, tender was made and refused during the taking of the depositions. England brought suit, offering in his complaint to pay into court all sums due Braddock, and alleging that he had succeeded to the rights of Luckett, and he prayed for specific performance of the contract. The court found that Braddock had waived his forfeiture,

and did not attempt to enforce it until after England had acquired rights in the property, and that Luckett was still indebted to Braddock in the sum of \$305, for 42 notes which remained unpaid. England was directed to pay said amount into court within five days, which he did; and thereupon it was decreed that all title to said land be divested out of Braddock and vested in England, from which decree of the chancellor Braddock has appealed.

The judgment was right. Braddock's course of conduct in habitually permitting payments to be made after default amounted in equity to a waiver of the forfeiture which he had theretofore been entitled to have demanded, and this waiver continued until after England had acquired rights in the property by levy of execution thereon. There could be no nunc pro tunc forfeiture. The principles governing this case are settled by *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562; *Bain v. Parker*, 77 Ark. 168, 90 S. W. 1000; *Morris v. Green*, 75 Ark. 410, 88 S. W. 565; *Banks v. Bowman*, 83 Ark. 524, 104 S. W. 209.

Decree affirmed.

HART, J., having presided in the chancery court, was disqualified, and did not participate.

SMITH et al. v. LAMB.

(Supreme Court of Arkansas. July 6, 1908.)

1. DOWER—CONVEYANCES BY HUSBAND AFTER MARRIAGE—EFFECT.

A bill of sale made by a husband four days before his death, and while he realized that his death was impending, to deprive his wife of her dower rights in the property conveyed, is in fraud of her dower rights, and void as to her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, § 141.]

2. CANCELLATION OF INSTRUMENTS—DEED—FRAUD—UNDUE INFLUENCE—EVIDENCE.

In a suit by a widow to set aside a deed to her stepson conveying her homestead and dower rights, evidence held not to show that it was obtained by fraud, undue influence, or coercion; there being no great disparity in their ages and no trust relation existing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 102.]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by Naomi Lamb against D. A. Smith and others. From a decree for plaintiff, defendants appeal. Reversed, with directions to dismiss complaint.

In May, 1905, Naomi Lamb, formerly Naomi Smith, instituted this action, claiming dower and homestead in the lands described in the complaint. She alleges that she is the widow of I. H. Smith, deceased, who departed this life in June, 1903, and that said lands comprised his homestead at the time of his death. She also alleges that at the time of his death said I. H. Smith was the

owner of certain personal property, and that his life was insured in the sum of \$2,000, made payable to his estate. The said I. H. Smith left surviving him several children, some of whom are adults and some of whom are minors, all of whom are made parties to this suit by proper service of summons. I H. Smith had been married to appellee for about seven years prior to his death. He left three minor children by a former wife—Hettie, aged 13; Zacharias, aged 10; and Celeste, 8 years old. About four days prior to his death he executed a bill of sale of all his personal property to James A. Smith, an adult son. It is as follows: "For value received I hereby sell and convey unto James A. Smith all of my cattle, about 75 head, all of my hogs, about 125 head, all of my mules and horses, 3 wagons, and harness for same. Witness my hand this 19th of June, 1903. [Signed] I. H. Smith." At the same time his life insurance policy for \$2,000, which was payable to his estate, was made payable to said James A. Smith. The homestead comprised 58 acres of land, adjoining the town of Manilla. About 30 acres of the land was in cultivation, and its rental value was \$5 per acre. There was a six-room frame cottage upon it.

I. H. Smith had been sick for about four weeks prior to his death. He was afflicted with dropsy of the stomach, and a surgical operation was performed upon him about seven days prior to his death. He had lived upon his homestead about 40 years. After his death, his widow and James A. Smith, one of his sons, entered into negotiations relative to the purchase of her dower and homestead interests. On the 28th day of July, 1903, after an agreement had been reached between them, a deed was prepared by the terms of which appellee conveyed to said James A. Smith all her rights of dower and of homestead in the estate of her late husband for the consideration of \$500. On the same day, pursuant to their negotiations, there was also prepared a contract by the terms of which appellee was permitted to remain upon the homestead until the 1st day of January, 1904, unless she should sooner complete a dwelling house which she contemplated erecting in the town of Manilla; and in consideration of her continuing in the meantime to care for the household and minor children she was to receive one-third of the crops grown upon the homestead. On his part the said James A. Smith bound himself to deliver at her place in Manilla all lumber and other material to be used by her in the construction of her house. Upon the deed and contract being presented for her signature, she refused to execute the same. The testimony adduced by appellants tends to show that, after consulting with one of her sons by a former husband, she did sign both the contract and the deed on the 15th day of September, 1903, and acknowledged the same before G. T. Hatfield, a justice of

the peace. The justice, who is not shown to have any interest in the case, testifies to both the fact of her signatures and her acknowledgment. He states that her son was present and that she advised with him. Other witnesses testify to the fact that she afterwards admitted to them the execution of these instruments. Her son denies that he was present when she signed the instruments, or that she consulted with him about signing them. Appellee admits signing the contract referred to. She says that she signed it in duplicate, but denies signing the deed.

The \$500 mentioned as the consideration in the deed was paid to her. She admits receiving it, but says she thought it was her part of the insurance. She denies receiving any part of the crop grown on the homestead in 1903. The materials for the construction of a house were furnished her. She finished the erection of her house in Manilla, and moved into it in February, 1904. When she left the homestead, she had no intention then of ever returning to it. Upon being further questioned in regard to it, she said that she intended returning at some time in the future, when she found she could get along with the children of her deceased husband. She remained at her house in Manilla until she married her present husband, in March, 1906, when she came to his home, near Monette, in Craighead county. In March, 1904, James A. Smith died of consumption, and his uncle, D. A. Smith, became administrator of his estate. He testifies that I. H. Smith had a mortgage on his homestead for about \$275 and owed many other debts when he died, and that these were all paid. D. B. Smith, a nephew of I. H. Smith, deceased, identified checks and receipts to the amount of nearly \$1,000, which he said was paid by James A. Smith in his lifetime on account of the debts due by said I. H. Smith, deceased.

The chancellor found in favor of appellee, the plaintiff below, rendered a decree in her favor, and appointed commissioners to assign her dower and homestead in the real estate described in the complaint. The deed purporting to be executed by her September 15, 1903, to James A. Smith, was canceled and annulled. The defendants in the court below were granted an appeal.

W. M. Taylor and A. G. Little, for appellants. J. F. Gautney, for appellee.

HART, J. (after stating the facts as above). The conveyance or bill of sale of I. H. Smith to his son James A. Smith was made only four days prior to his death. It was made at a time when he realized that his own death was impending, and all the facts and circumstances adduced in evidence show that it was made for the purpose of depriving his wife of her dower rights therein, and, having been thus made in fraud of her dower rights, it is void as to her. *Pomeroy's Equity Jurisprudence* (3d Ed.) vol. 4, par. 1383, and cases cited; *Murray v. Mur-*

ray, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95; Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Walker v. Walker, 68 N. H. 390, 31 Atl. 14, 27 L. R. A. 799, 49 Am. St. Rep. 616; Smith v. Smith, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142.

Upon a careful consideration of the testimony, we are of the opinion that a clear preponderance of the evidence establishes the fact that appellee signed the deed of September 15, 1903, conveying to James A. Smith her right of dower and of homestead in the estate of her deceased husband; but a more serious question presents itself in determining whether or not the execution of that deed was procured by fraud or undue influence, and therefore brings the case within the limits of the principle established by the cases of Parker v. Hill, 85 Ark. 363, 108 S. W. 208, and of Million v. Taylor, 38 Ark. 428, cited therein. But a thoughtful review of the evidence leads us to a conclusion that the facts of the present case do not bring it within the rule there announced. Appellee was only the stepmother of James A. Smith. There was no great disparity in their ages. She does not claim to have reposed confidence in him, and there was no good reason why she should have relied upon him; for the testimony shows that she was not on good terms with her stepchildren, so much so that they did not wish to live with her. No trust relations existed between the parties, and, although the contract may be said to have been improvident, we do not think the evidence establishes that it was obtained by fraud, undue influence, or coercion.

The decree is reversed, with directions to dismiss the complaint for want of equity.

PETTUS & BUFORD v. KERR.

(Supreme Court of Arkansas. Sept. 28, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE.

Evidence in an action for injuries sustained by a cotton gin employé, while replacing a belt which had escaped from a pulley, held to support a finding that the employers were negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

2. SAME—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

An instruction that it was the employers' duty to furnish the employé with suitable machinery and a safe place to work, and that the employé would be justified in obeying orders without being chargeable with contributory negligence or assumption of risk, and another instruction that reasonably safe appliances furnished the test of the employers' duty, and that, if a shaft and pulley were reasonably safe, to find for the employers, were not in conflict; but the latter explained and qualified the former.

3. SAME—DUTY TO FURNISH SAFE APPLIANCES.

The duty of a master is discharged by exercising ordinary care to provide reasonably safe appliances with which to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 174.]

4. TRIAL—INSTRUCTIONS—OBJECTIONS—SUFFICIENCY.

A general objection is insufficient to reach error in instructions, in that they charged that it was the absolute duty of the master to provide reasonably safe appliances, instead of that his duty would be discharged by exercising ordinary care in providing such appliances.

5. APPEAL AND ERROR—ERROR INVITED.

Parties requesting an instruction containing the same defect as another instruction given, having induced or acquiesced in the error, cannot complain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3602.]

6. TRIAL—INSTRUCTIONS.

Any error in an instruction making it the absolute duty of a master to provide reasonably safe appliances was corrected by an instruction that the law holds one operating machinery liable for such mishaps only as a reasonably prudent person should anticipate as a probable result of the condition of the machinery, and, unless reasonably prudent persons should have anticipated the accident from the condition of the machinery used, to find for the employers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705-718.]

7. SAME.

An instruction that it was the employers' duty to furnish suitable machinery, and that the employé might presume that the employers would do their duty in this respect, without being chargeable with contributory negligence or assumption of risk, could not have been understood as meaning that because of such presumption an employé could not be guilty of contributory negligence, where the court in another instruction clearly submitted that question to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

8. MASTER AND SERVANT—ASSUMPTION OF RISK.

A servant has the right to act upon the presumption that the master has discharged his duty with reference to providing suitable appliances, and does not assume the risk of danger caused by the master's negligence.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by J. D. Kerr against Pettus & Buford. Judgment for plaintiff, and defendants appeal. Affirmed.

R. J. Williams and N. W. Norton, for appellants. S. H. Mann, for appellee.

McCULLOCH, J. Appellee was employed by appellants to work in a cotton gin, and sues them to recover damages for physical injuries received while at work replacing a belt which had escaped from a pulley. He alleged in his complaint that appellants negligently fastened a rope to the pulley and the shaft on which it revolved, and left it there with a loose, knotted end six or eight inches long, and that while he was in the act of replacing the belt his clothing was caught by the knotted end of the rope, throwing him against the shaft and injuring him. It is also alleged that the rope on the pulley was in a dimly lighted place, that its presence there was not observable without close inspection, and that appellants were also guilty of negligence in failing to warn appellee of the presence of the rope. The testi-

mony adduced at the trial tended to establish the allegations of the complaint and was sufficient for that purpose. The jury rendered a verdict in favor of appellee, assessing his damages at \$500.

It is earnestly insisted that the testimony is insufficient to sustain the charge of negligence; but, as already stated, we are of the opinion that it was legally sufficient to justify the verdict of the jury. It is undisputed that the pulley did not fit on the shaft, that it had to be tightened with the rope, and that it was unusual to fasten a rope to the pulley and shaft. There is a conflict in the evidence as to there being a knotted end of the rope extending from the pulley or shaft; but the evidence abundantly establishes the fact, and that it caught appellee's clothing while he was attempting to replace the belt on the pulley. It is true that no one saw the end of the rope catch the clothing, but from the condition of the clothing wrapped around the shaft and rope, and from the position appellee occupied, according to his testimony, the jury could legitimately draw the inference that the injury occurred in that way. The evidence tends to show that it was not proper to have the pulley fastened in that way, that the rope with the knotted, loose end was situated in a dark place, where it could not be readily observed, that it frequently became necessary for an employé to go there to replace the belt, and that its presence there caused the injury to appellee. This was sufficient to make out a charge of culpable negligence on the part of appellants in the discharge of their duty to their employes in the exercise of ordinary care to provide a safe place where they were required to work.

Error is assigned in the giving of the following instruction at the request of appellee: "It was the duty of the defendants to furnish the plaintiff with suitable machinery, tools, and appliances and a safe place for him to work, and the plaintiff had a right to presume that the defendants would do their duty in this respect; so when directed by proper authority, or when in the performance of his duty, he was required to perform certain services, or to perform them in a certain place, he would be justified in obeying orders without being chargeable with contributory negligence or with the assumption of the risk in so doing." The chief objection urged to this instruction is that it defines the duty of the master to be to furnish a safe place to the servant, instead of a reasonably safe place. The objection to the instruction was general, and the attention of the court should have been called to the defect by specific objection.

The court also gave the following at appellant's request: "Reasonably safe appliances furnishes the test of the proprietor's duty to the laborer; and if you find the shaft and pulley were reasonably safe to those working about it at the time of the accident, you

will find for the defendants." The two instructions are not in conflict with each other, but the latter explains and qualifies the former. *Citizens' Electric Co. v. Thomas*, 75 Ark. 260, 87 S. W. 427. The latter explains what is meant by a safe place, and tells the jury that the master fully discharges his duty to the servant if he furnishes reasonably safe appliances. Both instructions were erroneous in failing to state that the duty of the master would be discharged by exercising ordinary care in providing reasonably safe appliances with which to work, instead of saying that it was the absolute duty to provide such appliances. That is the real defect in the instruction; but no objection has been made, either here or below, on that ground, and a general objection was not sufficient. *Railroad v. Barnett*, 65 Ark. 255, 45 S. W. 550.

Instead of objecting on that ground, appellants requested the court to give the instruction quoted above, which contains the same defect. Having induced or acquiesced in the error, they cannot complain. *Ft. Smith L. & T. Co. v. Barnes*, 80 Ark. 169, 96 S. W. 976. If, however, the instructions just quoted were calculated to give an erroneous impression of the law of the case, it must have been entirely removed by the following instruction which the court gave: "The law holds one operating machinery liable for only such mishaps as a reasonably prudent person should anticipate and foresee as a probable result of the condition of the machinery; and unless you find from the proof, by a preponderance, that the rope was the cause of the accident, and that it was upon the shaft and pulley in such a way that those in charge, as reasonably prudent persons, should have foreseen and anticipated the probability of an accident such as happened, you will find for the defendants."

The further objection urged to the instruction first quoted is that it told the jury in effect that, because of the presumption which the servant had the right to indulge that the master had discharged his duty, he could not be guilty of contributory negligence in so doing, nor could be held to have assumed the risk. We do not think the instruction could have been so understood by the jury, so far as the question of contributory negligence is concerned; for the court, in another instruction given at appellant's request, clearly submitted that question to the jury. As to the question of assumption of risk, it was entirely correct to say that a servant has the right to act upon the presumption that the master has discharged his duty with reference to providing suitable appliances and a safe place, and that he does not assume the risk of danger caused by the negligence of the master. *Railroad v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249.

Objection is made to another instruction given at request of appellee, but we find no error therein.

The record is free from error, and the judgment must be affirmed. It is so ordered.

FRANK KENDALL LUMBER CO. v. SMITH.

(Supreme Court of Arkansas. July 6, 1908.)

1. DEEDS—TITLE ACQUIRED—VENDOR WITHOUT TITLE.

A grantee of one without title or interest in the land conveyed acquires no interest therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 13.]

2. TAXATION—TAX SALES—VALIDITY.

A tax sale is void, where the clerk failed to record the list of delinquent lands and notice of sale, and certify at the foot of the record in what newspaper the list was published, the date of publication, and for what time the same was published before the day of sale, as required by Kirby's Dig. § 7086.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1281.]

Appeal from Grant Chancery Court; Alphonzo Curl, Chancellor.

Suit by J. S. Smith against the Frank Kendall Lumber Company and others. From a decree of dismissal, defendant Frank Kendall Lumber Company appeals. Affirmed.

White & Althelmer, for appellant. J. M. McCaskill and Isaac McClellan, for appellee.

BATTLE, J. J. S. Smith, complaining of the defendants, Frank Kendall Lumber Company, Daniel J. Taylor, as county clerk of Grant county, in this state, and W. J. Rushing, as county treasurer of the same county, states in his complaint:

"That the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 19 in township 6 S., R. 11 W., which is unimproved land, situate in said county, was placed on the tax books for the year 1903 for the taxes of 1878 to 1903, and by the collector of said county returned delinquent for same, together with the penalty thereon, and was by the said collector on the 15th day of June, 1904, after the same having been advertised by the clerk, as required by law, sold to the plaintiff for the taxes, penalty, and costs charged against same, amounting to \$25.45, and a certificate of purchase was issued to him by said collector. * * *

"That afterwards, on April 23, 1906, the defendant Frank Kendall Lumber Company filed in the recorder's office of said county a deed from Mary Crossett to it for the above-described lands, except that in said deed the name of the county and state in which same is situated is not given, dated April 20, 1906, * * * and on said April 23, 1906, applied to and did redeem same by paying to the said county treasurer the sum of \$34.32, which amount was paid over to plaintiff on June 11, 1906.

"That said Mary F. Crossett had no interest nor title in said land, and that said deed conveyed no interest to said defendant lumber company, and that it had no right to redeem said tract of land from said tax sale, and that said redemption was a fraud upon said plaintiff.

"Plaintiff further states that he was not aware that said defendant lumber company had no title to said land when he accepted said redemption money, and that upon learning the status of affairs he offered to return same to said treasurer, together with any interest that might be due thereon, which offer was by said treasurer refused. * * *

"The plaintiff is willing to return said redemption money, either to the treasurer or to the defendant lumber company, together with any interest that may be due thereon, and hereby tenders same, payable as may be ordered by this court.

"The plaintiff is entitled to tax deed from said clerk for said land under said tax purchase, and has tendered to him the legal fee for making same, which has been by him refused. * * *

"Wherefore * * * plaintiff prays that said deed from Mary Crossett to the Frank Kendall Lumber Company be canceled, set aside, and held for naught, as a cloud upon plaintiff's title to said land; that the clerk be ordered and directed to make, execute, and deliver to plaintiff a good and sufficient tax deed for said land; and that plaintiff be allowed to return to said treasurer of said lumber company the amount of redemption money erroneously drawn by him," etc.

An amendment was made to the complaint, which is not material.

The defendant lumber company answered, and admitted that the land was sold for taxes and purchased by plaintiff, and alleged that the sale was void for the following, among other, reasons:

"That the clerk before the day of sale had failed to attach his certificate to the delinquent list, showing in what newspaper and for what length of time the delinquent list was published previous to the day of sale, as required by section 7086, Kirby's Digest, and that the clerk failed to keep posted in his office such delinquent list for one year."

It admitted that it purchased the lands from Mary F. Crossett, and that within two years from the date of sale for taxes it redeemed the same by paying to the county treasurer all taxes, penalty, and costs legally imposed upon the same, which was duly accepted by the plaintiff, who, before accepting the redemption money, knew, or by the exercise of reasonable care could have known, its title to the land, and denied that it committed any fraud upon plaintiff in redeeming the land.

The defendant lumber company demurred to the complaint, which the court overruled,

and, after hearing the evidence, dismissed the action and the lumber company appealed.

The grantor of appellant had no right, title, or interest in the land in controversy, and it acquired none. The tax sale to the appellee was void, because the clerk did not record the list of delinquent lands and notice of sale thereof, at which appellee purchased, and certify at the foot of the record, "stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published before the second Monday in June then ensuing." Section 7086, Kirby's Dig.; *Martin v. Allard*, 55 Ark. 218, 17 S. W. 878; *Cooper v. Freeman Lumber Co.*, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; *Logan v. Eastern Arkansas Land Co.*, 68 Ark. 248, 57 S. W. 798; *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 8, 103 S. W. 609; *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84; *Taylor v. State*, 65 Ark. 595, 47 S. W. 1055; *Birch v. Walworth*, 79 Ark. 580, 96 S. W. 140; *Hunt v. Gardner*, 74 Ark. 583, 86 S. W. 426; *Magness v. Harris*, 80 Ark. 583, 98 S. W. 362. Appellant insists that appellee is barred by the redemption and refused to accept the return of the money thereby paid. There is no evidence that he accepted the same through mistake, and he has not appealed. Neither party has any interest in the land.

Decree affirmed.

DOYLE & BOOTH v. KAVANAUGH.

(Supreme Court of Arkansas. Sept. 28, 1906.)

1. TRIAL — EVIDENCE — INSTRUCTIONS — IGNORING TESTIMONY.

Where, in replevin by a chattel mortgagee, there was evidence that the mortgage was given to secure a note for the price of the chattels mortgaged and also to secure an account for supplies, that the proceeds of an obligation of a third person, assigned as security for the price, were applied to the debt for supplies, and the balance credited on the note, and that a part of the note remained unpaid, an instruction that if the note from the third person was assigned to secure the price of the chattels, and yielded enough to pay the same, the verdict should be for defendant, was erroneous, because it ignored evidence and took from the consideration of the jury the question of whether the account for supplies had been paid or was secured by the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

2. SAME—ERRORS IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

An erroneous instruction is not cured by another which is correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705, 718.]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Doyle & Booth against C. C. Kavanaugh, administrator of J. G. Parmer, deceased. From a judgment for defendant, plaintiffs appeal. Reversed, and remanded for new trial.

This is an action of replevin, brought before a justice of the peace in Pulaski county to recover the possession of two mules and a wagon, claimed by Doyle & Booth, a partnership consisting of D. M. Doyle and C. F. Booth, under a mortgage executed to them by J. G. Parmer. Judgment was rendered in favor of Doyle & Booth in the justice court, and Parmer appealed to the circuit court. There the verdict of the jury was in favor of Parmer. Doyle & Booth have appealed, alleging certain errors in the instructions of the court.

The testimony adduced at the trial, so far as material, is as follows: During the first part of the year 1905 J. G. Parmer bought a pair of mules and a wagon for \$195 from the firm of Doyle & Booth. He gave his promissory note therefor, due November 1, 1905, and also gave a mortgage on the mules and wagon to secure the payment thereof. He also bought his supplies for that year from Doyle & Booth. The mortgage referred to does not appear in the record; but both parties, without objection, testified as to its contents. Doyle says that the mortgage was given to secure both the \$195 note and the supply account; that the supply account was secured primarily by the assignment of a note given for the purchase of land by one Brewer to Parmer; that the mortgage was given to secure the \$195 note, and was also given as additional security for Parmer's account for supplies. Parmer testified that the Brewer note was assigned as security for the \$195 note given for the mules and wagon; that Doyle said to him that he would have to have other security on the mules, as he had the mules on the crop lien; that the Brewer note was collected, and the proceeds were applied first to the extinguishment of the debt for supplies, and the balance was credited on the \$195 note. Doyle testified that Parmer owed his firm \$87.44 at the time of the institution of this suit. Parmer adduced testimony tending to show that the whole debt, both the note and the account, had been paid.

Over the objections of the plaintiffs, the court instructed the jury as follows: "(1) If you find an amount due plaintiff by defendant, you will so state by your verdict, regardless of the sale of wagon and mules. (2) If you find the Brewer note was given to secure the purchase price of the mules and wagon, and yielded enough to pay for same, you will find for the defendant for the mules and wagon, or their value, and his damages for detention. (3) If you find usury charged on any items in the account, you will find same void, and disallow them." "(6) You are further instructed that, if you find by a preponderance of the testimony that the defendant agreed to give the plaintiffs \$195 for the mules and wagon, and executed to the plaintiffs his mortgage on said mules and wagon, and his crop raised in White county in 1905, to pay for said mules and wagon and for

provisions, tools, and implements furnished him by the plaintiffs, and that the said indebtedness has been paid, or that the plaintiffs charged the defendant usurious interest on said indebtedness, in either event you will find for the defendant, and award him possession of said mules and wagon, if to be had, and, if not, then their value and such damages as you may find the defendant is entitled to for the use of said property up to date, not to exceed an amount of 50 cents per day since the defendant was possessed of said property."

Buzbee & Hicks, for appellants. A. J. Newman, for appellee.

HART, J. (after stating the facts as above). The principal point which appellants urge for the reversal of this case is the giving of the second instruction. The vice of this instruction consists in the fact that it ignores the testimony of appellants to the effect that the supply account was also secured by the mortgage on the mules and wagon. Applying the proceeds of the Brewer note to the payment of the \$195 note, under appellee's theory of the case, there might still be a balance due appellants on the supply account. The second instruction took from the consideration of the jury the question of whether or not the account for supplies had been paid, or was secured by a mortgage on the property in controversy. This error was eliminated from the sixth instruction, which covered the same phase of the case; but the two instructions are irreconcilable and conflicting. No attempt was made to explain the first instruction in the latter. It cannot be known whether the jury found for the appellee because it believed the Brewer note was given to secure the purchase price of the mules and wagon and was sufficient to pay it, as directed by the second instruction, or because it believed that the mortgage was given to secure both the \$195 note and the account for supplies, and that the whole indebtedness had been paid. An erroneous instruction is not cured by another instruction which is correct, if it cannot be said which influenced the jury. *St. Louis, Iron Mountain & Southern Ry. Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715.

For the error in giving the second instruction, the judgment is reversed, and the cause remanded for a new trial.

BAKER v. CAZORT.

(Supreme Court of Arkansas. Sept. 28, 1908.)

1. APPEAL AND ERROR—RECORD—PRESUMPTIONS.

Where a peremptory instruction was based on an instrument not set out in the abstract, the court on appeal will presume that the instruction was correct, and will not examine the transcript for such instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3751.]

2. SAME.

The court will not explore the transcript for evidence omitted from the abstract in violation of court rule 9 but will presume that the judgment is correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673-3678.]

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by G. T. Cazort against T. B. Baker and another. From a judgment for plaintiff, defendant T. B. Baker appeals. Affirmed.

J. E. London and C. A. Starbird, for appellant. Sam R. Chew, for appellee.

HART, J. G. T. Cazort instituted this action in the Crawford circuit court to enforce a specific attachment on two mares, which he alleged he had sold to T. B. Baker and A. E. Baker. No service of summons was had upon A. E. Baker, and the case proceeded against T. B. Baker alone. After the evidence was introduced, the court told the jury that the facts were undisputed, and that the only question about which there was any contention was whether or not T. B. Baker became a purchaser of the mares, within the meaning of our law authorizing this character of suit. The note or obligation given for the purchase price of the mares was read in evidence, and the court told the jury that it was the contract of purchase, and that by its terms T. B. Baker and A. E. Baker became the purchasers of the mares. The jury was then directed to find for the plaintiff. Pursuant to the instructions of the court, the jury returned a verdict for G. T. Cazort, and T. B. Baker has appealed.

Appellee, Cazort, has made a motion to affirm the case because appellant, Baker, has failed to comply with rule 9 in his abstract of the record. Appellant's abstract does not give the whole instructions of the court, but only such excerpts therefrom as he deemed sufficient. Nor does it contain his motion for a new trial, or any reference thereto. The substance of the testimony of Cazort, the plaintiff in the court below, is not given, but only appellant's conclusion of its effect is stated. After appellee's brief, which contained his motion to dismiss for noncompliance with rule 9, had been filed, appellant prepared a supplemental abstract, which contains his motion for a new trial and also an abstract of the testimony of J. J. Cravens and T. B. Baker; but no reference is made to the obligation given for the purchase price of the property in controversy. Cravens' testimony is confined to the fact that, subsequent to the purchase from Cazort, A. E. Baker mortgaged the team of mares to him, that he did not pay the mortgage debt, and that his firm seized the mares under its mortgage, and afterwards sold and delivered them to T. B. Baker. The testimony of T. B. Baker is to the same effect, and in addi-

tion he states that A. E. Baker bought the mares from Cazort. If, as stated by the court to the jury, the obligation showed by its terms that T. B. Baker became one of the purchasers of the mares, it was the best evidence of that fact, and could not be contradicted by parol evidence.

We have no means of knowing whether the finding of the court in that respect is correct or not, except by exploring the transcript; for appellant has not set out the obligation in either his original or supplemental abstract. It is evident that the peremptory instructions of the court were based upon the language of this instrument. The presumption is in favor of the correctness of the trial court's ruling in that regard. It has been repeatedly held by this court that the rules of practice do not make it our duty to explore the transcript for evidence thus omitted, and the presumption is in favor of the correctness of the judgment of the trial court. For a full discussion of the proper office of the abstract, and the reasons for rule 9, reference is made to the case of *Neal v. Brandon*, 74 Ark. 320, 35 S. W. 776. Later cases in which the rule has been enforced are as follows: *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, 974; *Merritt v. Wallace*, 76 Ark. 217, 88 S. W. 876; *Beavers v. Security Mutual Ins. Co.*, 76 Ark. 138, 88 S. W. 848; *St. Louis, Iron Mountain & Southern Ry. Co. v. Boyles*, 78 Ark. 374, 95 S. W. 783; *Houghton v. Mosley*, 80 Ark. 259, 96 S. W. 1066; *Van Patten v. Wank*, 82 Ark. 547, 102 S. W. 371; *Wallace v. St. Louis, I. M. & Sou. R. Co.*, 83 Ark. 356, 103 S. W. 747.

The judgment is affirmed, for noncompliance with rule 9.

FORREST CITY v. ORGILL BROS. & CO. (Supreme Court of Arkansas. Sept. 28, 1908.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—SUPPLIES—FORMAL REQUISITES.

A city's contract to purchase water machinery, not authorized by any ordinance, resolution, or order of the city council, as required by Kirby's Dig. § 5473, and which was not ratified by any formal action of the council, was void.

2. SAME—INFORMAL CONTRACT—EXECUTION—LIABILITY FOR PRICE.

Where a city purchased waterworks machinery under a contract which was void for want of action by the council, as required by Kirby's Dig. § 5473, but the machinery was delivered, retained, and used by the city for nearly two years, the city thereby accepted the machinery, and the contract became executed by the seller, making the city liable for the price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 686.]

Hart, J., dissenting.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by Orgill Bros. & Co. against the city of Forrest City. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. J. Williams, for appellant. John Gatling, for appellees.

HILL, C. J. This is a suit by Orgill Bros. & Co. against Forrest City for the purchase price of machinery for waterworks. It was brought February 28, 1907, and resulted in favor of the plaintiff in September, 1907, and the defendant appealed.

Gorman was mayor, and Fussell chairman of the committee on waterworks of the common council of Forrest City. Acting on behalf of said city, as they supposed with authority, they purchased machinery for waterworks from Orgill Bros. & Co. at the price of \$1,642.90, f. o. b. Memphis. The machinery was to be installed by the city, and was received in October, 1905, and after some delay was installed at a cost of \$500 or \$600; Fussell paying therefor and the city refunding to him the amount he expended. There is some difference as to the terms of the contract, which was made between Mr. Jones, representing the machinery company, and Mr. Gorman and Mr. Fussell, on behalf of the city; Mr. Gorman and Mr. Fussell saying that they called for machinery which would pump three wells, which the city then had, and two others which it contemplated putting in. Mr. Jones represented that this machine which he was offering them would do so, and that they could take it and try it for 30 days (Mr. Gorman thought it was 60 days) before they paid for it. Mr. Jones says that he represented that it would pump 100,000 gallons in 10 hours, and that the city was to have 30 days to try it. The machine did not work satisfactorily to the city, and negotiations were entered into for a larger machine; and on December 27th, which was probably within the 30 days, the mayor wrote to Orgill Bros. & Co., asking on what terms they would substitute a larger compressor for the one they were then trying, and called their attention to the fact that they had expended something over \$500 in installing the machine, and they did not feel called upon to pay any additional expense of experimenting with some other machine, but would consider their proposition when submitted in writing. He said that the machine would be disconnected and the use of it discontinued at any time the company requested it done, and that they (the city) were thoroughly satisfied that it would not do the work for which it was purchased. Mr. Gorman says that in this letter he offered to return it, and also in a conversation with Mr. Jones he offered to return it. The company insisted that the machinery was all right, and, if properly installed and used, would do the required work.

Negotiations continued between the parties for several months. Experts examined the machinery and the installation, but could not discover the trouble; but it was not filling the reservoir as rapidly as was expected and required for the uses of the city. Whether

due to the machinery, the installation, the location of the wells, or improper handling, is not made clear. Mr. Fussell was asked why they did not disconnect the machinery and discontinue its use when they found it was not working satisfactorily. He says, because they did not want to leave the town without water, and they had spent six months and \$150 trying to get information as to what the trouble was, and that they had no place to store it. When Mr. Gorman was asked why they did not send it back when they found it did not work satisfactorily, he said: "We had a machine up there that cost \$750 with the tank, and we were running it in connection with this, and the two supplied the town. Now, we didn't want to set this aside and buy another, with the probability of having to pay for this one, too." The city used the machine from the time it was installed, and was continuing to use it when this case was tried. It was used in connection with other machinery, and this machinery pumped about half of the water in the reservoir which supplied the city, and the city was collecting water rates, and the receipts from the waterworks were monthly turned into the city treasury during all the time that this machinery was being used.

This contract was not authorized by any ordinance, resolution, or order of the city council wherein the yeas and nays were called and recorded, as required by section 5473 of Kirby's Digest, nor was it ratified by any formal action of the city council. The contract was therefore void. *Cutler v. Town of Russellville*, 40 Ark. 105. A different principle prevails, however, where a contract, which is within the power of the municipality to make, is made without authority, but passes from an executory state, as it was in *Cutler v. Russellville*, supra, to an executed one, where the benefit is retained by the municipality. Then it is held that the municipality cannot retain the property, which might properly have been purchased for it in proper manner, and defeat a recovery for the price thereof, or recover back the price, if paid. *Frick v. Brinkley*, 61 Ark. 397, 33 S. W. 527; *Springfield Furniture Co. v. School Dist.*, 67 Ark. 236, 54 S. W. 217; *Book v. Polk*, 81 Ark. 244, 98 S. W. 1049; *Texarkana v. Friedell*, 82 Ark. 531, 102 S. W. 374; *School Dist. v. Goodwin*, 81 Ark. 143, 98 S. W. 696; *Luxora v. Jonesboro, L. C. & E. Ry. Co.*, 83 Ark. 275, 103 S. W. 605, 13 L. R. A. (N. S.) 157, 119 Am. St. Rep. 139. In *Texarkana v. Friedell*, supra, it was said: "A municipal corporation may ratify the unauthorized acts of its agents or officers, which are within the scope of the corporate powers, but not otherwise. * * * In order to have ratification, there must be some affirmative action by the proper officers, or some negative action, which of itself would amount to an approval of the matter in question."

Under the undisputed facts in this case, the city retained the machinery which sup-

plied in part the water it was daily using and from which it was monthly collecting revenue. From November, 1905, to February, 1907, when this suit was brought, it continued to use the machinery, and was so continuing to use it when the case was tried in September, 1907, a period of almost two years. Under the authorities heretofore cited, the city must be held to have ratified the purchase of the machinery and waived its insufficiency, if in fact the unsatisfactory workings of the water plant were due to any fault in the machinery. Mr. Benjamin thus states the principle which governs: "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them; for receipt is one thing and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods." *Benjamin on Sales*, 703.

As to whether the machinery was at fault, or whether it was due to the installation or the improper use of the machinery, or to several other causes mentioned in the testimony, is not important. The city could, if in fact the machinery was not up to its representations, have discontinued the use of it, and then it would have been at liberty to have availed itself of its remedies, which are pointed out in *Ward Furn. Mfg. Co. v. Isbell & Co.*, 81 Ark. 549, 99 S. W. 845. It did not do so, but retained it for such a length of time that its acceptance must be presumed; for it did not exercise its right of rejection within a reasonable time, and, moreover, it acted toward the machinery in a way that it had no right to act unless it were the owner—that is, kept it in daily use. It has reaped the benefit, and now must pay the price.

Judgment affirmed.

HART, J., dissents.

SLEDGE & NORFLEET CO. et al. v. CRAIG et al.

(Supreme Court of Arkansas. Sept. 28, 1908.)

1. HOMESTEAD—INCUMBRANCE—CONSENT OF WIFE.

Where, though the mortgagor's wife was not mentioned in the mortgage, yet the mortgage concluded with the statement that "the parties of the first part have hereto set their hands and seals," and her name was subscribed thereto with the names of the other mortgagors, and the mortgage contained no relinquishment of dower, in order to give effect to her signature, it will be construed to show an intent to join in the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 205.]

2. SAME—ACKNOWLEDGMENT BY WIFE.

Under Kirby's Dig. § 3901, avoiding any conveyance, mortgage, or other instrument affecting the homestead of a married man unless his wife joins in and acknowledges it, but pre-

scribing no particular form of acknowledgment or certificate thereof, no particular form is essential, but it is sufficient if the wife joins in the execution and acknowledges the same before an authorized officer, and his certificate so states.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 213.]

3. ACKNOWLEDGMENT—CURATIVE STATUTES.

A certificate of acknowledgment not conforming to the general statute prescribing the form of acknowledgments, but showing that the wife acknowledged before the officer that she executed the mortgage, if defective, was cured by Act March 20, 1903 (Laws 1903, p. 151; Kirby's Dig. § 786), declaring valid all instruments affecting real estate defective by reason of the act relating to conveyances of homesteads.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 235-240.]

4. SAME.

Act March 20, 1903 (Laws 1903, p. 151; Kirby's Dig. § 786), declaring valid all instruments affecting real estate defective by reason of the act approved March 18, 1887 (Laws 1887, p. 90), relating to conveyances of homesteads, is not inapplicable because the homestead was not correctly described in a mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 235-240.]

Appeal from Crittenden Chancery Court; Edward D. Robertson, Chancellor.

Suit by the Sledge & Norfleet Company and others against Sol Craig and others to reform a mortgage so as to correctly describe the land and to foreclose the same. Decree for defendants, and complainants appeal. Reversed and remanded, with directions.

St. John Waddell and Rose, Hemingway, Cantrell & Loughborough, for appellants. I. P. Berry and A. B. Shafer, for appellees.

MCCULLOCH, J. During the month of March, 1900, Craig, Coston, and Duffing, who were farmers residing in Crittenden county, Ark., jointly executed to Sledge & Norfleet Company of Memphis, Tenn., a mortgage on certain crops, live stock, etc., and a 40-acre tract of land in that county which was owned by Craig and constituted his homestead. The tract is imperfectly described, but it is admitted in the pleadings that it was the intention of the parties to describe and convey the tract in controversy. This is a suit in chancery instituted by appellants Sledge & Norfleet Company to have the mortgage reformed so as to correctly describe the land intended to be conveyed, and to foreclose the mortgage. The chancellor refused to decree a foreclosure, on the ground that Craig's wife did not properly join in the execution of the deed and acknowledge the same. We find, however, from an inspection of the deed which is copied in the transcript that she did join in the execution, and acknowledged the same before an officer authorized by law to take acknowledgments. It is true that her name is not mentioned in the granting clause of the deed, along with the names of the other grantors, nor in any part of the deed, but the deed concludes with the statement that "the parties of the first part have hereto set their hands and seals," etc., and her name

appears subscribed thereto with the names of the other grantors. The deed contains no clause relinquishing the wife's dower, and, in order to give effect to her signature, it must be construed to evidence an intention to join in the grant. *Pipkin v. Williams*, 57 Ark. 247, 21 S. W. 433, 38 Am. St. Rep. 241. The statute provides that "no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity * * * unless his wife joins in the execution of such instrument and acknowledges the same." Kirby's Dig. § 3901. This statute prescribes no particular form of acknowledgment, and the court has held that the use of no particular form or words is essential in order to comply therewith, but that it is sufficient if the wife joins in the execution of a deed, and acknowledges the same before an officer authorized by law to certify acknowledgments; these being the substantive acts required by the statute in order to give validity to a conveyance of the homestead. *Pipkin v. Williams*, supra. The officer's certificate to the deed involved in this case does not conform to the general statute prescribing the form of acknowledgments to deeds, but it does show that the wife acknowledged before the certifying officer that she executed the deed. This is all that is required by the statute directed especially to the wife's execution of a conveyance of the homestead.

But, if we should hold that the certificate of acknowledgment is defective, the defect has been cured by a subsequent statute. Act March 20, 1903 (Laws 1903, p. 151; Kirby's Dig. § 786). It is urged, however, that the curative statute has no application, because the homestead was not correctly described in the deed. Appellees admitted in their pleadings the existence of facts which justify a reformation of the instrument so as to make it correctly describe the land; hence the cured defect in the certificate of acknowledgment, if a defect existed, presented no obstacle in the way of reformation of the inaccurate description. The right to a reformation of the instrument rests upon established principles of equity, and, when the defective certificate of acknowledgment was cured by the statute, these principles came into operation as if no defect had ever existed.

The pleadings also present the issue whether or not the mortgage lien on Craig's homestead was confined to his separate indebtedness to appellant. The chancellor found that the indebtedness of all the mortgagors was joint, and amounted to the sum of \$834.21 at the time of the rendition of the decree. We think the conclusion of the chancellor in this respect was correct, and that part of the decree is approved.

The decree is therefore reversed and the cause is remanded, with directions to enter a decree foreclosing the mortgage on the land described in the complaint.

FERRELL, v. LAUGHINGHOUSE, County Treasurer.

(Supreme Court of Arkansas. Sept. 28, 1908.)
COUNTIES—FISCAL MANAGEMENT—WARRANTS—PAYMENTS.

Kirby's Dig. § 7627, makes it the duty of school directors to draw orders on the county treasurer, stating the consideration therefor. Section 7628 provides that when such a warrant, properly drawn, is presented to the county treasurer, he shall pay the same out of any funds for that purpose, belonging to the district specified in the warrant. *Held* that, where a person had a judgment against the directors based on a warrant drawn by them, the warrant was merged in the judgment, and the county treasurer could not be compelled to pay the judgment, where no warrant for its payment had been drawn.

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Mandamus by A. B. Ferrell against F. Laughinghouse, county treasurer, to compel the payment of the judgment. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

There was presented to appellee, as treasurer of St. Francis county, on August 17, 1906, the following warrant: "District School Fund, District No. 16. No. 12. Aug. 16, 1906. Treasurer of St. Francis County, Arkansas: Pay for A. B. Ferrell, or order, the sum of seventy $\frac{70}{100}$ dollars, to vaccinate school children, out of the fund. \$70. Jno. W. Hall, W. Sweet, Directors." The treasurer made on it the following indorsement: "School Warrant. Presented August 17, 1906. Not paid for want of funds for the purpose for which this warrant was issued. F. Laughinghouse, County Treasurer." After this appellant obtained judgment before a justice of the peace on the warrant. In March, 1907, appellant petitioned the circuit court for a writ of mandamus to compel the appellee to pay the judgment. He set forth in his petition that the warrant was issued to him by the directors of the district in payment for his services in vaccinating the school children of the district who were unable to employ a physician for that purpose; that the school board had made the order requiring the children to be vaccinated under the advice and at the request of the board of health of the town of Widener, in said county, in which the school was located; that smallpox was prevalent in that community, and the order to vaccinate was made by the board of directors, because it was considered by them dangerous to run the school without requiring the children to be vaccinated, etc.; and that they employed the appellant to perform the services. Appellant alleged that he had obtained judgment on the warrant, and asked that appellee be compelled to pay the judgment, together with interest, costs, etc. The appellee demurred to the petition. The court rendered judgment sustaining the demurrer and dismissing the petition, and this appeal was taken.

John Gatling, for appellant. N. W. Norton, for appellee.

WOOD, J. (after stating the facts as above). In the absence of a warrant drawn by the directors of the district on the appellee as treasurer for the payment of the judgment that had been rendered against the school district, he would have no authority to pay same. It is the duty of the directors to draw orders on the treasurer, and they shall state in every such order the services or consideration for which the order was drawn. Section 7627, Kirby's Dig. "When the warrant of any board of directors, properly drawn, is presented to the treasurer of the proper county, he shall pay the same out of any funds in his hands for that purpose belonging to the district specified in said warrant." Section 7628, Kirby's Dig. The petition does not show that any warrant had ever been drawn by the directors of school district No. 16, on the appellee as treasurer of the county, for the payment of the judgment which the petition alleges, and the demurrer admits, had been obtained against the district. The petition does not show that any such warrant had been presented to appellee and that he had refused its payment. It is clear, therefore, that no cause of action for mandamus against appellee is stated in the petition. The warrant set forth in the petition, as the latter alleges, had been used as the basis for, and was therefore merged in, the judgment. The remedy, if any, is for mandamus to compel the directors to issue warrant for the payment of the judgment; but that case is not before us, and we express no opinion concerning it.

The judgment is affirmed.

MISSISSIPPI VALLEY CONST. CO. et al. v. CHAS. T. ABELES & CO. et al.

(Supreme Court of Arkansas. Sept. 28, 1908.)

1. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—LIABILITY—ELECTION.

Where a party deals with an agent without knowledge of the agency, he may elect to hold the after-discovered principal, if the election is made within a reasonable time after the discovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 513-520.]

2. SAME—AUTHORITY OF AGENT—APPARENT AUTHORITY—SECRET INSTRUCTIONS.

Where a corporation, having contracted to construct a building, placed B. in charge thereof as superintendent, and a sign was erected, reciting that both B. and the corporation were contractors, B. had apparent authority to purchase materials on the corporation's credit, and the corporation was liable for materials so purchased and used in the building, notwithstanding secret instructions to B. to purchase all material from another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 377, 377½.]

3. CORPORATIONS—OFFICERS—STATUTORY LIABILITY—ANNUAL STATEMENT—FAILURE TO FILE.

Where a corporation of which W. had been president continuously since its organization had never filed an annual statement signed by its president and secretary, as required by Kirby's Dig. § 859, W. was subject to the statutory liability created by such section for the corporation's debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1460-1467.]

4. JUSTICES OF THE PEACE—STATEMENT.

In an action before a justice of the peace against a president of a corporation on a corporate liability, where the president's statutory liability appeared evidence, taken without objection, of the corporation's failure to file an annual statement as required by law, it was no objection to a judgment against him that the account filed with the justice contained no statement showing such statutory liability.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Chas. T. Abeles & Co. against M. F. Bain and others. Judgment for plaintiffs against the Mississippi Valley Construction Company and Zeb Ward, and they appeal. Affirmed.

The authorities referred to in the opinion as cited in appellee's brief on the question of undisclosed principal were as follows: Ford v. Williams, 62 U. S. 287, 16 L. Ed. 36, and note; Jones v. New York Guaranty & Insurance Co., 101 U. S. 622, 25 L. Ed. 1030; Wheeler v. McGuire, 2 L. R. A. 812, note; Mechem on Agency, §§ 699, 701; 1 Am. & Eng. Ency. of Law (1st Ed.) 418, note 3; Meeker v. Claghorn, 44 N. Y. 349; Foster v. Persch, 68 N. Y. 400; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Matilage v. Poole, 15 Hun (N. Y.) 556; Garard v. Moody, 48 Ga. 96; Ferry v. Moore, 18 Ill. App. 135.

Appellee sued on M. F. Bain in the justice court on account for \$114.24. Afterwards, on motion of appellees, appellants were made parties defendant. On the trial day in the justice court, the cause was dismissed as to Bain, and judgment by default was taken against appellants. They appealed to the circuit court.

The cause was tried by jury in the circuit court upon the following undisputed evidence: "The Mississippi Valley Construction Company made a contract with one Frank to erect for him a building and furnish all the materials. That one Bain was to have half of the profits, and was employed by said Mississippi Valley Construction Company to superintend the erection of said building and to purchase the material for the same. That the president of the company, Zeb Ward, instructed him to buy all of the material from the Rock Creek Lumber Company and from no one else, but there was a part of the material needed for the erection of said building that said Bain could not get from the Rock Creek Lumber Company, and he bought this from the plaintiffs, Chas. T. Abeles & Co., and that this lumber is the bill sued on herein. That all of said lumber was used

in erecting said building, and the defendant, the Mississippi Valley Construction Company, received pay from said Frank for the whole contract price of said building, in which the lumber and building materials shown on the account sued on were used and that they have never paid the plaintiffs for the same, and that the price charged by plaintiff in said account for said materials is reasonable. That there was a sign on the building which the defendant the Mississippi Valley Construction Company was erecting which had on it in large letters: 'Contractors: Mississippi Valley Construction Company and Bain.' That the president of the defendant company, Zeb Ward, knew that this sign was on the building. That said Ward testified that he did not know the material bought of the plaintiff was used in said building till it had been so used, when the bill was sent to him, and he refused to pay it. The evidence showed that all the material shown on the bill sued on was purchased by Bain, and all was charged to him on the books of the plaintiff as it was delivered, and was not charged on their books to either defendant. And at first the plaintiffs brought this suit against Bain alone, when he told the plaintiffs that the Mississippi Valley Construction Company owed the bill, and not himself. Then the plaintiff made out the bill against the defendants the construction company and said Ward, and made them parties to the suit, using the same account, but before the trial in the circuit court the plaintiff made out its bill against the defendants the construction company and said Ward, which bill was duly verified, and filed and may be considered as copied herein as the same has been lost. The materials sued for were used in said building, and were necessary for its completion, or other like material, and has not been paid for. It was admitted by the defendants that the Mississippi Valley Construction Company is a corporation organized under the laws of Arkansas in 1901, and has been doing business in this state ever since, and that the president, Zeb Ward, was elected its president at its organization, and is now its president and has been continuously since it was incorporated, and that no annual statement of said corporation signed by its president and the secretary or by any one else has ever at any time been filed with the county clerk of Pulaski county, Ark., which is the domicile of said company. That said Ward was absent in Texas most of the time during the construction of said building, and he left Bain as superintendent of the defendant company to construct and complete the building under the contract with Frank. That Bain had a half interest in the profits of erecting the building. That Ward was here about the time the building was finished, and the material sued on in the account of the plaintiff was purchased by Bain to complete the

building and was so used, and was a very small part of the material used in its construction, and was material he could not get from the Rock Creek Lumber Company, and was necessary to complete the building under the contract of the defendant company."

At the request of appellees, the court gave the following instructions:

"(1) If you believe from the evidence that the material in the account was sold and delivered by the plaintiff and the same was used in the Frank building; that the Mississippi Valley Construction Company was the contractor to build said building, and under its contract was to pay for all material that went into said building, then the said Mississippi Valley Construction Company would be liable for the account sued on for the amount the evidence shows to be due on the same.

"(2) If you find the Mississippi Valley Construction Company liable in this case, then it is admitted that Zeb Ward has been the president of said company from its organization in 1901, and that no annual statement signed by him as president and the secretary of the company was ever filed with the county clerk, then you will also find against Zeb Ward for whatever you find due from the defendant Mississippi Valley Construction Company."

To the giving of these appellants properly saved their exceptions.

The court refused the following prayer of appellants: "(1) If the jury find that the Mississippi Valley Construction Company was a corporation, then it can be bound only by the acts of its authorized agents, and the jury cannot find a verdict against said company unless it by its authorized agents contracted for the goods sued for." The appellant requested the court to give the following: "(2) If the jury find that Bain was instructed to buy goods of no one but the Rock Creek Lumber Company, and that he was told by the Mississippi Valley Construction or its president to buy goods of no one except the Rock Creek Lumber Company, then they should find for the defendant." The court refused this prayer, but added the words, "Unless said company knew of said purchase and made no objection thereto," and gave it as thus modified. The appellants properly saved their exceptions to the court's rulings.

After verdict and judgment for appellee, appellants filed their motion for new trial, assigning as error the rulings to which they had saved exceptions. The motion was overruled, and this appeal followed.

Eben W. Kimball, for appellants. E. B. Kinsworthy and G. D. Henderson, for appellees.

WOOD, J. (after stating the facts as above). First. The judgment is correct. While Bain purchased the material sued for in his own name, and without disclosing his principal, and while credit was extended to him as the supposed principal, it was nevertheless true that he was the agent of appellant construction company, and was clothed with the authority to buy the material to be used in the construction of the building. The proof shows that appellee did not know that Bain was the agent of the construction company when the credit was extended to him, and that, as soon as this agency was discovered, appellee elected to proceed against the construction company, instead of its agent Bain. The doctrine is well settled that where a party deals with an agent without any disclosure of the agency, and without any knowledge thereof, he may elect to treat the after-discovered principal as the one with whom he contracted, and hold him alone responsible for the debt, provided the election is made within a reasonable time after the discovery. *Benjamin v. Birmingham*, 50 Ark. 433, 8 S. W. 183. See cases cited in appellee's brief. The agent, Bain, under the proof, was certainly clothed with the apparent authority to make the purchase from appellee. *Jacoway v. Insurance Co.*, 49 Ark. 323, 5 S. W. 339. This being true, appellant construction company was liable notwithstanding any secret instructions to Bain to purchase the material from another. See cases cited in appellant's brief in *Jacoway v. Insurance Co.*, supra. These principles rule this case, and establish the correctness of the judgment upon the uncontroverted proof, notwithstanding the rulings of the court upon the prayers for instructions may not have been technically correct.

Second. Appellant Ward was liable under section 859 of Kirby's Digest, making the debt, as to him, under the facts, a statutory liability. See *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. Rep. 301. The objection, raised here for the first time, that the account filed contained no statement showing his liability under the above statute, cannot avail. There were no written pleadings, and none required. The evidence taken without objection at the trial showed his liability under the statute, and warranted the judgment against him.

Affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. QUIGLEY.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. TELEGRAPHS AND TELEPHONES—TRANSMISSION OF MONEY—DELAY—COMPANY'S LIABILITY.

That, through defendant telephone company's negligent delay in transmitting money to prepare plaintiff's daughter's remains for transportation, plaintiff suffered great mental anguish because of the delay in transporting the remains, lost time, and expended money shows a cause of action against the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 33.]

2. SAME.

A telephone company cannot escape liability for negligently delaying transmission of money, sent by plaintiff for necessary use in preparing his daughter's remains for transportation, on the theory that it is uncertain that, if the money had been promptly delivered, the sendee would have prepared the remains for shipment earlier than she did, or that the railroad company would have delivered them promptly, where the telephone company knew the use for which the money was sent.

3. SAME—DAMAGES—ELEMENTS.

A telephone company, having negligently delayed transmission of money, sent to its knowledge for use in preparing the sender's daughter's remains for transportation, resulting in delayed shipment of the remains, is liable to the sender for mental anguish and humiliation arising because he was unable to make prompt burial, and to see her remains before decomposition set in, and for loss of time and money expended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 69, 70.]

4. TRIAL—MISCONDUCT OF COUNSEL.

In an action against a telephone company for negligent delay in transmitting money to prepare remains for transportation, the company was not prejudiced by plaintiff's counsel's statement to the jury that the sendee showed that the company had not notified her by trying to mortgage her only furniture to procure the necessary money, though there was no evidence of such attempt, where the jury were instructed to disregard counsel's remark if he went beyond the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

5. TELEGRAPHS AND TELEPHONES—VERDICT NOT EXCESSIVE.

Two hundred dollars was not excessive recovery against a telephone company for negligently delaying transmission of money, sent, to the company's knowledge, for use in preparing plaintiff's daughter's remains for transportation, where transportation was delayed from Friday to Sunday, resulting in mental anguish and humiliation, and loss of time and money, to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 74.]

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by Richard Quigley against the Cumberland Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baird & Richardson, for appellant. Harlin & White, for appellee.

LASSING, J. Between 8 and 9 o'clock on the morning of Friday, July 12, 1907, Rich-

ard Quigley deposited with the agent of the appellant company, the Cumberland Telephone & Telegraph Company, at Glasgow, Ky., \$25, to be transmitted and delivered to his daughter, Eddie Curd, in Louisville, Ky., for the purpose of having the body of the infant child of appellee, who had died at the home of Eddie Curd, her sister, in Louisville, Ky., prepared for burial, and shipped to their home in Barren county. All of the necessary charges were paid by the appellee, including the messenger fee for notifying Eddie Curd that the money had been telegraphed, and for her to call at the office of the appellant company in Louisville and get it. The money was not delivered to Eddie Curd until about noon on Saturday, and because of its delay in transmission, appellee alleged that he was caused to lose time and expend money, and suffer great mental pain and anguish and humiliation, and he sued to recover of appellant damages therefor. This litigation resulted in a verdict in favor of appellee for \$200, and from the judgment predicated on that verdict this appeal is prosecuted.

The facts, as alleged in the pleadings, and as gathered from the proof, are as follows: Appellee's daughter, a girl some 11 or 12 years old, while on a visit with her mother to her married sister, Eddie Curd, who lived in the city of Louisville, was taken sick and died. This was on Thursday, July 11th, about noon. Mrs. Curd telegraphed her father, who lived some four miles from Glasgow, notifying him of the death of his daughter, and also sent a special delivery letter to a friend living in Glasgow, with the instruction that he communicate with her father and apprise him of the fact that his daughter was dead. In both the telegram and the letter she notified her father to forward to her the money necessary to prepare the corpse for burial and shipment, as she was without funds herself. The telegram was received early Friday morning. Appellee at once went to Glasgow where, upon his arrival, he also received the special delivery letter. With the letter and the telegram he called upon the agent of appellant company in charge of its office in Glasgow, and notified him of the contents of the letter and of his purpose and desire to send the money at once to his daughter. Upon being assured that the money could and would be promptly forwarded, and that it would not take over 30 or 40 minutes to complete the transaction, he paid to the agent the \$25, together with all the necessary charges for telegraphing and transmitting the money, together with the messenger fee to notify his daughter that the money had been sent. This was about 9 o'clock in the morning. Appellee returned to his home, and, relying upon the assurances of the agent of appellant company that the money would be promptly transmitted to his daughter, he at once made arrangements for the necessary vehicle to meet the corpse at the 6 o'clock train in Glasgow, upon which

train his daughter would have had ample time to ship the corpse had the money been promptly delivered, as he expected it to be. The corpse was not upon the train, and appellee, being at a loss to know what was the matter, or what he should do, called upon the agent of the company with whom he had the conversation that morning, and learned that the money had not yet been delivered to his daughter, but was assured that it would be delivered early Saturday morning, in time for the shipment of the corpse of his child on the morning train, which would stop at Cave City, some three or four miles away from appellee's home. Accordingly appellee went home, and again made preparation for meeting the corpse at Cave City. When the train arrived he was again disappointed, as the corpse was not on it. He then called up his daughter in Louisville, over the appellant company's line, and learned that the money had just then—about 11:30 a. m.—been paid to her. She did not have time, after receiving this money on Saturday at 11:30 a. m., to have the body prepared for shipment, secure the necessary permit, etc., to have it shipped on the 3 o'clock train, and hence was compelled to wait until Sunday morning, when the body was shipped to Cave City, arriving there at 11 o'clock Sunday, and was buried about 4 o'clock on the evening of the same day. At this time the body was badly discolored, and in an advanced state of decomposition.

Counsel for appellant offer quite a number of reasons why the judgment should be reversed. Their first complaint is that the petition was fatally defective, and that the demurrer should have been sustained thereto. In substance, it alleges that, by reason of the negligent acts of appellant in failing to transmit the money, the plaintiff was caused to suffer great mental pain and anguish, by reason of the delay in the shipment of the corpse, loss of time, and expenditure of money. We are of opinion that these allegations constituted a cause of action, and, if true, appellant should be held answerable therefor.

Appellant's next complaint is that it was not liable, because of the intervention of a new agency, in the persons of Eddie Curd and the railroad company, and that it is uncertain, even though the money had been promptly delivered by appellant, whether or not Eddie Curd would have promptly, or sooner than she did, prepared the corpse for shipment, or that the railroad company, after receiving same, would have promptly shipped and delivered it to its destination in Barren county, and therefore, under the rule announced in the cases of *Talferro v. Western Union Telegraph Company*, 54 S. W. 825, 21 Ky. Law Rep. 1290, *Chapman v. Western Union Telegraph Company*, 90 Ky. 265, 13 S. W. 880, and *Smith v. Western Union Telegraph Company*, 84 Ky. 664, 2 S. W. 483, there can be no recovery. In the *Talferro*

Case no recovery was allowed "because," said the court, "his telegram was only an inquiry. It may be that if his telegram had been received in the confusion of the household, an answer might not have been sent, or if sent, by some miscarriage, without fault of appellee, it might never have reached appellant. Legal damages are such as directly and naturally result from the wrongful act complained of." In the *Chapman Case* Chapman sued for loss occasioned by not being able to attend his father before death, alleging that, had the telegram been delivered, he would have visited his father, and his father would have made him a present of a note which he held against him. The recovery in this case was denied, because the claim on which the damage was founded was entirely too remote, it being uncertain whether his father would have given him the note or not, and that there was nothing in the telegram to put the company upon notice of the purpose for which Chapman wanted to see his father before death. In the case of *Smith v. Western Union Telegraph Company* appellant sought to recover damages because of the failure to deliver to him a message notifying him of the condition of the stock market, alleging that, had he received the message, he would have telegraphed certain instructions to his broker, and thereby saved himself several thousand dollars. Here again the damages were held to be too remote and speculative, and that the failure to deliver the telegram in the ordinary course of events could not be charged to have been the cause of pecuniary loss. It will be observed that in none of these cases was the company notified of the particular importance attached to the telegram, which was later made the basis of the claim for damages. But not so in the case at bar. The company knew that appellee's daughter had written to him that she was unable to ship the corpse because of the lack of funds, that it would take \$25, and that it was to meet this very emergency that the money was sent. It is common knowledge that in warm weather a corpse cannot be kept long before decomposition becomes advanced. Hence appellant's agent and servants must have known that any delay on their part in the transmission of this money and the carrying out of their contract with appellee would delay the interment of his daughter, and it is but natural and human that he would suffer mental worry and anguish by having the burial of his child delayed until its body was in an advanced state of decomposition.

Appellee desired to give his daughter a decent and timely burial. With this end in view he sought the services of appellant, and appellant contracted with him to send the money necessary to enable him to have his daughter properly prepared for burial and promptly shipped. Had it carried out its contract, and delivered this money within a reasonable time, there is no question but

what the body would have been promptly shipped, and the wish and desire of the father gratified. It failed, however, to carry out its contract, and scant excuse is offered in the record for its not having done so. An attempt is made to shift the responsibility for the delay in delivering the money to Eddie Curd, appellee's daughter, but the decided weight of the testimony and the circumstances surrounding the transaction are altogether in favor of the finding of the jury that the responsibility for this delay in the delivery of the money rested with appellant, hence, if by its negligence appellant added to the weight of sorrow then borne by appellee because of the loss of his child, it should be made answerable therefor; for, as said by this court in the case of *Western Union Telegraph Company v. Caldwell*, 102 S. W. 840, 31 Ky. Law Rep. 497, appellant will not be permitted to escape responsibility for its acts upon the theory that what appellee's agent might have done was too remote to entitle him to compensation.

It is further insisted that, as the child was already dead, the mere delay in its shipment and interment affords no ground of complaint for appellee. To this we cannot agree. The delay in the delivery of the money and consequent shipment of the body denied to appellee the right to give his child a prompt burial; denied to him the right to look upon its features as they were in life, for, while it is true that before interment the casket was opened, it is equally true that at that time the body had become so discolored, and decomposition was so far advanced, that the father saw instead of the features of his child, a badly discolored and decomposed corpse. If this condition was brought about by the negligence of appellant, and in consequence thereof appellee suffered mental anguish, humiliation, and pain, appellant company should likewise be held answerable therefor.

Appellant also complains that the court erred in instructing the jury that appellee might recover for loss of time and money expended, which were due to the negligence of appellant. The petition charged that there was a loss of time and expenditure of money in going to the trains for the purpose of meeting the corpse. If there was, and the delay in the shipment of the corpse was occasioned by the failure of appellant to carry out its contract promptly, then it should be held answerable therefor, and the court properly submitted this question to the jury.

Appellant also complains that the court erred in instructing the jury, but the record shows that the instructions were, if anything, more favorable to appellant than they were to appellee.

Appellant also charges that, because of misconduct on the part of counsel for appellee in addressing the jury, the case should be reversed. The language complained of is as follows: "I will tell you how you can know

that the defendant did not notify Eddie Curd, and why you should believe her in preference to Clyde Harris. Eddie Curd went out and tried to mortgage her only furniture to get the money with which to buy a coffin and ship the corpse, and you know she would not have done this if she had been notified by the defendant." At the time these remarks were made counsel for appellant objected, and the court thereupon directed the jury that they must bear the evidence in mind, and if counsel went outside of the evidence in his speech, they must disregard it. It was error for counsel to make a statement of fact which was not supported by the evidence in the case, and, upon his doing so, the trial court should have excluded it, and reprimanded him for having done so, and directed the jury to disregard the statement, but we are of opinion that the admonition of the court had this effect before an intelligent jury, and that appellant's case was not prejudiced thereby.

To the complaint that the verdict is excessive we may say that larger verdicts have repeatedly been upheld in cases not more meritorious and under circumstances less aggravating.

On the whole case it is apparent that appellant had a fair trial, and the judgment is therefore affirmed.

HUTCHISON v. COHANKUS MFG. CO.

(Court of Appeals of Kentucky. Oct. 16, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—CAUSE—EVIDENCE.

Evidence held to show that the worn-out condition of a machine was not the cause of injury to an employé, whose hand was caught by a revolving cylinder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 951, 959.]

2. SAME—DEFECTIVE MACHINERY.

An employé, who, in suing for injuries, relies upon the employer's failure to furnish reasonably safe machinery, must show that his injuries were caused by defective machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 871.]

3. SAME—EMPLOYÉ'S INEXPERIENCE—RIGHT TO RELY UPON.

An employé, suing for injuries, cannot rely upon inexperience or ignorance of danger as to matters involving ordinary laws of nature, such as that a revolving cylinder with sharp teeth will injure a hand, if permitted to come in contact with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 603, 604.]

4. SAME—CHOICE OF WAYS.

An employé cannot recover for injuries resulting from his voluntary selection of a dangerous way of performing a duty, where a safe way was open to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 702.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

A factory employé cannot recover for loss of a hand, caught in a revolving cylinder studded with sharp teeth, while attempting to remove an obstruction from the cylinder, where he appreciated the danger of allowing his hand to

touch the cylinder, the machine was being stopped by his orders, and to get his hand in he had to raise a guard designed to keep hands out.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Personal injury action by J. M. Hutchison against the Cohankus Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Crice & Ross, for appellant. Wheeler, Hughes & Berry, for appellee.

CLAY, C. This action was instituted by appellant, J. M. Hutchison, against the appellee, Cohankus Manufacturing Company, to recover the sum of \$10,000 for personal injuries. Appellant based his right of recovery on the failure of appellee to furnish him a reasonably safe place in which to work and reasonably safe machinery with which to work; also upon the fact that he was inexperienced, and that appellee failed to warn him of the dangerous character of the machine which injured him. At the conclusion of plaintiff's testimony the defendant asked for a peremptory instruction. This was refused. The motion was renewed at the conclusion of all the evidence, and then sustained. Of this ruling the appellant complains.

Appellee operates a manufacturing establishment in the city of Paducah, where rope, twine, and other products are made. At the time of his injury appellant was engaged in working about a "hard waste" machine. This machine was operated by means of belts and pulleys propelled by steam. Connected with the machine were two small rollers and a cylinder. The cylinder was about 3 feet in diameter, 2 feet in width, and was studded with small, sharp teeth. The rollers were the same length as the cylinder, and each was about 30 inches in diameter. The rollers and cylinder were partly covered by a large hood; the part left uncovered by this hood being the length of the cylinder, and between $2\frac{1}{2}$ and $3\frac{1}{2}$ inches in height. This opening was covered by what is known as a "guard," which lapped over the hood. The machine was used for the purpose of grinding the matted cotton, which had gone through other machinery, but was left in a hard condition. Ordinarily the material would go through the rollers, and then pass on through the cylinder and be torn up. Sometimes, however, the machine would not tear up the cotton, and as a result the cotton would accumulate on the teeth. When the machine got in this condition, it was necessary for the operator to remove the material. For the purpose of passing upon the propriety of the trial court's ruling, it will be necessary to give the evidence somewhat in detail.

Plaintiff testified: That he was 49 years old, and had been engaged in farming the most of his life, and never worked around

machinery much. Went to work in the factory some time in the month of October, 1906. The accident occurred July 24, 1907. Had worked for appellee about four years prior to the accident, but did not work all the time during the four years preceding. Had been working on an intermediary machine, which was nothing like the one on which he was injured. Had been in the room where he was injured about five weeks. It was his duty to look after the mixing of the cotton, to watch the belts, and keep them on. If any part of the machinery gave way, he could take it out and put on a new piece. Was not acquainted with the construction of the machine. Did not receive any instructions in regard to it. Was never warned that the machine was dangerously defective. Anybody would know it was dangerous if they would go and get right in it, or handle it without care. When he was injured he put his hand in to get a piece of material, and by some means the cylinder got out and jerked his hand. The machine at the time was not in good working order. When his hand went into the machine, it was torn up half way to his elbow—smashed all to pieces. The doctors took it off up to his elbow. On cross-examination, appellant testified: That the accident occurred about 9:30 a. m. on the 24th day of July. He was attending to the mixing of cotton at the time. Might be called a foreman. James Jones operated the machine at the time. Jones called his attention to the machine, and he thereupon directed him to stop it. Had shown Jones how to stop the machine. Had worked from October, 1906, to January following on another machine, and was foreman of the two rooms at the time he got hurt. The machine had been in the room five or six weeks. Prior to that time it was in the room next to it. The teeth on the cylinder were exposed. The wheel was revolving, making from 20 to 30 revolutions per minute. Had constantly been taking chunks or obstructions out of the machine before. Just put his hand in there and got caught in one of the teeth. In doing so he raised the guard. Witness further testified that it would take 45 or 50 minutes to stop the machine after the belts had been removed. Did not stop the machine, because he wanted to see the wheel pass, so as to find out where the obstruction was. There was no danger if the machine was stopped. Any one would know, if he got his hand in there that there was danger. G. W. Johnson testified that he knew the machine appellant was injured by; that he considered it worn out. Sometimes it would run for an hour, sometimes for 10 or 15 minutes, and then they would have to shut it down and clean it out. Waste could be removed while the machine was running. It was just as easy to take it out one way as the other. Hutchison occupied the position of foreman.

J. J. Jones, a witness for the defendant, testified as follows: Was engaged in run-

ning the "hard waste" machine at the time Hutchison was injured. The waste refused to go through one feed row, and he asked Hutchison to come and see if he could fix it. Hutchison asked him to see if the machine was shut down, then told him to take the plank and put it up to the top of the house and stop the machine quick. Hutchison then took the guard and put it back over the hood. About this time he heard Hutchison say, "Oh, Lordy!" and hollow, "Back the machine!" Could not back it, as he had taken the rollers off. The machine was not out of repair. It was only choked down. F. S. Brown, another witness for the defendant, testified: That he was superintendent of the Cohankus Manufacturing Company on July 24, 1907. Hutchison was foreman in charge of the operation of the machine by which he was injured. The condition of the machine at the time was all right. It was choked up when Hutchison got hurt. The stock running through caused it to choke up, just as is likely to happen any time to any machine. Instructed Hutchison to be careful and keep his hands away from the machine when it was running. The purpose of the guard is to keep people's hands out of it. The usual way of removing the waste from the machine, when choked up, is to stop it and clean it out. It took only six or seven minutes to stop the machine. W. H. Fondeau, another witness for the defendant, testified: That he was working at the Cohankus factory at the time Hutchison was hurt. After the injury had a conversation with him at the hospital, and asked him what in the name of God ever possessed him to "monkey" with the machine when it was running. Hutchison replied that it was his fault; that he saw a piece of cotton there in a lump, put his hand in, and got caught.

It is manifest from the foregoing evidence that, while the fact that the machine was worn out was the occasion of appellant's injury, it was not the cause of it. Where a party relies upon the failure of the defendant to furnish reasonably safe machinery with which to work as a basis of his right to recover, he must show that his injuries were caused by the defective machinery. In this case appellant's injuries were caused by his placing his hand in contact with the revolving cylinder. Although he had given orders to Jones to stop the machine, he did not wait until it was stopped, but raised the guard, which was designed to keep people's hands out of the machine, then placed his hand in it, and let it come in contact with the cylinder, when he saw and knew the cylinder was revolving. He further knew that the cylinder was studded with sharp teeth. This is not a case where the cylinder was revolving so fast that it was impossible to see the teeth, and the injured party did not know of the danger. Here the danger was perfectly obvious and patent to appellant. He knew the machine was running, he knew the cyl-

inder was revolving, he knew it had sharp teeth on it, and he himself admits that any one would know it was dangerous if he put his hand in contact with the cylinder.

While appellant contends and bases his right of recovery on the ground of his inexperience, his own evidence does not disclose a lack of experience. He had been working at this very machine, and had frequently removed matted cotton therefrom. Prior to that time he had been working on other machines. His knowledge of the machine was sufficient to enable him to be appointed a foreman to keep a general oversight of it. Furthermore, it is not shown that the accident was the result of inexperience. It did not occur because the danger was unknown to appellant. He himself admits that he knew of the danger. Besides, it is not sufficient for a party seeking damages merely to state that he is inexperienced, or that he did not know of the danger. There are some things which a man of maturity must know. He must understand and appreciate the everyday laws of nature. He must know, unless he be shown to be of weak mind, that fire will burn, boiling water will scald, that a knife will cut, and that a revolving cylinder, with sharp teeth, will injure the hand if it is permitted to come in contact with it.

In the case of *Wilson v. Chess & Wymond Co.*, 117 Ky. 567, 78 S. W. 453, the rule is thus stated: "The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work, is frequently either misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has answered it. There is no feature of the law of negligence better settled than this. The contrivance in use in this case was of the simplest kind. It was merely a large vat or tub, plainly open at the top. The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes, and his most common experience, and his earliest instincts, to fully appreciate the danger of his position. There was no assurance by the master of the safety of the place, even if such assurance, under the circumstances, could have

shifted the liability. There was no promise by the master to provide other appliances of greater safety—no promise to repair. Under these circumstances, the servant assumed the dangers of his employment. He cannot, therefore, recover from the employer damages growing out of them."

In *Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271, which was a case where the servant was injured by getting his shirt caught in a revolving shaft over which he was required to bend in drawing buckets through an opening, the court said: "It was revolving right before his eyes, which he was bound to see, and did see, while he was performing his duty. * * * It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off of it, and that the common instinct of safety would have suggested to him to do that, and the exercise of only ordinary prudence would have enabled him to do that. * * * As said, he did see the shaft and that it was revolving, and that he would be compelled to bend over the shaft in drawing up the buckets, before he commenced to draw up the buckets; and he knew, as well as a country youngster would know, that if his clothes were caught by a revolving well windlass he would likely be drawn to it and hurt, and that it was safest for him not to get close enough to it for such accident to befall him." See, also, *McCormick Harvester Company v. Lister*, 66 S. W. 761, 23 Ky. Law Rep. 2154.

There is another principle of law which would prevent a recovery by appellant in this case. The rule is well settled that, where there are two ways in which a servant may perform his duties, one of which is dangerous and the other not, and he voluntarily chooses the more hazardous method, knowing it to be such, he does so at his own risk. 26 Cyc. 1189. Appellant could have waited until the machine stopped before attempting to remove the cotton. Instead of doing that, he voluntarily chose the more hazardous method of placing his hand in the machine while it was running. He did this at his own risk, and cannot, therefore, recover.

Being of opinion that the trial court did not err in giving the peremptory instruction complained of, the judgment is affirmed.

COMMONWEALTH v. STANDARD OIL CO. (Court of Appeals of Kentucky. Oct. 13, 1908.)

1. LICENSES—MERCANTILE BUSINESS—SALES OF OIL FROM WAGONS—"PEDDLING"—TRANSACTIONS DISTINGUISHED.

Sales of oil delivered from wagons to retail dealers for resale are within Ky. St. 1903, § 4224, requiring payment of an annual license fee of \$5 for each wagon; but sales from wagons to others than retail dealers constitute

"peddling," within section 4215, requiring peddlers to take out licenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 31.]

2. STATUTES—CONSTRUCTION—CRIMINAL STATUTES.

Criminal statutes should never be so construed as to punish those who have honestly conformed to the law as declared by the proper authorities; and, when a certain thing has been held by the Supreme Court to be allowable under a statute, refined distinction should never be made to bring within the statute persons who honestly acted in conformity to the rule declared.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

3. HAWKERS AND PEDDLERS—WHO ARE "PEDDLERS"—LICENSES—OIL COMPANIES.

An oil company, which fills tanks of regular customers every week under a standing order, is not a "peddler," within Ky. St. 1903, § 4215, requiring "peddlers" to take out licenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Hawkers and Peddlers, §§ 3-6.

For other definitions, see Words and Phrases, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

4. SAME—"PEDDLING."

Mere delivery of goods to a customer is not "peddling," within Ky. St. 1903, § 4215, requiring peddlers to take out licenses; "peddling" consisting in hawking goods about and offering and selling to any one who will buy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Hawkers and Peddlers, §§ 3-6.]

5. SAME—"SELLING BY SAMPLE."

The words "selling by sample," as used in Ky. St. 1903, § 4218, which provides that "agents for selling by sample" shall not be considered as peddlers, mean taking orders for future delivery, as the commercial traveler does.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Hawkers and Peddlers, § 4.]

Appeal from Circuit Court, Bracken County.

"To be officially reported."

The Standard Oil Company having been acquitted of peddling oil without a license, the commonwealth appeals. Affirmed.

Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and M. J. Hennessy, for the Commonwealth. Worthington & Cochran and Humphrey, Davie & Humphrey, for appellee.

HOBSON, J. The Standard Oil Company was indicted in the Bracken circuit court for peddling oil without license. On the trial of the case, at the conclusion of the commonwealth's evidence, the court directed a verdict for the defendant, and, the indictment having been dismissed, the commonwealth appeals.

1. Acts 1902, p. 358, c. 128, among other things, provides for a license (Ky. St. 1903, § 4224): "To each oil depot in this state, wherein petroleum, lubricating or other oils are stored in bulk or tank, ten dollars. To selling by retail petroleum, lubricating or other oils for each wagon used in transporting or retailing such oils, five dollars." The act also provides, under the subdivision regulating peddling as follows (Ky. St. 1903, §§ 4215, 4216): "All persons who are by this

article deemed peddlers shall before the sale or attempted sale of any article or right, as herein contemplated, procure and pay for license as required by law; and any peddler who shall violate the provisions of this section shall be deemed guilty of peddling without license and punished accordingly." "All itinerant persons vending lightning rods, patent rights, or territory for the sale, use or manufacture of patent rights, goods, wares, merchandise, clocks, watches, jewelry, gold, silver or plated ware, spectacles, drugs, nostrums, perfumery, and any other thing not hereinafter specially exempt, shall be deemed peddlers." The Standard Oil Company had taken out a license on its wagon, as provided by section 4224, but had not taken out a license as a peddler, as required by section 4215.

It is earnestly insisted that only one license is contemplated, and that, when the license fee is paid on the wagon, no license for peddling oil from the wagon, under section 4215, is required. This precise question, under the act of 1902, was before this court in the case of *Standard Oil Company v. Commonwealth*, 119 Ky. 1, 82 S. W. 970, 83 S. W. 557. In the response to the petition for rehearing, the court said: "Appellant thinks the opinion is not clear in its meaning. We decide that in sales by appellant and others doing similar business, where the oils are delivered from its wagons, and the sales are to retail dealers for resale, the transaction comes under section 4224, Ky. St. 1903, involved in the appeal. For each wagon so engaged a license fee of \$5 per annum must be paid, which is the license fee for the use of that wagon anywhere in the state. If the sales from the wagon are to others than retail dealers for resale, the act is peddling (*Standard Oil Co. v. Commonwealth*, 80 S. W. 1150, 26 Ky. Law Rep. 142); and, to do that character of business, appellant must take out a peddling license, being \$50 per year for one person with two-horse wagon, \$40 for one person with one-horse wagon, and \$20 additional for each additional person accompanying the wagon. These fees are for the whole state. For the county, one-fourth as much as is charged for the whole state." The court adheres to the construction of the statute then indicated. Business has been adjusted to it. A new revenue act has since been passed.

2. The Standard Oil Company has tanks in Augusta, from which it delivers gasoline. The F. A. Neider Company was a manufacturing establishment in Augusta using gasoline. It had a tank which it had the Standard Oil Company to fill once a week under a standing arrangement or standing order to this effect. The tank would not always be empty when the wagon would come around to fill it; and in that event the tank would be measured, and the quantity of oil necessary to fill it would be ascertained. The Standard Oil Company kept the tank suppli-

ed with oil under this general arrangement, without any specific order being made in advance every week for the tank to be filled. There was a similar arrangement with the Marggraff Manufacturing Company and the E. H. Hunefelt Manufacturing Company. The question presented is whether the Standard Oil Company was guilty of peddling in filling the tanks of the regular customers every week under a standing order to fill the tanks. In *Standard Oil Company v. Commonwealth*, 107 Ky. 608, 55 S. W. 9, the facts of the case are thus stated: "It was shown that, before these regular trips began, the agent of appellant went to Warsaw to see the retail merchants, and made arrangements for them to take oil from the tank wagon. When the wagon made its regular trip, each merchant would take such oil as he wanted or as was needed to fill his tank. Sometimes the merchant would pay the driver at the time of delivery, and sometimes he would sign a receipt showing the amount of oil received, and pay afterwards." On these facts the court thus states its conclusion: "We are of opinion that, on the facts proven and as found by the court in its conclusion, the appellant is not guilty of peddling within the meaning of the statute. Section 4218 of Ky. St. 1903, provides: 'No persons shall be deemed peddlers, under sections 4216 and 4217 of this article, for selling tinware, etc., nor merchants, nor their agents for selling by sample.' The words 'selling by sample' evidently mean by taking orders for future delivery, as the commercial traveler does. It is not necessary for the traveling salesman to carry with him a sample of everything he takes orders for. Indeed, he does not do this, as is well known. There are various well-known brands and kinds of staples in all lines of goods and merchandise that are so well known to the merchant that he does not care to see a sample. So in this case it was not necessary for the agent, when the first arrangement was made for regular trips and regular delivery of oil, to exhibit a sample of oils." In the previous case of *Brenner v. Com.*, 9 Ky. Law Rep. 239, it was held that a person whose business it is to make weekly or semiweekly visits to his customers to solicit orders and deliver goods previously ordered is not a peddler within the meaning of the statute. The rule announced in these cases has been very generally adhered to. *Davenport v. Rice*, 75 Iowa, 74, 39 N. W. 191, 9 Am. St. Rep. 454; *Kimmel v. Americus*, 103 Ga. 694, 31 S. E. 623; *Brookfield v. Kitchen*, 163 Mo. 546, 63 S. W. 825; *Sierra Gordo v. Rawlings*, 135 Ill. 36, 25 N. E. 1006; *Hewson v. Englewood*, 55 N. J. Law, 522, 27 Atl. 904, 21 L. R. A. 736; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Commonwealth v. Eichenberg*, 140 Pa. 138, 21 Atl. 253.

Criminal statutes should never be so construed as to catch those who have honestly

conformed to the law as it has been expounded by the proper authorities; and, when a certain thing has been held by this court to be allowable under a statute, refined distinctions should never be made, so as to bring within the statute persons who honestly acted in conformity with the rule that had been declared. If the rule is found to work badly, the remedy may be supplied by the Legislature, and, when the law is changed, all persons having notice of the change may conform their conduct to the law. Were the rule otherwise, persons would have great difficulty in conducting their business safely. The proof here shows that the defendant delivered gasoline only to its regular customers, filling the tanks weekly under the previous arrangement to this effect. This was not a peddling of oil as the term is generally understood. Such deliveries of gasoline were essential to the purchasers carrying on their manufacturing plants. They could not take more gasoline at a time than their tanks would hold; and it was important that some gasoline should be kept in the tanks, that the work should not stop until the tank could be refilled. There was no evasion of the statute, or effort to do so. The parties acted in good faith. The case would be essentially the same if a merchant doing business in Augusta had, under a previous arrangement to that effect, filled every week the coal oil can at the home of one of his customers. The mere delivery of goods to a customer is not peddling. The offense of peddling without license is committed where goods are hawked about, and offered and sold to any one who will buy; but the statute is not intended to obstruct ordinary business, or to prevent the delivery of goods to a regular customer under a general arrangement, such as is regularly made with milkmen and the like. Under the evidence, the court properly instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. CARTER.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE PLATFORM—PLEADING.

Where a servant was injured by falling through a defective platform, a petition alleging that the platform was unsafe, and was negligently constructed in that it did not completely cover the excavation, sufficiently pointed out the unsafe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 825.]

2. SAME—KNOWLEDGE.

Where a petition alleged that the dangerous condition of the platform from which plaintiff fell, while working thereon, was unknown to plaintiff, and charged that the platform was defective, in that it did not completely cover the excavation, it sufficiently alleged that plaintiff did not know the space through which he fell.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 853.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where a servant was injured by falling from a defective platform, a petition alleging that the dangerous condition of the platform was unknown to plaintiff was sufficient, without alleging that plaintiff by ordinary care could not have seen the exact condition of the platform, or that plaintiff did not have equal means with defendant of knowing of defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 853.]

4. SAME—QUESTION FOR JURY.

Plaintiff was employed in making an excavation under defendant's tracks through a fill. A platform had been erected over the excavation, the sides of which, as originally constructed, abutted against the sides of the excavation. A few days prior to the accident one of the planks on the north side of the platform had been removed, leaving an opening next to the fill eight inches wide and nine or ten feet long. Plaintiff had only been working on the platform 25 minutes, and then on the south side, when, in endeavoring to assist in lowering certain timbers and to escape being struck by one, he suddenly stepped backward into the opening, not having previously discovered the same. *Held*, that plaintiff's negligence was properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

5. SAME—SAFE PLACE TO WORK.

A master owes his servant the duty of providing him a reasonably safe place to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required and the dangers that a reasonably prudent man would apprehend under the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 179.]

6. SAME—ASSUMED RISK.

A servant does not assume the risk of a master's failure to provide a reasonably safe place in which to work; the servant being entitled to presume that the master has performed such duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547, 551.]

7. SAME—NATURE OF WORK.

If the place provided for a servant to work is unsafe because of the nature of the work, and the servant suffers injury in consequence thereof, the master is not liable; the risk of injury from such cause being one which the servant assumes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

8. SAME—DUTY OF INSPECTION.

Where a servant was injured by falling through an alleged defective platform due entirely to the removal of plank therefrom by defendant's foreman, no duty of inspection devolved on plaintiff to ascertain the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 713, 714.]

9. SAME—INSTRUCTIONS.

An instruction that it was defendant's duty to furnish plaintiff a reasonably safe place to work, and if defendant failed to do so, and thereby plaintiff, while at work injured himself, while in the exercise of ordinary care, he was entitled to recover, unless the defective condition of the platform by which he was injured, if any, was obvious, or plaintiff knew or by ordinary care should have known such dangerous condition, if any, was not objectionable as characterizing the place where plaintiff was at work as one of hidden danger.

10. TRIAL—INSTRUCTIONS—ASSUMING FACTS.

An instruction that if defendant failed to furnish plaintiff with a reasonably safe place

in which to work, and plaintiff injured himself "while himself in the exercise of ordinary care," he was entitled to recover, was not objectionable as in effect charging that plaintiff was in fact exercising ordinary care.

11. APPEAL AND ERROR—INSTRUCTIONS—PREJUDICE—DAMAGES.

Where plaintiff, who was permanently and severely injured, was only awarded \$1,500, defendant was not prejudiced by an instruction on the question of damages, which failed to limit the jury to the damages which they believed from the evidence plaintiff sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4228.]

12. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE PLATFORM.

Where a servant employed on a platform fell through an opening between the platform and the side of a railroad fill caused by the removal of a plank eight inches wide and ten feet long, an instruction that if the platform was dangerous, and plaintiff was negligent in backing into the "hole," and he would not have been injured but for such negligence, then the jury should find for defendant, was not defective as emphasizing the evidence from which the jury could find that the platform was dangerous, and in using the word "hole" to represent the opening caused by the removal of the plank.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Lyman M. Carter against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield and S. D. Rouse, for appellant. John B. O'Neal, for appellee.

CLAY, C. Appellee, Lyman M. Carter, instituted this action against the appellant, Louisville & Nashville Railroad Company, to recover damages for personal injuries received by him while in its employ. The jury returned a verdict in his favor for \$1,500. Appellant asks a reversal on the following grounds: First, the petition is fatally defective; second, the failure to give a peremptory instruction in favor of appellant; third, errors in the instructions.

The record discloses the fact that on the 8th day of October, 1904, appellee was employed by appellant company in the work of making an excavation through a fill over which appellant's tracks ran north and south. A platform had been erected over the excavation, which was at right angles to the fill, and the sides of the platform, as originally constructed, abutted against the sides of the excavation, leaving no space on either side through which any one could fall. A few days before the accident the foreman in charge of the work, needing a plank somewhere else, instructed one of appellant's employes to take a plank out of the platform upon the north side thereof. The removal of this plank uncovered the excavation, and left an opening next to the fill about eight inches wide and nine or ten feet long. This opening was upon the north side of the platform. Until about 25 minutes before the accident, Carter had been engaged in working upon the other side of the fill. While

there he was directed by the foreman to go upon the platform and work. This he did, and at the time of the accident he was engaged in letting down timbers which were being lowered from above the platform. It appears that a beam was being lowered from above, and appellee, believing it was going to fall upon him, stepped backward in order to avoid being struck. As he did so, his leg went into the opening described. Two of his ribs were broken, and his back was severely wrenched. As a result of his injuries, he was confined to his bed for several weeks. With this brief statement before us, let us examine the errors complained of by appellant.

1. Appellant contends that the petition is fatally defective because the plaintiff did not allege that he did not see the space or hole through which he fell, but merely alleged that he did not know of the unsafe and dangerous character of the platform. Plaintiff's petition did allege that the platform was dangerous and unsafe, and was negligently constructed in that it did not completely cover the excavation. Thus the petition pointed out the unsafe and dangerous condition of the platform. It did not allege that the platform was unsafe or dangerous in any other particular. When, therefore, the petition stated that the unsafe and dangerous condition of the platform was unknown to the plaintiff, the effect of the allegation was precisely the same as if the petition had alleged that the plaintiff did not know of the space or hole through which he fell. Counsel further insist that the petition is fatally defective in not alleging that plaintiff could not by the exercise of ordinary care have seen the exact condition of the platform, or in not alleging that plaintiff did not have equal means with the defendant of knowing of the defect. The rule contended for by counsel is no longer the law in this state. The allegation that the unsafe and dangerous condition of the platform was unknown to plaintiff was sufficient. *Peter & Melcher Steam Stone Works v. Green*, 76 S. W. 844, 25 Ky. Law Rep. 946; *Pfisterer v. J. H. Peter & Co.*, 117 Ky. 501, 78 S. W. 450.

2. Should a peremptory instruction have gone for appellant? The testimony for appellee conclusively shows that he had not been engaged on the platform prior to about 25 minutes before the accident occurred. When he did go upon the platform, it was upon the south side thereof, which was the side furthest away from the opening through which he fell. As soon as he got upon the platform, it was necessary for him to assist in lowering certain timbers which were being handed down from above. His time and attention were entirely taken up by the duties of his occupation. At no time did he go to the north side of the platform, and he knew nothing of the opening upon that side. When he fell, he was stepping backward. Counsel for appellant insist that the doctrine an-

nounced in the case of *Wilson v. Chess & Wymond Co.*, 117 Ky. 567, 78 S. W. 453, applies to this case, because the platform was a simple contrivance, and the lowest order of intelligence of a rational man would have comprehended that, if he stepped off the platform through the space between it and the embankment, he would fall into the pit; that the accident happened in the daytime; that the conditions were open and visible; and that all appellee had to do was to use his eyes, and his most common experience, and his earliest instincts to fully appreciate the danger of his position. The facts of this case, however, are materially different. The condition was not before appellee's eyes. There is not a single circumstance in the case going to show that appellee knew of the opening, or that he negligently failed to discover it. We cannot, therefore, say as a matter of law that appellee knew, or ought to have known, of the hole through which he fell. The question whether the opening was so obvious that appellee knew, or by the exercise of ordinary care could have known, thereof, was properly submitted to the jury. The law is well settled in this state that the master owes to the servant the duty of providing him a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required and the dangers that a reasonably prudent man would apprehend under the circumstances. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment; and the servant is entitled to rely on the assumption that the master has performed the duty, imposed on him by law, of providing a reasonably safe place to work. But, if the place is unsafe because of the nature of the work, and the servant suffers injury in consequence thereof, he cannot hold the master liable, provided reasonable precautions were taken by the master to avoid injury. The risk of injury from such cause is one of the risks assumed by the servant; or, if the place is obviously unsafe, so as to charge the servant with knowledge thereof, and he nevertheless enters on the work, he assumes the risk. *Pfisterer v. J. H. Peter & Co.*, 117 Ky. 501, 78 S. W. 450; 20 Am. & Eng. Encyc. of Law, p. 55. The duty of inspection was not placed upon appellee. The opening in the platform was not a danger incident to the risk of employment. The unsafe condition of the platform was due entirely to the removal of the plank. We therefore conclude that the court did not err in refusing to give the peremptory instruction asked by appellant.

3. The court instructed the jury as follows:

"No. 1. It was the duty of the defendant to furnish the plaintiff a reasonably safe place for the plaintiff to work, and, if the jury believe from all the evidence that the

defendant failed to furnish to the plaintiff at the time and place mentioned in the proof a reasonably safe place to work, and that by reason of such failure, if failure there was, the plaintiff while at work injured himself, while himself in the exercise of ordinary care, then the jury will find for the plaintiff, unless the defective and dangerous condition of said platform, if such there were, was so obvious and certain that the plaintiff knew, or by the exercise of ordinary care should have known, of said dangerous condition, if dangerous condition there were, in which case, you will find for the defendant.

"No. 2. If the jury find for the plaintiff, they will fix his damages at a reasonable compensation in money for his pain and suffering of body and mind, if any; for the impairment of his ability to labor and earn money, if any; for the amount expended for medical services, if any, not exceeding as to this item \$40; and for his loss of time, if any, not exceeding as to this item \$600, as the natural and proximate result of his injuries in the proof described—not exceeding in all the amount claimed in the petition.

"No. 3. If the jury believe that the platform in the proof described was in a dangerous condition, and they shall also believe that the plaintiff was negligent in the manner in which he backed into said hole on said platform, and that his injuries would not have been sustained but for such negligence on his part, then they shall find a verdict for the defendant.

"No. 4. Negligence is the failure to exercise such care as is ordinarily exercised by careful and prudent persons under the same or similar circumstances in the same or similar business.

"No. 5. Ordinary care is such care as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances, in the same or similar business.

"No. 6. Nine jurors may return a verdict, but, if less than twelve unite in the verdict, all those so uniting must sign the same."

Instruction No. 1 is attacked upon the ground that it is erroneous in its classification and characterization of the place where plaintiff was at work; that it treats the place as though it were one of hidden dangers. The instruction, however, is not subject to such criticism. It places squarely before the jury the questions whether or not they believed from the evidence that the defendant had failed to provide the plaintiff a reasonably safe place in which to work; whether the plaintiff was injured by reason of such failure, if any; whether or not plaintiff himself was exercising ordinary care; and whether or not the dangerous condition of the platform was so obvious and certain that the plaintiff knew, or by the exercise of ordinary care could have known, thereof. Nor is the instruction erroneous in using the expression "while himself in the exer-

cise of ordinary care." The effect of this expression was not to tell the jury that the plaintiff was himself exercising ordinary care. The instruction plainly tells the jury that they must believe that plaintiff was injured while exercising ordinary care for his own safety.

Counsel next insists that instruction No. 2 is fatally defective, in that it nowhere tells the jury that, in assessing plaintiff's damages, they should be governed by the evidence. While the instruction may be subject to criticism on this account, the failure to limit the jury in their finding to such damages as they believed from the evidence the plaintiff sustained was certainly not prejudicial in this case. The evidence shows that plaintiff was permanently and severely injured. The sum awarded him was only \$1,500. In view of the extent of his injuries, it does not appear that the jury "roamed at will" in determining how much damages they would award plaintiff.

Instruction No. 3 is attacked upon the ground that it emphasizes in the minds of the jury that there was evidence before them upon which they had a right to find that the platform was in a dangerous condition. In this connection counsel argue that there was nothing defective in the platform; that it did not break down, and there was no hole in it, but the plaintiff simply walked off the platform. We think this contention of counsel is without merit. There was an opening between the last plank on the north side of the platform and the north side of the fill. This is the hole referred to in the instructions. We do not think the jury were misled by the use of the word "hole." The evidence tended to show that the platform which crossed the excavation was at one time completed; that the last plank on the north side, connecting it with the fill, had been removed; that there existed an opening there about eight inches wide. These facts certainly justify the submission to the jury of the question whether or not the platform was in a dangerous condition.

There appearing no error in the record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

SWANN-DAY LUMBER CO. v. THOMAS.
(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. TRIAL—REFUSAL TO GIVE INSTRUCTIONS—FAILURE TO REQUEST—EFFECT.

It is not reversible error to fail to instruct on a point, where no instruction is requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627-641.]

2. MASTER AND SERVANT—FELLOW SERVANTS—WHO ARE.

An employé, engaged on the first floor of a sawmill in oiling and caring for the machinery, and an employé on the second floor charged with the duty of looking after the logs and removing the staves, are not fellow servants, nei-

ther having an opportunity to observe the other in the performance of his duty, or to assist or direct him in the discharge thereof.

3. SAME—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

An employé, engaged on the first floor of a sawmill in oiling and caring for the machinery, was injured while in discharge of his duty, and while just outside of the door of the mill, and on a passway by being struck by a stave thrown from a second story window by a co-employé. The employé knew that staves were not thrown out on the passway, and he had no reason to expect that any would be thrown thereon. It was gross carelessness for the co-employé to throw the stave onto the passway, for he had reason to know that employés were liable to use it. *Held*, that the employé did not assume the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-573.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

Where two courses are open to an employé in the discharge of his duty, and each is attended, under normal conditions, with practically the same degree of safety, it is not negligence for him to take one course rather than the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 702.]

5. SAME.

Where an employé, engaged on the first floor of a sawmill in caring for the machinery, could observe a part of the machinery by looking out of a side window, and he could observe it more satisfactorily by going out on a passway, and the passway was, under normal conditions, safe, the employé was not guilty of contributory negligence in going on the passway, where he was struck by a stave negligently thrown from a window above him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 702.]

6. SAME—TRIAL—INSTRUCTIONS—EVIDENCE—APPLICABILITY.

Where the injury to an employé resulted solely from the negligence of a co-employé, an instruction that the employé might presume that the place where his duty called him was reasonably safe was not prejudicial to the employer.

7. SAME.

An instruction, in an action for injuries to an employé struck by a stave thrown from an upper window by a co-employé, which requires the jury to find, to render a verdict for the employé, that the stave was thrown from the upper floor by an employé under the direction of the employer, and that it was the result of careless, wanton, or willful negligence, was not prejudicial to the employer, but to the employé.

8. SAME.

The use of the words "or any," in an instruction in an action for injuries to an employé that the jury should find for the employé if his injury "was the direct or any result of an order of" the employer, was not prejudicial to the employer.

9. APPEAL AND ERROR—ERRONEOUS INSTRUCTIONS—PREJUDICIAL ERROR.

A judgment will not be reversed for errors in the instructions, unless they are prejudicial to the substantial rights of the party complaining.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

10. SAME.

Where, in an action for injuries to an employé, the instructions fairly presented the issues, and were more favorable to the employer than to the employé, a recovery will not be disturbed because of an error in the use of the

word "willful," in an instruction authorizing a recovery, if the injuries were the result of careless, wanton, or willful negligence.

Appeal from Circuit Court, Lee County.
"To be officially reported."

Action by Jesse Thomas against the Swann-Day Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. E. Hogg, F. A. Lyon, Jr., and Greene & Van Winkle, for appellant. McQuown & Beckham, Hazelrigg, Chenault & Hazelrigg, and J. K. Roberts, for appellee.

LASSING, J. Appellee, Jesse Thomas, was employed by the appellant company as a laborer in its sawmill at Beattyville, Ky. His duties were to oil and look after the machinery, which included not only the machinery used in the mill building proper, but also the chains and other appliances which were used in drawing the logs from the water up into the mill. On the 9th of August, 1905, when just outside of the door of the mill, where he had gone to look after certain machinery, appellee was struck on the head by a stave thrown from a second-story window of the mill. His skull was fractured, and a portion of it had to be removed. Paralysis of the legs resulted from the injury, and he was shown to be, not only seriously, but permanently, injured. The stave which struck appellee upon the head was thrown from the second-story window by an employé named Coomer, whose special duty was twofold: To "bug" the logs, and to throw the staves from a second-story window out upon a pile in the millyard. The particular stave which struck appellee was not thrown upon the stave pile, but out of a front window onto a drive or roadway, which was used for the teams and mill hands in going around the millyard. In the lower court appellant sought to avoid liability by showing that appellee's duty as an employé at the mill did not require him to be where he was at the time he was injured.

The first ground relied upon for reversal is that the court erred in failing to instruct the jury on the law of fellow servants, and risks assumed by the injured employé. No instruction was asked upon either of these subjects, and hence, under the well-settled rule, the failure of the court to so instruct is not a reversible error. *Galbraith v. Starks*, 117 Ky. 915, 79 S. W. 1191, and *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233. Aside from this, however, there is nothing in the record from which it might be fairly inferred that Coomer and appellee were in the same grade of employment, or fellow servants. One of them was engaged upon the lower floor in oiling and caring for the machinery, while the duties of the other kept him upon the second floor, where he looked after the logs and removed the staves. Their field of labor was entirely separate and distinct; the

one had no opportunity to observe the other in the performance of his duty, or to advise, assist or direct him in the discharge of same. Neither had any opportunity of knowing with what degree of care and skill the other was discharging the duties assigned him. The most that the record shows is that they were working for a common master, but the work of each was independent of the other, and in separate and distinct departments of the mill. They were co-servants, but not fellow servants.

In the case of *L. C. & L. R. R. Co. v. Cavens*, 9 Bush, 559, an employé of the railroad on one train was injured by the negligence of another employé of the same rank on another train, yet it was there held that a recovery could be had because the situation of the parties was such as to preclude the idea that the injured employé had any control over the action or conduct of the one responsible for his injury, "for," said the court, "if Cavens had been on the same train with Armstrong, and in a condition, by reason of his equality with him as an employé, to watch over and provide against his negligence, the reasons then for refusing to make the company liable would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from such responsibility ceases to exist, and in such cases those controlling and directing the movements of one train with reference to those upon another and different train must be regarded as the agents of the company." And in the case of *L. & N. R. R. Co. v. Edmund*, 64 S. W. 727, 23 Ky. Law Rep. 1049, it was held that engineers on separate trains were co-servants, and not fellow servants, and the rule announced in the *Cavens* Case was approved. In the case at bar the duties of Coomer were confined to the second story of the mill building. Appellee had no opportunity of seeing or knowing what he was doing, and no chance to control his action, or advise or assist him in the discharge of his duties, and while each was the agent of their common master, neither was the agent of the other. No instruction on assumed risks was given for the twofold reason, first, the facts did not authorize it; and, second, none was asked for. Appellee was injured while on the passway in the discharge of his duty. He knew that staves were not thrown out upon this passway; he had no reason to expect that any would be thrown thereon. No ordinary care on his part could have prevented the injury; while, on the other hand, it was gross carelessness on the part of the employé Coomer to throw the stave out of this window onto the passway, where he had reason to know employés of the company were liable to be passing. In the case of *Angel v. Jellico Coal Mining Co.*, 115 Ky. 728, 74 S. W. 714, it was held that the man who fired the furnace did not as-

sume the risk from dynamite being placed near the fire by a co-servant, over whose actions he had no control. To the same effect are *L. & N. R. Co. v. Brantley's Adm'r*, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291, and *C. N. O. & T. P. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199. When the thus well-settled rule is applied to the facts in this case, it is evident that no instruction on assumed risks should have been given.

Counsel also complains because the court refused to give instructions A and B. These bore upon the question of contributory negligence. There is no evidence upon which to base such an instruction, unless it is to be inferred from the statement that appellee could have observed the condition of the machinery, which was not working all right, by looking through the window at the side. It is true he might have observed the condition of at least a part, if not all, of the chain, which was working improperly, by looking out of the side window. He could likewise observe it as completely, and, perhaps, more satisfactorily, by going in the road or pass-way, as he did. The latter course was, under normal conditions, neither more hazardous nor more dangerous than the former. In fact appellee had on the same day gone outside and observed the working of the machinery, on an occasion before that upon which he was struck. His injury was the result, not of any carelessness for his safety on his own part, but to the negligent act of his co-servant in throwing the stave out of the window on the driveway. Where two courses are open to one in the discharge of his duty, and each is attended, under normal conditions, with practically the same degree of safety, it cannot be charged that it is negligence, in any degree whatever, that the one course is accepted rather than the other. Appellee did not go upon the stave pile, or near it, and had Coomer thrown this particular stave out of the window at which he should have thrown it, it would not have been nearer than 10 feet to appellee. Under this state of facts the court was warranted in refusing to give instructions A and B, offered by appellant.

Appellant objects to the instructions given by the court; to instruction 1 because it is faulty in several particulars, and to instruction 3 because unauthorized, in that there is no plea of "dangerous premises." This is true. There was no plea that the premises themselves were dangerous; the danger was in the carelessness of Coomer in throwing the stave out of the wrong window, and upon the driveway. It was not improper for the court to say to the jury that appellee might presume that the place where his duty called him was reasonably safe, and this is the substance of this instruction. The place where ap-

pellee was assigned to work was, perhaps as safe as any place could be around a sawmill. The injury resulted, not from defective premises or appliances, but from the negligence and carelessness of one of the employes of appellant. The giving of this instruction could not have misled the jury, and appellant was not prejudiced thereby.

Instruction No. 1 is subject to criticism, but the errors complained of were prejudicial, not to the rights of appellant, but to appellee, because in this instruction the jury was required to believe, before it could find for appellee, that the stave was thrown from the upper floor by one of appellant's employes, under the direction or order of defendant, or its agent or manager, and that it was the result of careless, wanton, or willful negligence on the part of the defendant, its agent, or manager in directing this employe to throw the staves from the said window. This instruction is also criticised because the court told the jury that they "should find for plaintiff if his injury was the direct, or any, result of an order of defendant." The criticism to this part of the instruction is based upon the use of the words "or any" before "result." This is highly technical, and we are unable to see wherein appellant was prejudiced by reason of the instructions being given in this form.

Appellant also complains that the word "willful" should not have been used in this instruction, it being urged that the term "willful neglect" is applicable only in cases brought under the statute, where a recovery is had for an injury resulting in death. The contention of appellant in this particular is correct, and, in reversing the cases of *L. & N. R. Co. v. Long*, 94 Ky. 410, 22 S. W. 747, and *L. & N. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342, the use of the word "willful" in a similar instruction was condemned. But the case should not be reversed for this reason alone. Very few important cases are tried in which minor errors are not committed by the court in the introduction of testimony and the instructions, but in no case should a judgment be reversed because thereof, unless they should be deemed prejudicial to the substantial rights of appellant. The instructions in this case fairly and fully presented to the jury the issues as raised by the pleadings and the proof, and were more favorable to appellant than to appellee, and the case should not be reversed because of the technical criticisms to which the instructions are subjected.

Appellee was fearfully and permanently injured, and as the finding and verdict of the jury, in the light of the evidence, appears reasonable and just, we are of opinion that the judgment of the lower court should be affirmed, and it is so ordered.

**SINCLAIR'S ADM'R v. ILLINOIS CENT.
R. CO.**

(Court of Appeals of Kentucky. Oct. 21, 1908.)

**1. MASTER AND SERVANT—RAILROADS—DEATH
OF FIREMAN—DISOBEDIENCE OF ORDERS—AC-
TIONS.**

Where a conductor read aloud an order to the engineer in the presence of the fireman, the fireman was charged with the duty of understanding it, where it was in the usual form prescribed by the company for such orders, or was written in such language as would convey its meaning to a person of ordinary intelligence in the fireman's position, and where the order was disobeyed by him, and his death resulted, there could be no recovery therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 759-775.]

**2. APPEAL AND ERROR—REVIEW—SUBSEQUENT
APPEALS—FORMER DECISIONS AS LAW OF
THE CASE.**

On a subsequent appeal the opinion on the former appeal is the law of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368.]

**3. EVIDENCE—WEIGHT—WITNESSES—CRED-
IBILITY—POWER OF JURY TO DISREGARD
TESTIMONY.**

Where a witness testifies unequivocally to a fact, and there is nothing in his evidence to warrant the jury in rejecting it, and he is not contradicted or impeached, the jury cannot disregard his testimony.

4. TRIAL—DIRECTION OF VERDICT.

Where the proof is such that, had the case been submitted to the jury, they would have been bound to find a verdict for defendant, a verdict for defendant is properly directed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 383.]

Appeal from Circuit Court, Hardin County.
"To be officially reported."

Death action by C. O. Sinclair's administrator against the Illinois Central Railroad Company. There was a directed verdict for defendant, and plaintiff appeals. Affirmed. See, also, 100 S. W. 236, 30 Ky. Law Rep. 1040.

Irwin & Irwin and Caruth, Chatterson & Blitz, for appellant. L. A. Faurest, J. M. Dickinson, Trabue, Doolan & Cox, and C. H. Moorman, for appellee.

HOBSON, J. C. O. Sinclair was the fireman on train No. 193 on the Illinois Central Railroad going south; and he was killed in a head-on collision with train No. 152, going north. The collision was due to the fact that train No. 193 violated its orders. Under its orders, it should have stopped at McHenry and waited there for train No. 152; but it left McHenry on the time of train No. 152, and ran into it about four minutes later. In the collision the fireman and the engineer of train No. 193 were killed; and this action was brought by the administrator of the fireman to recover for his death. Upon the first trial of the case, at the conclusion of the plaintiff's evidence, the court instructed the jury peremptorily to find for the defendant. On appeal to this court, the judgment was reversed, the court holding, in substance,

that the fireman could not recover if he knew of the violation of the order under which the train was running, but that he could recover if he did not know of the violation of the order—that is, if he did not know that the order required the train to wait at McHenry for train 152—the ruling being based on the rules of the company which require that the fireman, after reading the train orders, must keep them in mind, and, if there be occasion to do so, must remind the engineer of them. See *Sinclair's Adm'r v. I. C. R. R. Co.*, 100 S. W. 236, 30 Ky. Law Rep. 1040. On the return of the case to the circuit court, it was tried again; the plaintiff's evidence being in substance the same as on the former trial. The defendant then introduced its evidence, showing that the order which was delivered to train 193 was in the usual form, and so expressed as to be intelligible to those operating trains. This it showed by a number of witnesses. It was also shown that the engineer of train 193, when found after the collision, had a copy of the order in his pocket. The company introduced the conductor of train 193, who testified that they received the order at Horse Branch, a station north of McHenry, and that he there read the order aloud to the engineer in the presence of the fireman, and that, after they had pulled out from Horse Branch, he went over to the engine, and he and the engineer and Sinclair counted up the time together, or, rather, that he counted it in their presence and they assented; that, as he counted the time, they had, by the time-table, time to go to Rockport, but that in making the calculation he made a mistake; and that, by reason of this mistake which he made and which the engineer and Sinclair assented to, the collision occurred. The plaintiff proved in rebuttal that the conductor afterward said at Cecilia that the collision was his own fault. On this evidence the court instructed the jury peremptorily to find for the defendant, and the plaintiff appeals.

The rule requiring the orders to be read by the fireman and requiring him to remind the engineer of them is a reasonable rule. The traveling public have a right to demand that all reasonable precautions shall be taken for their safety, and the rule is a safeguard against mistakes by the engineman which might imperil other lives. On the former appeal of this case we said: "If the evidence disclosed that this order was shown by the engineer to Sinclair, or that he read or heard it read, he would be charged with the duty of understanding it if it was in the usual form prescribed by the company for such orders, or was written in such language as would convey to a person of ordinary intelligence in Sinclair's position its meaning. Hence it would follow that, if Sinclair went out on the engine in disobedience of the order, he might be guilty of such contributory negligence as would defeat a recovery in an

action for damages resulting from his violation of the order. * * * It is of the highest importance that employes of railroad companies who have intrusted to their care so many lives and so much valuable property should be held to a strict observance of the rules of the company established for the protection and safety of the public, as well as persons in charge of the train. Absolute obedience to orders regulating the movement of trains is indispensable to the safety of life and the protection of property, and carriers engaged in the hazardous business of transportation by modern methods have the right to demand the highest efficiency in the service, and to exact implicit obedience to the orders of superiors, and to establish and enforce rules for the discipline of their employes. It is not the purpose of the courts to encourage in any way violations by employes of reasonable rules by relieving them of the consequences of their wrongful acts, or to subject the company to damages caused by their disobedience."

The opinion on the former appeal is the law of the case, and there can be no recovery by the plaintiff if the testimony of the conductor is true. But it is insisted that the court erred in not submitting this question to the jury. It is said that the jury might not have believed the testimony of the conductor, and might have found for the plaintiff notwithstanding his evidence. The conductor was not before the jury. His testimony was given by deposition taken in St. Louis. He was not in the service of the defendant, and had no interest in the controversy. His testimony is consistent, and there is nothing on the face of it in any way to weaken it. It was in no way impeached, except by the proof of the statement made by him at Cecilia that the collision was his fault; he testifying that he said at Cecilia that he was the only human being left to bear the responsibility. But whether he said the one thing or the other at Cecilia is immaterial. Under his testimony as given in the deposition, the collision was his fault. He made the mistake. He was the managing agent in charge of the train, and he did not in his testimony attempt in any way to exculpate himself, but simply said that he made the mistake in counting the time. Where a witness testifies unequivocally to a fact, and there is nothing in his evidence to warrant the jury in rejecting it, and he is in no wise contradicted or impeached, the jury are not at liberty to disregard his testimony. The jury are sworn to render their verdict according to the evidence, and they are not at liberty to reject the evidence capriciously. If this case had been submitted to the jury, they would have been bound to find a verdict for the defendant under the proof, and, as there was but one thing that they could properly do under the evidence, and of this there could be no difference of opinion, the court

properly instructed them peremptorily to find a verdict for the defendant. This court has in a number of cases held where stock is killed on a railroad, and the company introduces its men and shows that the killing was unavoidable, the court should peremptorily instruct the jury to find for the defendant, where the witnesses are not impeached, and their testimony is consistent and not contradicted. *Ky. Central R. R. Co. v. Talbot*, 78 Ky. 621; *Rogers v. Felton*, 98 Ky. 148, 32 S. W. 405; *I. C. R. Co. v. Gholson*, 66 S. W. 1018, 23 Ky. Law Rep. 2209. The same principle has been applied in other cases. *Henderson Trust Co. v. Stuart*, 108 Ky. 167, 55 S. W. 1082, 48 L. R. A. 49; *L. & N. R. R. Co. v. Mounce's Adm'r*, 90 S. W. 956, 28 Ky. Law Rep. 933; *Hall v. Louisville R. R. Co.*, 104 S. W. 275, 31 Ky. Law Rep. 853.

Judgment affirmed.

PERRY et al. v. DANCE et al.

(Court of Appeals of Kentucky. Oct. 20, 1908.)

1. WORDS AND PHRASES—"AS DOWER"—"IN LIEU OF DOWER."

The expressions "as dower," and "in lieu of dower," are often used interchangeably.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3475-3476.]

2. COMPROMISE AND SETTLEMENT—CONSTRUCTION.

A widow having instituted four actions, to which her husband's heirs were parties, to recover dower, a stipulation was entered into by which the widow waived all claim to dower in the lands claimed by the defendants, and received "in lieu of her dower" the homestead allotted to her husband. The stipulation also recited that, in the event she should ever be disturbed in the title or possession thereof by any creditors or heirs of her husband, she was to have laid off such amount out of the tract in litigation as should be equitable. *Held*, that the widow by such stipulation did not acquire a fee-simple title to the land so awarded to her, but only a life estate.

3. APPEAL AND ERROR—PREJUDICE—PLEADING.

A technical error in sustaining a demurrer to certain paragraphs of defendant's answer was without prejudice, where on the whole answer they had no defense to the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4089-4097.]

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Action by George B. Dance and others against Maggie Perry and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jno. H. Baker, for appellants. J. T. Simon, for appellees.

CLAY, C. George B. Dance, Robert Dance, and others, plaintiffs below, alleging that they were the children and only heirs at law of Henry A. Dance, instituted this action to recover a tract of about 47 acres of land in possession of appellants, Maggie Perry, Nancy Williams, William Moore, and his wife, Mary

Moore. The petition charged that the land was occupied by their father, Henry A. Dance, during his lifetime, and upon his death it was allotted to Elizabeth Dance as her dower in her husband's estate; that upon her death, which had taken place, the title thereto vested in plaintiffs; that the defendants were wrongfully withholding possession of the property from plaintiffs, who, as the only heirs of Henry A. Dance, were the owners and entitled to possession thereof.

The defendants answered in three paragraphs. In the first paragraph they denied that they were in the wrongful possession of the property referred to, and that the plaintiffs were the owners and entitled to the possession of the same. In paragraph 2 they pleaded adverse possession for a period of 15 years. In paragraph 3 they pleaded: That Henry A. Dance died seised of about 223 acres of land. He had sold in his lifetime certain other tracts of land, to wit, to one W. R. Miller a tract containing about 35 acres, to John L. Henry about 60 acres, and to G. S. Mullins about 20 acres. The 223 acres of land were claimed by J. J. Brann. The said Elizabeth Dance had never parted with her dower interest in any of said land, and on the 22d day of October, 1883, she filed her four separate actions in the Pendleton chancery court—one against J. J. Brann, claiming dower in the said 223 acres; one against G. S. Mullins, claiming dower in the 20-acre tract; one against W. R. Miller, claiming dower in the 35-acre tract; and one against J. L. Henry, claiming dower in the 60-acre tract. All of the then heirs of the said Henry A. Dance were parties to said suits. After the issues had been made, and before trial, a compromise of the matters involved was entered into on the 8th day of October, 1884, which was reduced to writing and by consent was filed and recorded as the judgment in said suits. By the terms of said agreement the said Elizabeth Dance waived her dower in all of the lands described in said suit, and in lieu thereof was given and accepted as her own a tract of land known and described as the "homestead tract" of Henry A. Dance, which had been allotted to him. She was also to have all the improvements on said land, and the spring on the said 20-acre tract, and the barn on said farm. By the terms of the judgment Elizabeth Dance became the owner of said tract of land, and was in the actual, uninterrupted, continuous, adverse possession thereof, claiming it as her own against all the world from the date of said judgment, 1903, at which time she for value sold and conveyed said land to the defendants Maggie Perry and Mary I. Williams, and placed them in possession thereof. The latter, on the 19th day of March, 1904, sold an undivided one-third interest therein to the defendants William Moore and his wife, Mary Moore. The defendants have been in the continuous, uninterrupted, actual, and adverse possession of said

land, claiming it as their own, since their said purchase, and are now so in possession and claiming said land.

The agreement, which is referred to and made a part of the answer, is as follows: "It is hereby agreed by all the parties to these consolidated causes that they be dismissed settled; the defendants to pay all the costs, including \$10 of the costs of survey. The plaintiff, Elizabeth Dance, waives all claim to dower in the land owned or claimed by the defendants, or either of them. In consideration of said waiver the parties hereto agree that the plaintiff may take in lieu of her dower the homestead allotted to her said husband during his lifetime, so as to include all of the improvements and the spring now on the 20 acres claimed by G. S. Mullins, one of the defendants herein; said homestead to include the barn on said farm and all south of the public road running along the north side of said tract. In the event said homestead has not been allotted, then it is agreed in lieu of dower she is to have all of the improvements and all the land south of said public road down to the north line of the said 20 acres claimed by said Mullins; said line to be run so as to include the spring now on the said 20 acres and to be all the land owned by plaintiff's husband at the time he died east of the tract belonging to the defendant Henry, known as the 'Brock tract,' and east of Comeman Collier's land. In the event plaintiff should ever be disturbed in the title or possession of the land allotted to her under this agreement by any creditors or heir of Henry A. Dance, deceased, then she is to have laid off to her so much land out of the tracts embraced in the pleadings in these consolidated causes as will be equitable and right between all the parties to this agreement. It is further agreed that this agreement be filed as the judgment in these causes. * * *

A demurrer was sustained to the answer, and, the defendants declining to answer further, judgment was entered in favor of plaintiffs below. From that judgment this appeal is prosecuted.

It is the contention of counsel for appellants that by the judgment above referred to Elizabeth Dance took an absolute estate in the land given to her in lieu of dower. This is made manifest by the use of the words "in lieu of dower"; it being contended that the land was given, not as dower, but in lieu of dower. Furthermore, the judgment recites that, in the event plaintiff should ever be disturbed in the title or possession of the land allotted to her under the agreement by any creditors or heir of Henry A. Dance, then there is to be laid off to her as much of the land, etc. For the purpose of arriving at the intention of the parties thereto in making the compromise agreement, we must take into consideration their relations at the time it was made and the purpose for which it was entered into. Elizabeth Dance had instituted four actions to recover dower.

She finally compromised by accepting in lieu of dower the 47 acres of land which had been allotted to her husband as homestead. Her purpose was to secure dower in her husband's land. The plaintiffs were parties to that suit. The only land which she secured as dower was that in which they had an interest; it being the homestead of their father. Having brought the suit for the purpose of securing her dower, the agreement must be interpreted in the light of the purpose for which the suit was brought. In the absence of any certain, unequivocal language showing an intention to vest in her an absolute estate to the land in controversy, we think it is plain that the homestead tract of her husband was conveyed to her merely as her dower interest in his estate. It was not intended that she should have the fee-simple title thereto. She was suing for dower—not to recover the property in question. We think it plain, therefore, that the compromise was made entirely upon the basis of dower, and not with a view of vesting in her the fee-simple title to the property. The expressions "as dower" and "in lieu of dower" are often used interchangeably. The latter expression is not sufficient to indicate a purpose to convey a fee-simple title. Nor do we think the words, "In the event plaintiff should ever be disturbed in the title or possession of the land allotted to her under this agreement by any creditors or heirs of Henry A. Dance, deceased, then she is to have laid off to her so much land out of the tracts embraced in the pleadings in these consolidated causes as will be equitable and right between all the parties to this agreement," add anything to the estate which is intended to be conveyed to her by said compromise agreement. This language is entirely consistent with the theory that she was to have a life estate in the property in controversy. It speaks of a disturbance to her title alone, and provides that she is to have laid off to her "so much land," etc. For these reasons, we think it perfectly plain that the land was assigned to her as dower. The only interest, therefore, that she could convey in it was her life estate. Upon her death it vested in the plaintiffs below.

Counsel for appellants earnestly insists that the court erred in sustaining a demurrer to the first and second paragraphs of appellants' answer. It may be that these paragraphs were of themselves sufficient to constitute a ground of defense; but, taken in connection with the third paragraph, which fully discloses the real ground of appellants' defense, it is perfectly manifest from appellants' answer that they had no real defense to the action. Although a technical mistake may have been made in sustaining the demurrer to the first and second paragraphs of the defendants' answer, it being apparent that upon their whole answer they have no real defense to the action, this court will not reverse the judgment, as the error, if

any, was not prejudicial to the substantial rights of the defendants.

Judgment affirmed.

KISLER'S ADM'R v. KENTUCKY DISTILLERIES & WAREHOUSE CO. et al.

(Court of Appeals of Kentucky. Oct. 15, 1908.)

1. NEGLIGENCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where boys trespassing in a distillery mill, without the knowledge of the person in charge, fell into a corn bin and were smothered, that the person in charge had allowed them to frequent the mill without warning them of danger did not render the proprietors liable; it not appearing that he had notice that the bin was dangerous, and he being the only person who knew that the boys ever frequented that part of the mill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 45-51.]

2. SAME.

That the boys went into the bin to get their hats in the presence of the person in charge on one occasion, and to get the corn by his direction on another occasion, when it was safe to do so, would not charge him with notice that they would go into it on other occasions, under different conditions, when trespassing on the property, without his knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 45-51.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Death action by Albert Kisler's administrator against the Kentucky Distilleries & Warehouse Company and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

W. O. Bradley and Popham & Webster, for appellant. Levy Mayer, Alfred S. Austrian, and Wm. Marshall Bullitt, for appellees.

HOBSON, J. There is a distillery in Louisville, on Thirtieth and Garland streets, known as the "John G. Roach & Co. Branch." The premises are inclosed by a fence. There is inside the fence a house, known as the "Mill," which has three stories, and the upper stories are reached by a stairway. In this building there is a large bin for holding grain. The bin is about 30 feet long, and can only be entered at the top on the third floor. Around the top of the bin there is a railing something over 3 feet high. On April 23, 1906, the miller, who had been about the mill all the morning, left and went over to the distillery to do some repairing there. About 2 o'clock the fireman at the boiler room saw Albert Kisler and Leo Pfanmiller, two boys 15 years old, in the mill on the first floor looking out of one of the windows. The boys had no connection with the distillery, and nobody but the fireman saw them. About 5 o'clock the miller came back and locked up the mill and went home. The boys did not return home that night. The next morning a search was made for them. A day or two after this the corn stopped running out of the bin into the hopper at the bottom,

and when the cause was looked into it was found that a boy's body had stopped the corn. When they got the body out it proved to be that of Albert Kisler. The other boy was sitting across a rod about 10 feet above, both of them being submerged in the corn, and both of them had been dead long enough for decomposition to begin. This suit was brought by the personal representative of Albert Kisler against the owners of the distillery to recover for his death, on the ground that the loss of his life was due to their negligence. At the conclusion of the plaintiff's evidence the court instructed the jury peremptorily to find for the defendants, and, the plaintiff's petition having been dismissed, he appeals.

The proof for the plaintiff showed that there were five or six boys in the neighborhood, about 15 years of age, including the two named, who had been in the habit of playing about the distillery. They usually played in the yard, but sometimes played in the mill. W. C. Hahn was the miller, and W. J. O'Hearn was the superintendent. On one occasion, some weeks before the death of Kisler, he and four or five other boys were on the lower floor of the mill, and went up to the third floor. There they got to throwing each other's hats in the bin, Hahn being present; and they all went down into the bin and got their hats, coming out on a ladder. On another occasion, about three weeks before the death of Kisler, some of these boys were there, and Hahn had them sweeping out for him, and this sweeping was done on the third floor, as well as on the first floor. Albert Kisler was there on this occasion. On still another occasion Hahn had some of the boys sweeping up for him, including Kisler, and he gave the boy some corn in a sack for sweeping up. On another occasion Kisler was seen going away with a sack of corn, and, as this was the way the boys were paid for sweeping when they swept up for Hahn, it may be assumed that he had been there sweeping that day. At any rate, the proof for the plaintiff showed that on three or four occasions Kisler and his companions had been there playing about the distillery, and that on one other occasion two of them had gone down into the bin to get some corn. But on both of these occasions, when the boys went down into the bin, the corn did not come up over their ankles, and they came up without any difficulty. No warning was given the boys by Hahn as to there being any danger in their going into the bin. It was also shown that for several days prior to April 23d, when the boys were missing, there had been a great deal of rain; that in damp weather, when the air is damp, the corn in the bin will get sticky and form a crust on the top. When this occurs, the corn below will run out through the spout, leaving a cavity; and in order to make the corn run out it is necessary to take a pole and stick it in the crust, so as to break the crust, and

when this is done it all runs down towards the spout. Three witnesses were introduced by the plaintiff who had worked about a distillery, and testified that they had known this to happen in bins where corn was kept; and the plaintiff's case rested on the idea that the two boys, after they were seen at the mill window about 2 o'clock, had gone up on the third floor and for some reason had jumped down into the bin; that a cake had formed, and when they jumped in they broke the crust, and went down into the corn, which ran down over them and smothered them; one of the boys having gone through to the bottom, and the other having hung on the cross-rod as he went down, as one leg was on one side of it and one on the other.

The plaintiff insists that the doctrine of what is known as the "turntable cases" should be applied. But the difficulty is that while there is proof that a crust might form on corn, and that if the crust did form, and the bottom of the corn was then withdrawn through the hopper, the corn would run down when the crust was broken, there is no proof that this had ever occurred at this distillery, or that any one, at any distillery or anywhere, had ever been hurt in this way, or that the managers of the distillery had any reason to anticipate that there was any danger in the corn bin. It is not shown that there was in fact any crust on the corn. It is not shown that the corn below had been drawn out, leaving a cavity beneath. No facts are shown which would charge Hahn with notice that the bin was dangerous, and he was the only person who had any knowledge that the boys were ever on this floor, so far as the proof shows. The boys were trespassers upon the property. They had not been invited there, and why they went to the mill, or what they were doing there, nobody knows. It may be surmised that they went there to play, or looking for a job from Hahn, and, it may be possible that, finding nobody in the mill, they went up to the third story and for some reason went down into the bin. But no facts are shown which imposed upon Hahn the duty of anticipating danger to the boys. We are therefore of opinion that his allowing the boys about the mill, without warning them of danger from the bin, is not sufficient to impose on the defendant any liability.

This conclusion makes it unnecessary for us to consider the other questions urged by counsel as to the application of the rule in the turntable cases to the facts shown here. The fact that boys 15 years old went into the bin to get their hats in the presence of Hahn on one occasion, and to get some corn by his direction on another occasion, when it was safe to do so, did not charge him with notice that they would go into it on other occasions, under different conditions, when trespassing on the property without his knowledge.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. GERARD et al.
(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. HIGHWAYS—OPENING PROCEEDINGS—JURISDICTIONAL FACTS.

That the petition to the county court to have a new road opened shall be signed by at least five landowners of the county, as required by Ky. St. 1903, § 4289, and that prior to filing of the petition notice shall be given, as required by section 4290, are indispensable jurisdictional facts that must be made to appear in that court, either by the record or the introduction of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 47.]

2. SAME—BURDEN OF PROOF.

It being necessary to affirmatively show, if it is denied, that the petition to the county court to open a new road was signed as required by Ky. St. 1903, § 4289, and that notice prior to the filing of the petition was given as required by section 4290, these being jurisdictional facts, petitioners have the burden of proof thereon, on exceptions being filed pointing out noncompliance with such requirements.

3. SAME—APPEAL TO CIRCUIT COURT—TRIAL DE NOVO.

Under Ky. St. 1903, § 4303, providing that appeal to the circuit court from the decision of a county court ordering a new road to be opened shall be tried de novo, petitioners for the road must, on such appeal, prove anew in the circuit court jurisdictional facts put in issue by exceptions filed in the county court and brought by the appeal to the circuit court.

4. SAME—APPEAL—RECORD.

To sustain on appeal the judgment of the circuit court rendered on appeal thereto from the decision of the county court ordering a new road to be opened, it is not necessary that the record affirmatively show that the circuit court heard evidence on jurisdictional facts put in issue by exceptions filed in the county court and brought to the circuit court by the appeal thereto; but it is enough that the record does not affirmatively show the contrary, as it does not by the certificate of the clerk, that "the foregoing pages contain a true, correct, and complete transcript of the entire record"—the circuit court, in disposing of the exceptions, having the right to hear oral evidence, and it being presumed, in favor of its judgment, reciting that "the court, being advised, adjudges that said exceptions be and the same hereby are overruled," that the court did hear evidence in support of the facts in issue by the exceptions.

5. SAME—SWEARING COMMISSIONERS—WAIVER.

The swearing, as directed by Ky. St. 1903, § 4291, of commissioners appointed to assess damages for opening a new road to faithfully and impartially discharge their duty, not being jurisdictional, is waived by failure to file an exception on that account in the county court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 89-91.]

6. SAME—ISSUES MADE BY EXCEPTIONS—TRIAL BY JURY.

The provision of Ky. St. 1903, § 4296, that when, in proceedings to have a new road opened, exceptions shall be filed by either party, the court shall, unless the parties agree that it may try such issues, impanel a jury to try the issue of fact made by the exceptions, applies to questions of fact growing out of the necessity for opening the road and the amount of damages awarded, and does not apply to exceptions pointing out as errors that the jurisdictional requirements of sections 4289, 4290, as to the signing of the petition for the road and the giving of notice, were not complied with.

Appeal from Circuit Court, Warren County.
"To be officially reported."

Proceedings by Paul E. Gerard and others to have a new road opened. The Louisville & Nashville Railroad Company filed exceptions, which being overruled, it appealed to the circuit court, where judgment was adverse to it, and it again appeals. Affirmed.

Sims, Du Bose & Rodes, Benjamin D. Warfield and C. H. Moorman, for appellant. W. B. Gains, for appellees.

CARROLL, J. This was a proceeding originally instituted in the Warren county court for the purpose of opening a road from the Louisville & Nashville pike to the Russellville road, a distance of about two miles. As it was proposed to open the road across land owned by the appellant company, summons was issued against it, and it filed a number of exceptions to the commissioners' report. These exceptions being overruled, it appealed to the Warren circuit court, where the following judgment was entered: "This cause being submitted for judgment upon the exceptions of the Louisville & Nashville Railroad Company filed herein, and being advised, the court adjudges that said exceptions be and the same are hereby overruled, and that the judgment of the Warren county court be carried out and executed, which said judgment is in words and figures as follows. * * *"

There is no bill of exceptions or evidence in the record, which consists only of the record made in the county court and the judgment of the circuit court. Among the exceptions filed in the county court are the following: "(1) That previous to the making and entering of the order appointing said commissioners written or printed notices were not posted in five of the most public places in the district in which the proposed road is to be established, and said notices were not so posted 20 days prior to the term of this court at which said order was entered, as is required by law. (2) That the application was not signed by five landowners, or any landowners." It is further insisted that the judgment is erroneous because the record does not affirmatively show that the viewers were sworn, although it does not appear that the question was raised by exception, either in the county or circuit court.

Ky. St. 1903, § 4289, provides, that all applications to have a new road opened shall be by petition to the county court, signed by at least five landowners of the county; section 4290 requires that, previous to the filing of the petition, notices thereof shall be given by posting written or printed advertisements in at least five of the most public places in the district or districts in which the road is to be located for at least 20 days prior to the term of court at which the petition is to be presented; and section 4291 directs that the commissioners appointed to assess the dam-

ages shall be sworn to faithfully and impartially discharge their duties under the law. In proceedings of this character it is indispensable that the petition shall be signed by at least five landowners and that the requisite notice shall be given. These are jurisdictional facts that must be made to appear in the county court, either by the record or by the introduction of evidence; and if exceptions are filed, pointing out that the required number of landowners did not sign the petition, or that the necessary notice was not given, the burden of proving these facts is upon the petitioners, as they must affirmatively show, if it is denied, that these steps necessary to give the court jurisdiction were taken. It is conceded that proof upon these controverted points was made in the county court, but insisted that, as the record does not show that any evidence was offered or heard in the circuit court, this court should reverse the judgment of the circuit court, because there is no evidence in the record in this court showing that the petition was signed by five landowners or that the necessary notice was given.

The statute (section 4303) provides that in cases of this character an appeal that may be prosecuted from the county court "shall be tried de novo, and from the decision of the circuit court either party may prosecute an appeal to the Court of Appeals, and the latter court shall have jurisdiction only of matters of law arising on the record of such cases." So that, on an appeal to the circuit court, the case must be tried anew, without reference to what transpired in the county court. In other words, the exceptions filed in the county court, and brought by appeal to the circuit court, are to be disposed of in the circuit court without reference to what disposition was made of them in the county court; and as the exceptions put in issue the jurisdictional facts, whether or not the petition was signed by the requisite number of landowners and whether or not proper notice was given, it was necessary for the petitioners to prove in the circuit court that these two things had been done. And if the record affirmatively showed that no evidence upon these points was heard by the circuit court, the point made by appellant would be well taken; but the record does not so show, and in the absence of anything to the contrary we must assume that the circuit court did hear evidence in support of the propositions excepted to. The judgment recites that "the court, having advised, adjudges that said exceptions be and the same are hereby overruled." It is not necessary that the record should affirmatively show that the circuit court heard evidence; nor does it follow that, because the certificate of the clerk recites that "the foregoing pages contain a true, correct, and complete transcript of the entire record, summons and subpoenas excepted, of the case late pending in the War-

ren circuit court, in which the Louisville & Nashville Railroad Company was appellant and Paul E. Gerard et al. were appellees," no evidence was heard by the lower court. In disposing of the exceptions, the court had the right to hear oral evidence, and the appellant had the right to have it made a part of the record, and if it appeared from the bill of evidence that the petition was not signed by five landowners, or that the requisite notice was not given, this court would take notice of these fatal errors as matters of law shown by the record. But this it did not do, nor did it have put in the record anything showing that the circuit court did not hear evidence. With the record in this condition, we will presume that the court did hear evidence. As stated in *Harvey v. Payne*, 2 Metc. 451: "It is a well-settled legal principle that the inferior court must be presumed to have done right until the contrary appear. Everything necessary to sustain its judgment will be presumed which is not inconsistent with the facts stated in the record. The legal presumption is always in favor of the correctness of its decisions." To the same effect are *Venable v. McDonald*, 4 Dana, 336; *Kimberlin v. Faris*, 5 Dana, 533; *Braxdale v. Speed*, 1 A. K. Marsh. 105.

Our attention is called to the case of *Mitchell v. Bond*, 11 Bush, 614, in which the court held that in a proceeding under the General Statutes to discontinue a road or erect gates across a road it was necessary that the record should show that the notice required by the statute was given. The statute that controlled the disposition of that case is different from the present statute applicable to road cases, under which this proceeding was instituted. *Ford v. Collins*, 108 Ky. 553, 56 S. W. 993; *Chamberlaine v. Hignight*, 97 S. W. 396, 30 Ky. Law Rep. 85. So that the rule laid down in the *Mitchell* Case must be considered as having been changed by the statute, and it is no longer applicable to proceedings in road cases.

In respect to the objection, made for the first time in this court, that the record does not show that the commissioners were sworn to faithfully and impartially discharge their duties, as provided in section 4291 of the Kentucky Statutes of 1903, we may say that, although the record does not show that they were sworn, this defect was waived by the failure to point it out by an exception in the county court. There is no reason why an error such as this may not be waived; nor is there any why a party desiring to avail himself of this objection should not call the attention of the county court to the failure or omission, so that, if in fact the commissioners have not been sworn, the error may be corrected without serious inconvenience or delay to the parties. It would entail unnecessary and unjustifiable expense and delay, and be opposed to the prevailing practice in this state, to permit a party to stand

by with knowledge that the record in the county court disclosed a technical error, and fail to call attention to it in that court by an exception, and also ignore it in the circuit court, and for the first time make the point in a brief in this court. In the Chamberlaine Road Case, *supra*, the court said: "It is said that two of the commissioners who acted were not appointed by the county court, but their report recites that they were appointed by the county court. They were allowed by the county court to amend their report. They filed an amended report, and neither in the county court nor in the circuit court was any exception taken to their report on the ground that the commissioners who acted were not the persons appointed by the county court. This objection, therefore, is not available here." The swearing of the commissioners is not a jurisdictional fact. True, it should be done; but, if it is not, the party desiring to except to the report for this reason should make his objection known in the county court by an exception there filed. Failing to do this, the error will be considered as waived.

It is further argued that, as section 4296 provides that, "when exceptions shall be filed by either party, the court shall, unless the parties agree that the court may try such issues, forthwith cause a jury to be empanelled to try the issue of facts made by the exceptions," the court had no right to render a judgment without the intervention of a jury, except by consent of the parties, and that the record should show such consent. The provision for a trial by jury does not apply to exceptions pointing out the errors herein mentioned. These errors are for the court, and not a jury. A jury need only be impaneled to try questions of fact growing out of the necessity for opening the road and the amount of damages awarded.

The judgment of the lower court is affirmed.

CITY OF BOWLING GREEN v. BOWLING GREEN GASLIGHT CO.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. MUNICIPAL CORPORATIONS—SIDEWALKS—DEFECTS—LIABILITY FOR INJURIES.

If a gas company, with the knowledge and consent of a city, has discharged steam into a city sewer under a sidewalk, it is the city's duty to notify the company to stop the flow while the sidewalk is being repaired, if the steam comes through the sidewalk so as to conceal the opening made therein, and also to warn pedestrians of the danger; otherwise, it is primarily liable to a pedestrian injured by falling into the hole, and cannot recover over against the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1653-1659, 1688-1693.]

2. CONTRIBUTION—TORT-FEASORS—MUNICIPAL CORPORATIONS.

The rule that there is no right of contribution between tort-feasors does not apply between a municipal corporation and another,

where a sidewalk is rendered unsafe by their joint wrongdoing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contribution, § 6; vol. 36, Municipal Corporations, §§ 1688, 1709.]

3. PLEADING—DEFECTS—CURE BY EXHIBITS.

Exhibits filed with a pleading will not cure an omission to state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 944.]

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by the city of Bowling Green against the Bowling Green Gaslight Company. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

R. C. P. Thomas and S. D. Hines, for appellant. Sims, Du Bose & Rodes, for appellee.

CARROLL, J. J. Reed Madison brought suit against the city of Bowling Green to recover damages for personal injuries sustained in falling into a hole in a plank sidewalk. He averred that, when the walk was torn up for the purpose of repairing the same, the city permitted large quantities of steam from an adjacent steam power building to be transported through pipes and emitted from the pipes under the sidewalk at a place where it was torn up, all of which was done with the knowledge of the city; that while the walk was torn up, and the steam boiling up from the walk, he, while passing along on the sidewalk in a careful manner, being blinded by the steam, and not knowing of the opening in the walk, fell into it; that the city, although it knew the custom of the power house company to permit the steam from its building to escape into the sewer under the sidewalk at the place where the opening was made, failed to guard or protect in any way the opening. To this petition the city filed an answer, controverting all the averments of the petition; but before a trial of the case it gave notice to the Bowling Green Gaslight Company of the pendency of the action and its insistence that the gas company was liable to the city for any amount that Madison might recover. Thereupon it was agreed between the city and the gaslight company that, if the city compromised and settled the case for a sum not exceeding \$500, the settlement should be treated as the verdict of a properly instructed jury for that amount; the compromise to have the same effect as if a judgment for the sum agreed upon had been entered. Thereafter the city compromised the claim on the terms specified in the agreement, and brought this action against the gaslight company to recover the amount so paid, making the pleadings in the Madison case exhibits with the petition.

The petition of the city, to which a demurrer was sustained, after setting out the foregoing facts, further averred that the gaslight company, at the time Madison sustained the

injuries complained of, was engaged in operating a gas and electric light plant, situated adjacent to the sidewalk upon which the repairs were being made, and that in front of the gas company's building and under the sidewalk was one of the sewers of the city, which was covered with wooden planks that furnished a walk for pedestrians, and that, while the city was engaged in repairing the cover over the sewer near or adjacent to the power house, the defendant carelessly and negligently, and without the authority or consent of the city, emitted or permitted to escape large quantities of steam and vapor from pipes extending from said power plant into the sewer, and negligently and carelessly emitted large quantities of steam into the opening where said sidewalk was torn up, and negligently permitted steam to escape under and over and on said sidewalk, by all of which acts Madison was so blinded that he did not see the opening, and, not knowing of its existence, fell into it. It further averred that the accident and the injury to Madison was the direct and proximate result of the negligence of the gaslight company in permitting the steam to escape under and upon said sidewalk and through the opening into which Madison fell.

As there is no allegation to the contrary, we may assume that the gaslight company had been in the habit of permitting the steam from its plant to escape into the sewer. The petition does not disclose any reason why the gaslight company did not have the right to do this. Sewers are made for the purpose of permitting water, vapors, and steams to escape, and in the absence of some good reason we would say that the company was not guilty of any negligence in this respect. Indeed, we do not understand that the city contends in the case before us that the gaslight company did not have the right to permit the steam to escape into this sewer—the allegation being “that, while the plaintiff's agents and servants were engaged in repairing the cover over said sewer near or adjacent to the power house of the defendant, said defendant carelessly, negligently, and without right, and without the authority or consent of this plaintiff, emitted or permitted to escape large quantities of steam and vapor from pipes extending from said power house plant into the sewer of this plaintiff, and negligently and carelessly and unlawfully emitted quantities of steam into the opening where said sidewalk was torn up and being repaired”; thus making it plain that the right of the gaslight company to permit its steam to escape into the sewer was not questioned, but only that it was guilty of negligence and acting without the authority or consent of the city in permitting it to escape at the particular time that the sidewalk was being repaired. Assuming, as we must, in the absence of averments to the contrary, that it had been the practice of the gaslight company, previous to the accident

to Madison, to permit the steam from its plant to escape into this sewer, and that this was done with the consent of the city, it was then the duty of the city, when it tore up the sidewalk, to notify the gaslight company of this fact, so that the company, while the walk was being repaired, would have notice that it ought not to permit steam to escape into the sewer. If the gaslight company had been notified by the city that it was going to tear up its sidewalk, and that while it was being repaired it must desist from permitting steam to escape, thereby preventing pedestrians from discovering the hole in the sidewalk, and after notice it had continued to do it, the city might have a cause of action against the company.

This class of cases is an exception to the general rule that there is no right of contribution between tort-feasors. The general doctrine is thus stated in *Dillon on Municipal Corporations*, § 1035: “If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful acts or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer as between itself and the author of the nuisance. And if the latter had notice of the pendency of the action against the municipality, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasioned. But he is not estopped from showing that he was under no obligation to keep the street in a safe condition and that it was not through his fault that the accident happened.”

But there is no charge in the petition that the gaslight company was notified of the necessity of stopping the flow of its steam while the sidewalk was being repaired. Evidently the learned counsel for the city omitted this essential averment because the facts did not warrant it. In addition to this, if the steam that came up through the sidewalk prevented pedestrians from discovering the hole, it was the duty of the city to provide means to warn them of the danger. This it did not do. As the gaslight company had been using the sewer, the city cannot maintain an action against it for the loss sustained, as it failed to notify the company of the necessity of stopping the flow of steam. It was the duty of the city, independent of and without reference to the conduct of the gas company, to exercise reasonable care to warn pedestrians of the danger of falling into the hole in the walk. For its failure to discharge this duty it became primarily liable to Madison, and he had the right to institute an action against it to recover damages for the injuries sustained growing out of its negligence. Whether or not the city can

make out a case against the gaslight company we express no opinion. The only question before us now is the sufficiency of the petition, and for the reasons indicated it does not state a cause of action.

In considering its sufficiency we have not looked to the record in the case of Madison against the city, because exhibits filed with a pleading will not cure an omission to state facts necessary to make out a cause of action. *Altemus v. Asher*, 74 S. W. 245, 24 Ky. Law Rep. 2418.

The judgment is affirmed.

FRYE'S ADM'R et al. v. FRYE et al.

(Court of Appeals of Kentucky. Oct. 20, 1908.)

WILLS—CONSTRUCTION—VESTING OF ESTATES.

Testator bequeathed to his wife all his estate, so long as she remained a widow and cared for their daughter; if she married, she to have dower only, the residue passing to the daughter. On the death of the wife all the property was bequeathed to the daughter, who was entitled to her share at 21, and if she died, and the wife survived, testator gave a pecuniary legacy to H., and in case of the death of both the wife and daughter the estate was to be divided among the living heirs of the testator and his wife, except the pecuniary legacy to H. *Held* that, the daughter having become of age and the widow having renounced the will, the time of distribution was the date the daughter became of age, so that she acquired an estate in fee to the property devised to her, and H. took nothing by the legacy.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Jennie Frye and another against Joseph D. Hengelbrok, as administrator with the will annexed of the estate of August Frye, deceased, and others, to construe the will. Judgment for complainants, and defendants appeal. Affirmed.

Thos. P. Carothers and Wm. U. Warren, for appellants. Frank V. Benton, for appellees.

CLAY, C. August Frye died in Campbell county, Ky., in the month of May, 1901, leaving the following will:

"I, August Frye, of the city of Newport, county of Campbell and state of Kentucky, being of sound mind and memory and mindful of the uncertainties of human life, do make, publish and declare this my last will and testament, in manner following:

"First. After the payment of my just debts and funeral expenses, I give, devise and bequeath to my sister Henrietta Cappelman the sum of one hundred dollars.

"Second. I give and bequeath to my wife, Jennie Frye, all of my real and personal estate for her use and benefit as long as she remains widow and takes care of our daughter Louisa.

"Third. In case she will marry again, she will be entitled to her dower only, and all the rest of the estate, both real and personal, all moneys and effects belonging to me at

the time of my death will go to my daughter Louisa Frye.

"Fourth. Should my wife Jennie die, all the real estate and all moneys and effects I bequeath to my daughter Louisa.

"Fifth. My daughter Louisa shall be entitled to her share (one-half of all my estate) when she will be twenty-one years of age.

"Sixth. I hereby nominate and appoint my brother Frederick Frye the executor of this my last will and testament and hereby authorize and empower him, the said Frederick Frye, to compound, compromise and settle any claims or demands which may be against or in favor of my said estate.

"Seventh. Should my daughter Louisa Frye die and my wife remain living I will hereby give and bequeath to Louisa Huels, my niece, the sum of five hundred dollars.

"Eighth. In case both my wife and daughter should die, all my estate, both real and personal, shall be equally divided among our lawful heirs with the exception of the five hundred dollars payable to Louisa Huels.

"In witness whereof I have hereunto set my hand and seal this 13th day of April, A. D. 1895.

[Signed] August Frye."

This action was instituted by Jennie Frye and Louisa Frye, devisees under the foregoing will, against Joseph D. Hengelbrok, administrator with the will annexed of the estate of August Frye, deceased, Louisa Huels, and Fred Frye, Jr., her committee, for the purpose of obtaining a construction of the will. It appears from the petition that the devisees had sold certain real estate left by August Frye, but that the purchaser declined to take the property, on the ground that Louisa Frye had only a defeasible fee therein, and that the \$500 bequeathed to Louisa Huels would, during the lifetime of Jennie Frye, be a charge upon the real estate. The petition also states that Joseph D. Hengelbrok, the administrator, is contending that it is his duty, as such personal representative, to hold the sum of \$500 for the purpose of paying it to Louisa Huels, should Louisa Frye die before her mother. It further appears from the petition that Jennie Frye, the widow of August Frye, had renounced the will and elected to take dower in his estate. The petition also shows that, at the time it was filed, Louisa Frye was 21 years old. Upon submission of the case the trial court adjudged that Louisa Frye had the absolute fee-simple title to the property involved, subject to the dower interest of her mother, and that Louisa Huels had no interest in said property, and took nothing by virtue of items 7 and 8 of the will. From this judgment, Joseph D. Hengelbrok, the administrator, Louisa Huels, and her committee, Fred Frye, Jr., prosecute this appeal.

It is the contention of counsel for appellees that the judgment of the lower court is correct, because, when the testator spoke of the death of Louisa Frye while his wife remained living, he meant her death during

the lifetime of the testator, and when he spoke, in clause 8, of the death of both his wife and daughter, he referred to their death during his lifetime. We do not agree, however, with counsel in this connection. It is apparent, from the fact that he devised his estate to Jennie Frye so long as she should remain a widow, and further provided, in case she should marry again, she should be entitled to dower only, and the rest of his estate should go to his daughter, he did not refer to her death during his lifetime. She could never be a widow so long as he lived. That being the case, we must search the will to see if there is not some other period at which the testator determined that the property devised by him should vest. This, we think, may be found in clause 5, which provided that his daughter Louisa should be entitled to her share when she became 21 years of age. This language is clear and certain. By it he intended that his daughter should have her share when she arrived at age. We do not think, then, that the testator intended to convey to his daughter merely a defeasible fee, which would be defeated by her death whenever it should occur. Having provided that she should have the estate when she became 21 years of age, and having fixed upon that as the period of distribution, it is perfectly manifest that he did not intend that the estate so devised to his daughter should thereafter be defeated by her death.

In *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398, the testator gave to his executor the entire management and control of the estate until his son was 21 years old, and directed that the estate should be paid over to the son and be delivered up to him by the executor "when he should arrive at the age of 21 years, if he should live that long," but that, in case his son should die without bodily heirs, all his estate should be converted into money by his executor and equally divided between certain of his relatives. It was held that the son, upon arriving at the age of 21 years, became vested with an absolute estate in fee simple. In *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. 533, the testator directed that his estate should be kept together, and jointly used and enjoyed by his children until the youngest became of age, and then the land to be equally divided among his sons then living. The will further provided: "If any of my sons should die without any bodily heirs, his portion of my estate to be divided amongst his brothers and sisters that may then be living." This court held that when the youngest became of age the estate of the sons in the land became absolute. So, also, in the case of *Kephart v. Hieatt*, 78 S. W. 425, 25 Ky. Law Rep. 1602, the testatrix devised all her estate to her children, share and share alike, to be held in trust by their guardian and trustee until the youngest arrived at the age of 21 years. The third clause of the will was as follows: "It is my will that should all my children

die without issue, then it is my will that the remainder of the estate at that time, in that event I will to my brother James Kephart's children, and my sister Bettie Smith's children, Elias Kephart's child, share and share alike, equally between them." This court held that the purpose of the testatrix was simply to provide that her estate should go to her collateral heirs in case her children should all die before the period of distribution, and was not intended as a limitation on the estate devised to them after the expiration of the trust created.

Following the rule laid down in the above cases, we are of the opinion that, the widow having elected to take dower, and Louisa Frye now having reached the age of 21 years, the period of distribution provided by the will, Louisa Frye now has the absolute fee-simple title to the property in question, subject to her mother's dower interest. That being the case, the purchaser of their interest would acquire the fee-simple title.

For the same reason, we do not think the bequest of \$500 to Louisa Huels is any longer a charge upon the real estate, or that she takes anything by such bequest. It is perfectly apparent that the testator intended to provide for his wife and daughter. When he spoke of the death of his daughter during the lifetime of his widow, he did not refer to her death whenever it might occur during that time. After providing that the daughter's share should vest in her when she became 21 years of age, he did not intend that any portion thereof should be divested by any event which could thereafter occur. The bequest of Louisa Huels was to take effect only in the event that Louisa Frye died during the lifetime of her mother and before reaching the age of 21 years. As Louisa Frye is now 21 years of age, Louisa Huels takes nothing under the will of August Frye.

For the reasons given, the judgment is affirmed.

MULLINS v. HALL et al.

(Court of Appeals of Kentucky. Oct. 20, 1908.)

1. QUIETING TITLE—ACTION—RELIEF.

A party, asserting ownership and possession of land, suing to quiet title, may have his title perfected to so much of the land as the evidence shows him to be the owner and in possession of, though the defendants may have a superior title to a part of the land.

2. SAME—PLEADING—DENIALS—CONSTRUCTION.

In a suit to quiet title, the answer charged that, about 1897 or 1898, plaintiff, when a tenant of defendant H., without his knowledge, secretly procured a survey of the land described. Plaintiff's reply denied that at that time he was a tenant of H., or without his knowledge or consent secretly procured such a survey. Held, that such reply was not a denial that, while plaintiff was a tenant of H., he procured a patent for the premises sued for, but only that he did not do so in 1897 or 1898.

3. LANDLORD AND TENANT—ADVERSE TITLE.

A tenant, while in possession under a lease, without renouncing the tenancy and restoring

the premises to the landlord, cannot set up title in himself, however acquired, in opposition to his landlord's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 190.]

Appeal from Circuit Court, Knott County.

"Not to be officially reported."

Action by Thomas Mullins against W. D. Hall and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hazelrigg, Chenault & Hazelrigg, for appellant. H. H. Smith and B. F. Combs, for appellees.

CARROLL, J. The appellant, Mullins, who was plaintiff below, brought this action in equity to quiet his title to 50 acres of land. The appellees, who were defendants below, after traversing the petition, affirmatively pleaded, first, that they were the owners of three patents, two for 100 acres each, and one for 1,000 acres, that covered a part of the land claimed by the appellant; and, second, that the land in controversy was leased by them to appellant, and while he was in possession under the lease he obtained a patent under which he claims title to the land. They also set up adverse possession of the premises, and that appellant could not in any event succeed, because the entire tract of land claimed by him was then covered by a senior patent issued to May and Whitten.

The evidence in the case is very unsatisfactory; but we gather from it that in April, 1897, the appellant obtained a patent for the land in controversy, and that many years prior thereto the patents relied on by appellees were issued. A surveyor's report shows that two of these senior patents, each for 100 acres, conflict with the patent issued to appellant; one of them covering it to the extent of $3\frac{1}{2}$ acres, and the other embracing about 5 acres. Whether the 1000-acre senior patent covers any part of the land in controversy is a disputed question. The plat filed with the record only gives two lines of this patent; that is, the line claimed by appellant, which does not touch the land in controversy, and, if correct, would exclude it entirely from the 1000-acre patent, and the line claimed by appellee, which, if it be the true line, covers a part of it. Which one of these two lines is the correct line is difficult of ascertainment; but in no event can appellees under the evidence shown by this record, assert title by virtue of the 1000-acre patent to any part of the land claimed by appellant, except that part of it embraced within the disputed conflicting lines before mentioned, claimed by appellees to be the true line. If this line is the true line, a fact which we do not deem it necessary to pass upon, the record does not show how many acres of appellant's land is included in the 1000-acre survey. So that, upon this issue, if we should assume that the 1000-acre patent covered a part of the land claimed by appellant, and that a part of it

was also covered by each of the two senior patents of 100 acres each, yet appellant would be the owner of, and entitled to the possession of, so much of his land as was not embraced within the lines of either of these three senior patents. The question, then, presented upon this point, is: Can appellant, who asks to have his title quieted to the whole of the land claimed by him, obtain relief when it is admitted that a part of the land is owned by appellees? The petition is very defective, and it is doubtful if it states a cause of action in conformity with the rule announced by this court in *Brown v. Ward*, 105 S. W. 964, 32 Ky. Law Rep. 261, and other cases. But, granting that it does, we should say that appellant was entitled to a judgment quieting his title to that part of the land that the record showed him to be the owner and in the possession of. The fact that a party, asserting ownership and possession of a tract of land, brings an action to quiet his title, does not deny him the right to have his title perfected to so much of the land as the evidence shows him to be the owner and in the possession of, although the persons against whom the suit is brought may have a superior title to a part of the land. So that, if there was no other obstacle in the way, a judgment should have been entered in favor of appellant, quieting his title as against the appellees to that part of the land not embraced within the senior patents.

But upon the issue made that the land in controversy was leased to appellant by appellees, and while thus in possession he obtained the patent under which he asserts title, we are of the opinion that the judgment of the lower court was correct. The answer of appellees charges that about the year 1897 or 1898 the appellant, when he was the tenant of appellee W. D. Hall, and without his knowledge or consent, secretly procured a survey of the land described in his petition. The reply denies "that about the year 1897 or 1898 the plaintiff, at a time when he was tenant of defendant Hall, or without his knowledge or consent, secretly procured a survey of the land described in his petition." It will thus be seen that there is no denial that, while he was a tenant of Hall, he procured a patent for the leased premises, but only that he did not do so in the year 1897 or 1898. The appellee W. D. Hall testifies that about the year 1894 or 1895 he leased by written contract to appellant, Mullins, the boundary of land in controversy for the period of five years, and that after Mullins had been in possession of the land as his tenant for two or three years he secured, without the knowledge or consent of Hall, a patent for the same. This statement is corroborated by the evidence of Harrison Hall. The appellant, testifying in his own behalf, said: "I leased a tract of land from the defendant W. D. Hall near where I now reside. There was a writing drawn to this effect. I was in possession of this writing, but don't know where

it is now. I may have burned it. This writing does not describe the boundary of the land which I leased. I know the boundary of the land I leased. I built on a 100-acre survey of W. D. Hall. I and my brother James Mullins was to clear 20 acres of said land, and was to have all we cleared for a period of five years. We leased the land about ten years ago. A part of the land that I claimed and worked on lies within the boundary described in the petition. I lived on the land I leased from W. D. Hall. At the time I made the survey, I never gave W. D. Hall any notice that I was going to make the survey described in my petition. My lease expired about four or five years ago; have been living there on the place ever since." Considering the state of the pleadings and this evidence, we conclude that appellant obtained the patent under which he now asserts title while he was in possession of the land as a tenant of appellees. It has been settled in numerous cases that a tenant, while in possession under a lease, will not be permitted, without renouncing the tenancy and restoring the premises to the landlord, to set up in himself title, however it may be acquired, in opposition to or that conflicts with the title of his landlord. *Trabue v. Ramage*, 30 Ky. 323; *King v. Hill*, 108 S. W. 238, 32 Ky. Law Rep. 1192.

In view of this conclusion, we do not deem it necessary to go into the question of adverse possession, or whether or not the May and Whitten patent covers the land in controversy.

The judgment of the lower court is affirmed.

SUN INS. OFFICE v. STEGAR.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. TRIAL—ADJOURNMENT—REFUSAL IMPROPER.

It was improper, after plaintiff's evidence was in, to refuse defendant an adjournment, asked on account of the nonarrival of depositions which constituted defendant's case, and which should have arrived before the trial, and were expected to and did arrive during the noon hour; defendant not having been dilatory in preparing its case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 42.]

2. SAME—REOPENING CASE.

The trial court having improperly refused defendant an adjournment of the trial during the noon hour on account of the nonarrival of depositions which constituted defendant's case, and which were expected to and did arrive during such hour, it was improper, on the arrival of the depositions within five minutes after defendant's argument began, to refuse to allow the depositions to be read, where the additional time required would not have exceeded an hour.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 161, 162.]

3. SAME—DISCRETION—NATURE.

The trial court's discretion as to the admission of belated testimony is judicial, and not arbitrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 160, 162.]

4. CONTINUANCE—COURT'S DISCRETION—CHARACTER.

A trial court's discretion as to granting continuances is judicial, and not arbitrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 17.]

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

Action by James E. Stegar against the Sun Insurance Office. From a judgment for plaintiff, defendant appeals. Reversed, for new trial.

Chas. H. Shields, Bernard Flexner, Robt. G. Gordon, and Hodge & Hodge, for appellant. Wheeler, Hughes & Berry, for appellee.

BARKER, J. For convenience, we adopt the following statement of the facts of the case from the brief of appellant, as the record supports it in every substantial particular:

"This is an appeal from a judgment of the Caldwell circuit court, rendered November 15, 1907, upon the verdict of the jury in favor of appellee (plaintiff below) in the sum of \$2,250, claimed under an alleged compromise of a claim of appellee under a policy of insurance of appellant. The petition in this case was filed on the 18th day of October, 1907, alleging in substance that appellee had sustained a loss by fire of property covered by a policy of insurance in appellant company, and that appellant company had agreed to compromise appellee's claim for the sum of \$2,250, and praying judgment for said sum. Answer was filed on the 29th day of October, 1907, denying the allegations of the petition. On November 8, 1907, appellant gave notice that on November 12, 1907, it would take the depositions of Thomas Bates and H. N. Kelsey at the office of Mr. Bates in the city of Chicago, Ill. On the 11th day of November, 1907, an order was entered setting this case for trial on the 14th of said month, and on the 12th day of November the depositions were taken by appellant at the time and place stated in the notice and pursuant to said notice, which had been served on the 8th day of said month. The case was called for trial on the 15th day of November, 1907, and local counsel for appellant entered a motion for a continuance, which motion was supported by affidavit. * * * The affidavit showed the materiality of the evidence embraced in the absent depositions and the diligence used in procuring same. The affidavit also showed the unavoidable absence of chief counsel for appellant and the fact that local counsel was unprepared to conduct the trial of the case, as he was not employed for that purpose. The adverse party did not admit the affidavit to be read as the evidence of the absent witnesses; but the court, nevertheless, overruled the motion for a continuance. Appellant's counsel thereupon moved the court to con-

tinue the case one day, so that chief counsel might be present, and that motion was likewise overruled. Appellant's counsel then moved the court for time to allow him to go to long-distance telephone and confer with chief counsel, which motion was also overruled, and he was forced into trial. At the conclusion of appellee's evidence, appellant's counsel moved the court to adjourn until 1 o'clock that day, in the expectation that the delayed depositions would arrive on a 12:40 train. This motion was also overruled. * * * The record shows that within five minutes after appellant's counsel began his argument the missing depositions arrived, and appellant's counsel then suspended and moved the court to allow him to read the depositions as evidence for the appellant, which motion was also overruled."

We think the court erred, under all the circumstances, in refusing the appellant an opportunity to get its evidence before the jury. It had not been at all dilatory in preparing the case. The petition was filed on the 18th of October, and the answer on the 29th. On the 8th of November, and before the case had been set down for trial, it gave notice to take the depositions on the 12th of November in Chicago, Ill., of its only witnesses. The depositions were properly taken on the day contained in the notice, and mailed to the clerk of the court on the 13th of November, and should have reached Princeton before the day of trial, the 15th of November; but by some delay, which is not accounted for in the record, and which, perhaps, cannot be accounted for, when the case was called for trial on the 15th, the depositions, which contained the only evidence which appellant had, or could have, had not arrived. Within less than one month from the time the petition was filed the issues were made up, proof taken, and the case called for trial. Certainly there cannot be, under these circumstances, any claim that the defendant had shown a disposition to delay the action. The affidavit which was filed for continuance showed that the depositions had been taken on the 12th and the materiality of the evidence which they contained. Passing the question as to whether or not the court should have continued the case, still it seems to us that he should have granted the short delay of one hour after plaintiff's evidence was in, which was asked by the defendant in order that, if the train from Chicago, which was due to arrive at 12:40, contained the missing depositions, they might be read in its behalf. The short time which was asked is the usual dinner hour, and many courts adjourn between 12 and 1 o'clock for dinner; and, had this been done,

appellant could have introduced all its evidence, as it afterwards transpired that the 12:40 train did bring in the depositions, which were in the hands of the clerk within five minutes after appellant's counsel commenced the first argument to the jury. And here again the court might have remedied the misfortune which had befallen appellant by the delay of the mails, by sustaining its motion to permit the argument to stop and allowing the testimony of appellant to be read to the jury.

We recognize the rule that the granting of continuances and the admission of belated testimony is within the discretion of the court; but this rule is always qualified by the principle that the discretion is not an arbitrary, but a judicial, discretion, and we think, under all the circumstances of this case, the trial court abused its discretion in refusing to permit the depositions of appellant to be read to the jury after they arrived. The additional time required would not have been more than from 30 minutes to an hour, and this would have enabled appellant to have at least made a show of maintaining its defense as set up in its answer. The belated depositions are in the record before us, and they contradict the testimony of the witnesses for the plaintiff on all material points, and there can be no doubt that the defense of the appellant was left entirely unsustained by the action of the court in refusing to allow the introduction of the depositions of the only witnesses who knew anything of its side of the case. In *Simms v. Alcorn*, 1 Bibb, 348, the court held: "An application to a court for the continuance of the case is an appeal to its sound discretion; and while, on the one hand, the court should grant the indulgence where it is necessary to the attainment of justice, on the other hand, they should guard against its being used as an instrument of delay and injustice." And in *Gaskin v. City of Georgetown*, 118 Ky. 251, 80 S. W. 821, we said: "Trial courts are allowed a broad discretion in the matter of granting or refusing continuances, which should be exercised in any given case according to the facts and circumstances thereof; but when there is an abuse of such discretion, operating to the prejudice of the substantial rights of the party applying for the continuance, it constitutes an error which may be corrected upon appeal by the court of revisory power."

The conclusion we have reached, as above set forth, renders it unnecessary to discuss any of the other errors urged by appellant, as a new trial will afford an ample remedy for them all.

For the reasons herein expressed, the judgment is reversed for a new trial.

BOARD OF COUNCILMEN OF CITY OF
FRANKFORT v. ILLINOIS
LIFE INS. CO.

(Court of Appeals of Kentucky. Oct. 20, 1908.)

TAXATION — PLACE OF TAXATION — MONEY
WRONGFULLY WITHHELD FROM INSURANCE
COMPANY.

Where a foreign life insurance company bought out a domestic life insurance company, which had securities on deposit with the State Treasurer, and the Treasurer wrongfully withheld the securities from the purchasing company, they could not be taxed while so withheld at the place of residence of the wrongful custodian.

Appeal from Circuit Court, Franklin County.
"To be officially reported."

Action by the board of councilmen of the city of Frankfort against the Illinois Life Insurance Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

Wm. Cromwell, for appellant. Greene & Van Winkle, Kohn, Baird, Sloss & Kohn, and Long & Price, for appellee.

CARROLL, J. The Mutual Life Insurance Company of Kentucky, incorporated under the laws of this state, had on deposit with the State Treasurer on the 31st day of July, 1902, notes, bonds, and other securities amounting to \$211,000. These securities were deposited with the Treasurer in compliance with section 648 of the Kentucky Statutes of 1903, providing in substance that every domestic life insurance company shall deposit with the state not less than \$100,000, to be held by the Treasurer for the benefit of the policy holders of the company making the deposit. On July 31, 1902, the Mutual Life Insurance Company, with the consent and approval of the Insurance Commissioner of this state, and its policy holders, sold and transferred all of its property, including the securities on deposit with the Treasurer, to the Illinois Life Insurance Company. Thereupon the Mutual Life Insurance Company ceased to do business as an insurance company. The Illinois Life Insurance Company is a foreign insurance company, and is not required by the laws of this state to make in this state a deposit of securities for the protection of its policy holders. Soon after it purchased the business and assets of the Mutual Life Insurance Company, it demanded of the State Treasurer the securities that had been deposited with him by the Mutual Life Insurance Company, and upon his refusal to deliver them instituted an action to compel their surrender, and this court, in *Prewitt v. Illinois Life Insurance Company*, 93 S. W. 633, 29 Ky. Law Rep. 447, held that the insurance company was entitled to the relief sought and adjudged that the securities be delivered to it. In 1907 this action was brought by the appellant, seeking to tax the securities for the benefit of the city of Frankfort for the years 1903, 1904, 1905, and 1906. The lower court dismissed the petition, and the city appeals.

Briefly stated, the facts are: First, that on July 31, 1902, the Illinois Life Insurance Company became the owner and entitled to the possession of the securities deposited by the Mutual Life Insurance Company and in the custody of the State Treasurer; second, that it demanded the surrender of the securities, and upon the failure of the Treasurer to deliver them brought a suit for their possession, which terminated in a judgment declaring that it was entitled to the securities and that they were wrongfully withheld by the Treasurer; and, third, that, except for the erroneous opinion of the Treasurer that he was entitled to hold the securities, they would have been removed from the county of Franklin when their delivery was first demanded. It thus appears that the city of Frankfort is seeking to tax the securities for the years they were improperly and against the consent of the power retained within the city by an officer of the state. Except for his mistaken conception of duty in failing to deliver the securities upon demand, no attempt to tax them would or could have been made, because they would not have been within the jurisdiction of the taxing authorities of the city. Under these circumstances it would be manifestly unfair to tax these securities. While all personal estate within the city is subject to taxation, evidently this means personal property that is within the city by the consent of the owner. An individual, by taking possession of personal property and holding it against the consent of the owner, cannot give it a situs for taxation in the place where the wrongful custodian happens to reside. The situs of personal property is generally, but not always, determined by the residence of the owner. But in no state of case can it be subjected to taxation against the consent of the owner at the place of residence of a person who is wrongfully in possession of it.

Neither the case of *Higgins' Trustee v. Commonwealth*, 103 S. W. 306, 31 Ky. Law Rep. 653, nor *Commonwealth v. Dun*, 102 S. W. 859, 31 Ky. Law Rep. 561, 10 L. R. A. (N. S.) 920, are applicable to the state of facts here presented. In the *Higgins Case*, the securities of a nonresident sought to be taxed were in the possession of a resident trustee, who rightfully exercised control over them, collected the interest, renewed and changed the evidences of debt, invested the surplus, and in these particulars exercised the same dominion over them as if he had been the actual owner. In the *Dun Case*, the money taxed was in the rightful possession of resident agents and managers of the nonresident owner, and was within this state as a part of the business of the owner and for the purpose of aiding in its conduct. In each instance the will of the owner was consulted, and the property with his consent was within the jurisdiction of the taxing authorities. The facts of this case are somewhat similar to *Commonwealth v. Northwest-*

ern Mutual Life Insurance Company, 107 S. W. 233, 32 Ky. Law Rep. 797. There it was sought to tax notes and choses in action representing loans made by the nonresident company and secured by mortgages on land in this state and by pledges of policies of insurance or other collateral. But the court held that these evidences of debt were not subject to taxation in this state, although they were in this state by the authority of the company.

Without further elaboration or citation of cases involving questions of taxation, we may safely rest our decision upon the ground that, as the securities sought to be taxed were wrongfully retained in this state, their presence here did not give them, under any statute or rule of law that we are familiar with, a situs for taxation in this state.

The judgment of the lower court is affirmed.

LOUISVILLE RY. CO. v. MCCARTHY.

(Court of Appeals of Kentucky. Oct. 16, 1908.)

NEGLIGENCE—IMPUTED NEGLIGENCE—HUSBAND AND WIFE.

Under the Weissinger act, defining the rights of married women, a wife is not chargeable with the negligent acts of her husband, unless the relation of master and servant or principal and agent exists; and, where personal injury results to the wife from the concurrent negligence of the husband and a third person, the negligence of the husband is not ordinarily attributable to the wife, so as to bar a recovery by her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 132.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Bridget McCarthy against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fairleigh, Strauss & Fairleigh and Greene & Van Winkle, for appellant. M. K. Yonts, for appellee.

LASSING, J. This is an appeal from a judgment of the Jefferson circuit court, wherein appellee recovered \$1,500 damages for personal injuries which she received in a collision with one of appellant's cars while she was being driven west on Frankfort avenue in a carriage. She charged that the collision and consequent injury to her was due to the gross negligence of the agents and servants of appellant in charge of the car. The answer, in addition to traversing the allegations of the petition, pleaded contributory negligence. A reply traversed the affirmative matter of the answer, and upon the issues thus joined the case was tried, and the verdict appealed from rendered. Several reasons were urged in the motion for a new trial why the verdict should be set aside and a new trial awarded, but upon this appeal

but one ground for reversal is urged, to wit, the failure of the court to properly instruct the jury on the subject of imputed negligence.

The appellant asked the court to give the following instructions: "(A) The court instructs the jury that, although they may believe from the evidence that the motorman in charge of the car that collided with the surrey in which plaintiff was riding was negligent in the management and operation of his car at the time of said collision, yet if they further believe from the evidence that the person driving said surrey was also negligent at said time and place, and but for his negligence, contributing or helping to bring about said accident, the same would not have occurred, then the law is for the defendant, and the jury should so find. (B) If the jury believe from the evidence that the driver of the surrey in which plaintiff was riding at the time of the collision complained of herein drove the same across the track on which defendant's car was running so close to the front end of said car that he rendered it impossible for the motorman in the exercise of ordinary care to stop his car in time to prevent a collision with said surrey, then the law is for the defendant, and the jury should so find." This the court refused to do, and gave instead instruction No. 5, which is as follows: "In this case, gentlemen, the plaintiff is responsible only for such negligence, if any there was, that she was guilty of. She is not liable for any contributory negligence, if any there was, that may have been committed by her husband, who was the driver of the surrey. I will say, further, to you that if you believe from the evidence that the motorman discharged all of the duties of which I have spoken to you—that is, that he did keep a lookout ahead, did have his car under reasonable control, did sound the customary signals, and did exercise ordinary care to prevent injury to the vehicle in which the plaintiff was riding—but that the vehicle suddenly appeared upon the track that the street car was occupying, so close to the street car that the motorman could not avoid the accident by the exercise of ordinary care, then the law is for the defendant, and you should so find." And it is the action of the court in refusing to give instructions A and B, asked for, and in giving instruction No. 5, of which appellant now complains.

The evidence shows that appellee and her husband and two others were driving west on Frankfort avenue on Sunday afternoon, and a car of appellant company was going in the same direction, and while the carriage in which appellee was riding was upon the west-bound track of appellant its car ran into the vehicle from behind, overturned it, and threw them out, and appellee sustained the injury complained of. It is the contention of appellant that the horse which was being driven by appellee's husband became frightened at a passing railroad train, and swerved suddenly upon the track a short dis-

tance before the car, and when the car was so close upon it that the accident and collision was unavoidable. It is conceded for appellant that appellee did nothing whatever, and was a passive occupant of the carriage, and unless the negligence of her husband (if any there was), as driver, can be imputed to her, then she is without fault, and must recover in any event, if those in charge of the car were shown to have been negligent of their duty. This presents the question squarely as to whether or not the negligence of a husband while driving a vehicle in which his wife is a passenger can be imputed to the wife, in an action for damages by her, and whether or not the relation of husband and wife is such as that the wife cannot recover under such circumstances if it is shown that the husband, with whom she was riding, was guilty of negligence. A somewhat similar question was raised in the case of *Cahill v. C., N. O. & T. P. R. R. Co.*, 92 Ky. 345, 18 S. W. 2, where it was held that a person, who was injured while riding in a vehicle at the invitation of the owner, cannot have the contributory neglect of the owner, who was the driver, imputed to him, unless the relation of principal and agent or master and servant exist between the passenger and the owner of the vehicle. The principle announced in that case has been followed in a number of subsequent cases.

While admitting that the trend of this opinion is to the effect that the occupant of a vehicle is not chargeable with the contributory neglect of the driver thereof, unless the relation between them is that of principal and agent or master and servant, or such that the passenger has some authority and control or direction over the acts of the driver, appellant relies upon the case of *Central Passenger Railway Company v. Chatterson*, 14 Ky. Law Rep. 665, and the authority of numerous courts of last resort in other states, to support its contention that the contributory neglect of the husband is to be imputed to the wife, because of the marital relation. The case of *Central Passenger Railway Company v. Chatterson* was decided before the passage of the *Weissinger* act, and, as counsel for appellant correctly states, the doctrine of imputing the neglect of the husband to the wife did not arise at common law by reason of the fact of the husband's interest in his wife's estate, and of the further fact that the wife was not allowed to sue without joining her husband as a party plaintiff. Such was the rule in Kentucky prior to the passage of the *Weissinger* act, and necessarily "this question could not have arisen in Kentucky before the *Weissinger* act was passed." This being true, the Kentucky authority relied upon by appellant does not apply. In the *Chatterson* Case both husband and wife were joined as plaintiffs, and the court evidently regarded the driver as the agent and servant of both, and held that the jury should have been so instructed. Since the passage

of the *Weissinger* act our court has not been called upon to pass upon this question; but, as above indicated, it is not a new one, but one which has been passed upon by most every state in the Union. An examination of the authorities shows that in many states the negligence of the husband in driving a vehicle is attributed to the wife, and she has been denied the right to recover. The Supreme Courts of Illinois, Texas, Vermont, Pennsylvania, Iowa, Connecticut, and Massachusetts have so held; while, on the other hand, the Supreme Courts of the states of Indiana, New York, and Ohio, and numerous federal authorities, hold that the negligence of the husband is not to be imputed to the wife, and that, even though he is negligent, she is not denied the right of recovery because thereof.

In the case of *Louisville, New Albany & Chicago Ry. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733, in passing upon a similar question, after commenting upon the right of one to recover for injuries sustained while riding in a carriage as the guest of the driver, the court said: "We can see no good reason why the foregoing statement does not apply to a wife riding with her husband with as much reason as to a stranger riding with him, nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there will be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sin because she was his wife." And in the case of *Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827, the rule was thus stated: "Where the negligence of a driver is sought to be imputed to an occupant of the vehicle, it must be shown that the relation of the person injured to the one whose negligence contributed to the injury was such that in contemplation of law the negligent act of a third person was, upon the principle of agency or co-operation in a joint or common enterprise, the act of the person injured." And in the case of *Honey v. Chicago, Burlington & Quincy R. R. Co.* (C. C.) 59 Fed. 423, it was held that "to render the contributory negligence of a wife, regarded as the agent or servant of her husband, imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person."

It seems to us that this rule is in consonance with reason and justice; that the negligence of the husband or the wife, as the

case may be, should not be attributable to or charged to the other, unless it should appear that in that particular instance the relation of principal and agent or master and servant existed between them. The mere fact that the one is the husband or the wife of the other should not render him or her answerable for the negligence of the other. Under the enlarged property rights which a married woman now enjoys she may prosecute a suit in her own name for personal injury without joining her husband. The husband has no interest in the recovery, and we see no good reason for denying to a wife the right of a recovery because her husband, into whose care she, for the time being, intrusted herself, was guilty of an act of negligence which contributed to bring about her injury. This was the wife's status at common law; but the purpose of all modern legislation, and the trend of judicial interpretation thereof, has been to give to married women, when dealing with their property rights, more and more freedom from the restraint, control, and dominion of their husbands, until now in Kentucky and in most states they may deal with the same, with few exceptions, as though they were unmarried. Hence the reason for the rule that, unless the relation of master and servant or principal and agent is made to appear in a particular case, the wife is not held chargeable with the negligent acts of her husband, and in cases where personal injury results from the concurrent negligence of her husband and a third party the negligence of the husband is not ordinarily attributable to the wife, so as to bar her right of recovery.

We are of opinion that the trial court did not err in refusing to give the instructions asked for by appellant, as the whole law of the case was embodied in the instructions given.

The judgment is therefore affirmed.

KERBY v. KERBY.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

DIVORCE—GROUNDS—UNCHASTITY OF WIFE—EVIDENCE.

Where, in a suit by a wife for alimony, the counterclaim of the husband, averring that the wife was guilty of such lewd behavior as proved her to be unchaste, was supported by evidence, he was entitled to the divorce prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 52-60.]

Appeal from Circuit Court, Jackson County.
"Not to be officially reported."

Action by Bettie Kerby against George Kerby, in which he filed a counterclaim for divorce. From a judgment dismissing the counterclaim, defendant appeals. Reversed, with directions.

A. W. Baker, for appellant.

CARROLL, J. The parties to this record are husband and wife. The appellee, al-

leging that the appellant abandoned her a few months after their marriage, brought an action against him for alimony. To this petition the appellant filed an answer and counterclaim. In the counterclaim he averred that appellee was guilty of such lewd and lascivious behavior as proved her to be unchaste. No reply was filed to the counterclaim, nor was any defense made by appellee to the charges against her. The lower court dismissed his counterclaim, and he appeals.

The evidence for appellant fully supports the allegations of his counterclaim, and he was entitled to the divorce prayed for. The property rights between the parties have been settled.

The judgment of the lower court is reversed, with directions to enter a judgment granting appellant a divorce from the bonds of matrimony with appellee.

VANCE v. ADAMS et al.

(Court of Appeals of Kentucky. Oct. 20, 1908.)

1. EASEMENTS—RIGHT OF WAY—ACQUISITION—PRESCRIPTION.

The uninterrupted and adverse use of a passway by a person and those through whom he claims and the public in general for more than 30 years creates a prescriptive right to the way, though during that period it has been shifted as required in consequence of the wasting away of the soil.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 31.]

2. SAME.

Where the use of a passway has extended over a long period of years, very slight evidence is sufficient to show that it was enjoyed under a claim of right; and when the owner undertakes to close the passway the burden is on him to show that the use was permissive merely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 89, 93.]

3. SAME—ALTERATION—PROCEEDINGS.

An owner through whose land a passway has been acquired by prescription cannot alter the same at his pleasure, though he provides a better passway; but he must apply to the county court, under Ky. St. 1903, § 4259, for an alteration thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 120.]

Appeal from Circuit Court, Simpson County.
"Not to be officially reported."

Action by M. C. Adams and another against John Vance. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. W. Milliken, for appellant. George C. Harris, for appellees.

CLAY, C. M. C. Adams and Thomas Barnett, plaintiffs below, instituted this action against John Vance to enjoin him from obstructing a passway. The passway leads from Walnut Hill schoolhouse, in Simpson county, Ky., westward for about 100 yards, then southward along defendant's fence for about 100 yards, then southwestwardly near and along defendant's line to the line of W. P. Rowland, whose land adjoins the place occupied by the defendant. The petition al-

leges that the passway has been in the continuous, actual, and adverse possession of the plaintiffs and the neighborhood for more than 30 years last past. After denying certain allegations of the petition, the defendant defended on the ground that the passway, as run, is a very great inconvenience to him in the management and use of his property, in that it interferes with the watering of his stock and necessitates additional fencing; that he provided another passway near the one in question that was many yards shorter, and was even a better road. The chancellor rendered judgment in favor of plaintiffs below, and the defendant appeals.

The evidence conclusively establishes the uninterrupted and adverse use of the passway in question by appellees and those through whom they claim and the public in general for more than 30 years. During that period of time the road was occasionally shifted; for when the creek got high it would be necessary to change the ford, and when the soil wasted away a slight deviation in the road would follow. With these few occasional variations the road has been in substantially the same place for more than 30 years. Under these circumstances, appellees acquired a prescriptive right to the use of the passway in question; for the law is well settled that, if the use of a passway has extended over a long period of years, very slight evidence will be sufficient to show that it was enjoyed under a claim of right, and when the proprietor undertakes to close the passway the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment for more than 15 years was not exercised under a claim of right. *Smith v. Pennington, &c.*, 122 Ky. 355, 91 S. W. 730, 8 L. R. A. (N. S.) 149. In this case, appellant made no effort to show that the use of the passway was merely permissive.

The only question that remains is whether or not the appellant can, by providing another passway, equally good or even better, deprive the appellees of the prescriptive right thus acquired. Manifestly the question is not to be determined by the fact of the convenience or inconvenience of the passway to the adjoining landowner, or his providing another and better road. Appellees acquired a right to the passway in question, and this right could not be revoked by appellant under any circumstances without their consent. The landowner through whose land a prescriptive passway has been acquired cannot alter the same at his pleasure, even though he does provide another and a better passway. The Legislature has provided a method by which a road may be changed or discontinued. Ky. St. 1903, § 4289. This method is by application to the county court. If, then, appellant, as a matter of fact, is being injured by the present location of the road, his remedy is by application to the county court. He cannot,

in opposition to the wishes of those using the passway, deprive them of the right which they have acquired by prescription.

For the reasons given, the judgment is affirmed.

LANGHAM et al. v. O'MEARA & JAMES.
(Court of Appeals of Kentucky. Oct. 16, 1908.)

1. PLEADING—ANSWER—FAILURE TO DENY ALLEGATIONS OF PETITION.

Where the allegations of the petition are not denied by the answer, they must be taken as true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 270-275.]

2. FRAUDULENT CONVEYANCES—REMEDY OF CREDITORS—SETTING ASIDE CONVEYANCE.

Where a judgment debtor has had the legal title to his land conveyed to his wife to conceal it and defraud his creditors, and the wife knowingly holds it for that purpose, the conveyance is properly vacated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 338.]

3. JUDGMENT—VACATING—GROUNDS.

Defendants not versed in the law may defend their own cause, and where they interpose no defense to the action they must abide the consequences, and the judgment will not be set aside because they did not appreciate the necessity of employing counsel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 708.]

Appeal from Circuit Court, Hardin County.
"Not to be officially reported."

Action by O'Meara & James against Eliza T. Langham and another for a bill of discovery and to subject property to the payment of a judgment. Judgment for plaintiffs, and defendants appeal. Affirmed.

James Montgomery, for appellants. H. L. James, for appellees.

BARKER, J. The appellees, O'Meara & James, recovered a judgment against H. T. Langham for \$75, with interest from the 16th day of July, 1906, until paid. Execution was issued upon this judgment, and came to the hands of the sheriff of the county in which it was issued, and was returned by him, "No property found." Thereupon this action was instituted in the Hardin circuit court, under section 439 of the Code, for a bill of discovery against the judgment debtor, and for subjecting any property he owned to the payment of the judgment. Among other things it was stated in the petition as follows: "They allege that the defendant owns and has in his possession a tract of land in Hardin county, Ky., about two miles east of Elizabethtown, Ky., worth \$5,000, containing 173 acres, and bounded and described as follows, to wit." The land was then described by metes and bounds, which is omitted here. Following the description of the land was this further allegation: "They state that the legal title to said land is held by the defendant Eliza T. Langham, but that it is held in trust for the said H. T. Langham, and the said H. T. Langham, when he

purchased the said land, had the same conveyed to his codefendant, who is his wife, by deed recorded in the Hardin County clerk's office in Deed Book No. 43, page 61, for the fraudulent purpose of covering up his property and preventing his creditors from subjecting the same to their demands. They say that the said defendant has had said conveyance so made to his codefendant for the fraudulent purpose of cheating, hindering, and delaying his creditors and these plaintiffs, and that his codefendant, Eliza Langham, knew that said conveyance was so made for said purpose, and she now holds the same for the purpose of cheating and defrauding the creditors of said H. T. Langham; that the said conveyance was a fraud upon the rights of the plaintiffs and the creditors of the said defendant H. T. Langham; and that same is void and of no effect."

Both defendants, H. T. Langham and Eliza T. Langham, his wife, were properly served with summons, and when the case was called upon the docket they personally appeared before the court and filed answers prepared by themselves. They were warned by the judge that they ought to procure the services of an attorney, but the husband said they had no need of counsel and preferred to conduct their own defense. The husband's answer is omitted here, because it contains no allegation with reference to the present case, but sets forth a rambling account of the original trial of the commonwealth against himself, in which the appellees, who are attorneys at law, appeared in his defense. The wife's answer is as follows: "Elizabethtown, Hardin County, Kentucky, March 4, 1907. In the first place, when I were first married, my mother gave me three or four dozen chickens. I saved what my chickens produced and bought the property in the Narrows. I sold it and made some money on it. My father gave me some hogs. I made some money on them. My father also gave me three hundred and fifty dollars (\$350.00) in money. I bought and sold stock. So this is my start and the way I have got what I have. Yours respectfully, Mrs. E. T. Langham." Thereupon the plaintiffs (appellees), O'Meara & James, consented that the statements of the defendants' answers might be taken as true, and moved the court to submit the action for trial and judgment. This was done, with the result that a judgment was rendered in favor of appellees, holding that the conveyance of the property described in the petition to the wife, Eliza T. Langham, was fraudulent and void, and subject to the payment of appellees' debt, and ordering a sale of the property by the master commissioner.

At a subsequent day in the same term Eliza T. Langham filed an affidavit and tendered an answer prepared for her by an attorney, who represents her here, and moved to set aside the judgment against her. In support of this she filed her own affidavit,

which is as follows: "Eliza T. Langham states that the paper herein called her answer was written by her husband, and was not given into the court by her or any one while she was present in court, and as soon as she learned there was a judgment in the case she employed James Montgomery to attend to the case. She did not know it was necessary to employ an attorney, as the property was hers. [Signed] Eliza T. Langham." The court overruled the motion to set aside the judgment, and the defendants are here on appeal.

As none of the allegations of the petition, which we have copied in the opinion, were denied by the answer filed by Eliza T. Langham, they were necessarily taken as true by the court; and, assuming these allegations to be true, undoubtedly the court correctly entered the judgment vacating the conveyance by the husband to the wife as fraudulent. The appellants were warned by the court that they needed the services of an attorney, and they have themselves to blame that the answer filed by them interposed no defense to the petition of appellees. They had a legal right to defend their own cause; but, when they came in court to do so, it was not the duty of the court to treat them otherwise than as attorneys, charged with the responsibility of conducting the defense. No legal reason was shown for setting aside the judgment, or permitting the answer prepared by the attorney to be filed after the judgment was entered. There may be some hardship in this case; but it results from the refusal of the appellants to accept the advice of the trial judge, and, as said before, they have only themselves to blame.

Judgment affirmed.

ILLINOIS CENT. R. CO. et al. v. FRANCE'S ADM'X.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. RAILROADS—OPERATION OF TRAINS—APPROACH TO PUBLIC CROSSINGS—SIGNALS.

Trainmen must give notice of the approach of trains to public crossings and when passing through populous communities, where they ought to expect the presence of people on the right of way, and a failure to do so is actionable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 988-1005.]

2. SAME—NEGLIGENCE—SPEED OF TRAIN—QUESTION FOR JURY.

Whether the speed of a train through a populous community, where the tracks are daily used by numerous persons, is negligence, is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1374.]

3. EVIDENCE—OPINION EVIDENCE—SPEED OF TRAINS—COMPETENCY OF WITNESSES.

Witnesses, without qualifying as experts, may testify that a train ran as fast as it could to stay on the tracks, and from 50 to 60 miles an hour.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2270.]

4. RAILROADS—DEATH OF PERSON ON TRACK—EVIDENCE—ADMISSIBILITY.

In an action for the death of a person struck by a train, evidence that the switchyard, side tracks, and main line, where the accident happened, were frequently used at all times of the day by persons living in the locality, was competent to show that the switchyard, side tracks, and main line were in constant use by the people in the vicinity in passing from one side of the track to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1348.]

5. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

In an action for the death of one struck while crossing a track, refusal to allow the engineer of the train to testify that the schedule required a speed of 45 to 50 miles an hour at the place of the accident was harmless error, where such evidence would have been merely in accord with the weight of the testimony of the other witnesses in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

6. RAILROADS—PERSONS ON TRACKS—INJURIES—SPEED OF TRAINS—EVIDENCE—ADMISSIBILITY.

The schedule rate of a train is admissible on the issue of its rate of speed; the value of the evidence being dependent on the condition of the engine, the weight of the train, the conditions of the track, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1351.]

7. COURTS—PREVIOUS DECISIONS AS PRECEDENTS—INSTRUCTIONS.

The fact that the instructions given in one case were approved on appeal does not justify the conclusion that they are applicable to another case, for the instructions in each case must present the law as warranted by the evidence.

8. RAILROADS—INJURY TO PERSONS ON TRACK—MISLEADING INSTRUCTIONS.

In an action for the death of a person struck by a train at a point where numerous persons daily used the track, an instruction which defines the duty of the company to the public, but which fails to define the duties which decedent owed to himself, is insufficient, because leading the jury to conclude that decedent could go on the tracks at any time and place, and that, if the company was derelict in the discharge of any of the enumerated duties, a recovery could be had, though decedent exercised no care for his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1389.]

9. SAME.

An instruction, in an action for the death of a person struck by a train at a point where numerous persons daily used the tracks, which authorizes a recovery if the engineer failed to give "timely or sufficient warning" of the train's approach, is not erroneous for using the words "timely" and "sufficient," for they are words of general import, in common use, and the instruction properly leaves to the jury to determine whether or not the trainmen exercised reasonable care.

10. SAME—CARE REQUIRED IN OPERATION OF TRAINS.

The duty of trainmen is not limited to a compliance with the statute requiring the giving of signals on the approach of trains to crossings; but they must use reasonable care to avoid injury to any one who may be on the track, and such duty increases as the liability to come into contact with persons passing on the track increases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1275-1284.]

11. TRIAL—INSTRUCTIONS—CONSTRUCTION TOGETHER.

Where the court, in an action for the death of a person struck by a train, charged that there could be no recovery if decedent was negligent in going on the track, and that but for such negligence the accident would not have occurred, an instruction authorizing a recovery if the engineer failed to give timely warning of the train's approach was not erroneous for failing to embody the idea that decedent's negligence would defeat a recovery, since the instructions must be considered together as a whole, and if, when so read, they present the issues, they are sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

12. SAME—SUPPORT IN EVIDENCE—NECESSITY.

Where, in an action for the death of a person struck by a train, the testimony of the engineer that when decedent came on the track the engine was so close to him that it was impossible to avoid the accident was not contradicted, an instruction authorizing a recovery if the engineer failed to use ordinary care after seeing the peril of decedent, notwithstanding his contributory negligence, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-602.]

Appeal from Circuit Court, Ohio County.

"To be officially reported."

Action by Samuel France's administratrix against the Illinois Central Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

H. P. Taylor, J. M. Dickinson, and Trabue, Doolan & Cox, for appellants. Belcher & Sparks and Barnes & Anderson, for appellee.

LASSING, J. While attempting to cross the tracks of appellant company, Samuel France was struck by one of defendant's fast north-bound trains and killed. His administratrix instituted suit against the railroad company and the engineer in charge of the train to recover damages for his killing, and alleged that his death was due to its careless, reckless, and negligent operation. The engineer and the company answered, denying the allegations of the petition, and pleaded contributory negligence. This latter plea was traversed in the reply, and on the issues thus joined a trial was had, which resulted in a verdict in favor of appellee for \$3,600. To reverse the judgment predicated on that verdict this appeal is prosecuted.

Several grounds are relied upon for reversal. First, that the court erred in refusing to give a peremptory instruction to find for the defendant; second, that the court erred in admitting incompetent evidence and excluding competent evidence from the consideration of the jury; third, that the jury was not properly instructed; and, fourth, that the verdict is against the evidence and should be set aside on that account.

Deceased was a coal miner living some distance east of McHenry, and had been engaged in mining coal from a mine which lay upon the west side of the tracks of appellant company, adjoining the town of McHenry. Near

the place where he was killed there is a large coal chute adjoining the railroad right of way. A creek, known as "Renders Creek," or "Copperas Branch," runs through the town almost parallel with the railroad tracks. At the south end of the coal chute there is a footbridge over this creek, which is used by the miners in going to and from the mine in which deceased had been working for some time prior to his death, and also by citizens living in that neighborhood, whose business took them from one side of the railroad tracks to the other. At the time deceased was killed the mine was not running. About 2:30 o'clock in the afternoon he and his son started from their home across the railroad tracks of the appellant company to the mine to get some tools which they had left there. When they reached the tracks they found some empty box cars standing on one of the side tracks. They passed around the south end of these cars and had started in a diagonal direction across the main track when deceased was struck by the fast train and killed.

The proof introduced is to the effect that, when the mine was running, from 200 to 300 people passed back and forth over the tracks and across the footbridge in question each day, and when the mine was not running fewer, though a considerable number of people, passed over the footbridge and tracks of appellant company each day. There was no well-defined passway across the railroad tracks; but it seems that persons were in the habit of crossing same at such point as most suited their convenience. This condition had continued for some time. McHenry is a town of some 550 inhabitants, in the center of a mining district, and that 'may be said to be a thickly settled community. From the testimony of all of the witnesses the train was running at from 45 to 50 miles an hour. There is a conflict as to whether the bell was ringing or the statutory signals given, though the decided weight of the testimony is to the effect that the signals were given for the crossing and the semaphore. No witness testifies who does not say that the train whistled at a point before it reached the place where decedent was struck, though some of them state that it whistled for a crossing some distance from the town, and not for the crossing at the edge of town, where it should have whistled.

Deceased's eyesight and hearing are shown to have been good. Whether he saw or heard the approach of the train which killed him is left a matter of conjecture, for the reason that he was instantly killed, and there is no evidence from anything he said just prior to his death indicating that he knew the train was approaching. His son testifies that when they left home they stopped at the house of a friend to secure a lantern, and started from there across to the mine; that when they reached the railroad they found the side track blocked by one or two box cars, which were standing there; that they then turned

and went around the end of the box cars and started diagonally, in a fast walk or trot, across the tracks; that at this time he was laughing and talking with his father, and that his father had his head turned looking back at him; that he does not know whether his father saw the train or not; that as his father stepped upon the track he discovered the presence of the approaching train, and called to and grabbed at his father; that his father continued across the tracks, while he jumped back to avoid being struck. His father was knocked some distance by the engine, and death was almost instantaneous. Other witnesses were introduced who corroborated deceased's son as to the direction in which they were going at the time he was killed and also as to the speed with which they were traveling.

The engineer testifies that he was running the train at about 45 miles an hour; that when he discovered the deceased he was not more than 125 to 150 feet away from him, and that when deceased stepped upon the track he was scarcely more than one-half of this distance from him; that at this time there was nothing in his power that could have been done to prevent the injury. On this testimony appellant asked for a peremptory instruction, and complains because it was not given.

It is the duty of those in charge of a railroad train to give notice of its approach to public crossings and when passing through towns and thickly populated communities, where they have a right to expect the presence of people along and upon its right of way, and their failure to do so has been repeatedly held to be actionable negligence, for which the company must respond in damages to those who, without fault, are injured by reason thereof. In the case at bar there is a conflict in the testimony as to whether or not signals were given of the train's approach. The weight of the evidence is that they were, but there is some evidence that no signals were given, and that by reason thereof deceased was not warned. The train is shown to have been running at a high rate of speed through a populous community, where the tracks of the appellant company were crossed by a large number of persons each day, and, under the rule announced in the case of *I. C. R. R. Co. v. Murphy*, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352, it was a question for the jury, under these facts and circumstances, to say whether the rate of speed at which the train was traveling was an act of negligence on the part of the defendant company. It was proper that the motion for a peremptory instruction should be denied, and the court did not err in so doing.

The testimony which was admitted over the objection of appellant, and of which it now complains, is that certain witnesses were asked how fast the train was going, and that they were permitted to answer (without first

qualifying themselves as experts) that it was running "as fast as it could to stay on the tracks," and "from 50 to 60 miles an hour." This was a matter of judgment, and we think it proper that the court permitted witnesses to testify what, in their opinion, was the rate of speed. It simply amounted to the witness testifying that the train was running very rapidly, or as rapidly as they had ever seen or known a train to run.

Appellant also complains because these same witnesses were permitted to testify that the switchyard, side tracks, and the main line of appellant's road, where deceased was killed, were frequently used at all times of day by persons living in that locality. We think this evidence was entirely competent for the purpose for which it was introduced. By evidence of this character plaintiff sought to show that the switchyard, side tracks, and main line of the appellant company were in constant use by the citizens of the town and vicinity, in passing from one side of the track to the other. Such use could only be shown in the manner in which plaintiff attempted to show it. Defendant offered to show by its engineer what the schedule rate of the train's speed was at the time and place of the accident. The court refused to permit this to be done, and held that the material point in the case was, not what the schedule rate of speed was, but what the actual rate was. If permitted to answer, however, he would have testified that it was from 45 to 50 miles an hour; and this is in accord with what the testimony of the majority of the witnesses in the case say, so that appellant was not prejudiced by this ruling. The fact that the schedule rate was 45 miles an hour would be a circumstance which the jury might consider as bearing on its rate of speed. The value of such evidence is slight, because dependent upon many circumstances, such as the condition of the engine, the weight of the load which it pulls, as well as condition of the track, weather, etc. Still the schedule showing the rate of speed may be admitted in evidence for what it is worth.

Appellant objects to all of the instructions given by the court on the ground that they do not fairly present the law of the case. It is insisted that instruction No. 1 is faulty in that it authorized a recovery if the engineer in charge of the train failed to give timely or sufficient warning of the train's approach; that the use of the word "timely," without any explanation as to exactly what precaution the railroad company should have taken, and the use of the word "sufficient" in the same way, left the jury to speculate, without any standard by which to measure the alleged negligent acts; that under this instruction the jury might have believed, and so found, that it was the duty of the defendant to stop the train, while under the facts it was impossible to do so in time to prevent the injury after deceased's peril was

discovered; that the instruction is likewise faulty in that no regard is had to the plea of contributory negligence, which, if supported by the evidence, was a complete defense; that each instruction should have presented this idea, either by having it embodied in the instruction, or by reference to the instruction in which this plea of the defendant was presented; that the words "sufficient warning" are too indefinite, in that they gave the jury the right to judge and determine what warnings were sufficient, whereas the instruction should have limited them to a determination of the question as to whether or not the statutory warnings of the train's approach were given. The same objections that are urged to instruction No. 1 are urged to instruction No. 2. The further complaint is made of this instruction that it permits a recovery on the part of the plaintiff without any regard to his contributory negligence. The objection to instruction No. 3 is that it is predicated upon the idea that defendant was guilty of gross negligence, when there was no evidence that tended to show gross negligence; that, as given, the instruction had the effect of placing the burden upon the defendant of showing that, after those in charge of the train discovered deceased's peril, they were guilty of no negligence, whereas it is urged that the burden should have been cast upon the plaintiff to show that they were guilty of negligence after discovering the peril of deceased.

Appellee's answer to these objections is that these identical instructions were approved in the case of I. C. R. R. Co. v. Murphy, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352, and that, therefore, they are not subject to criticism, and, having been approved in that case by this court, they are now the law, which should be recognized and given full credit as such. To this latter conclusion we cannot subscribe our unqualified approval. The fact that the instructions were given in another case, and on appeal here approved, does not by any means justify the conclusion that they are applicable to the case at bar. The facts in the two cases, while similar in some respects, are very dissimilar in others, and the instructions in each particular case must present the law of the case as warranted by the facts proven. These instructions are correct as far as they go, but they failed to present to the jury the duty which deceased owed to himself for his own safety when attempting to pass over the tracks of the defendant company, and, while the instructions given set out in detail the duty which the railroad company owed to the public as to rate of speed, signals, lookout duty, etc., in passing through populous communities, they failed to define the duties which the decedent owed to himself for his own safety under similar circumstances, and the failure to present this idea to the jury left it to conclude, as it naturally would, in the absence of any such

instruction, that the decedent could go upon the tracks of the appellant company at any time and place he chose, and, if the company was shown to have been derelict in the discharge of any of the enumerated duties which it owed to the public at such time and on such occasion, then a recovery could be had, even though the deceased had exercised no care whatever for his own personal safety, and his death may have resulted directly from this negligence on his part. *Southern Railway Co. in Ky. v. Winchester's Ex'r*, 105 S. W. 167, 32 Ky. Law Rep. 19.

The objection to the use of the words "timely" and "sufficient" warning in instructions 1 and 2 is not well taken. These are words of general import, in common use, and, as applied in these instructions, have been frequently approved. There can be no hard and fast rule laid down as to what is a "timely" or a "sufficient" warning; but the jury must be left in each case to determine from the evidence in that case whether or not those in charge of the train exercised reasonable care in its operation to avoid injury to the public. It is true that there are certain statutory signals which must be given by trains in approaching crossings, but the duty of those in charge of trains is not limited to a compliance with the statutory provisions; but they must, in addition to the observance of such provisions as to signals, etc., at all times use reasonable care to avoid injury to any one who may be upon the track, and this degree of care, of course, covers a very wide range. In the country and sparsely settled communities it is very slight, while at public crossings, in towns and thickly populated communities, it is greatly increased. It may be said that the degree of care imposed upon those operating a train increases exactly in the ratio as the liability to come into contact with persons passing upon, along, and over the track increases, so that what would be reasonable care or "timely" warning in one locality or under one state of facts might be neither reasonable nor "timely" in another locality and under a different state of facts. Therefore the court very wisely left to the determination of the jury this question.

Appellant also complains because the court did not, in instruction No. 1, say to the jury that if they found the company guilty of negligence, as therein defined, they should, nev-

ertheless, find in its favor if they should further find that deceased himself was negligent in going upon the track, and that but for such negligence on his part the accident would not have occurred. This point would be well taken if it was necessary to embody the whole law of a case in one instruction. Such, however, is not the rule. The law can be much more clearly given and made more easily understood by being set out in a series of instructions. As the idea which appellant insists should have been embodied in instructions 1 and 2 was fully and completely expressed in instruction 3, appellant has no substantial ground of complaint. The instructions must be read and considered as a whole, and when each is so read in connection with the others, if they present plaintiff's case and defendant's defense as set up in their respective pleadings and supported by proof, the ends of the law have been complied with.

Instruction No. 3 is faulty in that there was no proof which authorized the qualification which the court added thereto. The engineer testified that when deceased came upon the track the engine was so close to him that it was impossible for anything to have been done to avoid injuring him. There was no proof whatever which tended to contradict this statement of the engineer. Hence the qualifying clause: "Unless the jury should further believe from the evidence that the defendant's engineer, Theodore Shelton, alias 'Bud' Shelton, on said occasion saw the peril in which said decedent's negligence, if any, had placed him, and that said engineer thereafter failed to use ordinary care to give the intestate warning of the approach of said train, then and in that event the law is for the plaintiff, notwithstanding the plaintiff may have been guilty of contributory negligence"—should not have been added to this instruction. Instruction No. 3, with this clause omitted, properly presented the defendant's plea of contributory negligence on the part of the decedent, as warranted by the proof.

As there must be another trial of this case, we expressly refrain from passing upon the complaint that the verdict is against the weight of the evidence.

For the reasons indicated, the judgment is reversed, and cause remanded for another trial consistent with this opinion.

HAZELHURST LUMBER CO. v. CARLISLE MFG. CO. et al.

(Court of Appeals of Kentucky. Oct. 21, 1908.)

1. PLEADING—PETITION—ALLEGING DEFENDANT'S LIABILITY IN THE ALTERNATIVE—APPLICATION OF RULE.

The rule that a petition cannot allege two states of case, in one of which the defendant is liable and in the other he is not, does not apply to a petition in an action to recover a payment made by an insolvent corporation as a preference, where the allegations were that the debt preferred was the corporation's debt for money borrowed of defendant bank on notes of three stockholders and used in the business, but, if the debt was that of the three stockholders, they used the corporation's funds in paying their own debt, so that it was a wrongful conversion of the funds with the bank's knowledge, since in either case a cause of action was stated against the bank.

2. SAME—FORMAL DEFECTS—NOTICE TO ELECT OR TO MAKE MORE CERTAIN.

Where a petition alleges defendant's liability in the alternative, if there is a formal defect in the petition, in that it did not show that plaintiff did not know which of the two states of case was true, it is ground for a motion to elect or to make the petition more certain, but not for a dismissal of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1193.]

3. SAME—WAIVER OF DEFECTS BY ANSWER TO MERITS.

A defect in the petition is waived by answer to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1366.]

4. PRINCIPAL AND AGENT—GIVING CREDIT TO AGENT.

If a creditor elects to give credit to an agent, and not to his principal, when he has all the facts before him, he cannot hold the principal for the debt, though the principal got the benefit of the credit.

5. CORPORATIONS—OFFICERS—TRUSTEES OF THE COMPANY'S FUNDS.

The officers of a corporation hold its funds as trustees for the stockholders and creditors, and it is a breach of the trust for a trustee to pay his own debt out of the trust fund and leave other debts unpaid, thus getting an advantage for himself out of his trust position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1393-1398.]

6. SAME—INSOLVENCY—PREFERENCES.

A bank had furnished money to a corporation on the notes of its directors. The corporation's plant having burned, and the insurance money being deposited in the bank to the corporation's credit and the corporation insolvent, the directors applied the money to the payment of their notes, canceling their debt to the bank and the corporation's debt to them. *Held*, that the payment was a preference of one creditor over others, forbidden by statute.

7. SAME—ACTION TO RECOVER—NECESSARY PARTIES DEFENDANT.

In an action by a creditor of an insolvent corporation to recover money paid by the corporation to a creditor bank as a preference, the corporation and the bank were the only necessary defendants.

8. SAME—NOTICE BY CREDITOR OF INTENT OF DEBTOR TO PREFER.

It was not material that the bank preferred had no notice of the corporation's intent to prefer, as the intent of the corporation governs.

9. SAME—RETURN OF PREFERENCE—REMITTANCE TO SECURITIES FOR DEBT.

Where a creditor of an insolvent has received a preference, upon repayment thereof the creditor will be remitted to the notes and securities which were formerly held for the debt.

10. SAME—ACTION TO RECOVER PREFERENCES—PROPER PARTIES.

Where a transfer of an insolvent corporation's assets by the directors is attacked as a preference, the directors appearing to have an interest in the matter are proper parties defendant; but, when the suit is brought in time against the transferor and transferee, it will not be defeated if it afterward appears that others not joined have an interest in the transfer, making them proper defendants.

Appeal from Circuit Court, Carlisle County.
"To be officially reported."

Action by the Hazelhurst Lumber Company against the Carlisle Manufacturing Company and others. Judgment of dismissal, and plaintiff appeals. Reversed and remanded.

J. M. Nichols & Son, for appellant. Robbins & Thomas, for appellee Bank of Bardwell. John W. Ray and J. B. White & Son, for appellees Lovelace and Vaughn.

HOBSON, J. The Carlisle Manufacturing Company was in debt to the Hazelhurst Lumber Company in the sum of \$814.67, for which the lumber company held its note, dated November 3, 1906, and due one day after date. On the 30th day of September the plant of the Carlisle Manufacturing Company was destroyed by fire. The plant was insured in the sum of \$2,600. The insurance was paid, and the money was deposited in the People's Bank of Bardwell. On February 5, 1907, this suit was brought by the lumber company against the Carlisle Manufacturing Company and the bank, in which it was charged that the manufacturing company, in contemplation of insolvency and with the design of preferring the bank to its other creditors, had in October, 1906, paid the bank out of the insurance money a debt of \$1,600 which it owed it; that the manufacturing company was insolvent; and that the payment operated as an assignment for the benefit of all its creditors. The appointment of a receiver was asked, and a settlement of the affairs of the Carlisle Manufacturing Company. The defendants filed an answer, which traversed the allegations of the petition. On June 12, 1907, the plaintiff tendered an amended petition, which was filed on June 13th. In this amended petition it alleged that the bank held three notes for borrowed money executed by J. H. Lovelace, W. B. Vaughn, and S. P. Vaughn, that the money had been used in the business of the Carlisle Manufacturing Company, and that the debt was in fact its debt to the bank; the three notes aggregating \$1,600 and being the same debt referred to in the original petition. The plaintiff further averred that if the debt was the individual debt of J. H. Lovelace and the two Vaughns, and not the debt of the Carlisle Manufacturing Company,

that Lovelace and the two Vaughns were the sole owners of the stock in the company and in sole charge of the business, and that, if they had used the funds of the company in paying their own debt to the bank, it was a misapplication of the company's funds, made with the knowledge of the bank when the company was insolvent and was known to be so, and was a wrongful conversion of the company's funds. Lovelace and the two Vaughns were made defendants to the petition, and filed a demurrer to it, which was not acted on. The bank filed an answer, in which it traversed the allegations of the amended petition, and, the case being submitted, the court entered a judgment dismissing the action. The plaintiff appeals.

The proof shows that the three notes referred to were executed for money borrowed for the Carlisle Manufacturing Company by Lovelace and the two Vaughns, who were its sole stockholders and managing agents; that the bank declined to take the note of the corporation for the money, and required Lovelace and the two Vaughns to execute their individual notes for it, and to give security, which they did. The notes were renewed several times, and were unpaid when the plant burned. When the first installment of the insurance money was paid, it was deposited in the bank to the credit of the manufacturing company, and one of the notes was then charged to the account; and when the other installment of the insurance money was collected it was deposited in like manner, and the other note was then charged to the account. The manufacturing company was at this time undoubtedly insolvent, and this was known, or should have been known, to Lovelace and the two Vaughns. The bank had sufficient security to secure the notes. It then gave up the notes to Lovelace and the Vaughns, and so far as the proof shows had no notice that the corporation was insolvent. It is earnestly insisted that the plaintiff's petition states no cause of action because it does not state that the plaintiff does not know which of the two states of case alleged in the amended petition is true, and that it discloses no cause of action against Lovelace and the two Vaughns because it does not show positively that they paid their own debt with the corporation's money, but only shows alternatively that they may have done so. This court has held that a petition is bad unless it states a cause of action against the defendant, and that the plaintiff cannot allege in his petition two states of case, in one of which the defendant is liable and the other he is not. But that is not this case. If the debt was the debt of the manufacturing company, and the \$1,600 was paid upon the debt when it was insolvent to prefer the bank to its other creditors, a cause of action exists; and although the debt was not the debt of the corporation to the bank, still, if the funds of the corporation were transferred

by it, when insolvent, to the bank to pay the debt, and to prefer thus some creditors to others, the statute applies. If the debt was the debt of Lovelace and the two Vaughns, and not the debt of the corporation, they were without authority to use the funds of the corporation which they represented to pay their own debt; and if the bank was a party to the misapplication a cause of action exists against it. Therefore, in either of the states of case set out in the petition, a cause of action is shown against the bank; and if there was a formal defect in the petition, in that it did not show that the plaintiff did not know which of the two states of facts was true, this was ground for a motion to elect or to make the petition more certain; but it is not ground for a dismissal of the action. The defect in the petition was waived by answer to the merits.

The authorities are to the effect that if the creditor elects to give credit to the agent, and not to the principal, when he has all the facts before him, he will not be allowed to hold the principal liable for the debt, although the principal got the benefit of the money. 1 Am. & Eng. Cyc. of Law, 1138; Story on Agency, § 447; 1 Lawson on Rights and Remedies, § 107. Under the proof the bank clearly elected to make Lovelace and the two Vaughns its debtors, and it had no debt against the corporation. The sum of the case is, then, that the bank had a debt of \$1,600 against Lovelace and the two Vaughns, they had a like debt against the corporation for the money advanced to it, and the corporation had in the bank \$2,600 of its own money deposited to its credit. In this situation of affairs Lovelace and the two Vaughns checked out to the bank \$1,600 of the corporation's money in payment of their debt to the bank, and thus paid the debt which the corporation owed to them for the money advanced to it. By this transaction they gave this debt of the corporation a preference over its other debts, and the purpose of the transaction was to prefer this debt to the other debts of the corporation. The officers of a corporation hold its funds as trustees for its stockholders and creditors. It is a breach of trust for a trustee to pay his own debt out of the trust fund and leave other debts unpaid. In other words, he is not allowed to get an advantage for himself out of his trust position, and pay his own debt to the prejudice of other creditors. The money in the bank was deposited to the credit of the corporation. If this were an action against Lovelace and the two Vaughns for preferring themselves to the other creditors of the corporation, manifestly the case would be made out. They clearly took the money of the corporation and paid the corporation's debt to them in preference to other debts. The bank got the money from them, but the money was not in fact paid to them. It was paid by them to the bank; the payment by them to the bank operating to cancel at the same time both

their debt to the bank and the debt of the corporation to them. To allow such a circumlocution to defeat the operation of the statute would be to regard the form of a transaction, rather than its substance. The bank had furnished the money to the corporation on the personal credit of the directors. The directors, when the corporation was insolvent, undertook to prefer this debt to the other debts of the corporation. The money being in the custody of the bank, and never leaving it, and being paid directly from the corporation's account to the bank, the transaction falls within the purview of the statute, which, among other things, includes any device resorted to in contemplation of insolvency and with the design to prefer one creditor to another. The corporation paid the money to the bank. The corporation was the transferor. The bank was the transferee. The transfer being within the statute, the bank and the corporation were the only necessary parties defendant; and it was not material that the bank had not notice of the intent of the transferor to prefer. *Fogarty v. Pace*, 4 Ky. Law Rep. 999; *Nock's Ex'r v. Goodloe*, 5 Ky. Law Rep. 247; *Thompson v. Heffner's Ex'rs*, 11 Bush, 359; *Mt. Sterling National Bank v. Priest*, 111 Ky. 886, 64 S. W. 972. The intent of the transferor controls the transaction, and the bank will be remitted to the notes and securities it then held. *Northern Bank v. Farmers' Bank*, 111 Ky. 350, 63 S. W. 604. Lovelace and the two Vaughns are proper parties defendant; but the fact that they were not brought in until after six months is not material. The thing assailed is the transfer of the corporation's assets by it to the bank. As Lovelace and the Vaughns appeared to have an interest in the matter, they were properly joined and given an opportunity to defend; but, when the suit is brought in time against the transferor and transferee it will not be defeated if it afterwards transpires that others have an interest in the transfer, making it proper that they should be made defendants.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

BOULDEN v. LOUISVILLE & N. R. CO. (Court of Appeals of Kentucky. Oct. 23, 1908.)

1. RAILROADS—PERSONS ON TRACK—INJURY—INSTRUCTIONS.

Where, in an action for injuries to a pedestrian struck by a train, the issue was whether he stepped from a path onto the track in front of an approaching train when the train was so close to him that the trainmen could not avoid the accident, the court's charge held not misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1382-1390.]

2. SAME.

Persons walking along a railroad track must keep out of the way of trains, and can-

not complain that the train is run on one track and not on another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1285-1287.]

3. SAME.

Where there was nothing in the conduct of a pedestrian on the path near the railroad track to apprise the trainmen that he was ignorant of the approach of the train, or to impose on them the duty of taking extra precautions for his safety until, without looking back to see if a train was approaching, he suddenly placed himself in peril, there could be no recovery for being struck by the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1275.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"Not to be officially reported."

Action by Harry Boulden against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Frederick W. Schmitz, for appellant. Benjamin D. Warfield and S. D. Rouse, for appellee.

HOBSON, J. The right of way of the Louisville & Nashville Railroad Company runs through a populous part of the city of Covington between the bridge over the Ohio river and the station in Covington. It has two tracks on the right of way, which does not run along a street, but runs across the streets. A good many people walk along the right of way, using it as a walkway, instead of following the streets. Harry Boulden, about 6 o'clock October 9, 1906, was walking south along the right of way near the station in a populous part of the city, and when about 25 feet north of Pike street he was struck by an engine, also going south, and severely hurt. He brought this suit to recover for his injuries; and, the case having been submitted to a jury, a verdict was found in favor of the defendant, on which the court entered judgment, and he appeals.

He testifies that he was walking along between the two tracks going southward; that he came to a puddle of water and, to get around the puddle of water, got upon the ends of the ties of the east track, and while walking on these ties was struck and knocked down by the train which came up behind him. The trains going south regularly ran on the west track; but on this occasion that track could not be used, and so the trains going south were using the east track. While this was unusual, it happened often that for some reason or other the trains would be run on the track that was not regularly used for trains going south. The men on the train testified that it was a dark night; that when they came in sight of Boulden he was walking along the path, where he was perfectly safe, and just before they got to him he left the path and got on the end of the ties, so-

close to the train that it could not be stopped before he was struck. They also showed that proper signals were given of the approach of the train and a lookout was kept. There was proof on behalf of the plaintiff that no signals of the approach of the train were heard, and that the tracks at this point were much used by the people of the city in going to and fro.

The court instructed the jury in substance as follows: (1) That, if the right of way at this point was much used by the public as a passway, it was the duty of the defendant to give reasonable and timely warnings of the approach of the train and to keep a lookout for persons on the right of way, and that if this was not done, and by reason of this not being done the plaintiff was injured, they should find for him; but that it was incumbent upon him, in passing along the right of way, to exercise ordinary care for his own safety, and if he failed to do so, and but for this would not have been injured, they should find for the defendant. (2) That the defendant had the right to run its trains on either of the two tracks shown in the proof. (3) That if the defendant was walking between the tracks, and in a position where he was not in danger, the defendant was not required to anticipate that he would put himself in a position of peril, but had the right to assume that he would keep out of danger.

The jury evidently concluded, from all the evidence and from the circumstances shown by the proof, that the plaintiff was in no

danger while walking along the path, and that his being hurt was due to his leaving the path and stepping on the end of the ties just in front of the approaching train, when the train was too close to him for those in charge of it to avoid injuring him. Whether this was the fact was the real question in the case, and the jury could not have been misled by the instructions of the court. It is true all the proof showed that the place where the plaintiff was injured was one much used by the public, and, as there was no contrariety of evidence on the subject, the court might not have submitted that matter to the jury; but the plaintiff could not have been injured by the form of the instructions, as under the evidence there was but one way the jury could find as to this matter. The court properly instructed the jury that the defendant had the right to use either track, as otherwise they might have thought it negligent for the defendant to run the train in question on the east track. Persons who walk along a railroad track are under obligations to keep out of the way of trains, and they cannot complain that the train is run on one track and not on another. There was nothing in the plaintiff's conduct to apprise the operatives of the train that he was ignorant of its approach, or to impose upon them the duty of taking extra precautions for his safety, until he, without looking back to see if the train was coming, suddenly placed himself in peril when the train was right upon him.

Judgment affirmed.

SANDERS v. STATE.

(Court of Criminal Appeals of Texas. June 6, 1908. Rehearing Denied Oct. 21, 1908.)

1. RAPE—ASSAULT WITH INTENT TO COMMIT RAPE—FEMALE UNDER AGE OF CONSENT.

One may be convicted of assault with intent to commit rape on a girl under 15 years of age, though she consented to the intercourse, or did not resist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 12.]

2. CRIMINAL LAW—APPEAL—PROCEEDINGS NOT IN RECORD—BILL OF EXCEPTIONS—NECESSITY.

Questions as to the introduction of evidence and the state's failure to place certain witnesses on the stand cannot be considered on a criminal appeal, in the absence of a bill of exceptions in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2803-2861.]

3. SAME—TRIAL—INSTRUCTIONS ON WEIGHT OF EVIDENCE.

An instruction, after defining rape and its essential elements, that if the jury believed that accused unlawfully took hold of the girl and laid her down, and got on her for the purpose of having carnal knowledge of her, which he attempted, or did, and the girl was a female under 15 years old, accused was guilty, etc., was not on the weight of the evidence; the facts recited therein being the testimony of the prosecuting witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1748.]

4. SAME—APPEAL—PROCEEDINGS NOT IN RECORD—ALTERATION OF CHARGE AFTER RETIREMENT.

Alleged error in recalling the jury after retirement, in a rape prosecution, and altering the charge, stated as a ground of the motion for new trial, cannot be considered on appeal, where the ground alleged is in no wise verified.

5. SAME—BILL OF EXCEPTIONS—NECESSITY.

Alleged error in the state's refusal to place on the stand as witnesses the father and mother of the prosecutrix in a rape prosecution, to corroborate her testimony, cannot be considered on appeal, in absence of a bill of exceptions.

6. SAME—TRIAL—NECESSITY THAT STATE CALL ALL WITNESSES.

In criminal prosecutions, the state need not put on the stand all the witnesses cognizant of the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1567-1579.]

Appeal from District Court, Cass County; P. A. Turner, Judge.

Henry Sanders was convicted of assault to commit rape, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault to rape on a girl under 15 years of age.

The evidence of the prosecutrix makes a sufficient case to justify the verdict of the jury under the decisions of this court since the case of *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882. After stating her age and a lot of envolving circumstances, she uses this language: "When we got to the house, he laid me on the bed in the room—in his room. Didn't say anything

to me; just picked me up and laid me on the bed. He got on top of me. He pulled my clothes up. Don't know what he did with his clothes; kept them on, I guess. He did unbutton his pants. He worked up and down on me. I do know what his private is. Had that fully explained to me last court. I do know what you mean by his private, now. He put his private into me. Put it in between my legs and into my private. He did work up and down. Don't know how many times he done that; never counted. Just laid me on the bed one time. When he got through, I got up."

Appellant testified in his own behalf, denying the entire story. There are no bills of exception in the record. So the matters with reference to the introduction of evidence and the failure of the state to place on the stand certain witnesses mentioned in the motion for a new trial cannot be considered.

The following portion of the court's charge is criticised: After defining rape and the necessary ingredients of that offense, the court then proceeds: "Now, if you believe from the evidence beyond a reasonable doubt that the defendant, Henry Sanders, in Cass county, Texas, on or about the 30th day of March, 1906, unlawfully took hold of Mincy Satterwhite, and laid her down, and got on her, and that his purpose in so doing was to have carnal knowledge of her, and that he attempted to have carnal knowledge of her, or that he did have carnal knowledge of her, and that she was then a female under the age of 15 years, and was not the wife of the defendant, then you will find him guilty of an assault with intent to rape," etc. The objection urged to this charge is that it is on the weight of evidence. We are of opinion this exception is not well taken. It submits the facts as stated by the witness, and upon those facts instructed the jury they could find appellant guilty. It does not instruct the jury that any of these facts were proved, but informs them that if such were the facts appellant would be guilty.

The fourth ground of the motion is that the court erred in recalling the jury after their retirement and altering and changing the charge. This is simply stated as a ground of the motion, and is in no wise verified, and therefore cannot be considered.

Nor does the fifth ground present any sufficient legal reason for a reversal. This alleges error in that the district attorney failed and refused to place on the stand as witnesses Will and Mary Satterwhite, father and mother of prosecutrix, whose testimony he alleges was necessary to corroborate prosecutrix. There was no bill of exceptions reserved to this, and, as presented, it cannot be considered. Under the decisions in Texas, it is not necessary for the state to put on all witnesses. The prosecution may make out its case, or at least put on evidence thought to be sufficient for that purpose,

without placing on all witnesses who are cognizant of the facts.

As the case is presented, we find no such error as requires a reversal, and the judgment is affirmed.

BROOKS, J., absent.

HIGH v. STATE.

(Court of Criminal Appeals of Texas. March 11, 1908. Rehearing Denied Oct. 21, 1908.)

1. HOMICIDE—MURDER IN THE FIRST DEGREE—EVIDENCE—SUBMISSION OF ISSUE TO JURY.

Evidence held to authorize the submission to the jury of the issues of murder in the first and second degrees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 574.]

2. SAME—APPEAL—CONVICTION OF MANSLAUGHTER—ERRORS IN INSTRUCTIONS DEFINING MURDER—REVIEW.

Where there is a conviction of manslaughter, errors in the charge defining murder will not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 720.]

3. SAME—VERDICT “CONTRARY TO LAW AND EVIDENCE.”

Under Code Cr. Proc. 1895, art. 817, declaring that new trials in felonies shall be awarded where the verdict is “contrary to law and evidence,” where accused is found guilty of an offense of inferior grade, but of the same nature to that proved, a conviction of manslaughter, while the evidence shows guilt of a higher grade of homicide, is not prejudicial to accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 722.]

4. CRIMINAL LAW—APPEAL—DENIAL OF MOTION TO QUASH VENIRE—REVIEW.

In the absence of a bill of exceptions saving the point, or the authentication of the facts, the overruling of a motion to quash a venire because accused had not been served with a copy thereof is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2813.]

5. SAME—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Under the rule that a charge on circumstantial evidence is not required where the testimony is not wholly circumstantial, the refusal to charge on circumstantial evidence, where accused admitted the killing of decedent, otherwise established only by circumstantial evidence, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 1883–1888.]

6. WITNESSES—IMPEACHMENT—PROOF OF CONTRADICTORY STATEMENTS.

Where a witness for accused testified on direct examination that he had inspected the ground where the homicide occurred and that he could not detect tracks, and denied on cross-examination that he had stated to a third person at a designated time that the surroundings indicated where the parties were at the time of the homicide, it was not error to permit the third person, for impeachment only, to testify that the witness brought the third person to the place of the homicide and pointed out the place where the person who did the killing stood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1209, 1248.]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Sam High was convicted of manslaughter, and he appeals. Affirmed.

Harrison & Davidson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Harrison county for the murder of one Dave Pilot. He was tried on the 9th day of November, 1907, and such trial resulted in a verdict for manslaughter; his punishment being assessed at two years' confinement in the penitentiary.

Appellant proved a most excellent reputation as a quiet, peaceful, and inoffensive man. There were no eyewitnesses to the killing, and, except for the admissions of appellant, which shall be hereafter noted, the case rested upon circumstantial evidence. Both parties lived near the village of Wood Lawn, in Harrison county, Tex. At the time of his death the deceased was shown to have had a Winchester rifle. Appellant had a shotgun. The deceased was riddled with shot from his waist up to his shoulders. As stated, appellant admitted to a number of witnesses, including Henry King, Josh Callaway, as well as his kinsman, Rufus High, that he had killed the deceased, Dave Pilot, but made to none of them any explanation or gave any reason or account of why he had done so. It was the theory and contention of the state that the killing was by assassination, and there was some testimony tending strongly to support this contention. There was shown to have been a large tree a short distance from where the dead body of the deceased lay when found. Some of the witnesses testify to seeing tracks near this tree, and one witness, Clay Callaway, says he picked up two shotgun wads near this tree, some 8 or 10 steps from where the body lay, which was about 15 steps from the tree in question; that these were wads of an ordinary breech-loading shotgun, and were in range between the tree and the body of deceased. It was shown in the testimony, and admitted by appellant, that neither himself nor his family were on good terms with deceased. They seemed, a short while before this, to have had some trouble over a dog that had been bothering some turkeys belonging to the family of appellant. It was also shown that appellant, after the killing, took not only his own gun, but the rifle which had been in the possession of deceased, home with him, giving as a reason for this that he did not want the gun to get back in the hands of his enemies, and that he kept it for his own defense. This is a sufficient statement of the case to illustrate the questions discussed.

Appellant raises many questions, both in his printed brief and in oral argument before this court. We have thought, from an examination of this brief as well as the motion for a new trial, the positions assumed by counsel for appellant are somewhat contradictory;

but the assignments are all well presented, and are of such character as to require consideration and treatment by us.

The contention is made that the court below erred in submitting to the jury murder in the first degree, for the reason, as stated, that the evidence introduced on the part of the state was not of that degree of certainty which would justify the court in rendering a judgment upon a verdict of the jury finding the defendant guilty of murder in the first degree. We believe that the issue of murder in the first degree was raised by the testimony, and that the evidence, considered all together, presented a strong case of assassination, and that the court did not err in submitting murder in the first degree to the jury.

A like contention was made that the court erred in charging the jury on the law of murder in the second degree, and for the same reason, that the testimony did not raise the issue of murder in the second degree and was not of that degree of certainty which would justify the court in rendering a judgment upon a verdict of the jury finding the defendant guilty of that degree of murder. We think and hold there is no merit in this contention.

Complaint is also made by the third assignment of error that the court erred in defining murder in the second degree, and various grounds of complaint of this charge are urged in appellant's brief. It is well settled in this state that, where there is a conviction for manslaughter, that errors in the charge in respect to murder will not be reviewed by this court. See *Griffin v. State* (Tex. Cr. App.) 53 S. W. 848, and *Gonzales v. State*, 35 Tex. Cr. R. 83, 29 S. W. 1091, 30 S. W. 224.

Again, complaint is made that the court erred in charging the jury on the law of manslaughter, because the testimony developed on the trial, as claimed by appellant, both on the part of the state and the defendant, fails to show that there was any element of manslaughter, surrounding the homicide, because the state's theory of the case was that the defendant was standing behind the tree and waiting until deceased drove up and got in position to be shot from ambush, whereas the defendant's theory was that he was walking along down a path to the road and accidentally met the deceased, who opened fire on him, and he killed deceased in his necessary self-defense. It is urged by counsel for appellant that the testimony fails to show any sudden passion arising from adequate cause, and that it fails to show any cause reducing the homicide from murder to manslaughter, and that the evidence fails to show any provocation on the part of deceased that would cause the defendant to act at all, except in his own necessary defense. It is claimed that the evidence fails to show any cause which would produce a degree of anger, rage, sudden resentment, or terror suf-

ficient to render the mind incapable of cool reflection, except the cause that made the defendant act in his own necessary self-defense. It must be confessed that there is slight ground in the record to justify the court to submit the issue of manslaughter. It has, however, not infrequently been held in this state that the issue of manslaughter does arise in cases where a defendant's testimony makes a case of clear self-defense. Whatever, as an original proposition, might be our view as to whether manslaughter arose in the case, it is, we think, clear that under our law the fact that the issue of manslaughter was submitted, and a conviction had therefor, cannot avail appellant, from the mere fact that, if guilty at all, he was guilty of a higher grade of homicide. Subdivision 9 of article 817 of the Code of Criminal Procedure of 1895 is as follows: "Where the Verdict is Contrary to Law and Evidence.—A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved." And it has been held (*Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108) that "where there has been a trial for murder, and a conviction for murder in the second degree, which was set aside, if the evidence on the second trial establishes a murder on express malice and murder in the first degree, this does not constitute such variance between the allegations and proof as would entitle defendant to an acquittal, but he may legally be convicted upon such proof of murder in the second degree." And we have uniformly declined to grant a new trial solely because the evidence suggested, or even tended more strongly to support, a higher grade of offense than that of which appellant was convicted. The holding, indeed, has been uniform that where the accused might have been convicted of murder, but was in fact convicted of manslaughter he was not harmed by a charge on manslaughter. See *Brown v. State* (Tex. Cr. App.) 50 S. W. 354, and *Chapman v. State* (Tex. Cr. App.) 53 S. W. 103.

Again, it is insisted that the court erred in overruling defendant's motion to quash the venire, because, as stated in said motion, appellant had not been served with a copy of same, although he had been out on bond. This cannot be reviewed, for the reason that there is no bill of exceptions in the record saving the point, or authenticating in any proper manner the facts arising on such motion.

Complaint is made in the seventh assignment of error that the court erred in refusing to give a charge to the jury on circumstantial evidence. In view of the fact that the killing of the deceased was admitted by appellant, and therefore the charge against him does not depend wholly upon circumstantial evidence, it was not error to refuse such charge. A charge on circumstantial evidence

is never required where the testimony is not wholly circumstantial.

The only other ground which we deem it worth while to notice is that contained in the eleventh assignment of error. Clabe Wright, a witness for the defendant, testified, among other things, to hearing the reports of the shots fired at the time of the killing. He also testified that he inspected the tree and the ground around it to see if he could arrive at any conclusion; that he inspected the large tree that stood inside of the fence opposite the body; that he could detect no tracks or evidence of where any one stood alongside of the tree; that the leaves appeared a little disturbed, as though a hog or a bird had been there. On cross-examination, and for the purpose of impeachment only, he was asked if he had a conversation with Clay Callaway on the night of the inquest about the surroundings at the place of the killing, and if he did not state that such surroundings indicated where the parties were or could have been who did the shooting, and if he did not carry Callaway to this big tree and state that "here is where the scoundrel stood who did the killing, right by this tree." This was denied by Wright, and the bill of exceptions shows that Clay Callaway, in rebuttal, testified that he did have such conversation. In his explanation of this bill the court says that "the witness Clabe Wright was introduced by defendant, and testified that he saw no place on the ground patted down by the big tree that looked like some person had stood there to waylay deceased, and that on cross-examination he was asked if he did not, at the time of the inquest, the day of the killing, point out on the ground to the justice of the peace holding the inquest, Clay Callaway, the place on the ground by the tree where it appeared the party doing the shooting had stood." If this testimony could, in the light of the entire record, be considered merely as an expression of opinion by the witness Wright as to where the person who did the killing stood, it would be clearly inadmissible; but we think the reasonable intentment of this testimony was merely to affirm and say that the witness Wright stated to Justice of the Peace Callaway that the place near the tree shown him was where it appeared from the signs seen by him that the party doing the shooting had stood, and in effect amounted to a statement by said witness that he saw tracks at or near said tree. The court further states, in his explanation allowing the bill, that this testimony was admitted for the purpose of affecting the credibility of the witness Clabe Wright, and was so limited in the charge. Our view of the intent and meaning of the witness in using this language is made manifest, we think, by reference to the charge limiting this testimony, which is as follows: "The testimony of the witness Clay Callaway as to what the witness Clabe Wright showed him on the ground at the

place where the homicide was charged to have been committed was admitted for the purpose only of enabling you to judge of the credibility of the witness Clabe Wright, and you will not consider such testimony for any other purpose."

We have carefully gone through the entire record, aided by the well-prepared brief of counsel for appellant, and in the light of their oral presentation of the case. We have been deeply impressed by our investigation of the case that the killing was either an assassination or self-defense. We think that subdivision 9 of article 817 of our Code of Criminal Procedure of 1895 was intended to meet just such cases as this. In other words, the purpose of that article is to declare that the mere fact that a defendant has not received at the hands of the jury the punishment to which he was justly entitled should be no reason why he should not be punished at all. We think appellant may well be congratulated that the jury did not visit upon him a more severe penalty.

There being no error, as we believe, in the record, the judgment of the court below is affirmed.

GONZALES v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 21, 1908.)

1. PERJURY—INDICTMENT—SUFFICIENCY.

An indictment charging that accused testified before a grand jury which investigated gambling transactions occurring at his residence, which was a common resort for gaming, that no games were played there within his knowledge, and charging that games had been played there between specified parties, sufficiently charges perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 65, 66.]

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 117-124.]

3. WITNESSES — IMPEACHMENT — EXTRANEOUS CRIMES.

Though a state witness denied on cross-examination that he was living in adultery with a specified person, it was proper to exclude evidence offered by accused from which the jury might or might not have found that witness was so living.

Appeal from District Court, Brewster County; B. C. Thomas, Judge.

Conception Gonzales was convicted of perjury, and he appeals. Affirmed.

Sanford & Douglas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of perjury. Motion in arrest of judgment was made because of the alleged insufficiency of the indictment. In substance the indictment alleges that the grand jury investigated gambling transactions that occurred at appellant's residence, which residence was a

common resort for gaming, and that appellant testified before the grand jury that no games had been played at his house within his knowledge. Then follows the usual traverse, to the effect that games had been played at such residence between certain named parties. Without going into a critical review of the indictment and its allegations, under the authorities, we are of opinion that the crime of perjury is sufficiently alleged.

Contention is made that the evidence does not support the conviction. We are of opinion this contention is not well taken. Several witnesses testified to seeing gambling carried on in appellant's house, that his residence was used as a common resort for gaming purposes, and quite a number of names of people were given who met and played at said residence, and that appellant not only knew and permitted it, but sold chips and took pay for games that were so played, and within the time specified in the indictment.

Ramirez, a state's witness, was asked on cross-examination if he was living in adultery with one Maria Cobos, an unmarried female. This he answered in the negative. Appellant then introduced Villegas, and offered to prove by him facts and circumstances of a tendency to show that the witness Ramirez was living in adultery with the woman Cobos. On objection by the district attorney this testimony was rejected. Appellant contends this is error, and cites in support of his contention *Curtis v. State*, 46 Tex. Cr. R. 480, 81 S. W. 29. We are of opinion this case is not in point, and does not support appellant's contention. Without discussing the question as to how far a witness may be impeached by showing evidence of adultery, or prostitution, we are of opinion that, as this bill discloses this matter, the court was not in error in rejecting the testimony. To permit the examination of witnesses as sought in this particular instance would place the trial of the case before the jury in the attitude of trying violations of the law on the part of the witness. To have permitted the testimony sought to be introduced, the same exactness of proof would have been required to impeach as would have been necessary to have convicted Villegas, had he been on trial for adultery. The testimony offered was circumstances, quite numerous, from which the jury might or might not infer that the witness was living in adultery with the woman mentioned. As we understand the rule in regard to impeachment, this manner of examining would not be permitted. In fact, it would not be permissible to go aside from the main case and enter into a trial of extraneous crimes of which a party may or may not be guilty as if the party were on trial himself for the extraneous offense. This is carrying the rule in regard to impeachment too far, and would render the trial of the main case interminable in length, and divert the issues of the case on trial to those matters involved in the

trial of the witness on some supposed criminal offense. *Ware v. State*, 36 Tex. Cr. R. 597-600, 33 S. W. 198.

We are of the opinion that the court was correct, and the judgment is affirmed.

BROOKS, J., absent.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1908. Rehearing Denied Oct. 21, 1908.)

WITNESSES—CONTRADICTION—COMPETENCY OF CONTRADICTING TESTIMONY.

In a prosecution for unlawfully selling intoxicants, where accused had testified that he did not know until a few days before trial that he was charged with selling liquor to the person alleged, questions on cross-examination as to when accused signed a bail bond for the offense, and as to when he employed counsel, were admissible to contradict accused, as were also copies of the bail bond and capias.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1277.]

Appeal from Coleman County Court; F. M. Bowen, Judge.

Bob Taylor was convicted of violating the local option law, and he appeals. Affirmed.

Woodward & Baker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law. Kyle testified that on or about the 15th day of January, 1907, he went into Beckham's club room and ordered some whisky. The order was in writing, and he gave Beckham \$1.25 with which to pay for the whisky. This money was handed Beckham when the order was written. He asked Beckham if he could get the whisky then. Beckham answered in the negative. About that time appellant came in, and Beckham said, "Maybe Uncle Bobbie can let you have it." Kyle hailed Uncle Bobbie, and asked him if he could let him have a quart of whisky; that he had ordered some, and he asked if the witness had ordered whisky, and Beckham told him that he had, and appellant then told Beckham to let Kyle have a bottle of whisky. Beckham handed him a quart, and witness told Beckham, when his whisky came, to give it to the defendant. He said he would. The witness said he had known defendant three or four months; that when he asked him for the loan of the whisky he went to him and whispered in his ear; that he was about 10 or 12 feet from Beckham; that he did not want anybody else to hear, the reason he whispered to appellant; that appellant did not tell him to whisper. He said he was not mistaken about appellant telling Beckham to give him a quart of his whisky. The witness admitted that he had told appellant that he could be mistaken about the transaction; but he now swears that it was not true, because appellant had no right to ask him about it. He denied getting mad with appel-

lant because appellant would not let him gamble in his tenpin alley. Appellant testified in his own behalf that he never let Kyle have any whisky at the time testified about, and had no recollection of ever letting him have any whisky. He stated Kyle got mad with him because he had charged him ten cents more than he owed for rolling on tenpin alley, and that he (Kyle) admitted to him that he might have been mistaken about this transaction, and he would go to the county attorney and see if he would not turn appellant loose. On cross-examination he stated that he knew nothing about the method of doing business being a scheme to violate the local option law; that if there were any rules and regulations in the club house he did not know them, and knew nothing of any entries being made on the orders showing who loaned the intoxicating liquors; that he knew this transaction did not occur.

Upon the trial of the case appellant testified he did not know until a few days prior to the trial that he was charged with selling whisky to the witness Kyle. On cross-examination, over defendant's objection, he was asked if he did not sign the bail bond shown to him, to which defendant replied that he did. Then, over appellant's objection, the bond was introduced in evidence, and defendant was asked, over his objection, when he employed his lawyers to defend him. Defendant answered, "About four or five days ago." To this defendant objected, as to signing bond and employing counsel, for the reason that it was immaterial, irrelevant, and tended to prove no issue, and was prejudicial to appellant. The state offered this testimony for the purpose of contradicting the defendant's evidence as to not knowing that he was charged with selling intoxicating liquor to the witness Kyle; and another bill in this same connection shows, while he was testifying in his own behalf, he stated that he did not know until a few days prior to this trial that he was charged with selling intoxicating liquors to Kyle. The state introduced the capias for appellant's arrest. Same objection was made to the introduction of this as to the bail bond, and the bill states it was introduced for the purpose of contradicting the defendant's evidence as to not knowing that he was charged with selling intoxicating liquors to the witness Kyle. We are of opinion these matters were admissible.

The judgment is affirmed.

CORDES v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1908. Rehearing Denied Oct. 21, 1908.)

1. CRIMINAL LAW—TRIAL—REFUSAL OF REQUESTS.

Special instructions, covered by the court's main charge, are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. SAME—INSTRUCTIONS ON WEIGHT OF EVIDENCE.

In a prosecution for infanticide, a requested charge that the testimony of physicians in the case was not sufficient to show that the deceased child was wholly born alive and had an independent existence from its mother, and, unless the jury believed that the testimony of a named witness was true, accused should be acquitted, was properly refused as upon the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1748.]

3. SAME—SINGLING OUT TESTIMONY.

A requested charge that there was not sufficient testimony to convict accused unless the jury believed that the testimony of a named witness to certain facts was true, and unless they believed it true they should acquit, was properly refused as singling out testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1969-1973.]

4. SAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution for infanticide, witnesses were properly allowed to state that accused, shortly before the child's body was found, appeared to them to be pregnant, and their testimony did not constitute mere conclusions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1044.]

5. SAME—EXHIBITS—ADMISSIBILITY.

In a prosecution for infanticide, a portion of a blanket alleged to have been found wrapped around the deceased infant, and which a witness testified was similar to another portion found at the home of accused, was admissible, though it had been washed, while when found it was dirty and bloody, being practically the same color of the other portion found at accused's home; an objection that it did not show the exact condition of the blanket when found, nor that it was of the same color, going to the weight of the testimony, and not to its admissibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 891.]

6. SAME—STATEMENTS BY ACCUSED—ADMISSIBILITY.

In a prosecution for infanticide, statements made by accused to the sheriff while he was investigating the case at accused's home, but before he had arrested her, were admissible in evidence.

7. SAME—PHYSICAL EXAMINATION.

On trial of a woman for infanticide, where she consented to a physical examination during her incarceration, after being advised by the physician that he would not examine her without her consent, the physician's testimony of her condition was admissible.

8. SAME—SIZE OF FOOTPRINTS.

In a prosecution for infanticide, testimony of a person, who had measured tracks leading to a water hole where the body was found, that they corresponded in size, with the exception of being a little shorter, with a pair of men's shoes found at accused's residence, was admissible, though the stick with which the tracks were measured was not produced; its absence going merely to the credibility of the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 768.]

9. SAME—HYPOTHETICAL QUESTIONS TO MEDICAL EXPERTS.

In a homicide case, medical experts may be asked hypothetical questions embracing practically all the evidence on the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1073.]

10. SAME — TRIAL — MISCONDUCT OF PROSECUTOR—IMPROPER ARGUMENT.

In an infanticide case, where the prosecutor stated accused's motive in killing the child to be to hide her shame of having a child begotten by her brother, and the court, upon objection by accused's counsel, stopped the prosecutor and admonished the jury to disregard the remarks, and gave a special charge to the same effect, stating that there was no evidence to support the assertion, the statement was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

11. SAME—READING DECISIONS TO JURY.

It was not error for the court to refuse to permit counsel to read a decision from a law report to the jury, since questions of law must be addressed to the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1682-1687.]

12. HOMICIDE—PERSON SUBJECT TO HOMICIDE.

"Homicide" is the killing of one human being by the act or culpable omission of another, and a person, to be subject of homicide, must be in existence by actual birth, having been completely expelled from the body of the mother, and must thereafter have been alive before the infliction of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 2.]

For other definitions, see Words and Phrases, vol. 4, pp. 3339, 3340; vol. 8, p. 7690.]

13. SAME—"INFANTICIDE."

To constitute "infanticide" the child must have been totally expelled alive from its mother's body, must have lived in an independent existence after such expulsion, and its death must have been caused by violence inflicted upon it by some other person after the commencement of its independent existence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 2.]

14. SAME—MURDER—PRINCIPAL.

If a person, at the time another unlawfully and with express malice killed an infant, was present and had agreed with the other to do the act, and aided him by acts or encouraged him by words or gestures in killing the child, the person was guilty of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 48-50.]

15. CRIMINAL LAW—INSTRUCTIONS TO BE CONSIDERED AS A WHOLE.

In passing upon an instruction, it should be considered together with the whole charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

16. HOMICIDE—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to support a conviction of murdering an infant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 513-522.]

17. CRIMINAL LAW—APPEAL—REVIEW—QUESTION OF FACT.

A finding of the jury on the testimony of an impeached witness cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

Appeal from District Court, Gonzales County; M. Kennon, Judge.

Annie Cordes was convicted of murder, and she appeals. Affirmed.

Rainbolt & Blanton, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was indicted for the murder of her child, and upon conviction her punishment was assessed at imprisonment for life.

The facts, in substance, show that appellant and her brother, Ellert Cordes, lived upon a farm in Gonzales county, occupying alone their home. In August, 1906, Ellert secured the services of several negroes to assist in picking cotton. These negroes lived in a house 20 or 30 yards from the home while engaged in picking cotton. One negro, Johnnie Hamilton, testified that he slept in the kitchen by the cooking stove in the same house and in an adjoining room to appellant. "That night I heard a baby cry in the night, and heard them walking around in the house. I don't think I heard it cry but once that night before I went to sleep. I got up the next morning before sun-up, and heard it crying in the house next morning. It sounded like it was in the room from me adjoining the kitchen. I don't know who lived in there. I couldn't say what room they stayed in. Nobody else lived in that house but these people. It was about between 6 and 7 o'clock in the morning when I heard the baby cry. I saw Mr. Cordes around the house that morning, and I saw him afterwards during the day when he passed me going down towards the creek. He had a bundle under his arm that looked like a croker sack or saddle blanket balled up under his arm; but I couldn't say what it was. When he came back from the creek he had nothing with him. I never heard the baby cry after he carried the bundle off. I stayed there Tuesday, Wednesday, and Thursday, and went to town Friday evening and heard that the baby had been found Saturday night of the same week." A baby was found in the creek, which was some 300 or 400 yards from appellant's home.

Dr. Finny Blackwell, in reference to finding the child, testified as follows: "I visited the water hole about 200 or 300 yards away from the house of the defendant about the 10th or 11th of August of last year, and then went with Mr. Johnson, the sheriff, on that night to Cordes' house. At the water hole I found something covered up in a gunny sack and blanket, very badly decomposed. I came to the place, and found Mr. Pittman and another gentleman there, and stayed on the bank and waited for the justice of the peace and Mr. Johnson; and they didn't come, and I picked the gunny sack up, and unwrapped the blanket, and found a little girl baby, and I examined it and went over it very thoroughly. The body was very much decomposed. The head had been fractured, and the ribs had been broken or fractured. The brains were gone, and the membranes were intact. It was either the third and fourth or the fourth and fifth ribs that was fractured. In addition the child had a string tied around its neck three times and tight as tight could be, and the back and shoulders of the

child were badly decomposed. I prized the ribs open, and got hold of the lung and opened it and extracted the lung, and introduced two fingers, and pulled out a part of the lung tissue, and when I pushed around in it air and water escaped. That air might have come from two or three places. It might have been caused from putrefaction, and it might have been caused from natural prevailing conditions. The color of the lung tissue differed. It was light in places, but where it was badly decomposed it was of a brown hue; but I could not say positively just what the color was, looking at it with my naked eye and from a scientific standpoint. I could not say whether the air had been breathed in there or whether it was the result of putrefaction. The child was well developed and would have weighed about eight or nine pounds. For a living child to have its brains knocked out would kill it sure. The wounds in the side, untreated, I think would have killed it. I don't think it would have produced immediate death. The string tied three times around its neck would have killed it. A living child would live a very few minutes with that string around its neck. A still-born child would have a flat chest and the diaphragm would be way up. In a child that had lived you would find air in its lungs that could not be expelled. If it had been completely submerged for four or five days, it would not have decomposed that fast. From my examination of the body and the appearance of the lung tissue I could not state whether that child had ever lived or not. I can state that you would have found these conditions in a child that had breathed, but I must state that results of putrefaction would produce the same results. A child by the act of breathing produces a rounded condition of the chest, and this child's chest was rounded. The lungs were extended. Its abdomen was swollen, and the skin around its neck had broken where the string was tied, and it was decomposed all over. Any part of that child would float. As a medical expert I cannot say whether or not that child lived. I can state that the air and extension of that lung would indicate that the child had breathed; but at the same time I believe the results of decomposition in that side would produce the distension just the same. The child's breast was round and distended and the diaphragm was down."

The child had been taken out of the water upon which it was floating a short while before the doctor reached the scene. Johnnie Hamilton swore it was 2 or 3 o'clock in the evening on Monday that he saw Cordes go down to the creek with a bundle under his arm. The negroes who lived in the house on the farm testified that appellant was sick at the time that Johnnie Hamilton says he heard the baby cry, and was sick for several days. Various witnesses testify that appellant appeared to be pregnant a short while before the child was found, and at that time

did not show any signs of pregnancy. The doctor who examined appellant after she was placed in jail testified that everything indicated that she had given birth to a child a short while before the examination, some seven or eight days. The testimony shows that this will correspond with the date that Hamilton says he heard the baby cry. The sheriff testifies to taking a sack and blanket and a string that were found around the baby's neck and comparing them with blankets and cloth found in the home of appellant, and they corresponded in texture and color with said blanket and cloth so found. He says the blanket he took from around the child was dirty and bloody, and, after washing it, it was of a lighter color than the blanket found in the house, but in texture and other respects corresponded. The figures on the cloth string around the baby's neck corresponded with the figures on the cloth in the home. The sheriff, through an interpreter, asked appellant if she had given birth to a child prior to her arrest. She denied it. Several bloody clothes and garments were found in the house, indicative of child-birth. This, in substance, as we glean from the statement of facts, is the testimony.

Appellant complains the court erred in refusing to give the following charge: "In this case you are instructed that, unless you find from a preponderance of the evidence that the child with whose murder the defendant is charged had a complete and independent existence from its mother and was wholly born alive, then you must acquit the defendant. In this connection you are further charged that the testimony of the physicians in this case is not sufficient to show that said child was wholly born alive and had a complete and independent existence from its mother, and unless you further believe that the testimony of the witness Johnny Hamilton is true you will acquit the defendant." The first clause of the charge was given by the court in his main charge. The second clause is a charge upon the weight of evidence, and should not have been given.

Appellant further complains of the refusal of the court to give the following charge: "In this case you are charged that there is not sufficient testimony in this case to convict the defendant unless you believe, in connection with the other testimony in the case, that the testimony of the witness Johnny Hamilton, to the effect that he heard the child cry, is true; and unless you so believe this portion of the testimony of the witness Johnny Hamilton to be true you will acquit the defendant." It is never required or proper for a court to single out testimony and charge upon same, as suggested in appellant's special charge.

Bill of exceptions No. 1 complains of the following: The state proved by the witness Neighbors, over objection of appellant, that a short time previous to the finding of the body of the dead child in the water hole he passed

along by the road a distance of about 50 yards from the home of the defendant, and that he saw her, and that she looked as if she was in a family way; and the defendant at the time said testimony was offered objected to same on the ground that the proper method was for the witness to describe her appearance, that he had not qualified as a medical expert, and that his testimony that "she looked as if she was in a family way" was but a conclusion of the witness, and therefore inadmissible. This testimony was legitimate. It is but a shorthand rendering of the facts, and it was proper for the witness to state what was the appearance of appellant at that time.

Bill of exceptions No. 2 shows that the state proved by the witness Jim Pittman, over objection of appellant, that he lived on the adjoining tract of land from defendant, was a married man and had children, and saw her on several occasions just prior to the time the child was found in the hole; that his house was about 400 yards from that of defendant, and that he had also seen her from the road, which was about 50 yards from the house of defendant; and that just before this occurrence (finding of the baby) she looked like she was going to have a baby. Appellant objected to this testimony for the same reasons above stated. This testimony was also admissible.

Bill of exceptions No. 3 complains that W. W. Johnson, sheriff, was permitted to identify and exhibit to the jury in evidence a portion of a blanket purporting to have been found wrapped around the deceased infant, and which the witness testified was similar to another portion of blanket found at the home of defendant; that the portion shown to the jury and purporting to have been found around the body of the deceased infant has been washed and was now white in color, while originally, when found, it was very dirty and bloody and of a dark color, practically the same color of the other portion found at the home of defendant. Appellant objected to the same, for the reason it did not show the exact condition of the blanket when found, nor the same color. This objection would only go to the weight of the testimony, and not to its admissibility.

Bill of exceptions No. 4 shows the sheriff testified as follows: While he was at defendant's home, whither he had gone for the purpose of investigating the murder of the child, defendant made the following statement to him: That he saw her at her home, and told her, if she would allow herself to be examined by a physician then present for the purpose of seeing whether or not she had recently borne a child, that he would not arrest her if her condition showed that she had not recently borne a child, and that the defendant refused to allow an examination made of her person at that time, but stated that she had not borne a child recently, to which testimony that she stated to the sheriff at

that time that she had not borne a child, but would not allow an examination of her person to be made, the defendant objected, on the ground that said statement was shown to have been made while the defendant was virtually under arrest, that she had not been warned, and that the statement was not in writing. Witness further testified that he had not arrested defendant at the time this statement was made. Under the facts of this bill we believe defendant was not under arrest. See *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

Bill of exceptions No. 5 complains of the same testimony discussed in the last bill.

Bill of exceptions No. 6 shows that Dr. McCaleb, county physician, at the request of the district attorney, went over to the jail and made an examination of the womb and private parts of the defendant, and that it was his opinion from that examination that she had borne a child within a period of three weeks prior to such examination; that he told her he was the county physician, and present for the purpose of examining her if she would permit it, but that he would not examine her without her consent, and she consented. Defendant, at the time said testimony was offered, objected to same for the reason that such examination was made while she was under arrest, and that it was in effect forcing her to furnish testimony against herself. Appellant consenting, any physical condition upon her person could be made manifest by an examination.

Bill of exceptions No. 7 complains that Tom Holly was permitted to testify that he found tracks leading from the house where defendant resided to the hole of water where the dead body was found and back again; that he measured these tracks with a stick, and that they corresponded in measurement, with the exception of being a little shorter, with a pair of men's shoes found at the residence of the defendant; that he did not know what became of the measure and did not know where it was, and the defendant at the time said testimony was offered objected to same for the reason that the stick was the best evidence of the size of the tracks found by the witness; and that it had not been identified as belonging to any particular person and did not connect defendant with the crime. It did not devolve upon the state to produce the stick before the witness could testify. If the stick was not produced, and the shoes were measured by said stick, this fact would merely go to the accuracy and credibility of the witness' testimony, rather than to its admissibility.

Bill of exceptions No. 8 complains of the introduction of testimony of the sheriff as to what appellant stated, and has been reviewed above.

Bill of exceptions No. 9 complains of the following: Dr. McCaleb, medical expert, was asked the following hypothetical question: "If you were called upon to examine a dead

infant found under the following condition: The body badly decomposed and freshly taken from a hole of water, and you were to unwrap a gunny sack with rocks in it, and a blanket wrapped around the body of the child, and find that child's head broken, the brains all gone, two of its ribs broken, and the membranes of the brains intact, with a string tied three times tightly around the child's neck, and you were to prize its ribs open and pull out a portion of the child's lung, and you were to press on the lung and air and water came out of it, and the appearance of that lung was light in color in places, and where it was decomposed it was of a brown hue, and you were to find the navel string of that child tied with a string, and the appearance of the child showed it to be a fully developed female child weighing about nine pounds, and upon pressing on it, when the lung was pulled out of the pleural cavity, there were gases in the lung, and it would spue and bubble, what would be your opinion as to whether that infant lived or not independent of its mother, were that child's breast rounded out and its diaphragm dropped down?" To which question the defendant then and there in open court objected on the ground that same was illegal and inadmissible, for the reason that said question did not contain all the material facts as to the condition of the child when found, that the doctor was not present and did not hear the witness testify to the condition of the child, and that the question does not give an accurate description of the condition of the child when found, all of which objections were overruled, and the doctor answered, "I think it lived," and said answer of said witness was permitted to go to the jury. In the trial of cases of this character it is permissible to put hypothetical questions to medical experts. In the first place, we wish to say, in substance, the above is practically, if not literally, all of the testimony as to the condition of the child when found. These facts were testified to by Dr. Blackwell, and the state, in asking Dr. McCaleb the question, practically reproduced the testimony of said Dr. Blackwell. See *Burt v. State*, 88 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Bill of exceptions No. 10 shows defendant complained of the argument of the district attorney, to wit: "The defendant did have a motive in killing this child, and that motive was to conceal her shame of having a child begotten by her brother." Appellant objected to this on the ground that there was no evidence introduced showing said statement to be true, and was prejudicial, therefore, to the defendant. The court stopped the district attorney, and admonished the jury not to consider such argument, and appellant requested the court to give the following charge: "You are hereby instructed to disregard the argument of the district attorney in his opening address, in which he

stated that the defendant had a motive in killing this child, and that motive was to conceal her shame of having a child begotten by her brother, for the reason that there is no testimony in this case to authorize such remarks." In the light of the admonition of the court to the jury to disregard this statement, and special charge to the same effect, we do not believe there is any error in the statement of the district attorney authorizing a reversal of this case.

Bill of exceptions No. 11 complains that the court refused to permit appellant to read to the jury the case of *Wallace v. State*, 10 Tex. App. 255. The court refused to do this on the ground that it was his rule not to permit decisions to be read to the jury. We do not believe there was any error in the ruling of the court. Questions of law must be addressed to the court, and not to the jury.

The first ground of appellant's motion for a new trial complains of the following: "Homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. The person upon whom homicide is alleged to have been committed must be in existence by actual birth; that is to say, the child must have been completely expelled from the body of the mother, and must thereafter have been alive, before the infliction of the injury alleged to have caused its death." "As a preliminary inquiry in a case of this class, the jury must find (1) that the child in question was totally expelled alive from its mother's body; (2) that it lived in an independent existence after such expulsion; and (3) that its death was caused by violence inflicted upon its person by some other person after the commencement of such independent existence. If all these propositions are not found to be true beyond a reasonable doubt, then no further inquiry need be made." This charge is practically a reproduction of the charge in the case of *Wallace v. State*, above cited, which this court held was a proper presentation of the law.

On the doctrine of principals the court charged as follows: "Or that by such means and at such time and place Ellert Cordes did unlawfully and with express malice kill said infant, and that when the said Ellert Cordes so killed said infant the defendant was present and had agreed with the said Ellert Cordes to so kill said infant, or that she was present when the said Ellert Cordes so killed said infant (if he did so), and, knowing his unlawful intent, did aid him by acts or encourage him by words or gestures in so killing said infant, you will find defendant guilty of murder in the first degree, and assess her punishment at death or confinement in the penitentiary for life, in your discretion." Appellant insists said charge is erroneous, in that it did not require her to have express malice at the time she agreed with the said Ellert Cordes to kill said infant, nor did it require her to have express malice

at the time she aided him by acts or encouraged him by words or gestures in so killing said infant. The charge, we hold, shows clearly a proper presentation of this question. Furthermore, we cannot isolate this clause from the balance of the charge; but the court properly charged all the law applicable to the facts of this case, telling the jury that appellant must aid by words, acts or gestures and be present at the time of the commission of the offense, knowing the unlawful intent of the said Ellert Cordes.

Various other errors are alleged in the motion for a new trial of omission and commission in the charge. We have reviewed each and all of same, and must say that the charge, as stated above, is a clear, succinct, and proper presentation of all the law applicable to the facts of this case. The evidence in the case, as shown above, shows clearly by circumstantial evidence that the deceased infant came to its death by the direct co-operation, participancy, and consent of its mother, appellant, while assisting her brother. That it had an independent existence at the time of its death, separate and independent of its mother, is manifest from the cries, both on the night of its birth and the morning thereafter, as testified by the witness Hamilton. It is true the witness Hamilton is thoroughly impeached by divers and sundry witnesses; but this is a matter we cannot pass upon. The jury have seen fit to believe him, and we are not authorized to disturb the finding of the jury on a question of fact.

Finding no error in the record, the judgment is in all things affirmed.

WILLIAMS v. KEITH.

(Court of Civil Appeals of Texas. Oct. 21, 1908.)

COURTS—PREVIOUS DECISIONS AS CONTROLLING—DECISIONS OF COURT OF LAST RESORT.

The Court of Civil Appeals will follow a decision of the Supreme Court directly in point, though the soundness of the decision is questionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 325.]

On motion for rehearing. Denied.

For former opinion, see 111 S. W. 1056.

KEY, J. At the last term of this court we first rendered judgment reversing and remanding this case. Thereafter, on account of the decision of our Supreme Court in *Adams v. Terrell*, 107 S. W. 537, appellee's motion for rehearing was granted, and the judgment affirmed, and the case is now before us upon appellant's motion for rehearing.

This motion and the argument accompanying it assail the soundness of the doctrine announced in *Adams v. Terrell*, supra, and while there is much force in appellant's contention, and the writer confesses his inability to satisfactorily refute it, still the decision referred

to seems to be directly in point, and on account of that decision, and for that reason only, we adhere to our judgment of affirmance and overrule the motion under consideration. Motion overruled.

DAVIS et al. v. DAVIS et al.

(Court of Civil Appeals of Texas. June 25, 1908. Rehearing Denied Oct. 15, 1908.)

1. JUDGMENT—CONFORMITY TO PLEADINGS.

Testator conveyed property in trust for his children, on the death of his widow, the property to be divided by the surviving trustees among the several devisees. In a suit after the death of testator's widow for partition, the trial court decreed partition, on the ground that the surviving trustee had unreasonably delayed the division. The petition alleged that testator died October 8, 1893, leaving his widow surviving, and that the will bequeathed the property to trustees, to be equally divided among his children at any time after January 1, 1895, and that the property had never been divided, and the only surviving trustee was a devisee and disqualified to divide it. Held, that the petition did not allege unreasonable delay of the trustee as a ground for partition, and a finding thereof, and judgment of partition based thereon, was unauthorized by the pleadings and void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 434-437.]

2. SAME.

That the demurrer to the petition was not acted upon so as to be deemed waived, and that the evidence of such unreasonable delay was not objected to, did not authorize the court to base its judgment on facts not alleged in the petition.

3. PLEADING—DEMURRER—FAILURE TO PASS UPON DEMURRER—EFFECT.

If a demurrer to the petition is not acted upon, it will be considered as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1399.]

4. TRUSTS—EXECUTION—CONVEYANCE TO BENEFICIARY—TRUSTEE AS DEVISEE—EFFECT.

Property was devised to trustees to be equally divided among testator's children on his widow's death, by the "survivor or survivors" of those trustees who qualified before that time. There was a provision of the will for the appointment of other trustees, if the number should be reduced to one, but it was not mandatory, and never was acted on. Held, that the fact that the only qualified surviving trustee would take under the division did not prevent him from dividing the property.

5. SAME—TESTAMENTARY TRUSTS—ENFORCEMENT.

Where a will conveyed property to trustees to be equally divided among certain persons on the death of testator's widow, any division by the trustee contrary to the will would be subject to the control of a court of equity, but its control cannot be invoked until the trust is abused, as by the trustee's failure to act, etc.

6. SAME.

Where property was devised in trust to be equally divided by the trustees on the death of testator's widow, testimony of the trustee to his willingness to make partition did not prevent a finding of unreasonable delay by him in making partition; there being nothing to prevent partition after the widow's death.

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Suit by P. W. Davis and others against J. F. Davis and others. From a decree for com-

plainants, defendants appeal. Reversed and remanded.

Nugent & Foster, for appellants. Hill, Williams & Elkins, for appellees.

REESE, J. This is a suit by P. W. Davis and others, constituting, with J. F. Davis, all of the persons entitled, under the wills of N. Hart Davis and his wife, S. E. Davis, both deceased, to the property and estate of said testators, against J. F. Davis, trustee under the will of the said N. Hart Davis, and in possession of said property, for a partition thereof between plaintiffs and defendant. The court, trying the case without a jury, ordered partition of the one-half of the property belonging to the estate of N. Hart Davis, said property being all realty and community property of said N. Hart Davis and his wife, S. E. Davis; and commissioners were appointed to make partition, but the court refused to order a partition of the one-half of the property belonging to the estate of Mrs. Davis. While the case was pending, Mrs. Amella Wood joined by her husband, original plaintiffs, in some way got on the other side of the docket, and joined J. F. Davis in resisting the partition, and were made defendants. J. F. Davis, Mrs. Wood, and her husband join in prosecuting this appeal from the judgment, in so far as it orders a partition of the property of N. Hart Davis. No objection is made by any of the parties to the refusal to order partition of Mrs. S. E. Davis' portion of the property.

The property ordered to be partitioned consists of several small tracts of land lying in Montgomery, Harris, and Madison counties. N. Hart Davis, previous to his death in 1893, executed a will, and afterwards added various provisions thereto by way of codicils and additional items. The final result of these various additions, with the original instrument, was to convey to certain trustees, or those of them who should qualify at any time before the death of his wife, Mrs. S. E. Davis, the legal title to his one-half of the property in controversy, to be by them held in trust for his five children, naming them. The property was not to be divided until the death of Mrs. Davis, but upon her death the trustees, or the survivor or survivors of them, were to make partition among the said devisees, by dividing it into portions of equal value, and then draw lots for the portions of the respective parties. It was provided, however, that P. W. Davis, one of the children, and named in the original will as one of the trustees, should not participate in this partition. Mrs. Davis died August, 1904, and at her death, of the several trustees named by the testator, there were living only P. W. Davis, the defendant J. F. Davis, and Felix Davis. The two former regularly qualified under the will, but Felix Davis has never qualified. The only one of the trustees qualified, under the terms of the will, at the death of Mrs. Davis, and at the date of the trial,

to make the partition was the defendant J. F. Davis. This suit was filed June 20, 1905. The court, in conclusions of fact embraced in the judgment, found, as a basis of the decree, that Mrs. Davis died on or about August 26, 1904, leaving a will, which was duly probated, and that the trustees under the will of N. Hart Davis had failed and refused to partition the land within a reasonable time after the death of Mrs. Davis, and that the plaintiffs and interveners had a legal right to have said land partitioned. The court then proceeds to make decree ordering partition among the heirs of N. Hart Davis, appointing commissioners, etc.

The first assignment of error, with the proposition thereunder, fairly presents the objection urged by appellants to the judgment that there are no allegations in the petition that the trustees were abusing their power, or were delaying unnecessarily the partition of said estate, and that it was error for the court to nullify the terms of the will and to award plaintiffs a statutory partition. The decree of the court is based solely upon the ground of unreasonable delay in making partition of the property after Mrs. Davis' death. The finding of the court, upon the evidence, that there had been such unreasonable delay would not be disturbed, but the objection of appellants that there were no allegations in the petition to authorize such finding, or to authorize a decree awarding partition by commissioners under the orders of the court, must be sustained. The case comes within the familiar and well-settled rule that facts proven, but not alleged cannot be made the basis of a judgment. *Cooper v. Loughlin*, 75 Tex. 527, 13 S. W. 37. Appellees insist in reply to this assignment of error, that the following allegations in their petition are sufficient to authorize the conclusion of the court and the judgment based thereon: "That the said N. H. Davis died on or about the 8th day of October, 1893, and that he left surviving him his widow and the following children (naming them); that he left a will, which has been duly probated in the county court of Montgomery county, wherein he bequeathed his community interest in and to all of the premises and property herein above mentioned and described to J. R. Davis, J. F. Davis, and J. L. Irion, as trustees, to be by said trustees as aforesaid, at any time after January 1, 1895, equally divided, share and share alike, between his said children. That the said J. R. Davis and J. L. Irion, trustees as aforesaid, died without having divided said property, or any part thereof, between said parties. That said property, or any part thereof, has never been divided between said heirs, but that they in common own and possess the same in fee simple. Wherefore, they pray for partition," etc. It is further alleged in the petition, however, that "J. F. Davis is the only surviving trustee, is an heir at law and a legatee under said will, and is disqualified to divide said property between himself

and the other heirs and legatees." So far from complaining in the petition that there has been unreasonable delay on the part of J. F. Davis, the only surviving trustee, authorized under the will to make partition, to make such partition, as a ground for invoking the aid of the court, the petition expressly denies his right or authority to make such partition, on the ground of his interest as a legatee and devisee under the will. We can find nothing in the petition that can, by the most liberal intendment, be made to do service as an allegation that there had been unreasonable delay on the part of J. F. Davis in dividing the property. The facts stated are clearly not intended to form a basis for such a conclusion. That the demurrer to the petition, not having been acted on, must be considered as waived, and that evidence of such unreasonable delay was not objected to, did not authorize the court to take facts, which, by the most liberal intendment in favor of the pleading, cannot be found to have been alleged, and make such facts the sole basis of the decree. It may be remarked that the allegation of the petition that the property was to be divided at any time after January 1, 1895, is not supported by the evidence. By the provision of the original will, and by subsequent codicils, it was provided that the property was not to be divided until after the death of the wife of the testator, who died in August 1904, and the court in the judgment so finds, by finding that there has been unreasonable delay in making the partition after the death of Mrs. Davis.

The objection that J. F. Davis is disqualified from making the partition under the will, on account of his interest as one of the parties entitled to the property, urged in the petition as the sole ground of taking the partition out of the hands of the trustees, to whom it had been committed by the plain terms of the will, and putting it in the hands of commissioners under the order of the court, is obviously untenable. The trial court must have so considered it, as the decree is based on an entirely different ground, and no reference is made to this interest of J. F. Davis as a ground for the interposition of the court. This interest was well known to the testator. Having full power to make such disposition of his property as suited him, we know of no rule of law that would interfere with his right to make this provision, whereby the partition was to be made by the trustees named, or the survivors, or survivor, of them. It cannot be said that he did not contemplate the contingency of this power becoming vested solely in the defendant J. F. Davis, he being the sole surviving qualified trustee. The will provides that such partition shall be made by the "survivor or survivors" of those qualified to act. Evidently this was the view taken by the court and the plaintiffs, as the only objection urged in the petition to a partition by him is that he is disqualified by reason of his interest. Provision is made in the will

for the selection of other trustees if the number should be reduced to one, but this provision is not mandatory, and was never acted upon. The will provides that the property shall be equally divided among named persons, and any partition made by the trustee which violated this provision would undoubtedly be subject to the control of a court of equity; but this control cannot be invoked until the trustee shall have by some act, or by failure or refusal to act, abused the trust committed to him. Under the terms of the will, J. F. Davis and P. W. Davis being the only qualified surviving trustees at the death of Mrs. Davis, and by the express provisions of the will, P. W. Davis being barred from participation in the partition, J. F. Davis was authorized to act.

The second assignment of error attacks the conclusion of the court that there had been unreasonable delay on the part of the trustee in making partition, after the death of Mrs. Davis. As heretofore stated, we cannot say that this conclusion is not authorized by the evidence. It is true that the trustee testified that he had been at all times willing to make the partition, but there does not appear to have been anything to interfere with his prompt action after the death of Mrs. Davis. His willingness was a mere abstraction, or state of the mind, and could not reasonably have been expected to satisfy appellees. The assignment is overruled.

For the error indicated the judgment is reversed, and the cause remanded.

Reversed and remanded.

CITY OF BEAUMONT v. RUSSELL†

(Court of Civil Appeals of Texas. June 17, 1908. Rehearing Denied Oct. 15, 1908.)

1. HOMESTEAD — LIABILITIES ENFORCEABLE AGAINST — STREET IMPROVEMENT — ASSESSMENT — "TAX."

A street improvement assessment, not made in accordance with the Constitution and laws regulating the levy and assessment of ad valorem taxes, is not a tax within Const. art. 16, § 50, exempting the homestead from forced sale for any debt except, among others, taxes due thereon.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886; vol. 8, p. 7813.]

2. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — FINDINGS OF COUNCIL — CONCLUSIVENESS.

Under the charter of the city of Beaumont (Laws 1903, p. 55, c. 15) § 36j; Sp. Laws 26th Leg. (Laws 1899, p. 147, c. 12), as amended by Sp. Laws, 28th Leg. (Laws 1903, p. 48, c. 15)—making the finding of the city council, upon the issue of whether the special benefit accruing to abutting property by reason of a street improvement exceeds the assessment against the property conclusive, a finding that the benefit did exceed the assessment is at least prima facie evidence thereof, and, an abutting owner not having offered any evidence that the assessment exceeded the benefit, his objection on that ground to a judgment for the assessment cannot be sustained.

† Writ of error refused by Supreme Court.

3. SAME—ACTIONS FOR ASSESSMENTS—TIME TO SUE.

Under the charter of the city of Beaumont (Laws 1903, p. 55, c. 15) § 36j; Sp. Laws 26th Leg. (Laws 1899, p. 147, c. 12), as amended by Sp. Laws, 28th Leg. (Laws 1903, p. 48, c. 15)—making it the duty of the city attorney to institute a suit for a street improvement assessment if not paid within 30 days after due, limitations do not begin to run against the city until expiration of the 30 days.

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Suit by the city of Beaumont against Tom J. Russell for a street improvement assessment, and to foreclose a lien on defendant's property. Judgment for plaintiff for the amount of the assessment, but denying the lien, and the city appeals, and defendant files a cross-assignment of errors. Affirmed.

Marvin Scurlock and L. B. Da Ponte, for appellant. Tom J. Russell, in pro. per.

PLEASANTS, C. J. This suit was brought by appellant against appellee to recover the sum of \$1,024.52, together with interest and attorney's fees, said principal sum being alleged to be due for paving and curbing streets in the city of Beaumont, upon which property owned by appellee abuts, and to foreclose a lien for said sum upon said abutting property, which is fully described in the petition. The defendant answered by general and special exceptions and general denial and by special plea, in which it is alleged that the property upon which the lien was claimed by appellant was defendant's homestead, and therefore not subject to the lien sought to be enforced thereon. The answer also contains a plea of limitation of two years against plaintiff's cause of action. The trial in the court below was without a jury, and resulted in a judgment in favor of plaintiff for the amount sued for, with interest and attorney's fees, and in favor of defendant that no lien for said amount existed upon defendant's property, because of its homestead character.

The following is an agreed statement of the facts upon which the judgment of the court below was rendered:

"(1) Plaintiff is a municipal corporation, and at and before the levy of the taxes sued for was operating under a special charter granted by the Twenty-Sixth Legislature, chapter 12 of the Special Laws of said Legislature, approved May 12, 1899 (Laws 1899, p. 147), as amended by chapter 15, Sp. Laws 28th Leg., which became a law April 21, 1903 (Laws 1903, p. 48), which acts are referred to and made a part hereof, and shall be looked to and considered by the lower and appellate courts without the necessity of the same being set out in the statement of facts or transcript on appeal.

"(2) That on the 7th day of October, 1903, the city council of Beaumont regularly passed an ordinance levying and assessing a tax upon all property fronting and abutting on Calder avenue, within said city, between Pearl and Gulf streets, one-third of the costs

of paving, and all the cost of curbing; that is, assessing one-third of such cost against the owners on each side of the street, making two-thirds to be paid by the two abutting owners, and the balance of the cost of paving to be paid by the city, except the tracks of the Beaumont Traction Company, it being required to pave between its tracks and for 12 inches on either side of the rails. That the lot of land on which said tax was assessed is fully described in the ordinance, together with the number of feet in such lot, name of the owner, and proportionate share of the cost of paving and curbing to be paid for by such owner, as shown by the roll prepared by the city engineer of the city of Beaumont.

"(3) That on the 2d day of December, 1903, the city council of Beaumont regularly passed another ordinance, levying and assessing a tax upon all property fronting and abutting on Magnolia avenue between Calder avenue and Long street within said city, levying and assessing against the abutting owners two-thirds of the costs of paving, and all the costs of curbing; that is, one-third of such costs against the abutting owners on each side, the balance of one-third to be paid by the city, except the tracks of the Beaumont Traction Company, which company was required to pay the cost of paving between its rails and for 12 inches on either side. That the lot of land on which said tax was assessed is fully described in said ordinance, together with the name of the owner, front feet, cost of paving, linear feet of curbing, cost of curbing, and total cost of paving and curbing.

"(4) That prior to the passage of the aforesaid ordinance and levy of said taxes the city council of the city of Beaumont in regular session adopted a resolution, the material portions of which are as follows: 'Whereas the city council of the city of Beaumont deem it necessary to pave the following named streets, to wit, Calder avenue from Pearl to Gulf streets, * * * Magnolia avenue from Calder to Long street, * * * therefore be it resolved by the city council of the city of Beaumont, first, that the following streets within said city be paved, to wit, Magnolia avenue from Calder to Long avenue, * * * Calder avenue from Pearl to Gulf street. * * * That the material to be used in paving said streets shall be vitrified brick or asphalt, the determination of the material to be made when the bids for the work on the above material shall be opened. * * * That the owners of the lots * * * fronting or abutting upon the streets so designated shall pay two-thirds of the costs of such improvements according to the number of fronting or abutting feet. Said property owners to pay for all curbing as provided by the charter of the city of Beaumont.' Then follows a section providing for the street railways to pave their tracks. 'That the plans and specifications for the paving of the hereinbefore mentioned streets

prepared by the city engineer and approved by the board of public works are hereby approved by the city council.' The last section provides for the mayor to advertise for bids. That the city engineer had duly prepared the plans and specifications for said improvements, and delivered the same to the board of public works, and the same were approved by that board, who so reported to the council, and the said report and said plans and specifications were duly adopted.

"(5) That thereupon the mayor of the city of Beaumont advertised for bids, and bids were received, as provided by the charter, and were opened, and the contract was awarded to the lowest and best bidder, and Thurber or vitrified brick was selected and designated by the council for the pavement, and brick for curbing, and the contractor duly entered upon the performance of the contract, and completed and finished his contract for said paving and curbing on or about the ——— day of ———, and the job was duly accepted and paid for by the city council.

"(6) It is further agreed that, the bids for the work having been received and opened, and the cost of the improvements ascertained, the city engineer prepared a roll describing the lots, stating the name of the owner, the number of front feet in such lots fronting on the streets to be improved, the proportionate amount of the cost of the improvement to be borne by such owner of abutting property, the streets occupied by the street railway, and the amount or proportion of the cost to be borne by such railway.

"(7) It is agreed that the defendant was, at the time of the levy of said taxes, a citizen of the city of Beaumont, and that he owned at said time, and for a long time prior thereto, and ever since, lots 15 and 16 of block 4 of the Calder addition to the city of Beaumont, fronting 100 feet on Calder avenue, and 140 feet on Magnolia avenue, and within the district designated by the city council for the improvement of said streets. That said lots were included in the roll of the city engineer and in the said ordinances, and were assessed to the defendant, and the cost of the Calder avenue paving so assessed against said defendant, in accordance with the manner prescribed by the city charter, was \$401.88, and the curbing \$74.10, aggregating \$475.98, and the cost of the paving on Magnolia avenue, so assessed and ascertained, was the sum of \$450, and for the curbing \$98.48.

"(8) That after the completion of the said roll, and including the defendant's property therein, the same was delivered to the city secretary, and thereupon the city secretary issued two notices to the defendant relating to the assessment on Calder and Magnolia avenues, of which the following is a copy: 'Mr. Tom J. Russell: You will take notice that the city council of the city of Beaumont, by ordinance duly passed on the 6th

day of May, 1903, ordered the paving of Calder street in the city of Beaumont, said paving to be of Thurber brick on shell concrete with brick curbing. That the proportionate cost of said improvement on the 100 feet, lots Nos. 15 and 16, block No. 4, being $185\frac{2}{10}$ square yards of paving, is \$401.88, and for $114\frac{1}{2}$ lineal feet of curbing is \$73.42, making a total of cost to be paid by you for the improvement on said street on which your property fronts or abuts \$475.30. And you are hereby cited to be and appear before the honorable city council of the city of Beaumont, at the regular meeting thereof to be held on the 21st day of July, 1903, to show cause, if any, why the amount of the cost to be apportioned to you for said improvements shall not be levied and assessed as a tax upon the herein described property. W. A. Ives, City Secretary of the City of Beaumont, by J. G. Sutton, Deputy. Beaumont, Tex., July 8, 1903.' 'Come to hand this 14th day of July, 1903, and executed the 15th day of July, 1903, by delivering to Tom J. Russell a true copy of this writ. J. H. Stewart, City Marshal of the City of Beaumont, by Charles E. Ligon, Deputy.' That the notice relating to the assessment of Magnolia avenue was duly given, and is the same in terms, except the figures, which figures are the same as those hereinbefore stated with reference to the assessment for Magnolia avenue paving and curbing.

"(9) It is further agreed that afterwards the defendant appeared before the city council, and the following findings were made by said council, to wit: 'At a regular adjourned meeting of the city council of the city of Beaumont, held August 12, 1903, the mayor and a quorum of aldermen being present, Mr. Tom J. Russell, the owner of lots 15 and 16 in block 4 of the Calder addition to the city of Beaumont, appeared in person before the city council to show cause why the amount of costs apportioned to said owner should not be levied and assessed as a tax upon the above-described property. The petition of the said Tom J. Russell setting forth the objections thereto was read, and, the evidence having been heard and fully understood by the city council, it is considered by the council that the objections, and none of them, are sustained, and the city council of the city of Beaumont further finds that the costs apportioned will not materially and substantially exceed the special benefits accruing to said property by said paving, but that the special benefits accruing to said property by the said paving will exceed the cost apportioned against said owner, and to be levied and assessed as a tax on the above-described property, and the city council so finds.'

"(10) It is further admitted and agreed that sections 2 and 3 of the ordinances assessing the said tax for the paving and curbing of Magnolia and Calder avenues provide as follows:

"Sec. 2. That the said tax so levied and assessed shall become due and payable upon the completion of the paving upon which the portions of said streets on which said lot * * * abuts.

"Sec. 3. That the amount of the tax hereby levied and assessed, together with the cost of collecting the same and ten per cent. interest per annum from the date same is due is hereby declared a lien against the said lots * * * and shall be a personal charge against the owner * * * thereof."

"(11) It is further admitted that at the time of, and long prior to, the passage of the aforesaid ordinances, and the proceedings had thereunder assessing the tax, and ever since, up to the present time, the defendant resided on said property as his homestead, and the same was, and still is, the homestead of the defendant from July 4, 1890, up to date.

"(12) For the purpose of simplifying the questions involved it is further agreed that all of the proceedings taken by this city council, by virtue of its charter, was regular and in accordance with said charter, that the work was let according to the charter and ordinances, and that all things were regular."

In the case of *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770, our Supreme Court decided that an assessment for street improvements, not made in accordance with the Constitution and laws regulating the levy and assessment of ad valorem taxes, was not a tax as that term is used in section 50, art. 16, of the Constitution of this state, exempting the homestead of a family from forced sale for the payment of any debt, except for the purchase money thereof, taxes due thereon, or work and material used in constructing improvements thereon, and therefore no lien could be enforced against the homestead to secure the payment of such assessment. Under this decision the trial court properly held that appellant had no lien upon the property of appellee to secure the payment of the assessment sought to be recovered in this suit. The case of *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S. W. 874, 10 Tex. Ct. Rep. 340, relied on by appellant, does not sustain the contention that a lien can be enforced against a homestead to secure the payment of an assessment of this kind. In the *Kettle* case the tax levied against the homestead for street improvement purposes was an ad valorem tax and was levied and assessed in accordance with the provisions of the Constitution and laws regulating the levy and assessment of such tax, and was therefore a tax for which the homestead might be sold under the provisions of the Constitution before cited. This disposes of the only assignment of error presented in appellant's brief.

Under cross-assignment appellee assails the judgment against him for the amount of said assessments, on the grounds, first, that it does not appear that the benefit accruing to his

property, by reason of the improvement of the street, was equal to the amount of the assessments made against him for such improvement; and, second, that plaintiff's cause of action for the recovery of said assessments was barred by the statute of limitation of two years. Neither of these objections to the judgment can be sustained. After due notice the appellee appeared before the city council, and there was a hearing by the council upon the issue of whether the proportion of the cost of the improvements assessed against him, as shown by the report of the city engineer, exceeded the special benefit accruing to his property by reason of such improvement of the streets. Upon this hearing the council found that the value of the special benefit to appellee's property exceeded the assessment made against him. Under section 36 of the charter of the city of Beaumont, before referred to, this finding is made conclusive against appellee. If appellee's contention that the Legislature had no authority to provide in said charter that the finding of the city council upon this issue should be conclusive is sound, such finding is at least prima facie evidence of the fact so found, and, appellee not having offered any evidence showing or tending to show that the assessment exceeds the value of the special benefit to his property, his objection to the judgment on that ground cannot be sustained. The assessment which was held invalid in the case of *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, was made under the provisions of a city charter which did not require the city council to determine, before the assessment was made, that it did not exceed the special benefit to the property, and there was no such finding by the council in that case. It was therefore held by the Supreme Court that the assessment was prima facie illegal, and the property owner in a suit to enjoin its collection was not required to show that it exceeded the value of the special benefit to his property caused by the improvement. We think the case cited is easily distinguished from the one we are now considering.

The record does not sustain appellee's contention that the suit was not filed within two years after appellant's cause of action accrued. The original petition and citation had been lost, and the evidence introduced on the subject shows that the suit was filed about January 22, 1906. Under the ordinance levying the assessments they became due and payable when the improvements were completed in front of the property upon which such assessment was made. The date upon which the improvements were completed in front of appellee's property is not fixed more definitely than that it was some time in the month of December, 1905. Section 36j of the charter of the city of Beaumont provides that, if such assessment is not paid within 30 days after it becomes due, it shall be the duty of the city attorney to institute suit therefor. Un-

der this provision of the charter no suit could have been maintained against appellee if brought in less than 30 days after the assessments became due, and limitation did not begin to run against the city until its right to sue had accrued. The facts as before stated fail to show that appellant's cause of action accrued more than two years before the filing of this suit, and therefore the plea of limitation is not sustained.

None of the assignments show any error in the judgment of the trial court, and it is therefore affirmed.

Affirmed.

McCLARY et al. v. TREZEVANT & COCHRAN.

(Court of Civil Appeals of Texas. Oct. 10, 1908.)

1. PRINCIPAL AND SURETY (§ 59*)—EXTENT OF LIABILITY.

The liability of sureties cannot be extended by construction.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.*]

2. INSURANCE (§ 83*)—AGENTS' BONDS—LIABILITY OF SURETY.

A surety in a bond of an insurance agent, conditioned for his faithfully paying over sums due for moneys received for premiums and performing other duties of agent, is not liable for the failure of the agent to pay a premium note procured from an insured, and indorsed and delivered to the general agent of insurer, the agent having taken the note and indorsed it pursuant to instructions from the general agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 109; Dec. Dig. § 83.*]

3. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CAUSE ON APPEAL.

Where the facts were fully developed on the trial, the court on appeal will render such judgment as should have been rendered in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4579; Dec. Dig. § 1175.*]

Appeal from Dallas County Court; W. M. Holland, Judge.

Action by Trezevant & Cochran against R. C. McClary and others. From a judgment for plaintiffs, defendants appeal. Reversed and rendered.

W. S. Terrell, for appellants. Crane & Gilbert, for appellees.

TALBOT, J. At the last term of this court we affirmed the judgment of the lower court in this case without a written opinion, and appellants have filed a motion for a rehearing. Further consideration of the case, upon this motion, has led to the conclusion that we were in error in affirming said judgment, and that it should be reversed. Appellees were the general agents for the Southwestern Department of the Fire Association of Philadelphia, with authority to appoint

local agents and empower them to receive proposals for insurance by said fire association against loss or damage by fire, to fix rates of premium, receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance, subject to such instructions, rules, and regulations as might be given by said Trezevant & Cochran. On November 28, 1908, J. C. Welch was appointed such agent by Trezevant & Cochran, and on that day entered into a bond payable to them, conditioned "that if the above-bounden agent shall faithfully and punctually pay over, at Dallas, Tex., to said Trezevant & Cochran, general agents, all sums due or that may become due to them, as general agents, aforesaid, from time to time, for moneys collected or received by said agent for premiums on policies of insurance, or for any other account whatever, and shall well and truly perform all the other duties of such agent of said company and comply with all instructions contained in his commissions of authority and that may be from time to time communicated to said agent by said Trezevant & Cochran, general agents, or their proper representative—then this obligation shall be null and void," etc. On or about the 29th day of May, 1902, appellees sent a general letter of instructions to all of their local agents in Texas, including J. C. Welch, in which, among other things, they said: "Concerning the collection of premiums on gin policies, we make the same request of our local agents this year that we made last year; that is, to have a specific understanding with each customer as regards the time and number of payment of the premium. Of course we prefer to have the premium paid in cash, but we are prepared to take notes therefor, bearing interest at 10 per cent. per annum from date of policy, and running 30 or 60 days, as may be desired, but in no event to mature later than October 1, 1902. These notes must be taken on our regular gin note forms, which contain a condition that if same is not paid at maturity, the policy becomes null and void; and in each case the note must be indorsed by the local agent taking same." About September 8, 1903, J. C. Welch, as local agent, issued a policy of insurance in the Fire Association of Philadelphia, covering certain gin property of J. S. Mills at Dodd City, in Fannin county, Tex., and in lieu of cash payment of premium accepted therefor said Mills' promissory note, in accordance with the instructions contained in Trezevant & Cochran's said letter of date May 29, 1902. This note was sent by Welch to appellees at Dallas, Tex., and payment thereof, at maturity, was refused by both Mills and Welch. The policy of insurance issued to Mills was canceled on February 5, 1904, and this suit instituted in the justice court to recover of J. C. Welch and the sureties on his said bond the earned portion of the premium of said policy, to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gether with interest and attorney's fees, as provided for in said note. Before trial in the justice court the suit was dismissed as to Welch, upon the ground that he was notoriously insolvent, and judgment rendered in said court for the plaintiffs against said sureties for the amount sued for, and upon an appeal to the county court judgment was again rendered in favor of plaintiffs, and the appellants have appealed to this court.

The principal question arising on the appeal is, was the failure of J. C. Welch to pay the note signed by him with Mills, for the premium to become due for insurance issued to Mills, a breach of his bond, for which appellants, the sureties on said bond, were liable? It will be observed that the condition of the bond is that the agent, Welch, "shall faithfully and punctually pay over to Trezevant & Cochran all sums due or that may become due to them for moneys collected or received by him for premiums on policies of insurance or for any other account whatever, and shall well and truly perform all the other duties of agent of the Fire Association of Philadelphia," etc. That the liability of sureties is strictissimi juris, and cannot be extended by construction, is settled law. In the case of *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881, it is well said that, "the bond having been executed presumptively with reference to, and to secure the performance of, the contract of agency, the liability of the sureties cannot be extended so as to embrace transactions beyond the scope of the contract with which it was executed; nor can they be held to answer for the failure of the agent, except such failure relates to some duty imposed by the contract creating the relation of principal and agent." The facts alleged or proved do not bring the present case within the rule here laid down. The obligation of the bondsmen, McClary & Dickey, is that their principal, Welch, shall pay to Trezevant & Cochran all sums due, or that might become due, to them for moneys collected or received by the said Welch as their agent, and that he shall perform all the

other duties imposed upon him as such agent. The suit is not to recover money collected or received by the agent for premiums on policies of insurance or on other account, but is an action to recover an amount alleged to be due on a note taken for such premiums, and signed by Welch, in accordance with instructions of appellees, and which had not been collected. Such liability on the part of Welch was not provided for or contemplated by the terms of the bond, to which appellants' liability must be restricted. The note signed by Welch as surety for Mills, to whom the insurance policy was issued, and for the nonpayment of which appellants are sought to be held liable, was a new and different obligation from any assumed in, or contemplated by, the contract, to secure the performance of which the bond was executed, and appellants as sureties on said bond are not liable for its payment. That Welch, by signing the note, rendered himself personally liable for its payment, is not questioned; but his failure or refusal to pay it was not a breach of that stipulation in the bond, to the effect that he should "well and truly perform all the other duties of such agent of said company and comply with all instructions" given him, for which the sureties on his bond were liable. He was instructed to take Mills' note for the premium to become due on the policy issued to Mills, and to indorse said note himself. This he did, in full compliance with his instructions, thereby assuming a personal obligation, the discharge of which was not one of the duties comprehended or contemplated by the language of the bond last above quoted.

This disposes of the case, and no other question need be discussed. The facts were fully developed on the trial in the county court, and it becomes our duty to render here such judgment as should have been rendered in that court.

It is therefore ordered that the judgment of the court below be reversed, and that judgment be here rendered for appellants.

Reversed and rendered.

SOUTHERN ORCHARD PLANTING CO. v. TURNER.

(Supreme Court of Arkansas. Sept. 28, 1908.)

LANDLORD AND TENANT — AGRICULTURAL LEASE—LANDLORD'S RIGHTS — ATTACHMENT.

An agricultural tenant vacated the premises in debt to the landlord, but left a crop. The landlord sued for the debt and attached the tenant's goods. *Held* that, while it was proper to determine the amount of the debt by the outcome of the crop as handled by the landlord, it was improper to make the validity of the attachment dependent thereon, since that depended upon the fair market value of the crop when the tenant vacated.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by the Southern Orchard Planting Company against J. J. Turner. From a judgment of the circuit court for defendant, on appeal from justice court, plaintiff appeals. Reversed and remanded.

Turner rented 40 acres of land in Sevier county from the Southern Orchard Planting Company for the year 1905. The company furnished him supplies and a team. In 1906 he owed a balance to the company, and rented another 40-acre tract from it, and was to cultivate an orchard thereon, for which he was to receive \$50, and to raise a crop of cotton and corn. The company continued to supply him. He failed to cultivate the orchard as required by the company, and refused to gather his crop or to complete his contract with the company, and on the 7th day of October he was notified to vacate. On the 10th of October the orchard company made an affidavit to attach his goods; the affidavit stating that he was about to remove his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, in conformity to section 344 of Kirby's Digest. There was a trial in the justice court, which resulted in a judgment for the plaintiff for the full amount of the claim, and attachment was sustained. The defendant appealed to the circuit court, and in October, 1907, the case was tried in the Polk circuit court, where it was taken on a change of venue. The orchard company took charge of the crop, gathered and marketed it, and claimed a balance due, after crediting him with the proceeds of the crop, of \$166.01. The defendant claimed that he had been charged with unreasonable amounts and that he had not received proper credits by the orchard company. There was no dispute as to the indebtedness at the time of the attachment. At the time of the attachment three bales of cotton had been gathered and the proceeds credited to Turner. This amounted to \$156.20, leaving an undisputed balance at that time of \$175.30. Subsequent to the attachment he received credit for 4½ bales of cotton, \$37.38 for cotton seed, and for 100 bushels of corn at 50 cents per bushel. These credits were received in October, November,

and December, 1906; the last being the 17th of December.

The court gave these instructions: "If you believe from a preponderance of the evidence that the defendant, J. J. Turner, was at the time this suit was instituted indebted to the plaintiff, the Southern Orchard Planting Company, in any amount, then in that event your verdict should be for the plaintiff for whatever amount you should find due from the evidence." "The defendant denies the account sued upon, and the burden is upon the plaintiff to establish each item of the account, and it is not sufficient of itself to establish the fact that the statements introduced in evidence are correct copies of the book entries, but the correctness of the book entries themselves must be established by a fair preponderance of the evidence." "You will charge the defendant with whatever amount of the account that is established, together with a reasonable expense incident to caring for, harvesting, and marketing the crop, and you will credit him with a reasonable value of the crop received by plaintiffs, together with the amount of his personal labor, established by a preponderance of the evidence upon the part of the defendant, and you will then strike a balance and give judgment therefor in favor of which ever party the balance is due to." "If you find for the defendant upon the account, you will give him judgment for damages in whatever sum you find from the evidence was a reasonable usable value of the property attached from the time attached to the present time, not exceeding \$150." The jury returned a verdict of \$50 for the defendant, and the orchard company has appealed.

J. S. Lake and J. D. Head, for appellant. Otis T. Wingo, for appellee.

HILL, C. J. (after stating the facts as above). It is earnestly insisted that the evidence does not sustain the verdict; and it must be admitted that it is doubtful whether the record shows sufficient evidence to sustain the verdict that there was no indebtedness. It was within the province of the jury to disallow the item of \$50 for gathering the crop, and possibly some other items that were attacked as unreasonable, which are not definitely explained in the evidence; and the jury were authorized, under the defendant's evidence, to have allowed him some credits which he was not given. But whether, allowing the full force to all of the defendant's evidence, there was enough evidence to sustain the verdict, may well be questioned. As the instructions were erroneous, however, it is not necessary for the court to pass upon the sufficiency of the evidence, as the case may be more fully developed at another trial.

At the time of the attachment Turner was owing the orchard company \$175.30, after allowing him full credit for 3½ bales of cotton that it had received. If the fair market value of the property that he left was suffi-

cient to have paid the plaintiff's claim at that time, then the plaintiff had no ground of attachment. It might have been that the market value of his crop at that time was not equal to the plaintiff's debt, and that the plaintiff, by good husbandry, worked out the crop so that it did pay its claim, in which event, the attachment should be sustained, and the cost incident thereto be adjudged against the defendant up to the time the debt was liquidated by plaintiff's realization of the crop. On the other hand, the crop may have been of a market value more than sufficient to have paid the plaintiff's claim, and yet the plaintiff, by poor husbandry, had not received enough therefrom to pay its debt, in which event the attachment should not be sustained.

There was another issue as to whether the debt had been paid. If the debt had been paid by the plaintiff so gathering and marketing the crop that it liquidated the indebtedness, then there should be no recovery in favor of the plaintiff for the debt; and if it overpaid it there should be a recovery in favor of the defendant for the excess; and if, under proper care, the crop had not paid the debt, the plaintiff should have judgment for the balance. This is a separate issue from the one on the attachment, and should not be confounded with it, and the fate of the attachment made to hang upon it.

In the third instruction the court correctly instructed the jury as to striking a balance between the plaintiff and defendant and giving judgment accordingly; but in the fourth instruction the jury were told, after such balance was struck and they should find for the defendant on the account, then they should give him judgment for damages in whatever sum the evidence showed was the reasonable usable value of the property attached from the date of the attachment. This was confounding the two issues, and made the sustaining of the attachment dependent upon the outcome of the crop as handled by the plaintiff. It was proper for the question of debt to be determined by that, but not proper for the issue on the attachment to be so determined, for the reasons heretofore explained.

Judgment reversed, and cause remanded.

UNITED STATES FIDELITY & GUARANTY CO. et al. v. BANK OF BATESVILLE.
(Supreme Court of Arkansas. July 6, 1908.)

1. INSURANCE—INDEMNITY INSURANCE—CONTRACTS—CONSTRUCTION.

A bond indemnifying an employer against the fraud or dishonesty of an employé amounting to larceny or embezzlement does not cover a loss due to carelessness of the employé.

2. SAME—EVIDENCE—SUFFICIENCY.

In an action on a bond indemnifying an employer against fraud or dishonesty of an employé, evidence held not to show a shortage in the accounts of the employé, due to his fraud or dishonesty amounting to larceny or embezzlement.

3. EVIDENCE—PRESUMPTIONS—INNOCENCE.

The law presumes every man honest until the contrary is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 81.]

4. INSURANCE—INDEMNITY INSURANCE—CONTRACTS—BREACH OF WARRANTIES.

An application for insurance, indemnifying a bank against the dishonesty or fraud of an employé engaged as time check buyer, warranted that the employé would account once a month, that remittances to him would be checked up three times a month by the cashier of the bank, etc. The bond issued made the application a part thereof. Money delivered to the employé to buy checks was charged to his accounts, and the checks and expense accounts sent in were credited thereon. A balance was struck, and he was considered to have on hand the amount thereof; but no effort was made to ascertain whether the money was on hand, or in whose possession it was. Had the employé been required to account, no shortage would probably have resulted. Held, that the bank failed to comply with the warranties, and could not recover for a loss sustained.

5. SAME—CONSTRUCTION.

A contract indemnifying an employer against the dishonesty or default of employés is subject to the rules governing the construction of other insurance contracts.

Appeal from Independence Chancery Court; Geo. T. Humphries, Chancellor.

Suit by the Bank of Batesville against the United States Fidelity & Guaranty Company and another. From a decree for plaintiff, defendants appeal. Reversed and dismissed.

The application was partly destroyed in the Baltimore fire, but sufficient of it is extant to obtain from it the following information: Among the questions and answers made by the cashier of the bank, are:

"5. To whom and how frequently will he account for his handling of funds and securities? Once a month to bank.

"6 (a) What means will you use to ascertain whether his accounts are correct? Check up his remittances. (b) How frequently will they be examined? About three times a month. (c) By whom will they be examined? Cashier of bank.

"7. When were his accounts last examined? This day, January 30, 1903.

"8. Were they reported correct? Yes.

"9. Is there now or has there been any shortage due you by applicant? No.

"10. Is he now in debt to you? No."

The above questions and answers were made conditions precedent and the basis of the bond applied for, or for any renewal thereof.

That part of the application signed by the employé contained the following stipulation, to wit:

"I hereby agree, for myself, my heirs, and administrators, in consideration of the United States Fidelity & Guaranty Company becoming surety for me and issuing the bond of security hereby applied for, or any renewal thereof, or any further or other bond of security hereby issued by the said company on my behalf in my present position or any other position in this service, to protect and

indemnify the said company against any loss, damage, or expense that it may sustain or become liable for in consequence of such guarantee on my behalf by said company, and forthwith, after said company shall have paid the party or parties entitled to the same any money under or by reason of such guarantee, to repay the said company the amount so paid, and all other losses, costs, damages, and expenses, if any, that it shall have insured or become liable for in consequence of such guarantee. I hereby agree that any proper evidence of payment by said company of any such loss, damages, or expense shall be conclusive evidence against me and my estate of the fact and extent of my liability to said company under this agreement."

The application was accepted, and the following bond was issued:

"Whereas, the employer has delivered * * * a statement in writing setting forth the nature and character of the office or position to which the employé has been elected or appointed, the nature and character of his duties and responsibilities and the safeguards and check to be used upon the employé in the discharge of the duties of said office or position and other matters, which statement is made a part hereof.

"Agreement to Reimburse. In consideration of the sum of twenty dollars paid as a premium, for the period from January 31, 1903, to January 30, 1904, at 12 o'clock noon, and upon the faith of said statement as aforesaid by the employer, which the employer hereby warrants to be true, it is hereby agreed and declared that, subject to the provisions and conditions precedent to the right upon the part of the employer to recover under this bond, the company shall within three months next after notice, accompanied by satisfactory proof of a loss as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employé, or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employé in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this bond, or any renewal thereof, and discovered during said continuance, or within six months thereafter, or within six months from the death or dismissal, or retirement of the employé from the service of the said employer.

"Within What Time Claim to be Made. That any claim made in respect to this bond shall be within six months after the expiration or cancellation of this bond as aforesaid.

"Character of Employment must Remain Unchanged. Nor shall it be liable, if at any time during the continuance of this bond, or

any renewal thereof, the duties and responsibilities of the employé shall be increased or enlarged, or the employé shall, without notice to the company and its written consent thereto obtained, be required or permitted to assume or discharge, either temporarily or otherwise, the duties of any other office or position than that set forth and described in said statement; it being the true intent and meaning of this bond that the company shall be responsible only as aforesaid for moneys, securities, or property diverted from the employer through fraud or dishonesty, amounting to larceny or embezzlement as aforesaid, on the part of the employé within the period specified in this bond, while in the discharge of the duties of the office or position to which he has been elected or appointed.

"Written Statement a Warranty. If the employer's written statement hereinbefore referred to shall be found in any respect untrue, this bond shall be void.

"Only One Bond in Force, and Not Cumulative. The company, upon the execution of the bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer in behalf of said employé, and upon the issuance of any bond subsequent hereto upon said employé, in favor of said employer, all responsibility hereunder shall cease and determine; it being mutually understood that it is the intention of this provision that it is but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company.

"Stipulation as to Signature of Employé. This bond is issued upon the express understanding that the employé has not, within the knowledge of the employer, at any former period been a defaulter, and will be invalid and of no effect unless signed by the employé.

"No Waiver, Unless in Writing, etc. No one of the above conditions or the provisions contained in this bond shall be deemed to have been waived by or on behalf of said company, unless the waiver be clearly expressed in writing over the signature of its president and secretary, and its seal thereto affixed.

"Agreement of Employé for Indemnity. And the said employé doth hereby, for himself, his heirs, executors, and administrators, covenant and agree to and with the said company that he will save, defend, and keep harmless the said company from and against all loss and damage of whatever nature and kind, and from all legal and other costs and expenses, direct or incidental, which the said company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him thereof), or for or by reason, or in consequence of the said company having entered into the present bond."

This suit was originally brought in the Independence circuit court by appellee against appellants to recover on a fidelity bond written by the United States Fidelity & Guaranty Company, hereinafter called "Guaranty Company," agreeing to indemnify the Bank of Batesville against loss by reason of any act of fraud or dishonesty amounting to larceny or embezzlement on the part of its employé, Matt R. Smith. The Fidelity & Deposit Company of Maryland was security upon the bond of said guaranty company given to the state as a condition of its admission to do business in this state, and was made a party defendant to the action. The cause was transferred to equity on the motion of the defendants.

The guaranty bond on behalf of M. R. Smith to the Bank of Batesville was dated January 31, 1903, and expired January 30, 1904. On January 30, 1904, in consideration of \$20 paid to defendant Guaranty Company the bond was renewed for a period beginning January 30, 1904, and ending January 30, 1905. The complaint alleges that during the continuance of the employment and services of the said M. R. Smith as time check buyer, from the 31st day of January, 1903, to April 21, 1904, the plaintiff advanced to Smith various sums of money with which to buy time checks, amounting in all to \$120,529.22; that Smith accounted for \$116,185.22, and is short in his account by \$4,344. An itemized statement of the account is exhibited with the complaint. The defendant's answer was a general denial, and contained an averment that it was not liable on the bond, except for the pecuniary loss caused by the larceny or embezzlement of the employé, and that it was discharged from liability on the bond by reason of statements of the bank, on the faith of which the bond was issued, containing misrepresentations and promises unfulfilled that render the bond void.

The facts are as follows: During the years 1902, 1903, and 1904 what is generally known as the "White River Branch" of the Iron Mountain Railroad was in course of construction. J. H. Reynolds & Co. had the general contract to construct the whole line. Under them were between 12 and 17 subcontractors. It was the practice of these subcontractors to give their laborers between the 1st and 10th of the month a time check evidencing the amount of labor performed during the preceding month and the sum due therefore to the laborer. These time checks were not paid until the 25th of the month. Nearly all the laborers wanted their wages in cash before the 25th of the month, and it soon became the custom along the line of the railroad for various parties to buy these time checks at various rates of discount and take an assignment of them from the laborers. In order to obtain this discount and to get most of the time checks, the plaintiff bank arranged with the contractors and the several

subcontractors to buy them, and employed M. R. Smith as its agent for that purpose. His duty was to go among the laborers at the camps of the subcontractors and buy all the time checks that were offered for sale at a discount. The bank furnished him money for that purpose. Afterwards, in order that he might get all the time checks that were for sale, Smith, with the knowledge of the bank, arranged with the subcontractors to leave sufficient money with them to buy the time checks that were offered for sale at a discount. He would visit the camps at intervals, take up the time checks for the money he had left, and would forward the time checks, with a statement of the same and of his expenditures, to the bank. This method was pursued until about the 1st day of August, 1903, when, with the knowledge of the bank, he arranged to deposit funds to the credit of the various subcontractors with whom he was dealing in the banks most accessible to their camps, and in paying for time checks the subcontractors would draw upon their respective accounts. Smith would settle with them at stated periods, and the time checks would be forwarded to the bank, or a statement of amounts expended for time checks would be sent to Reynolds, the principal contractor, who would give Smith a receipt for the same, and Smith would in turn forward the receipt to the plaintiff bank. On pay day Reynolds would remit to the bank in settlement. This custom of sending in the receipts, instead of the time checks, commenced about the 1st of May, 1903. Smith was at first given a salary of \$50 per month. This was afterwards increased to \$60, and then to \$65, per month. He was allowed a liberal expense account, which was usually sent in at the end of the month, and was not required to be itemized. On March 24, 1904, Mr. Thomas, assistant cashier of the bank, went to Yellville, Ark., to see Smith for the purpose of checking his accounts. Smith was sick with smallpox, and Thomas did not get to see him. Afterwards Thomas arranged a meeting with the subcontractors for the purpose of checking up Smith's accounts. About the 5th of April, 1904, the bank notified Smith that a checking up of his accounts disclosed that he was short. Afterwards, when Smith became well, he tried to assist the bank in its checking up and to find out where the discrepancy in his accounts lay. The above is a general statement of the plan adopted and used by the parties in the business of buying and discounting time checks. A large mass of testimony was taken showing the details of the work and the various accounts and transactions that were entered into on account of the business, which we do not deem necessary to abstract here. Other facts will be stated under their appropriate headings in the opinion.

The chancellor found that amounts aggregating \$817.23 were drawn by Smith on his

account as agent at the Bank of Yellville; that such appropriation was without the authority of the plaintiff bank, and that the same amounted in law to larceny and embezzlement of such funds; that various other sums were shown to have been spent by said Smith during the period of his employment and during the existence of the bond and the renewal thereof, which are not shown by direct evidence; that the aggregate amount of all the sums expended by Smith was \$3,993.14. A decree was rendered accordingly, and judgment for said amount given plaintiff against the defendants. The defendants have appealed.

Rose, Hemingway, Cantrell & Loughborough, for appellants. S. M. Casey and Jno. W. & Jos. M. Stayton, for appellee.

HART, J. (after stating the facts as above). The bond sued on is one of indemnity. Among other recitals, not material here, the agreement is that the surety shall "make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employé, or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employé in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement." A subsequent provision of the bond requires the employer, upon the employé becoming guilty of an offense covered by the bond, to lay information before the proper officer, and to furnish every aid and assistance, not pecuniary, capable of being rendered, in bringing the employé promptly to justice. In construing the provisions of a similar bond in the case of *Monongahela Coal Co. v. Fidelity & Deposit Co. of Maryland*, 94 Fed. 732, 38 C. C. A. 444, the court said: "These provisions all relate to the obligations of the company. From them it appears that the liability of the company is restricted to claims based upon the larceny, embezzlement, or at least the dishonesty, of the employé."

The obligation of the company does not cover every liability or claim which might accrue in favor of the employer and against the employé. A loss by carelessness or inattention to business might be the foundation of a just claim against the employé by the employer, which would impose no liability on the company by the terms of its obligations in the bond. If, with the consent of the employer, express or implied from the course of dealings between it and the employé, the latter used or retained moneys, charging itself with them, it would be no obligation covered by the insurance on indemnity of the company. It follows, therefore, that the fact that the account between the employer and the employé shows an indebtedness from the latter to the former is not sufficient of it-

self to support a claim on the bond against the company. To recover in an action on the bond, defense being made, there must be an allegation of the breach of it, sustained by the evidence. This view is sustained by the following authorities: *Williams v. U. S. Fidelity & Guaranty Co.*, 105 Md. 490, 66 Atl. 495; *Guarantee Co. v. Mech. Savings Bank*, 100 Fed. 559, 40 C. C. A. 542; *Milwaukee Theater Co. v. Fidelity, etc., Co.*, 92 Wis. 412, 66 N. W. 361; *Reed v. Fidelity, etc., Co.*, 189 Pa. 596, 42 Atl. 294. The difference between liability on a fidelity bond insuring an employer against loss through the fraud or dishonesty of an employé and one insuring against the fraud and dishonesty of such employé amounting to larceny or embezzlement is discussed and clearly pointed out in the case of *U. S. Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345.

The evidence shows that commencing in May, 1903, and continuing up to the time his employment was terminated in 1904, Smith drew, on his account as agent in the Bank of Yellville, checks in favor of various parties. The aggregate amount of these checks was \$817.53. Smith attempts to account for these amounts. He accounts for about one-half of it as being used in the business of the company, and the remainder seems to have been used for his own personal expenses and for the purchase of some jewelry. The record does not disclose that the rest of the money found to be due the bank by Smith has been accounted for in any way. The bank contends that the fact of Smith drawing these checks on this account as agent at the Bank of Yellville is evidence of appropriation of its funds amounting to larceny and embezzlement under the terms of the bond. The plaintiff bank and the Bank of Yellville, during this period, exchanged statements according to the usual course of business. A comparison of the monthly statement received by the plaintiff bank from the Bank of Yellville with that received from Smith at the end of the month would have disclosed what items, if any, Smith had drawn and not used in the business with which he was intrusted. Smith made no attempt to conceal these amounts, or the fact that he drew on his agent's account in favor of the various persons. A comparison of these checks or drafts with the time checks would have disclosed whether or not they were given in discounting the amounts to become due the laborers; for the time checks given the laborer contained his name and the amount due him on pay day. A checking up with Smith of his expense account would have shown whether these checks were a part of it. He was allowed to draw on his account as agent for his expense fund, and was not required to itemize it.

After Smith was notified by the bank that his account was short, he assisted in every

way possible to discover the discrepancy in his accounts. A part of it, amounting in the aggregate to over \$1,000, was found. Smith is not shown to have any money or to have made any investments. True, there is some testimony to show that he was extravagant; but it must be remembered that he was allowed a liberal expense account, which was not confined to his actual expenses, and that the opportunity to spend money on a line of railroad not in operation and being constructed through a country containing only small towns could not have been great. There is some testimony that he gambled. This he denies. But in any event it is not shown that he gambled habitually, but only occasionally, and then with men who could not afford to play for high stakes. The law presumes every man honest until the contrary is shown. We do not think the evidence establishes that the discrepancy arose from the fraud or dishonesty of Smith, amounting to larceny or embezzlement. Under the course of business adopted by the parties, the accounts of the bank showing the amount of money drawn by Smith, and the time checks received by the bank, are not sufficient evidence that Smith appropriated the funds. The books of the plaintiff bank charged every thing to Smith. Nothing was charged to the principal contractor, to the subcontractors, or to the local banks, with whom Smith was permitted to deposit money for the use of the subcontractors in discounting time checks. If mistakes were made at any of the local banks or at any of the subcontractors' camps, the plaintiff bank had no way to take this into account; but the mistake would be carried into the account of Smith as a shortage. The plaintiff bank knew that Smith kept no set of books, and that if any time checks were lost, or were miscarried in the mails, there would be no way to account for them.

The appellant Guaranty Company contends that the statement of the bank on the faith of which the bond was issued contains misrepresentations and promises unfulfilled that render the bond void. The representations and warranties made in the application for the bond are as follows: "Q. To whom and how frequently will he account for his handling of the funds and securities? A. Once a month, to the bank. Q. (a) What means will you use to ascertain whether his accounts are correct? A. (a) Check up his remittances. Q. (b) How frequently will they be examined? A. (b) About three times per month? Q. (c) By whom will they be examined? A. (c) Cashier of bank. Q. When were his accounts last examined? A. This day, January 30, 1903. Q. Were they reported correct? A. Yes. Q. Is there now or has there been any shortage due by applicant? A. No. Q. Is he now in debt to you? A. No. Q. (b) If so, state the amount and nature of such indebtedness. Q. Have you ever sustained loss through the dishon-

esty of any one holding the position of applicant? A. No. A contract to indemnify an employer against the dishonesty or default of employes is subject to the same rules of construction as apply to other insurance contracts. 19 Cyc. 517; American Bonding Co. v. Morrow, 80 Ark. 49, 96 S. W. 613, 117 Am. St. Rep. 72.

The only attempt to comply with the terms of the bond in this regard was that, whenever money was delivered to Smith for the purpose of buying time checks, it was charged to his account, and when time checks or expense accounts were sent in by him his account was credited with these amounts. A balance was struck, and he was considered to have on hand the amount of that balance. No effort was made to ascertain if the money was actually on hand, nor to ascertain in whose possession it was. The plaintiff bank knew that Smith left money with the various subcontractors or deposited it with the local banks most accessible to them, to be used by them in discounting and buying up time checks. No inquiry was ever made, nor report given, of the amounts in the hands of the various subcontractors. Had this been done at stated intervals, the bank could have known in whose hands its money really was, and any mistake made by any of the numerous persons handling the money could have been promptly corrected, and no shortage would probably have resulted. The questions asked and the answers given in the application for the bond show that it was in the contemplation of the parties to adopt some system whereby the bank should know at frequent intervals the exact state of the accounts between it and the employe, who was the principal in the bond. Evidently this result could not be accomplished unless the checking up meant, not only the examination of the record of the amounts furnished Smith and the time checks remitted by him, but where the money was put out in the hands of numerous persons, as was done in this case. It also required that the part of the duty of plaintiff bank in checking up the accounts of Smith, and requiring of him an account of his handling of the funds once a month, would be to ascertain, not only the balance that should be on hand, but to find out in whose hands it actually was at the time.

Reversed and dismissed.

• WOOD, J., not participating.

CLARK v. JONESBORO, L. C. & E. R. CO.
(Supreme Court of Arkansas. Sept. 28, 1908.)

1. CARRIERS — PASSENGERS — "REGULAR STATION" — QUESTION OF FACT.

Whether a railway station was a "regular station" or a "flag station" within Kirby's Dig. § 6612, authorizing railway companies to make special charges to passengers boarding a train

or alighting at other than regular stations, is a question of fact.

2. SAME—"REGULAR STATION"—"FLAG STATION."

A railway station was a "flag station," and not a "regular station," within Kirby's Dig. § 6612, authorizing railroad companies to make special charges to passengers boarding or alighting at other than regular stations, where the company had no depot there and no joint agency with the railroad which it crossed and did not use the other company's depot, though trains stopped at the crossing opposite the depot and passengers were received and discharged there on signal, and freight, express, and mail matter was received there; no tickets, bills of lading nor baggage checks being issued, and such stations being designated "flag stations" by the railroad, as distinguished from regular stations at which tickets were sold, baggage checked, bills of lading issued, and station houses and agents were maintained [citing 7 Words and Phrases, pp. 6039, 6644].

Appeal from Circuit Court, Greene County; Frank Smith, Judge.

Action by A. S. Clark against the Jonesboro, Lake City & Eastern Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. G. Taylor, for appellant. E. F. Brown, for appellee.

HILL, C. J. In March, 1906, Clark rode over the Jonesboro, Lake City & Eastern Railroad from Chickasawba to Blytheville, and from Blytheville to Chickasawba, making 19 trips between these points. He was charged, and paid, 10 cents for his fare on each trip. The distance between these points is less than one mile. Clark has brought this suit for penalty under the act of April 4, 1887 (sections 6611-6615, and sections 6619-6620, Kirby's Dig.). Section 6612 provides that "any railroad company may charge the sum of twenty-five cents for the carriage of any passenger who may get on or off a train at other than a regular station." The only question in this case is whether Chickasawba was a regular station of the appellee railroad company, or whether it was a flag station. This is a question of fact. *C. R. I. & P. Ry. Co. v. Stanford*, 84 Ark. 406, 106 S. W. 205. There is no conflict in the essential facts as developed by the plaintiff and defendant in the trial, and at the conclusion of the trial the court directed a verdict for the defendant, and the plaintiff has appealed; and it is for this court to determine whether there was any evidence to send that issue to the jury.

The evidence developed these facts: Appellee railroad crossed the Paragould & Southeastern Railroad at Chickasawba, and the Paragould & Southeastern Railroad had a depot at this place. In March, 1906, appellee railroad company had no depot there, had no joint agency with the other railroad, and did not use its depot; but its trains stopped at the crossing, right opposite the depot of the Paragould & Southeastern Railroad. It received and discharged passengers at this point when called to do so. It re-

ceived freight, express and mail matter, although it did not always stop for the mail, merely checking up to receive and discharge it when it did not otherwise stop. It sold no tickets, issued no bills of lading for freight nor checks for baggage, and did not keep an agent at the place. When freight or express matter was delivered, it was merely taken on without receipt or contract. This railroad had numerous other stations like this one, where it received and discharged passengers and freight upon being flagged, receiving the passengers without tickets and freight without bills of lading. Such stations were designated "flag stations" by the railroad; and at such flag stations its trains made no stops unless signaled to do so. Most of these stations were at sawmills along the line. It also maintained regular stations at numerous places at which tickets were sold and baggage checked, bills of lading issued, and at which station houses were erected and agents maintained. At such stations the agent would stamp and sell tickets to the public, issue and receive bills of lading for freight and express, operate the telegraph and receive orders for the moving of trains, and everything necessary to conduct a public carrier's business at such place. The depots were kept warm in cold weather for the reception of passengers, and separate waiting rooms for the white and black races were equipped and maintained, in conformity to the laws of the state.

There is a statute in North Carolina that uses the term "regular station" in referring to depots maintained for receiving freight tendered at railway stations or wharfs or boat landings; and a case came before the Supreme Court of that state as to whether that statute had been violated where freight was refused at a place called "Spring Hill." At the place in question there was no depot, no freight house, no agent, no employees stationed there for the purpose of receiving freight, although at times considerable freight was received there. The mail trains stopped there regularly to deliver mail, and the place was designated by the company as a station. The court said: "A 'regular' depot or station of a railroad company, as contemplated by the statute, is a certain place situate alongside of or near to its railroad, fitted up by it with suitable buildings, erections, appliances, and conveniences for carrying on generally and continuously, in an orderly manner, the business of transporting freights, as is usually done by such companies. Such buildings and other things necessary for a regular depot or station may be greater or smaller in number and extent, or more or less elaborate, than others of like kind and for like purposes; but whether they be sufficient or good or indifferent, or are well or ill adapted to, and intended for, the purposes of prosecuting the business of transporting freights and passengers, receiving from shippers generally, and at all seasonable

times, such freights as the railroad company is required to transport over its road, such depots or stations imply ordinarily such suitable and sufficient buildings, erections, and appliances as may be necessary in receiving and delivering freights, and for the temporary protection of the same until they shall be transported or delivered to the persons entitled to have them, and that the company has a business office there, and suitable agents and employes to receive and deliver freights, to give receipts, bills of lading for the same, and to do the like and similar service." *Land v. Railroad*, 104 N. C. 48, 10 S. E. 80. See, also, to the same effect, *Kellogg v. Suffolk & Carolina Ry. Co.*, 100 N. C. 158, 5 S. E. 379, and *Ill. Cent. Ry. Co. v. Latimer*, 123 Ill. 163, 21 N. E. 7. The reasoning of the North Carolina court was applied to the handling of freight; but is equally as applicable to the handling of passengers. The term "regular station" or "station," as distinguished from a "flag station," has a well-understood meaning in railroad parlance, and is recognized by the courts. 7 Words & Phrases Judicially Defined, pp. 6039, 6644. When the Legislature used the term, it must be taken that it was intended as generally understood.

The court was right in directing the verdict.

Judgment affirmed.

BUFORD v. LEWIS et al.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. PARTNERSHIP — EXISTENCE — INTENTION OF PARTIES.

Whether an agreement creates a partnership, as between the parties thereto, depends on their intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 3.]

2. SAME — AS TO THIRD PERSONS — SHARING PROFITS.

Participation in the profits of a business is a cogent test for trying the question of existence of a partnership, where the rights of third persons are concerned, and is conclusive, unless there are circumstances altering the nature of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 15-28.]

3. SAME.

Persons who contribute to carry on a joint business for their common benefit, and who share the profits thereof in fixed proportions, are partners as to third persons, and are liable on contracts made by any of them with third persons within the scope of the business, though an express stipulation between them declares that one shall not be so liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 29-37.]

4. SAME—EVIDENCE.

S. and C. formed a partnership, L. furnishing the money for the half interest therein, which was conveyed by S. to C. The advancement was not a loan, and L.'s recompense was to be a fourth interest in the profits. S. subsequently withdrew from the partnership, pursuant to an agreement whereby L. was to have one-half of the profits. Pursuant to the

agreement, C. executed a note to a third person. C. was intrusted with the entire management and control of the business. *Held*, that L. was a partner as to the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 34-44.]

Appeal from Little River Chancery Court; Jas. D. Shaver, Chancellor.

Action by J. B. Buford against J. A. Lewis and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Buford owned a sawmill, with some timber and lumber on its yards, situated at Mills Ferry, Little River county, and in October, 1906, sold it to W. D. Strong for \$2,000, \$500 cash and the balance represented by 15 notes of \$100 each. He executed to Strong a bill of sale, and reserved a lien on the property to secure the payment of the purchase money. This lien was not recorded. W. A. Carroll was an experienced sawmill man, and was told by J. A. Lewis, who had some money for investment, that he would advance money for a sawmill enterprise if he found a suitable one. Strong offered to sell Carroll a half interest in this mill, and, after investigation, Carroll considered it an advantageous proposition. Carroll says that he had no knowledge of Buford's claim upon the mill, that it was represented to him that it was clear, and that he so represented to Lewis. On the other hand, Strong and his wife testified that Lewis was shown the bill of sale, and said that it was not sufficient to constitute a claim against the property. On the 25th of January, 1907, Strong, Carroll, and Lewis met in the office of an attorney at Mena (the home of Lewis), and there this transaction took place. Lewis paid Strong \$1,000 for an undivided half interest in the sawmill, which included the machinery, lumber on hand, timber contracts, and commissary. Strong made a bill of sale of a half interest to Carroll, and Carroll assigned the same to Lewis, and Strong also executed a mortgage upon the whole interest of Lewis. This mortgage recited an indebtedness of \$1,000, payable one year after date, "the extension of the time or date of payment being a matter of mutual consent between the parties hereto, and for all other moneys, advances, goods, wares, merchandise, supplies, services, etc., furnished by the party of the second part to the party of the first part." The mortgage contained the usual power of sale, duly acknowledged, and was filed for record on the 13th of March, 1907. Strong and Carroll operated the mill until March 19, 1907, when Carroll bought out Strong's interest. This was brought about in this way: Some time prior thereto Buford came to the mill to collect his debt of Strong, amounting to over \$1,700, and Carroll then learned, as he says, for the first time that Buford was asserting a lien against the property. Strong, Carroll, and Buford met at Texarkana, and settled the matter by Buford

remitting his debt down to \$1,200, and accepting \$200 cash and taking Carroll's note for the remaining \$1,000, secured by a mortgage upon the property; and Strong, in consideration of being relieved of this debt, conveyed his interest to Carroll. The sawmill was subsequently destroyed by fire. Buford sued Carroll, seeking to foreclose the mortgage and put the property in the hands of a receiver (this was before the mill burned), and subsequently joined Lewis, seeking to hold him as a partner of Carroll, and jointly liable upon the note. There was a decree for the defendants, and Buford has appealed. The controlling question is whether a partnership existed between Carroll and Lewis.

Lewis thus states the contract between him and Carroll: "The agreement, as I understand it—I was to furnish Mr. Carroll a certain amount of money to go into, operate a mill, and for the use of that money I was to receive half of the profits. This is about the sum and substance of that. Mr. Carroll was to manage the mill business in his own name, and I was not to be known in it so far as being responsible for anything was concerned. I was simply to furnish him a certain amount of money to operate the mill." He further testified: At that time the mill was to be operated in the name of Carroll and Strong. His profits were to be one-half of Carroll's profits, which were one-half of the business. He took no note from Carroll for the money advanced. When Carroll bought out Strong, he had no other agreement with him, and did not know of it until after it was done. He was not to furnish any more money than the \$1,000 furnished at the time of the purchase of Strong's half interest, but he subsequently did advance \$260 or \$265 for operating expenses. Carroll was to operate the mill for their mutual benefit, according to their agreement, and he (Lewis) felt like he owned half the profits. He was not a partner in the business, because he was not responsible for debts that Carroll and Strong might make; and this was because he did not want to become responsible for their accounts and acts, but wanted his profits as interest on his investment. Carroll was to manage the business. Lewis went to the mill twice to see how the business was getting along. Before he had made the investment, he sent Carroll to investigate the situation and see if there were any liens on the property. Strong represented to him and Carroll that there were no liens upon the property at the time he advanced the \$1,000. During the operation of the mill, Carroll sold a planer belonging to the property, and made important contracts in the management and conduct of the business, and it was understood that he would have authority to do so when he undertook to run the business. Carroll's testimony on this subject is, in substance, as follows: That Lewis told him if he found some mill property, that he would put \$1,000 into it.

After investigating this proposition, he concluded it was a good one, and he was borrowing the money. He insisted that Strong should give a mortgage upon the whole property to Lewis to secure it, and he assigned a half interest in the bill of sale which he had received from Strong and Lewis for the same purpose. He was asked if Lewis bought an interest in the mill at the time the purchase was made at Mena, and said: "He practically bought an interest in it." The following excerpts are taken from his testimony: "Q. Were you and Mr. Lewis partners in this transaction? A. So far as the profits were concerned only. Q. You had no joint interest in the property? A. One way we did, and one way we did not. He had his security on the property. Q. I will ask you what business, if any, or what was your duties under your agreement with Mr. Lewis? A. I had full charge of the property to run it. Q. Were you to operate it? A. Yes, sir, and make some money out of it. Q. What part of the profits was he to receive? A. One-half of my profits. Q. During the connection of Strong there you would have gotten one-half? A. Yes, sir. Q. Was he to get one-fourth? A. Yes, sir. Q. After Strong went out, what part was he to receive? A. One-half." The chancellor found that there was no partnership, and Buford appealed. There were other matters in the suit. Some were not brought here, and others are not necessary to consider.

Richard M. Mann (W. H. Arnold, of counsel), for appellant.

HILL, C. J. (after stating the facts as above). Concede, for the moment, that the relation between Carroll and Lewis was a partnership. Then, when Carroll, in order to relieve an asserted claim against the property, and to buy the other half interest in the property, thereby increasing the respective holdings of himself and Lewis from one-fourth to one-half each, executed a note to Buford in accomplishment of this twofold purpose, it would be binding on Lewis, if in fact they were partners. If it be conceded that it was not within the apparent scope of Carroll's authority to do this, yet Lewis acquiesced in it, and was to receive the benefit of it. The sole inquiry is whether the facts constituted Carroll and Lewis partners. To determine whether a given agreement amounts to a partnership between the parties themselves is always a question of intention. But a different test prevails where the rights of third parties are concerned. It was formerly held that participation in profits was conclusive evidence of partnership in actions by creditors. That rule has been modified, so that a participation in profits is not conclusive, but "it is a cogent test for trying the question," and "is conclusive, unless there are some circumstances altering the nature of the contract." *Culley v. Edwards*,

44 Ark. 423, 51 Am. Rep. 614; Johnson v. Rothschilds, 63 Ark. 518, 41 S. W. 996; Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Herman Kahn Co. v. Bowden, 80 Ark. 23, 96 S. W. 126. In Johnson v. Rothschilds, supra, this statement from the Supreme Court of Florida (Dubos v. Jones, 34 Fla. 539, 16 South, 392) was approved: "To constitute a loan in such a case, the money advanced must be returnable in any event. It is not a loan if repayment is contingent upon the profits, for in such case it is made, not upon the personal responsibility of the borrower, but upon the security of the business. Neither must the transaction be a mere device to obtain the benefits of a partnership without incurring its responsibilities, for in such case, whatever else the parties may call it, it will be construed to be a partnership." In this case, the advance of \$1,000 to Carroll was not a loan, because the money was not returnable in any event; its repayment was contingent upon the profits. The loan was not made upon the personal responsibility of the person to whom it was advanced, but upon the security of the business. No note was taken from Carroll to Lewis, but a device was contrived by which Strong gave a mortgage upon the entire property, at the same time conveying a half interest in the property to Carroll, which was in turn assigned to Lewis. This mortgage was evidently to secure to Lewis a preference over possible creditors of the new concern, for it was not pretended anywhere that Strong owed him \$1,000, for which the mortgage was executed. The only \$1,000 transaction between them was the purchase of a one-half interest in the business for Carroll, or Carroll and Lewis, as the case may be.

In Rector v. Robins, this court cited with approval Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, and this excerpt from that decision is applicable here: "In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And par-

ticipating in profits is presumptive, but not conclusive, evidence of partnership." Lewis advanced the money upon the business, and his recompense was to be a fourth interest in the profits, until Strong went out on the execution of the note sued on to Buford, and, in consideration of it, then his interest was to be one-half of the profits. He intrusted Carroll with the entire management and control of the business. Therefore it is seen that, in addition to the strong presumption arising from the participation in the profits, the facts also bring the case within the rule laid down in Culley v. Edwards that, where the relation of principal and agent existed between persons taking the profits and those carrying on the business, such relation determined the partnership. The evidence of these parties themselves shows that all the elements necessary to constitute a partnership existed between them, so far as third parties were concerned; and the court erred in not so holding.

The judgment is therefore reversed, and the cause remanded, with directions to enter judgment in conformity with this opinion.

BRYANT LUMBER CO. et al. v. CRIST.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. EVIDENCE — COMPETENCY—TIMBER—QUANTITY.

Testimony as to the amount of timber cut from land, based upon measurement of the remaining stumps and tree tops and the rule of scaling timber, was proper; questions as to its reliability affecting its weight rather than its competency.

2. LOGS AND LOGGING—TIMBER SALES—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

Evidence, in an action for the price of timber, held to sustain a verdict for plaintiff.

3. SAME—CONTRACTS—CONSTRUCTION.

A sale of all merchantable timber on specified land, and requiring full payment within two years, required the buyer to pay for the timber whether used or not; the seller having bought all the timber on the land under an agreement to remove it by a specified time.

4. CORPORATIONS—CONTRACT BY PRESIDENT—LIABILITY.

If a lumber company acted under a contract made by its president and manager in his own name, it is liable, he being also bound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1603-1614.]

5. PRINCIPAL AND AGENT — CONTRACT BY AGENT—LIABILITY.

An agent making a contract is primarily liable thereon, and the principal, when discovered, can also be held.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 476-491.]

Appeal from Circuit Court, Perry County; Robert J. Lea, Judge.

Action by Josephine Crist, administratrix, against the Bryant Lumber Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. M. Armistead and Carmichael, Brooks & Powers, for appellants. P. H. Prince and Frauenthal & Robins, for appellee.

HILL, C. J. W. H. Blackwell owned a tract of timber land in Perry county, and on December 1, 1896, sold the timber thereon to J. M. Crist. The timber was to be cut and removed by December 1, 1904. Crist took possession of the land, and cut some timber therefrom. On the 19th of February, 1901, he entered into a written contract with B. Faisst, by which he sold Faisst all the merchantable timber suitable for making lumber upon said lands. The terms of payment were provided in said contract, including the payment to the heirs of Blackwell for the amount which would accrue to them under the terms of the contract between Blackwell and Crist. The aggregate amount due the Blackwell heirs was \$1,025. It was further provided that the amount of all the timber sold should be paid for within two years from the date thereof. Faisst was president of the Bryant Lumber Company, and it was admitted that he made the contract in his own name, but on behalf of the lumber company and for its benefit. The lumber company cut timber from said land, and made various payments therefor, and, among others, made a settlement with Mrs. Burrow for the heirs of Blackwell, on the 14th of October, 1902. Crist brought suit in his lifetime against the lumber company for the amount due under the contract, but it was dismissed. He subsequently died, and this action was brought by his administratrix to recover for the timber cut by the company, and the timber not used by it at the expiration of the lease. It was shown that the lumber company and Faisst were familiar with the terms of the lease by which Crist's rights ceased on the 1st of December, 1904. The administratrix recovered judgment for \$1,500, and the lumber company and Faisst have appealed.

1. The first contention is that the verdict is not supported by the evidence. There is a conflict in the testimony as to the amount of timber on the land and as to the amount cut by the lumber company. The appellants insist that the evidence adduced by the appellee to sustain the amount cut by the company and that left upon the land is vague, indefinite, and uncertain, and not sufficiently reliable to constitute the basis of a recovery. It is contended that it was not possible to measure the stumps of the trees and then measure the tops of the trees, when the intervening log was gone, and then determine whether or not the intervening timber contained in the tree was merchantable, after several years had elapsed, and the land had been inundated by floods, in some instances covering the stumps with sediment, and sometimes carrying away the tops. Witnesses for appellee, however, said that they were able, except in a few instances, to find the tops of the trees and by the rule of scaling timber to make an estimate of the amount taken therefrom, and where they were unable to do so, to make an approximation thereof;

that they were able to recognize the stumps from their age which had been made by the cutting of the lumber company, and did not estimate the cuttings which had been made some years prior thereto by Crist. The argument made against the testimony goes solely to its weight, and does not reach to its competency. The evidence was sufficient to sustain the verdict, and the court was right in refusing to exclude the testimony of certain witnesses as requested by appellants.

2. It is contended that there was a settlement between Mr. Crist and Mr. Faisst, in the lifetime of Mr. Crist, of the matters in controversy, and that Mr. Faisst's testimony upon this point was undisputed. But Mrs. Burrow, with whom the settlement was made, gives another version of the transaction, and she says that after the settlement was made, Crist still retained the right to the standing timber until the 1st of December, 1904, and that he only surrendered to her the agricultural portion of the land, and not the timber, as a result of the settlement. The issue as to the settlement was properly sent to the jury, and their finding is not without evidence to support it. In addition to Mrs. Burrow giving a different version of the transaction, there were other facts in evidence, not necessary to review, which were in conflict with the testimony given by Mr. Faisst on this point. The jury was warranted in not accepting his testimony of the settlement.

3. Appellants asked an instruction of the court to the effect that appellee could not recover for any timber left standing on the land by the appellants, but that the appellants were only liable for timber actually cut, scaled, and received by them. This was an erroneous construction of the contract. It was a sale to Faisst of "all the merchantable timber suitable for making lumber, standing and lying [being] on the following described lands. * * *" Then follows a description of the lands, and following that the terms of payment, concluding with this clause: "And the payment of all of said timber hereby sold shall be completed within two years from date hereof." This was a sale of all the merchantable timber suitable for lumber, and all of such timber had to be paid for whether used by the lumber company or not. Crist had a right to utilize every foot of the timber until December 1, 1904. Instead of utilizing it himself, he sold it to the lumber company; and it was reasonable and businesslike that he should sell all of the timber that he had, instead of selling only such as the lumber company saw fit to use. At any rate, such were the terms of the contract, and it must be enforced as written.

4. Objection is made to an instruction which told the jury that, if they found that Faisst was president and manager of the lumber company, and while acting as such made the contract with Crist, and that the

lumber company acted under the contract, it would be liable, and also to an instruction that if Falst executed the contract in his own name, he is bound by such contract. These instructions were right, and pertinent to the case. Where an agent makes a contract, he is primarily liable, and the principal, when discovered, can be held liable at the election of the party who has dealt with the agent. In such cases both parties are liable. *Mechem on Agency*, 695, 696; 1 *Am. & Eng. Enc.* 1122; *Miss. Val. Const. Co. v. Abeles & Co.*, 112 S. W. 894; *Benjamin v. Birmingham*, 50 Ark. 433, 8 S. W. 183.

Some other matters are presented, and all have been carefully considered; but the court finds no error in the record, and the judgment is affirmed.

KANSAS CITY SOUTHERN RY. CO. v. HENRIE et al.

(Supreme Court of Arkansas. July 6, 1908.
On Rehearing, Oct. 19, 1908.)

1. DEATH—NEGLIGENT DEATH—ACTION FOR DAMAGES—PARTIES.

Under Kirby's Dig. § 6290, requiring an action for negligent death to be brought by decedent's personal representative, or, if there be none, by his heirs at law, where there is no representative, all the heirs who could take as distributees under the laws of descent must join in such an action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 35-46, 58.]

2. WORDS AND PHRASES—"ADMINISTRATION."

The word "administration" as applied to decedents' estates comprehends an executorship.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 197, 198.]

3. DEATH—NEGLIGENT DEATH—ACTION—PARTIES—EVIDENCE—SUFFICIENCY.

Plaintiff's testimony that she married decedent at a specified time and place; that they had three children only, naming them, and giving their ages; that there "is no administration pending on his estate"—sufficiently negatives the existence of other heirs at law or any executor or any administration on decedent's estate, within Kirby's Dig. § 6290, requiring actions for negligent death to be brought by decedent's personal representative, or, where there is none, by his heirs at law.

4. MASTER AND SERVANT—RAILROADS—DEFECTIVE CARS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for death of a conductor crushed between cars while making a coupling, held to sustain a finding that the company negligently permitted the drawheads of the cars to remain defective, so that they permitted the ends of the cars to come together.

5. TRIAL—PROVINCE OF JURY—CONFLICTING EVIDENCE.

It is the jury's province to settle conflicts in testimony as to physical, as well as other facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 342, 343.]

6. EVIDENCE—EXPERT TESTIMONY—SUBJECTS—RAILWAYS.

Whether drawheads of railway cars will pass each other if properly constructed and in

good repair is a proper subject for expert testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2319-2323.]

7. TRIAL—ORDER OF PROOF.

The allowance on rebuttal of testimony not proper rebuttal is within the trial court's sound discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 146-152.]

8. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in excluding expert opinion was harmless, where the witness was permitted, in other parts of his testimony, to state his opinion fully.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200-4207.]

9. MASTER AND SERVANT—INJURY TO EMPLOYEE—INSTRUCTIONS.

In an action against a railway company for the death of a conductor crushed between cars, instructions that, if he could have coupled them without going between them, and it was dangerous to go between them, there could be no recovery, were properly refused as making him insurer of his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1180-1185.]

10. SAME.

It is not negligent per se for a trainman to go between cars in coupling them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 755, 1125.]

11. SAME—OBVIOUS DANGERS.

Where running boards on the ends of cars are so constructed that they come close to each other when cars are coupled on a curve, the condition is an obvious danger, of which trainmen must take notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

12. DEATH—NEGLIGENT DEATH—MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for negligent death that the measure of damages was compensation for the injury resulting to plaintiffs, and that the jury could consider decedent's health, etc., his disposition to labor, his earning capacity, etc., was not objectionable for failing to state that the rate of wages received by him should be considered, that his personal expenses should be deducted from his gross earnings, and that his earning power might be diminished with increasing age, especially in the absence of a request for a more specific instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 145.]

13. SAME

Decedent's widow's and children's pecuniary loss through his death is the probable aggregate amount of his contributions to them, reduced to present value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 112.]

14. SAME—EXCESSIVE RECOVERY.

Thirty-two thousand five hundred dollars recovery by a railway conductor's widow and three minor children for his death was excessive by \$7,500, where his contribution to the family did not exceed \$1,500 annually, and there was little prospect that his earnings would materially increase, and where his life expectancy was 31 years, though he was robust, sober, industrious, economical, and affectionate toward his wife and children, and greatly interested in the children's proper training and education.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 125-130.]

On Rehearing.

15. APPEAL AND ERROR—REHEARING—SCOPE OF REVIEW.

The losing party on appeal cannot on rehearing present a point not presented on the original hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3242.]

16. MASTER AND SERVANT—RAILWAYS—TRAIN-MAN KILLED—INSTRUCTIONS.

In an action against a railway company for the death of a conductor crushed between cars, instructions that if there were two ways of coupling the cars, and he chose the more dangerous way, he was guilty of contributory negligence, was properly refused; as making him the insurer of his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1180-1185.]

17. SAME—COUPLING CARS—NEGLIGENCE—JURY QUESTION.

When there are no safety coupling appliances, or when they are out of repair, and it becomes necessary to couple cars without them, it is always a jury question whether, under the particular circumstance of each case, an employé going between cars to couple them was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Action by Ollie M. Henrie and others against the Kansas City Southern Railway Company for negligent death. From a judgment for plaintiffs, defendant appeals. Affirmed on condition of remittitur; otherwise reversed and remanded for new trial.

G. W. Henrie, who was employed by the Kansas City Southern Railway Company as conductor on a work train, was killed on November 6, 1905, while attempting to couple cars in his train at Horatio, Ark., and his widow, Ollie M. Henrie, and his three infant children instituted this action in the circuit court of Miller county to recover damages alleged to have been sustained on account of his death. The damages are laid at the sum of \$50,000, and on a trial of the case the jury returned a verdict in favor of the plaintiffs, assessing damages in the sum of \$32,500. Negligence of the company is charged in permitting the drawheads of the cars to become rotten and defective, so that, when Henrie went in between the cars to adjust the coupling, the drawheads passed each other, and allowed the two cars to come together and catch him and crush him to death instantly. It is also alleged in the complaint that the plaintiffs are the widow and only heirs at law of said decedent, and that no administrator of his estate had ever been appointed. The defendant filed its answer, denying all the allegations of the complaint. The material facts established by the testimony are discussed in the opinion of the court.

S. W. Moore and Read & McDonough (C. B. Moore, of counsel), for appellant. N. B. Morris, Weeks & Whitley, and W. H. Arnold, for appellees.

McCULLOCH, J. (after stating the facts as above). 1. It is contended in the first place that the testimony fails to show that appellees were the only children and heirs at law of the decedent, or that there was no personal representative of his estate. The statutes of this state provide that an action for damages, caused by the wrongful act, neglect or default of another, "shall be brought by, and in the name of the personal representative of such deceased person, and if there be no personal representative, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." Kirby's Dig. § 6290. Where there is no personal representative of the decedent all the heirs at law who could take as distributees of the estate under the laws of descent must be joined in the action. McBride v. Berman, 79 Ark. 62, 94 S. W. 913. The only testimony bearing on these points was that of Mrs. Henrie, and is as follows: "Q. When did you and Mr. Henrie marry? A. In 1893; at Sealy, Tex. * * * Q. Did you and he have any children? A. Yes, sir. Q. How many children did you have? A. Three. Q. What were the names and ages of those children? A. The oldest is Vivian. She is 13, and George Whitfield Henrie is 11 now, and Ollie Marie Henrie is 7. Q. All of them live with you, and they are all the children of yourself and your deceased husband? A. Yes, sir. Q. Those are the only children you and Mr. Henrie have? A. Yes, sir. Q. There is no administration pending on his estate? A. No, sir. Q. No guardianship or administration pending? A. No, sir." She also testified in detail concerning his care and treatment of the children, and stated that he contributed nearly all his earnings to the support of the family. She was not cross-examined on this subject. It is argued that the proof does not negative the fact that Henrie died testate, and that there was an executor of his estate, nor that he may have married and had living issue of that marriage prior to his intermarriage with appellee, Mrs. Henrie. This is, we think, a strained construction of the testimony. True it does not expressly negative these facts, but it does so by fair implication. The use of the word "administration," as applied to estates of deceased persons in its common and popular acceptance is sufficiently comprehensive to cover the meaning of an executorship. It is so defined by the lexicographers. Webster's: "Administration: (a) The management and disposal, under legal authority, of the estates of an intestate, or of a testator having no competent executor. (b) The management of an estate of a deceased person by an execu-

tor, the strictly corresponding term 'execution' not being in use." Our statute treats of executors, as well as administrators, in a chapter under the general subject of administration. The law writers on the subject treat it in the same way. See, also, *In re Murphy*, 144 N. Y. 557, 39 N. E. 691; *Crow v. Hubbard*, 62 Md. 560. Nor does the testimony leave room for an inference that there may have previously been administration on the estate. The testimony of Mrs. Henrie leads fairly and irresistibly to the conclusion that the children named were all that her husband had. She testified concerning their marriage, and the names and ages of all their children, and it can scarcely be inferred that there had been another marriage and set of children born, when the record is entirely silent on the subject. It is fairly to be presumed that, if there had been children of a former marriage, Mrs. Henrie knew of it. Appellant did not, by asking an instruction on the subject, treat the question as an issue in the case. Aside from a formal denial in the answer of the allegations of the complaint concerning administration and next of kin, appellant does not appear to have insisted on the question until the case reached this court.

2. Do the facts established by the evidence sustain the verdict as to negligence? Deceased was, at the time of his death, a conductor in charge of a work train, and was engaged in hauling gravel for ballast from Horatio, Ark. The cars of his train had been loaded, and some of them were standing on a curved "Y" track. Other cars were attached to the engine. Orders were received to move the train south to another station in time to meet a north-bound passenger train, and it became necessary to couple together the cars hurriedly, as the time for meeting the other train was very short. He went to the end of the cars on the "Y," and signaled the engineer to back up, so that these cars could be coupled into the train. Willis Martin, a witness introduced by appellees, testified that he was present and saw the injury inflicted. He said that Henrie went between the ends of the standing and approaching cars to adjust the couplers, that the cars came together the first time without coupling, and without accident, but that a second attempt was made to couple them, and as they came together, the drawheads passed each other, so as to permit the ends of the cars to come together close enough to catch Henrie and crush him. He also testified that immediately after the accident the wood or timber supporting the drawhead was found to be rotten. He said: "You could mash it this way [indicating], and it would crush." He said a drummer standing by pulled a piece of rotten wood from around, or next to, the drawhead with his hand. The timbers next to the iron drawheads are explained, by one of appellant's witnesses, to be draft timbers or middle sills, which run through the center of

a car from end to end, and lie on either side of the couplers and hold them in place. The end of these timbers was manifestly what the witness Martin referred to when he said that the drummer pulled out a piece of rotten wood. George Hawkins, another witness introduced by appellee, testified that he was present and saw the accident, that the cars failed to couple on the first attempt, and that when Mr. Henrie went in between them the second time, the drawheads passed each other, allowing the cars to come close enough together to crush him. He also stated that the timber around the drawhead was rotten, and that a bystander, immediately after the accident, pulled out with his hand a portion of the decayed wood. These were the only eye-witnesses who testified in the case, except the engineer and fireman, who did not pretend to know all the details of the accident. It is shown by the testimony of another witness that the drawheads could not have passed each other if they had been properly constructed and were in good repair. One of appellants employees, whose duty it was to inspect cars at Horatio, testified that he inspected the cars in question the morning before the accident, and also in the afternoon after the accident, and next day, and found them at each inspection to be in good condition and without defects. He testified that there were running boards on the end of each car, which, when two cars came as close together as the couplers would permit, would leave only a clear space of six inches. He and several other witnesses testified that tests of these two cars between which Henrie was injured were made on the curved "Y" track where the injury occurred, and that the result of the tests showed that when the cars came together on the curve (the couplers meeting, without passing) the running boards came together close enough to catch and hold a two-inch board. These tests, if correct, demonstrated the fact that, with the couplers coming together properly, there was not sufficient clear space between the running boards to accommodate a man's body. There was also testimony tending to show that after the accident blood was found on the running boards. It will be seen, therefore, that the theory of appellees is that Henrie went between the cars to adjust the defective couplers, or those which at least had failed to couple, and was caught between the ends of the cars by reason of the defective drawheads passing each other; whilst the theory of appellant is that the couplers were not defective, but that Henrie went in between cars having these running boards which would come close together, and were obviously dangerous, and that his death was caused by his own negligence. These two theories are necessarily conflicting, and cannot both be correct. The testimony tending to support them, respectively, is also conflicting, and the jury, of course, must have rejected appel-

lant's testimony. If the testimony of the two eyewitnesses introduced by appellees be true, it could not be true that the running boards came together on the curved track without the drawheads having passed each other, for these witnesses say that Henrie went in between the cars the first time in safety as they came together. They say he was in between the cars when they came together the first time, and failed to couple, and that he came out unhurt. There are other sharp conflicts in the testimony, which it became necessary for the jury to consider, and which they have settled by the verdict. If they accepted as correct the theory of appellees, and found the testimony introduced by appellees to be true, the verdict was correct. The evidence sustained it.

It is argued by learned counsel for appellant with much zeal that the tests made by the witnesses established certain physical facts, to which the statements of appellees' witnesses must yield. The weakness of this contention is that the existence of the alleged physical facts is in dispute, and depends upon the testimony of other witnesses, whose statements of the facts are in conflict with appellees' witnesses. This conflict raised a question of credibility, which it was the province of the jury to settle in determining what the physical, as well as all other, facts were. We think the proof was sufficient to establish the fact that there was a defect in the drawhead which permitted the ends of the two cars to come together. Two witnesses testify that some of the timbers which supported the drawhead were rotten, and that the two drawheads passed each other. Another witness, who proved himself qualified to testify on the subject, testified that if the drawheads were properly constructed, and were in good condition of repair, they could not pass each other even on a curved track. If these statements were true, then the jury under the circumstances were warranted in finding that the defect was a discoverable one, and that appellant was guilty of negligence in failing to inspect and discover it. *St. L. & S. F. Ry. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738. Appellant relies upon the case of *St. L., I. M. & S. Ry. Co. v. Andrews*, 79 Ark. 437, 96 S. W. 183, as sustaining their contention that there was no discoverable defect. That case does not, however, sustain the contention. There the plaintiff sued for an injury caused by the breaking of a ladder, and in the opinion of the court it was said: "There is no evidence at all that the ladder had any appearance of being defective. On the contrary, the undisputed evidence established the fact that the timbers were perfectly sound, and that the break at the place where the round parted from the mitre-joint in the side beam was a fresh split. * * * The case is quite unlike one where defects are found, after the injury caused thereby, which must have been discovered if a careful inspection had been made. In such a case the

jury would be warranted in finding, either that no inspection was made, or that no effort was made to repair the defect after discovering it; but in the case before us the evidence does not show such a defect as must have been discovered in advance of the injury on a reasonably careful inspection." In the present case the defect, which is proved to have existed in the drawheads at the time of the injury, was such as could have been discovered in advance. Therefore the jury were warranted in concluding, either that there was no inspection, or no steps taken to repair the defect after discovering it. In this respect the case is like the *Wells Case*, supra.

3. Error of the court is assigned in permitting witness Gibson to testify to the effect that, if the drawheads had been properly constructed and in good state of repair, they would not have passed each other. It is argued that that was wholly a question for the jury to determine, and was not proper subject for expert opinion. The witness proved himself to be fully qualified to testify on the subject. The question could not have been properly answered except by one possessing knowledge and skill, therefore it was proper to admit as evidence the opinion of one who possessed such special knowledge. *Railway v. Lyman*, 57 Ark. 512, 22 S. W. 170; *Railway v. Dawson*, 77 Ark. 434, 92 S. W. 27.

Complaint is also made because the court permitted witness Gibson to be recalled in rebuttal to testify concerning matters which were not properly rebuttal testimony. This was a matter in the sound discretion of the court, and no abuse of discretion is shown.

4. The next error assigned is in the court's refusal to permit witness Preble to testify that it was dangerous for Henrie to go between the cars. The witness was in fact permitted, in other parts of his testimony, to state his opinion fully on this subject, so no prejudice resulted. We need not decide whether or not the testimony was admissible.

5. Appellant requested the court to give, among other things, the following instructions, which were refused, and error is assigned in so doing: "(7) If the deceased could have made the coupling without going between the moving cars, and if it was dangerous to go between the moving cars, and if deceased did go between the moving cars into a dangerous place, and if that contributed to his injury, the plaintiff cannot recover. (7a) If the deceased could have made the coupling without going between the moving cars, and if it was dangerous to go between the moving cars, and if the deceased did go between the moving cars into a dangerous place, and if these, or either of them, contributed to his injury, the plaintiffs cannot recover." These instructions were properly refused. The court gave other instructions, telling the jury that if deceased was guilty of negligence which contributed to his in-

jury in going into a dangerous place to couple cars, the plaintiffs could not recover. In other instructions the court defined the terms "negligence" and "ordinary care," and also instructed that deceased was bound to take notice of patent or obvious defects in the appliance used, and that if he failed to do so, and his death was due to such failure, the plaintiffs could not recover. This was sufficient. The refused instructions make the servant the insurer of his own safety, and absolutely prevent a recovery if the place turns out to be dangerous. This is not the law. *C. & G. Ry. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83. It is a matter of common knowledge that it is more or less dangerous to go between cars in a moving train, or trains about to be put in motion, yet it is not negligence per se for a trainman accustomed to that work to go between cars to couple or uncouple them. That is a question for the determination of a jury, under the circumstances of each case. The testimony in this case shows that the coupler on the cars did not work satisfactorily. Of course, if the position of the running boards on the ends of the cars was as stated by appellant's witnesses, that would have been an obvious danger which deceased was bound to take notice of and avoid; but the jury found against the theory that the running board came too close together to allow space enough for a man's body. The court gave the following instruction, over appellant's objection, on the measure of damages: "(3) Should you find for the plaintiffs in this case, then you will assess the damage at such sum as you shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of said Geo. W. Henrie, to the plaintiffs in this case, as may be shown by the evidence. In estimating this loss it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition of labor, his earning capacity, the care and attention, the instruction and training one of his disposition and character may be expected to give to his children during their minority, as may be shown by the evidence." The correctness of the instruction is challenged, on the ground that it failed to say that the rate of wages received by deceased should be considered, or that his personal expenses should be deducted from his gross earnings, or that the power of deceased to earn money might be diminished with increasing age. Appellant asked no instructions on the measure of damages, but contented itself with an objection to this instruction as a whole. The instruction given did not necessarily exclude consideration of the subjects now suggested as proper by appellant, but, on the contrary, we think the general term employed in the instruction, fairly construed, excluded them. If appellant desired anything more specific or def-

inite, it should have made the request therefor. The pecuniary loss of decedent's widow and children was the probable aggregate amount of his contributions to them, reduced to present value. This court, in *Railway v. Sweet*, 60 Ark. 538, 31 S. W. 573, in describing how this is to be determined, said: "How is this compensation to be determined? By taking into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time, deceased's earning power, rate of wages, and the care and attention which one of his disposition and character may be expected to give his family—all these are proper elements for the consideration of the jury in determining the value of the life taken. From the amount thus ascertained the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict."

6. Was the assessment of damages excessive? Deceased was 35 years of age at the time of his death, and had a life expectancy of 31 years. He is described in the evidence to be a man of robust physique, healthy and intelligent, without about 12 years' experience in railroad work. He was earning about \$175 per month at the time of his death. The proof does not show with satisfactory accuracy the amount contributed to the support of his family, but we think it was sufficient to sustain a finding of as much as \$1,500 per annum contributed to his family—no more than that. He was sober and industrious, economical in his habits, kind and affectionate towards his wife and children, and greatly interested in the proper education and training of his children. He had three children, aged, respectively, 13, 11, and 7 years. There is little ground in the evidence to warrant a conclusion that his earning capacity would have been very materially increased. He had been in railroad work as a conductor for 12 or 13 years, and his earnings had increased very little. Considering the pecuniary loss of the amount of decedent's probable contribution to his wife and children, reduced to its present value, and the pecuniary value of the instruction, moral training, etc., to his children, which might have been expected, we think the evidence does not warrant an assessment of more than \$25,000 damage. It does warrant that amount, but the verdict is to that extent excessive.

There are numerous other assignments of error, but we find none of them well founded.

The case was fairly tried, and the evidence sustains the verdict except as to the amount of damages. If appellees will, within 15 days, remit the amount of damages down to \$25,000, the judgment will stand affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

On Rehearing.

It is contended now, for the first time in argument in this case, that the undisputed evidence shows that the cars which Henrie attempted to couple together were supplied with automatic couplers as required by the terms of the federal statute, and that his failure to use the coupling appliances from the outside, instead of going between the cars, constituted contributory negligence, and that for this reason a peremptory instruction should have been given to the jury to return a verdict for appellant. The rules of this court forbid that the losing party may, on petition for rehearing, take advantage of a point which he failed to bring to the attention of the court on the original hearing. It is true that the complaint contains an allegation, which is denied in the answer, to the effect that the automatic coupler was out of repair, so that it became necessary for Henrie to go between the cars to make the coupling; but that question does not appear to have been pressed in the trial by either party. There was evidence tending to show that the coupling appliances would not work, and that it was necessary for Henrie to go in between the cars to adjust the knuckle, and there was evidence, adduced by appellant, to the effect that the coupling appliances were found on inspection to be in good condition, but the controlling issue in the trial was whether or not the drawheads were defective, and whether or not the running boards on the ends of the cars came so close together that enough clear space was not left for a man's body. The result of the trial turned principally on these issues, and it does not appear that a single witness was asked the direct question whether the automatic coupling appliances were in such condition that it was unnecessary for Henrie to go between the cars. No instruction was asked by either party directly submitting that particular question to the jury. The argument on the original hearing of the case here turned upon the same questions as to defects in the drawheads and condition of the running boards, and nowhere in appellant's brief do we find a contention that the undisputed evidence showed the coupling appliances to be in perfect order, so that they could be operated from the outside. Therefore appellant is forbidden by the rules of the court to raise that question here now for the first time. But, as already stated, we find that there was evidence sufficient to go to the jury and sustain a finding that the appliances could not be operated. The evidence tends to show that efforts to couple the cars, both before and immediately after the accident, were unsuccessful because the coupling would not work.

Error is assigned, and now reargued, on the refusal of the court to give the following instruction: "(9) If the jury believe from the evidence that there were two ways to

make the coupling, one of which was less dangerous than the other, and deceased chose the most dangerous place or way, and was killed, he was guilty of contributory negligence, and plaintiffs cannot recover." The contention of counsel with respect to this instruction in their original brief was not overlooked, but the correctness of this instruction was not discussed in the opinion, for the reason that we considered the discussion concerning other instructions to be applicable to this one. We still think that the purport of this instruction was the same as refused instructions No. 7 and 7a, and that it was incorrect, and properly refused, for the reasons stated in the opinion. An instruction to the same effect, substantially, was condemned in *C. O. & G. R. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83. It was stated in the opinion in that case that authorities to the contrary were to be found, but that we considered them unsound and declined to follow them.

A request for an instruction, telling the jury that if safety appliances were provided on the cars so that the coupling could have been made from the outside without the necessity of going between the cars, and that if the employé disregarded these appliances provided for his safety, and needlessly went between the cars to make the coupling, he would, as a matter of law, be deemed guilty of contributory negligence, and also held to have assumed the risk of the increased danger, would present a different question for our consideration. The correctness of such an instruction seems to be sustained by the authorities. *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 474, 47 C. C. A. 661; *Gilbert v. Chicago, R. I. & P. Ry. Co.*, 123 Fed. 832; *Gilbert v. Burlington, C. R. & N. R. Co.*, 128 Fed. 529, 63 C. C. A. 27; *Suttle v. Choctaw, O. & G. R. Co.*, 144 Fed. 668, 75 C. C. A. 470; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. 870, 52 C. C. A. 286; *Tuttle v. Detroit, etc., Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Union Pac. Ry. Co. v. Brady* (C. C. A.) 161 Fed. 719. But no such instruction was asked in the present case. The instruction now under consideration might have been understood by the jury to mean that, even if the automatic coupling appliance on the car was so defective that it could not be operated from the outside, yet if Henrie made use of a way to couple the cars which turned out to be more dangerous than some other way which he might have chosen, he was guilty of negligence. They might have understood it to mean that, notwithstanding a defect in the appliance which prevented him from operating it with the lever on the outside, yet if some other way to adjust the knuckle and make the coupling could have been found without going between the cars, he would, as a matter of law, be deemed guilty of negligence. That is not the law. When safety coupling appliances

have not been provided, or where those provided have gotten out of repair, and it becomes necessary to couple cars without them, it is always a question of fact for a jury to determine, under the particular circumstances of each case, whether an employé who went between cars to couple them was guilty of negligence in so doing. It is not correct to say, as a matter of law, after balancing the chances, that an employé was necessarily guilty of negligence because he selected a method of doing his work which turned out to be the more dangerous way. This, as we have already said, is to make the servant the insurer of his own safety, notwithstanding the fact that the master has failed to discharge his duty. We have reconsidered all the other assignments of error in the case, and find no cause for changing the result announced in the former opinion. The evidence is not altogether satisfactory, either on the question of appellant's negligence or contributory negligence of deceased, or as to the amount of damages; but we think it is sufficient to sustain a verdict for damages in the amount which we have allowed to stand, and we do not feel justified in disturbing the verdict further than the remit-titur of the amount already ordered.

The petition for rehearing is therefore denied.

BARNWELL et al. v. TOWN OF GRAVETTE.

(Supreme Court of Arkansas. Oct. 5, 1908.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—PROCEEDINGS—APPEAL.

Kirby's Dig. § 5519, relating to the annexation of territory to municipal corporations, provides for the presentation to the county court of a petition for annexation, and that 30 days shall be allowed for a notice of complaint against such annexation, and, where the complaint has been heard and dismissed, that 30 days must elapse before the order of annexation shall be made. Section 5575 provides that any person interested may appear and contest the granting of the petition. *Held*, that the delay before making the order of annexation is to allow all persons contesting the proceeding an opportunity to appeal, and a mere protest against the annexation, filed within the 30 days by such persons, though stating no reasons for attacking the validity of the proceeding, is sufficient to make them parties, and entitle them to an appeal.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Petition by the town of Gravette for the annexation of territory, to the granting of which J. J. Barnwell and others remonstrated. The petition was granted by the county court, and remonstrants appealed to the circuit court, and from a judgment of dismissal they again appeal. Reversed and remanded.

Rice & Dickson, for appellants. McGill & Lindsey, for appellee.

HILL, C. J. On April 16, 1907, there was filed in the county court of Benton county a

petition on behalf of the town of Gravette, signed by the mayor, the designated agent of the town, and 21 petitioners, praying for the annexation to that town of certain described territory. It was alleged that the proceedings were pursuant to an ordinance, passed on February 19th by the town council, and voted upon April 12th at the regular election. On the 9th of May a petition, signed by 21 persons, "living and freeholders within the boundaries set forth in the petition above referred to, do most positively protest and remonstrate against the granting of said petition," was filed with the county clerk. The 10th of June was the date the petition for annexation was set for hearing, and it was submitted on that day; and on the 17th of June it came on for final hearing, and the court granted it, and declared the described territory to be annexed, and made a part of the town of Gravette. The judgment recited that it appeared from the certificate of the election commissioners that at the regular municipal election on the 12th of April there was a vote on the subject, resulting 59 to 39 in favor of annexation, and that notice had been duly published pursuant to the statute. No reference was made in the judgment to the remonstrance, but the judgment refers to the submission of the cause and the final hearing of it on the 17th of June. On the 15th of July three of the signers of the petition of remonstrance joined in an affidavit and prayer for an appeal from this judgment of the county court. It was filed on the 17th of July with the circuit clerk, and the appeal by him granted. Appellants on the same day filed with the county clerk a notice to him of the appeal, and that they had filed "a complaint against the annexation." The complaint against annexation filed in the circuit court set forth in nine paragraphs their reasons for opposing the annexation. It is unnecessary to consider them on this appeal. The town moved the circuit court to dismiss the appeal, on the ground that it did not appear from the record of the county court that the appellants were made parties, or asked to be made parties, to the proceedings in the county court. The court found that the said appellants had filed with the clerk of the county court a protest, on the 9th of May, against the annexation of the designated territory, but that none of them were ever made parties to the proceedings, or asked to be made parties thereto, or contested the same in the county court, and held that they had no right to appeal from the judgment of the county court in the matter, and dismissed the appeal, and the remonstrants have appealed to this court.

The appeal from the county court was properly prosecuted and the statute complied with, and the sole inquiry is whether the filing of the protest was such a joining of the parties as to entitle them to appeal from the judgment annexing the designated territory, against which annexation they in apt time

remonstrated. The authority for the annexation is section 5519, Kirby's Dig., and the procedure is provided in said section, and in 5574, 5575, and 5576 as far as applicable. Thirty days are allowed for a notice of complaint against such annexation; and, where such complaint has been heard and dismissed, then 30 days must elapse before the order of annexation shall be made. This 30 days after the dismissal of the complaint is evidently in order to allow the remonstrants to appeal. There can be no other purpose for it in the legislative scheme. That course was pursued in this case, and was a proper recognition by the county court that a complaint had been filed. While it was not formally dismissed, yet the contrary judgment was a denial of the contentions of the remonstrants. No reasons, legal or otherwise, are alleged in the remonstrance against the petition. It is a mere protest. But it is sufficient to entitle the parties to a hearing. There do not have to be reasons for attacking the validity of the proceedings in order to defeat the annexation. Section 5575 provides that any person interested may appear and contest the granting of the petition; and section 5576 provides that it shall only be granted where the statutory provisions are complied with, and it "be deemed right and proper in the judgment and discretion of the court that said petition should be granted." The nature of this proceeding is fully discussed by Mr. Justice Eakin in *Dodson v. Mayor and Town Council of Ft. Smith*, 33 Ark. 508. While some of the language of the discussion may not be in accord with the since settled practice of trials de novo in the circuit court, yet the case as a whole is undoubtedly sound. These remonstrants became parties to the proceedings in the way in which they were authorized by the statute to become so; that is, by filing a petition against the annexation within the time prescribed by the statute. Under the repeated decisions of this court in analogous cases, this made them parties, and entitled them to take an appeal. *Dodson v. Ft. Smith*, 33 Ark. 508; *McCullough v. Blackwell*, 51 Ark. 159, 10 S. W. 259; *Lee County v. Robertson*, 66 Ark. 82, 48 S. W. 901; *Reese v. Steel*, 73 Ark. 66, 83 S. W. 335, 1136; *Whisen v. Furth*, 73 Ark. 366, 84 S. W. 500, 68 L. R. A. 161; *Bowman v. Frith*, 73 Ark. 523, 84 S. W. 709. The court erred in not entertaining the appeal and hearing the case de novo.

Judgment reversed and cause remanded.

HARRIS et al. v. BRADY et al.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. TAXATION—TAX DEEDS—VALIDITY.

A tax deed of separate subdivisions of 40-acre tracts, which shows on its face that the tracts were sold en masse, is void on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1513.]

2. LIMITATION OF ACTIONS—SUIT TO SET ASIDE VOID TAX DEED.

Under Kirby's Dig. § 5075, providing that a minor, entitled to sue, may bring his action within three years after full age, one reaching his majority in April, 1904, may maintain a suit begun in April, 1905, to set aside a void tax deed executed in July, 1902, pursuant to sale made in June, 1900.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 392.]

3. SAME.

Since adult heirs have no right to the possession of the homestead of the decedent until the termination of the homestead interest of a minor heir, which occurs on his reaching majority, limitations of two years within which to sue to set aside a void tax deed of the homestead do not begin to run against the adult heirs until the infant heir reaches his majority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 386.]

Appeal from Circuit Court, Marion County; B. B. Hudgins, Judge.

Action by John N. Harris and others against J. W. Brady and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

The appellants were the children and heirs at law of Mark M. Harris. Benjamin Harris was the youngest of these, and he reached his majority on the 11th day of April, 1904. Mark M., the ancestor, died in March, 1883, seised of a certain tract of land in Marion county, Ark., which he occupied as his homestead. This suit is by the appellants against appellee J. W. Brady and his tenant to recover possession of the land. Appellee Brady defends upon the ground that he was the owner and in possession of the land by virtue of a sale thereof for the taxes of 1899 and a deed pursuant thereto, executed to him by the clerk of Marion county on the 28th of July, 1902; that he took possession of the land on the 1st of January, 1901, and has held it adversely since, paying all taxes thereon. He pleads the two-year statute of limitation. A clerk's deed was exhibited, describing the lands in four separate subdivisions, of 40 acres each, and recites the sale of all of them in one offer for the total sum of \$6.60, without stating the price of any one of them. Appellants were the owners and entitled to the possession of the land, unless appellee has title by virtue of his tax deed, and the two-year statute of limitation is virtually conceded. The court, at the instance of appellee, found the facts to be that the land was duly sold on the 11th day of June, 1900, for the taxes, penalty, and costs due thereon for the year 1899, and that appellee Brady became the purchaser thereof at this sale; that he took possession by virtue of the purchase January 1, 1901; that on the 28th day of July, 1902, after the time for redemption had expired, the clerk of Marion county executed his tax deed for the land; that after this appellee Brady held said land under the tax deed openly, continuously, and adversely for more than two years next before the institution of this suit; and the court declared that

appellee's purchase was valid, and that his adverse possession under the tax deed barred the appellants' right to recover.

Woods Bros., for appellants. Sam Williams, for appellees.

WOOD, J. (after stating the facts as above). First. The tax deed was void on its face. It appears that the tracts of land were sold en masse, and not separately. *La Cotts v. Quertermous*, 83 Ark. 174, 103 S. W. 182, and authorities cited. Section 5075 of Kirby's Digest (Act April 17, 1899) provides: "If any person entitled to bring any action under any law of this state, be, at the time of the accrual of the cause of action, under twenty-one years of age * * * such person shall be at liberty to bring such action within three years next after full age." This statute was passed after the decision of this court in *Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623, and after the facts arose upon which was made the decision of *Sparks v. Farris*, 71 Ark. 117, 71 S. W. 255, 945. The sale was made on the 11th of June, 1900, and the tax deed was executed July 28, 1902. Appellant Benjamin Harris did not reach his majority until the 11th of April, 1904, so he was under disability of nonage when his cause of action accrued, and under the above statute he had three years after becoming of age within which to sue. He was, therefore, not barred by the statute of limitations.

Second. Until the termination of the homestead estate of Benjamin Harris in the land in controversy, which occurred when he became of age (11th day of April, 1904), the adult heirs had no right to the possession of the homestead. Therefore the statute of limitations of two years did not begin to run against them until that date. This suit was begun April 10, 1905. The court erred, therefore, in holding appellants barred by this statute. *Gannon v. Moore*, 83 Ark. 196, 104 S. W. 139.

Judgment reversed, and cause remanded for new trial.

MORRISON v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. JUSTICES OF THE PEACE—PLEADING—FORM. Written pleadings are not required in justice court, nor in the circuit court on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 306.]

2. SAME.

A written statement filed with a justice, alleging that defendant railroad company owed plaintiff \$38 for stock killed by one of defendant's east-bound mixed trains at a specified time, and that defendant was indebted \$38 as a penalty, and a further sum of a reasonable attorney's fee, to be taxed by the court, and asking judgment for \$76 costs and a reasonable attorney's fee, sufficiently meets the requirements of Kirby's Dig. §§ 4565, 4580, as to the necessary statement of facts upon which the action is founded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 307-322.]

3. SAME—EVIDENCE—ADMISSIBLE UNDER PLEADING.

Allegations in justice court that defendant's train killed plaintiff's stock, for which he claimed \$38, a penalty of \$38, and a reasonable attorney's fee, was sufficient to admit proof as to how defendant became liable, if at all, for the penalty and attorney's fee.

4. SAME—APPEAL—TRIAL DE NOVO—PLEADING.

Pleadings sufficient in justice court are sufficient in the circuit court, on trial de novo on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 665-693.]

5. SAME—DEFECTS AND FORM.

Formal pleadings are not required in justice court, and on appeal to the circuit court a demurrer should not be sustained to the complaint; plaintiff being entitled to amend as to defects in form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 665-693.]

6. SAME—AMENDMENT—DISCRETION.

It was within the circuit court's discretion on appeal from justice court, in an action for negligently killing stock, to refuse to allow plaintiff to amend, so as to allege the value of the stock to be \$50 instead of \$38.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 665-685.]

7. APPEAL AND ERROR—COURTS—PLEADING.

Pleadings being part of the record proper, and hence not required to appear by bill of exceptions, no bill is essential to a review of a ruling sustaining a demurrer to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2342, 2416.]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by S. E. Morrison against the St. Louis & San Francisco Railroad Company. From the judgment of the circuit court, on appeal from justice court, plaintiff appeals. Reversed and remanded.

The appellant brought suit before a justice of the peace in Benton county against appellee, and alleged that "[defendant] was indebted to him in the sum of \$38, for one cow killed by one of its east-bound mixed trains, on April 16, 1907, about 2 o'clock p. m.; that said company was indebted as a penalty in the sum of \$38, and a further sum of a reasonable attorney's fee, to be taxed by the court." Plaintiff asked judgment for \$76. cost and a reasonable attorney's fee. The justice thereupon issued a summons, whereby defendant was called upon "to answer the claims of plaintiff, for one cow killed \$38. and for penalty \$38, and for reasonable attorney's fee." This summons embodying the plaintiff's itemized claim was served on the defendant by copy. At the return day of the summons the defendant failed to appear, and the justice heard the evidence and rendered judgment against the defendant for \$38 for value of cow, and \$38 for penalty, and \$10 for an attorney fee, total \$86. On the 21st day of July, 1907, the defendant filed its affidavit for an appeal, and took a transcript of the proceedings and filed same in circuit court on August 31, 1907. On September 21, 1907, the defendant in writing notified the

plaintiff that, if it failed in its defense, the damage should be assessed at \$38. The proposition was declined, and the notice and declination was filed in circuit court on September 25, 1907. On the 25th day of September, 1907, the defendant filed its demurrer to the complaint and its answer. Thereupon the demurrer came on for hearing, and the court sustained the same as to the item of double damages and attorney fees. The attorneys for appellant, treating the demurrer as a motion to make the complaint more definite and certain, offered to amend the complaint, and set out more definitely its cause of action as to double damages and a reasonable attorney fee under the act of 1907, but the court refused to permit the amendment. To the ruling of the court sustaining the "demurrer," and refusing plaintiff permission to amend and make the complaint more definite and certain, the plaintiff at the time excepted. The plaintiff then asked to amend its complaint, by alleging the value of the cow to be \$50 instead of \$38, but the court refused to permit the amendment, to which refusal the plaintiff at the time excepted. The court then rendered judgment for plaintiff for \$38, and taxed all the cost occurring since September 21, 1907, to appellant. To this ruling of the court the plaintiff at the time excepted. The plaintiff prayed an appeal from all the rulings of the court to which he excepted, which was granted.

Rice & Dickson, for appellant. W. F. Evans and B. R. Davidson, for appellee.

WOOD, J. (after stating the facts as above). First. No written pleadings are required in a justice court, nor in the circuit court on appeal from a justice of the peace. *Mississippi Valley Con. Co. & Zeb Ward v. Chas. T. Abeles & Co.*, 112 S. W. 894; *Sparks v. Robinson*, 86 Ark. 460, 51 S. W. 460. The written statement of the facts constituting appellant's alleged cause of action was sufficiently formal and definite to meet the requirements of sections 4565 and 4580 of Kirby's Digest as to the necessary statement of facts upon which the action is founded. The appellant's written statement of facts or "complaint," and the summons based thereon, notified appellee that it was being sued for the killing of appellant's cow by one of appellee's trains, and that for said killing damages were claimed in the sum of \$38, also a penalty of \$38, and a reasonable attorney's fee. These statements were sufficient to admit of proof before the justice as to how appellee incurred and became liable, if at all, for the alleged penalty and attorney's fee. *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783. Being sufficient in the justice court, they were also sufficient in the circuit court, where the cause, on appeal, was for trial de novo. Formal pleadings are not required before a justice of the peace, and on appeal to the circuit court a demurrer should not be sustained to the complaint. Chowling

v. Barnett, 30 Ark. 560. Even if the written statement were defective in the particulars designated by the court, such defects were of form, and not of substance, and the court in no event should have dismissed the complaint (*St. L. & So. Ry. Co. v. Moss*, 75 Ark. 64, 86 S. W. 823; *C. O. & G. Ry. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768, but should have allowed appellant to amend and set forth the particulars wherein it claimed that appellee had incurred the penalty prescribed by the statute.

Second. To refuse to allow appellant to amend his complaint, so as to allege the value of the cow killed to be \$50 instead of \$38, at that juncture in the proceedings, was within the sound discretion of the trial court, and we cannot say that the discretion was abused. *Birmingham v. Rogers et al.*, 46 Ark. 254. The pleadings in a cause are part of the record proper, and are not required to be set forth in the bill of exceptions. No bill of exceptions was necessary to bring the error of sustaining the appellee's demurrer to the attention of this court. The ruling was properly entered of record.

Third. As the cause must be reversed and remanded for new trial, it would be premature to pass upon the question of costs.

MCKINNEY et al. v. BLAKELEY.

(Supreme Court of Arkansas. Oct. 5, 1908.)
SHERIFFS AND CONSTABLES—FAILURE TO LEVY ON ORDER OF ATTACHMENT—LIABILITY.

Under Kirby's Dig. § 360, providing that an order of attachment binds defendant's property seizable thereunder from the delivery of the order to the officer, an order of attachment is a lien on the property of defendant sold subsequent to the delivery of the order to the officer, who must levy on it and perfect the lien by seizing the property; and for failure to do so he and the sureties on his bond are liable for the damages sustained by plaintiff in the attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, *Sheriffs and Constables*, § 176.]

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Action by S. L. Blakeley against E. J. McKinney and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. C. Pinnix and T. D. Crawford, for appellants. Sain & Sain, for appellee.

McCULLOCH, J. This is an action on the bond of a constable to recover damages for failure to execute an order of general attachment issued at the instance of the plaintiff against certain property of the defendants in the action in which it was issued. The defense is that the property in question belonged to other persons than the defendants in attachment, and that the property had been sold and delivered by those defendants to the other persons before the writ came to the hands of the constable. The court instructed the jury to return a verdict in favor

of the plaintiff, and that ruling is assigned as error.

We find on examination of the testimony in the record that it establishes beyond dispute the fact that the sale and delivery of the property by the defendants in attachment took place after the writ came to the hands of the officer. The writ was, therefore, a lien on the property, and it was the duty of the officer to levy on it. Kirby's Dig. § 380; Cross v. Fomby, 54 Ark. 179, 15 S. W. 461; Derrick v. Cole, 60 Ark. 394, 30 S. W. 760; Merriman v. Sarlo, 63 Ark. 151, 37 S. W. 879. The lien could have been perfected by the seizure of the property by the officer, and it was his duty to do so and to hold it subject to the further orders of the court. For a breach of this duty the constable and the sureties on his bond are liable for the damages incurred by the plaintiff in the attachment.

Judgment affirmed.

CHICAGO, R. I. & P. RY. CO. et al. v.
PERRY COUNTY.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. COUNTIES—WARRANTS—REISSUE—SUCCESSIVE ORDERS.

An order of the county court calling in outstanding county warrants for cancellation and reissue is not invalid because the record of the proceedings in the county court does not affirmatively show that a similar order has not been made by the court within a year.

2. EVIDENCE—PRESUMPTIONS FOR AND AGAINST OFFICIAL PROCEEDINGS.

No presumption as to the existence of facts can be indulged in aid of the record of proceedings calling in outstanding county warrants for cancellation and reissue, nor, on the other hand, can any be indulged to defeat the validity of the proceedings.

3. SAME—RETURN OF SHERIFF—SUFFICIENCY.

The sheriff's return on an order calling in outstanding county warrants for cancellation and reissue showed that a copy of the order was posted at each of the election precincts in townships named. *Held*, the county court will take judicial cognizance whether the townships named constitute all the townships in the county, and the order is not invalid because not showing that the townships named are all the townships in the county.

Appeal from Circuit Court, Perry County; Robert J. Lea, Judge.

Certiorari, on petition of the Chicago, Rock Island & Pacific Railway Company and others, against Perry county. Judgment for the county, and petitioners appeal. Affirmed.

Buzbee & Hicks and Geo. B. Pugh, for appellants. Sellers & Sellers, for appellee.

MCCULLOCH, J. This appeal brings in question the validity of an order of the county court of Perry county calling in for cancellation and reissuance the outstanding warrants of the county. It is questioned on two grounds, viz.: (1) That the record of the proceedings in the county court did not affirmatively show that a similar order had not previously been made by the court with-

in a year; (2) that the return of the sheriff on the notice did not affirmatively show that a copy of the preliminary order was posted at the election precinct in each township of the county. The first question has already been decided by this court against appellants' contention, and we now see no reason for changing the views expressed in that decision. Yell County v. Wills, 83 Ark. 231, 103 S. W. 618. The return of the sheriff recited the fact (in addition to complying with the other method of publication required by the statute) that he posted a true copy of the order at the election precinct in each of the townships named in the return, but it did not negative the fact that these were all the townships in the county. It is therefore argued that the order is void because it nowhere appears in the record of the proceedings that these were all the townships in the county, and that the defect cannot be cured by evidence aliunde. It has often been held by this court that the statute authorizing such proceedings must be strictly complied with, and that all facts necessary to give the court jurisdiction must affirmatively appear in the record of the proceedings. Gibney v. Cranford, 51 Ark. 34, 9 S. W. 309; Nevada County v. Williams, 72 Ark. 394, 81 S. W. 384. No presumption as to the existence of facts can be indulged in aid of the record, nor, on the other hand, can any be indulged to defeat the validity of the proceedings. Where the return of the sheriff shows that a copy of the order was posted at each of the election precincts in the townships named, the county court will take judicial cognizance whether or not these constitute all of the townships in the county. Webb v. Kelsey, 66 Ark. 180, 49 S. W. 819; Railway v. State, 68 Ark. 561, 60 S. W. 654. This would also apply to election precincts, notwithstanding the fact that they are established, and may be changed from time to time, by the board of election commissioners, for these, too, are political subdivisions of a county.

We find no error, and the judgment is affirmed.

JONESBORO, L. C. & E. R. CO. v. BROOKFIELD.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. BILL OF EXCEPTIONS—UNESSENTIAL MATTERS—EFFECT.

A bill of exceptions is not vitiated because it contains more than is necessary for a bill to show as to matters properly of record.

2. STATUTES—PENAL STATUTES—CONSTRUCTION.

Penal statutes must be strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

3. CARRIERS—PASSENGERS—FARE—FRACTION OF MILE.

Under Kirby's Dig. § 6611, authorizing railroad companies to make certain charges "per mile" for carrying passengers, the same fare

can be charged for a part of a mile that is charged for a whole mile.

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by B. J. Brookfield against the Jonesboro, Lake City & Eastern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

This is a suit by appellee against appellant for a penalty under sections 6611 and 6620 of Kirby's Digest. Those sections, in so far as it may be necessary to set them out, are as follows:

"Sec. 6611. The maximum sum which any corporation," etc., "operating a line of railroad in this state, shall be authorized to charge and collect for carrying each passenger over such line within the state, in the manner known as first class passage is fixed at the following named rates: On lines of railroad fifteen miles or less in length, eight cents per mile. On lines of railroad over fifteen miles in length and less than seventy-five miles in length, five cents. * * *

"Sec. 6620. Any of the persons or corporations mentioned in section 6611, * * * that shall charge, demand, take or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit and pay for every such offense any sum not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction. * * *

The appellant received from appellee the sum of 20 cents as first-class passenger fare for transportation over its road from the station of Jonesboro to the station of Nettleton, a distance of 3 miles 1,572 feet. Appellee sued for and recovered penalties and attorney's fee under the above sections.

E. F. Brown and W. J. Driver, for appellant. F. G. Taylor, for appellee.

WOOD, J. (after stating the facts as above). Appellee insists that there is no bill of exceptions, but an examination of the transcript discloses that "a bill of excep-

tions," containing all that is necessary and proper to be included in a bill of exceptions, was presented to, and certified and signed by, the trial judge. True, this bill of exceptions contained, also, more than was necessary for a bill of exceptions to show, matters that were properly of record, but that did not have the effect to vitiate the bill of exceptions.

Second. The only question necessary to consider is whether or not appellant could charge 20 cents for first-class passenger fare over its road for a distance of 3 miles and a fraction (1,572 feet); appellant's road being over 15 miles and less than 75 miles in length. Penal statutes must be strictly construed. There is nothing in the act prescribing what shall be the charge for a fraction of a mile. The act only takes notice of the integral mile. There is nothing in it requiring the carrier to carry the passenger free for a fractional mile, or inhibiting it from charging the same fare for a part of a mile that it charges for the whole mile. It was evidently not the purpose of the Legislature to require a railroad company to proportion its charge for a fraction of a mile; for the act does not say so. It fixes the charge to be made "per mile." As was said by the Supreme Court of Ohio: "A construction which would subdivide the mile into halves, or tenths, or hundredths, or even thousandths, or infinitely less fractions, would be unreasonable and impracticable, and would subject the company to endless annoyance and numberless prosecutions; for, if we may take account of a half or one-third of a mile, there is no reason why we should not be compelled to measure to the exact one-thousandth part of a mile." *Cleveland, C. C. & St. L. Ry. Co. v. Walls*, 65 Ohio St. 313, 62 N. E. 332, 58 L. R. A. 651. It was not intended that the charge of five cents per mile "should be subdivided in the ratio of the fractional portion of each mile of transportation. Our currency does not lend itself to such a minute subdivision." *Hunter v. Erie R. R.*, 70 N. J. Law, 101, 56 Atl. 139.

The court erred, therefore, in refusing to instruct the jury to return a verdict for the defendant, as requested by appellant in its first and second prayers.

The judgment is therefore reversed, and the cause is dismissed.

BLADES et al. v. HAWKINS et al.

(St. Louis Court of Appeals. Missouri. June 30, 1908.)

1. COUNTIES—FISCAL MANAGEMENT—CONTRACTS BY COUNTY COURT.

Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), provides that no county, etc., shall make a contract unless within the scope of its powers or expressly authorized by law, or unless made on a consideration wholly to be performed after the making. Section 6760 (Ann. St. 1906, p. 3328) requires such contracts including the compensation to be wholly written, and that duplicate copies shall be made, one of which shall be filed with the clerk of the county court, and forbids its removal except for use as evidence in some legal matter or cause, and that, in case of variance between copies, the one on file shall control. *Held*, that where a county court entered of record its order for the employment of a person for work wholly in the future, setting forth the details of the employment and the compensation, and the person filed a written acceptance, the contract was complete so far as its execution was concerned, though no duplicate of the contract was filed as provided by section 6760; the purpose of that section being merely to provide evidence of the terms of the contract.

2. MUNICIPAL CORPORATIONS—GOVERNMENTAL POWERS—STATUTORY PROVISIONS.

Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), prohibiting counties and other municipal bodies from making contracts not within the scope of their powers or expressly authorized by law, is but declaratory of the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 645-650.]

3. COUNTIES—POWER OF COUNTY COURT TO HIRE ACCOUNTANT TO EXAMINE OFFICERS' ACCOUNTS.

There is no statutory authority to county courts to employ an expert to audit and examine the books of the county and its officers.

4. SAME—STATUTES—CONSTRUCTION—IMPLIED POWERS—POLICY OF COURTS.

The courts are slow to imply powers not expressly given by statute, and no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created.

5. COUNTIES—POWERS OF GOVERNMENT—IMPLIED POWERS.

While the law is strict in limiting the authority of the county courts, they may exercise certain incidental powers germane to the authority and powers expressly directed and indispensable to their performance.

6. SAME—POWER TO HIRE ACCOUNTANT TO EXAMINE OFFICERS' ACCOUNTS.

Rev. St. 1899, § 6781, c. 97 (Ann. St. 1906, p. 3334), makes a county court the general fiscal agent of the county, with a supervisory power over the collection and preservation of its funds. Various officials and others chargeable with money of the county are required to report to and settle with the court. If any person bound to settle with the court fails to render a true account, the court must adjust the account from the best information it can get to ascertain the balance due and require its payment. Section 6790 (Ann. St. 1906, p. 3336) requires the court to audit all accounts to which the county is a party, and enforce the collection of money due it. *Held*, that the statute expressly imposes on the court responsibility for the safety of the public moneys, the accuracy and honesty of the settlements of officials and the collection of defalcations, and such duty carries with it implied authority to employ an expert to look over books and documents in order to ascertain

whether county officials and others, chargeable with public moneys have correctly accounted and settled with the court.

7. SAME.

Rev. St. 1899, § 1778 (Ann. St. 1906, p. 1246), providing that the county court, or some judge thereof, when the settlements required by law are made by county officers holding funds, with the county court, must ascertain by actual examination and count the amount in the hands of such officers, etc., relates to the verification of balances in the hands of the officials when they settle with the county court, and has no application to the examination at other times of accounts of holders, present or past, of the county officers.

Bland, P. J., dissenting.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Suit by J. A. Blades and others against George E. Hawkins and others, as judges of the county court of Stone county, to enjoin their issuing a warrant. Judgment of dismissal, and plaintiffs appeal. Affirmed, and case certified to the Supreme Court for final decision.

This is a suit in equity to enjoin the respondents, as judges of the county court of Stone county, from issuing to L. U. Crawford a warrant to pay said Crawford for services rendered as an expert accountant in examining, checking up, and auditing the accounts of various officers of Stone county pursuant to employment by the county court. The suit was instituted at the relation of certain citizens and taxpayers, who seek to prevent issuance of the warrant for the reason that the employment of Crawford was without authority of law, and public money cannot be disbursed to pay him. Respondents answered that on or about April 12, 1907, certain of the officers of Stone county then in office and certain other persons who theretofore had been in office were delinquent in their accounts, and had failed to pay to the treasurer of the county large sums of money due the county, aggregating \$5,000; that certain of the officers had made incorrect returns to the court of the earnings of their respective offices, and other persons who had occupied the offices of treasurer and collector, had made incorrect and false settlements of their accounts, and had led the court to believe they had made correct returns of the fees due from their respective offices; that knowledge of this had come to respondents in a general way, but they were not apprised of who were delinquent, or in what particulars the delinquencies consisted; that though respondents and their predecessors, as judges of the county court, had performed to the best of their ability the duty of examining the accounts and records of the various officers of the county, yet neither respondents nor their predecessors were expert accountants or auditors; that respondents were not able to audit the books of the county, and recover the amount of the items delinquent because they lacked the necessary skill, and, unless said

work was done, the amount of the delinquency would be wholly lost; that it would be greatly to the interest of the taxpayers and the financial affairs of the county for an accountant to be employed to audit the various books of the officials then in office and therefore in office, wherefore, respondents entered into a contract with L. U. Crawford, an expert accountant, to audit said books and check up the accounts of the various officers for such periods as the court might direct; that Crawford was to receive for his services \$10 a day and expenses limited to his board while employed in the work and one trip to and from Kansas City, Mo., his place of residence; that said contract was entered into in good faith by the county court through an agent appointed for the purpose, to wit, the prosecuting attorney; that shortly after he was hired Crawford began the work of auditing the books, checking up the accounts of the county officers, and making reports of his action to the court; that he had completed his services and the compensation due him under the contract amounted to about \$1,000; that from the work done by him in investigating the accounts of officers and auditing the books the county had recovered from delinquent officials, either now or theretofore in office, and from other persons holding money belonging to said county, the sum of more than \$2,000, and the further sum of \$3,000 still delinquent would be recovered; that without said services all this money would have been lost to the taxpayers. Respondents denied the contract was without authority of law, and affirmed it was entered into in the manner provided by law, and denied certain other allegations of the petition which need not be stated. After a temporary restraining order had been issued by the circuit court of Stone county, the case went on change of venue to Greene county, where it was tried and judgment entered finding the issues for respondents on the merits, dissolving the temporary injunction and dismissing the petition.

It appears from the records of the county court of Stone county that on or about April 12, 1907, the court ordered the prosecuting attorney to negotiate with expert accountants for the purpose of employing a suitable one to investigate the records and submit a report to the court. About the same date the court spread on its record an entry reciting that, whereas the court had found it advisable to examine the accounts of the various county officers, it was ordered that L. U. Crawford be authorized to check up, audit, and examine the accounts of said officers during such periods as the court might direct, and make a report in detail of his findings; that said Crawford be paid for his services \$10 a day, and expenses, it being understood his expenses should be limited to board and car fare for one trip from Kansas City and return; that while the examination of the

books was in progress each officer should render every assistance possible to expedite the work, and Crawford should be given free access to all records and files in the various offices which he might desire to use in the investigation. Crawford accepted this employment in writing, agreeing to check up and audit the accounts of the county officers for such periods as might be designated by the court, and on the terms expressed in the order. This acceptance was filed and spread on the record. It was admitted at the trial that Crawford had performed a large part of the services contracted for at the time the injunction was issued, and that at said date the respondents were about to order a warrant on the treasury to pay for said services at the rate of \$10 a day. It was further admitted Crawford began performance of the work shortly after he was employed; that he performed the services for which he was hired and audited the books of the various officers then in office or who had been in office theretofore; that he had discovered discrepancies and delinquencies to the amount of \$2,229.24 in the accounts of certain officials, to wit, three ex-county treasurers, an ex-sheriff, the cashier of the county depository, and one other person; that these sums due the county were discovered by Crawford during his investigation, and had been paid into the treasury. It was further admitted there was \$3,000 more which Crawford claimed to have discovered to be due from other men holding office and who had theretofore held office, but which relators denied was due the county. It was admitted respondents were not expert accountants, but were all farmers; that all the relators, except one, who are asking an injunction against paying Crawford, are bondsmen of one of the delinquent officials; that, if the warrant should be issued and paid, the respondents and the prosecuting attorney would refuse to take action to recover the amount of it, as they contend it is a legal obligation. The temporary injunction was sued out June 14, 1907. On June 17th, pursuant to an order of the county court, a contract in duplicate was entered into between W. E. Renfrow, prosecuting attorney and agent of the county, and Crawford. This contract embodied the terms theretofore stated, and contained in the original order of the county court for the employment of Crawford entered April 12, 1907.

G. W. Thornberry, O. F. Douglas, and Edw. J. White, for appellants. Sebree, Farrington, Pepperdine & Wear, for respondents.

GOODE, J. (after stating the facts as above). The right of the county court to issue a warrant to Crawford in payment for his services is denied on two grounds: First, because said court had no authority to employ an accountant to examine and audit the books of the county and the accounts of

its officers; second, because, if it had this power, the contract of employment was not entered into in the manner provided by law. In support of both these grounds certain statutes are invoked, and among others section 6759, Rev. St. 1899 (Ann. St. p. 3327), which says no county, city, etc., shall make a contract unless the same is within the scope of its powers or is expressly authorized by law, or unless it is made on a consideration wholly to be performed or executed subsequent to the making, and that the contract, including the consideration, shall be in writing, dated when made and subscribed by the parties thereto or by an agent authorized by law and duly appointed in writing. The next section (section 6760 [Ann. St. p. 3328]) says duplicate copies shall be executed of every such contract, one of which shall be filed in the office of the clerk of the county court if made by a county, or with the proper officer if the contract is made by some other body politic; that it shall not be taken thence except to be used as evidence in some legal matter or cause; and that, in case of variance between the copies, the one on file with the designated custodian shall control the construction. The contract in question was not reduced to duplicate writings signed by Crawford and Renfrow, agent of the county, until June 17th, three days after the temporary injunction was issued, and after the work for which Crawford was employed had been done. For this reason, it is contended the employment was void, and the county court was without authority to pay Crawford. This is not the interpretation put on the statutes we have cited by the Supreme Court. In *Globe Furniture Co. v. School Dist.*, 51 Mo. App. 549, it was held by a majority of the members of the Kansas City Court of Appeals that failure to enter into a contract with a public municipality (in said case a school district) by executing duplicate copies in writing was fatal to the validity of the contract. One of the judges dissented, and held that, when such a contract was reduced to writing and signed by the parties, it became binding and operative, as the statute requiring duplicate copies was directory. In *Saleno v. Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653, the question was presented for decision to the Supreme Court. In said case it appeared the city of Neosho had passed an ordinance granting the plaintiff a water-works franchise, and agreeing to pay a certain sum yearly for water hydrants used by the city. After this ordinance was ratified by a vote of the people, plaintiff filed with the board of aldermen his written acceptance of the contract contained in the ordinance. It thus will be seen the cause is identical with the present one as regards the form of the contract originally entered into, because, in the present case, the county court entered of record an order employing Crawford for

a specified work on specified terms, and he filed his written acceptance. The Supreme Court said in the *Neosho Case* the validity of the contract for the hydrants was in no way dependent on its having been executed in duplicate as required by the statute aforesaid, as the purpose of said statute was to provide controlling evidence of the terms of the contract in case a dispute arose regarding its terms. See, too, *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *McShane v. School Dist.*, 70 Mo. App. 624. When the county court of Stone county entered of record its order for the employment of Crawford for work wholly to be performed in the future, setting forth the details of the employment and the compensation to be paid, and Crawford filed his written acceptance of the employment, we think, under the above authorities, the contract was complete as far as the mode of its execution is concerned.

The more important proposition, and the one chiefly controverted, is as to the power of the county court to employ an expert accountant to audit the public records and the accounts of present and prior officials. Its power to do so must be found in some express statutory grant, or else implied as essential to the proper execution of powers expressly granted, or duties expressly imposed. Section 6759 of the statutes prohibits counties and other municipal bodies from making any contracts not within the scope of the powers of the municipality or expressly authorized by law. This provision is but declaratory of the common law; for these public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county courts and commissioners, as well as to the governing bodies of other subordinate political corporations. 7 Am. & Eng. Ency. Law, § 789; *Wolcott v. Lawrence Co.*, 26 Mo. 277; *Sturgeon v. Hampton*, 83 Mo. 204. There is, in our statutes, no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the courts by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation, unless it is cognate to the purpose for which the corporation was created. *Grant Co. v. Bradford*, 72 Ind. 455; 2 Abbott, Mun. Corp. § 708, p. 1672. Therefore, in determining whether or not the county court of Stone county had authority to employ an ex-

pert to look over official books and accounts, we must call to mind the duties of such a court.

A county court is the general fiscal agent of the county, and is possessed of a supervisory power over the collection and preservation of its funds. Various officials, such as treasurers, collectors, sheriffs, marshals, clerks, and constables, as well as other persons chargeable with money belonging to the county, are required to report to and make settlements with said court. All these officials and persons must render accounts to the county courts at stated terms thereof, pay any balance due the county into the treasury, take duplicate receipts, and deposit them with the clerk of the court. Section 6781 and other sections; chapter 97, Rev. St. 1899 (Ann. St. 1906, p. 3334). If any person charged with the duty of reporting to and settling with the court fails to render a true account, it is made the duty of the court to adjust the account of the delinquent according to the best information it can obtain, ascertain the balance due, and require said balance to be paid into the treasury. Other sections following section 6782 of the statutes provide for proceedings by the court against delinquents. In addition to said provisions, section 6790 (Ann. St. 1906, p. 3336) requires the court to audit and adjust all accounts to which the county shall be a party, order payment out of the treasury of any sum of money found due by the county on such accounts, enforce the collection of money due it, order suit to be brought on the bond of any delinquent, issue process to secure the attendance of any person deemed necessary to be examined in the investigation of any account, compel the attendance of such person and the production of accounts, books, documents, and papers, and examine all parties and witnesses on oath touching the investigation of any accounts. The various provisions of the statutes demonstrate that it is not only within the power, but is the duty, of the county court, to look after public funds, examine and investigate the accounts of the different officials and other persons, enforce the collection of money due the county, and order suits to be brought on the bonds of delinquents. In short, responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations is imposed on county courts. The question for decision is whether the express delegation of those powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this inquiry ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it

never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated and indispensable to their performance may be exercised. 7 Am. & Eng. Ency. Law (2d Ed.) pp. 987, 989, and cases cited in notes. In *Boggs v. Caldwell Co.*, 28 Mo. 586, the Supreme Court allowed a bill for services rendered in indexing the deed records of a county pursuant to an employment by the county court. In the brief against the demand *Wolcott v. Lawrence Co.*, supra, was cited in support of the proposition that the county court was without power to make the contract; but the Supreme Court deduced the power from the duty of the county court to look after the property of the county, and said that, though it was the duty of recorders to make up their indexes without extra compensation, yet in the course of time it might happen these books would become unfit for use and need to be renewed. We regard that case as in point; for, though the work was different from what respondents contracted for, it was not more essential to the performance of a statutory duty of the county court. The precise question at bar was decided in *Duncan v. County Com'rs*, 101 Ind. 403. Those commissioners, who in Indiana correspond to our county courts, had employed said plaintiff to examine and report on the accounts of the treasurer of the county, and the plaintiff, having done the work, asked payment for his services. The Indiana statute relied on as authorizing the employment was one giving the board of commissioners power to audit the accounts of all officers having the handling and disbursement of the funds of the county, a statute of no broader scope than those we have cited. It was held the commissioners had full authority with reference to the adjustment of public finances, and, as incident thereto, power to employ an accountant.

As impugning the authority of respondents to make the contract in dispute, much stress is laid on section 1778 of the statutes (Ann. St. 1906, p. 1246). Said section says that in the settlements required by law to be made with county courts by treasurers and other officers holding funds it shall be the duty of the county court or some judge thereof to ascertain, by actual examination and count, the amount in the hands of an officer, and to what particular fund it appertains, and that such examination and count shall include all funds on hand to the day when the settlement is made. Because the section requires the county court, or some judge thereof, to ascertain, by actual examination and count, the balances in the hands of officials, it is argued that no one else can be employed to do or assist in the work. This would not follow necessarily we think, but do not decide; for in our opinion said statute has nothing to

do with the present case. It relates to the examination and count of balances in the hands of officials when they settle with the county court. The idea is to prevent a perfunctory settlement by requiring the court to make an actual examination and count of the balances and funds and ascertain to what particular fund the money belongs. Crawford was not hired for such a work, was not hired to examine the account tendered by some official at one of the periodical settlements required by law, nor to count the funds in his hands. He was employed to go over the books, papers, and accounts of officials who were in office or theretofore had been during such periods as the court might direct. Settlements had been made by different officials at different times during those periods; and, according to the answer, which there is no evidence to disprove, the court had examined and counted the balances as required by law when the settlements were made. Nevertheless respondents had heard of defalcations by certain officials and of discrepancies in their accounts which had escaped attention at these settlements. In order to ascertain whether there was merit in these reports, respondents, who were farmers and not trained in bookkeeping or the investigation of accounts, deemed it necessary to employ an expert. It turned out the reports were well founded, and a substantial sum was paid into the treasury without controversy as the result of the expert work. We deem authority to contract for such work is not only wholesome, but indispensable to an accurate knowledge by the county court of the financial condition of the county.

The judgment is affirmed.

NORTONI, J., concurs. BLAND, P. J., dissenting, deems the decision in conflict with that of the Supreme Court in *Wolcott v. Lawrence Co.*, 26 Mo. 277, and asks that the case be certified to the Supreme Court for decision. It is so ordered.

BLAND, P. J. (dissenting). On February 9, 1907, the county court of Stone county, by resolution entered of record, authorized the prosecuting attorney of the county, as agent of the county, to negotiate for the employment of an expert accountant to make an examination of the books of such of the public officers of the county as are required to make settlements with the county court of the public funds which come into their hands. On April 12, 1907, the county court, by order entered of record, agreed to hire L. U. Crawford, Esq., an expert accountant to check up and examine the accounts of the various county officers of the county, and to pay him \$10 per day for his services and certain expenses. Mr. Crawford accepted these terms of employment, and his acceptance was spread upon the records of the court. On June 17, 1907, a formal written contract, em-

bodifying the terms set forth in the order of April 12th, was entered into between the county of Stone, through B. W. Renfro, as agent, and L. U. Crawford. Mr. Crawford immediately entered upon the performance of his part of the contract, made an examination of the books of the county officers, and reported that he found the following due:

From W. B. Langley, ex-county treasurer	\$ 321 08
From W. I. Long, ex-county treasurer	1,688 00
From W. I. Long, ex-county treasurer	206 13
From W. T. Moore, ex-sheriff	17 44
From Jno. T. Moore for W. R. Gillette	56 59
	<hr/> \$2,289 24

These delinquencies were immediately made good by payments to the county treasurer. Mr. Crawford also reported other defalcations amounting to about \$3,000; but the correctness of this much of his report is in dispute. It is admitted that Mr. Crawford earned \$1,174 under the terms of his agreement with the county. Under the provisions of section 6763, Rev. St. 1899 (Ann. St. 1906, p. 3328), 50 resident, solvent, and responsible taxpaying citizens of Stone county filed a petition in the circuit court of said county, stating that they believed the contract entered into with Mr. Crawford was illegal, and asking that its legality be inquired into. Afterwards, to wit, on June 14, 1907, the plaintiffs Blades, Speers, Grisham, Short, Smythe, and Rickman, all resident taxpayers of Stone county presented their petition to the judge of the Stone circuit court, praying that the defendants, who are the three justices of the county court of said county, be enjoined from issuing a warrant to Crawford in payment for his services. A temporary restraining order was issued by the circuit court. Subsequently the venue of the cause was changed to Greene county, where the cause was tried, resulting in a judgment for the defendants, from which the plaintiffs appealed.

1. But two questions are presented by the record and briefs for determination. They are, first, whether or not on the pleadings and facts injunction is the appropriate remedy, and, second, whether or not the county court had any legal authority to employ Mr. Crawford at the expense of the county to render the services contracted for and rendered by him. It is admitted by defendants "that at the time of the issuance of the injunction said Crawford had performed a large part of the services under the attempted contract, and that at the time of the issuance of the injunction the defendants, as the county court of Stone county, were about to order the issuance of a warrant upon the county treasurer for the payment of the services that had been performed for the amount earned up to that date at the rate of \$10 per day by said Crawford." The county court and the county attorney contend and insist

that said obligation is the obligation of the county, and that said county court was prepared to order the issuance of the warrant at the time of the issuance of said injunction. From this admission it appears that the county court would have issued the warrant notwithstanding the petition of the 50 citizens and taxpayers filed in the circuit court asking that court to determine whether or not the contract with Crawford was valid or invalid, and but for the injunction defendants would have done the mischief, the doing of which plaintiffs seek to enjoin. But it is contended by defendants that section 6703, *supra*, affords a complete remedy, and the only one open to plaintiffs in the circumstances. This section provides a method of inquiry into the legality of contracts made by the county court as agent of the county, which does not exist independent of the statute, and seems to contemplate that the inquiry should be made before the contract is performed or its performance is entered upon by the other contracting party. The remedy is purely statutory, and does not exclude any remedy at law or in equity that existed prior to its enactment. It is well settled that a bill in equity will lie to enjoin a public municipal corporation from acting in contravention of the laws of the state, and that this remedy is available to taxpaying citizens of the municipality, whose individual interests or property will be affected by the illegal act, such as the illegal disbursement of public funds. *State ex rel. Cramer v. Hager*, 91 Mo. 452, 3 S. W. 844; *State v. Saline County Court*, 51 Mo. 350, 11 Am. Rep. 454; *Black v. Ross*, 37 Mo. App. 250. Therefore, if defendants were about to illegally disburse public funds of Stone county to Crawford, the plaintiffs as taxpaying citizens were entitled to enjoin defendants.

2. Did the defendants, as the fiscal agents of Stone county, have power to employ Crawford, at the expense of the county, to perform the services he performed? That Crawford's services were beneficial to the county does not admit of question, but the question is not one of benefit or no benefit, but whether the employment of Crawford was authorized by law. Section 1778, Rev. St. 1899 (Ann. St. 1906, p. 1246), provides: "In the settlements required by law to be made by the county court with treasurers and other officers holding county funds, whether quarterly, yearly or otherwise, it shall be the duty of the court, or some judge thereof, to ascertain by actual examination and count the amount of balances and funds in the hands of such officers, and to what particular fund it appertains, and such examination and count shall include all funds on hand up to the day on which such settlement is made." In making these settlements, the county court does not act in a judicial capacity, and its settlements may be set aside for mistake. *State, to use, et al., v. Roberts et al.*, 62 Mo. 388; *Cole Coun-*

ty v. Dallmeyer, 101 Mo. 57, 13 S. W. 687. The section imposes the duty on the county court, or some judge thereof, to ascertain the condition of accounts by "actual examination and count." The section is the warrant of authority to the county court to make these settlements, and in making them the court acts as the agent of the county (*Wolcott v. Lawrence County*, 26 Mo. 272), and its agency or powers are restricted to such as are expressly conferred by statute (*State ex rel v. Shortridge et al.*, 56 Mo. 126; *Sturgeon v. Hampton*, 88 Mo. 204; *State ex rel v. Wilder*, 200 Mo., loc. cit. 105, 98 S. W. 465). But defendants contend that the employment of an expert accountant is incident to the power to make settlements with public officers. Defendants allege in their answer that they are farmers by occupation, and not competent to discharge the duties imposed upon them by section 1778, *supra*; that the employment of an expert accountant was indispensable, and contend that the power to employ an accountant is impliedly conferred by the section. The reading of the section repels this contention, for it provides that the court, or one of the judges thereof, shall "ascertain by actual examination and count the amount of balances and funds," etc. The duty is a personal one, which cannot be delegated to another and an examination and count made by any person other than by the court, or a member thereof, is of no binding force on any one. The statute intended that the results reached by the settlement should be official and legally binding on the officers with whom the settlement is made, subject to attack for fraud or mistake, and selected as the agents of the county to make the settlement, the county court composed of persons, who, in contemplation of law, would be peculiarly fitted to make the settlement. It was not thought by the Legislature, after providing for frequent settlements by the county officers and designating competent agents of the county to make the settlements, that the accounts of the officers would, or could, become so complicated and entangled as to require the services of an expert to untangle them, and such condition would never arise if the county courts would require officers to settle at the time and in the manner required by law, and we unhesitatingly conclude that the county court of Stone county had no power or authority to employ Mr. Crawford, at the expense of the county, to do what the law requires the county court, or some judge thereof to do.

Defendants cite a number of cases where it has been held that county courts possess such implied powers as are necessary to carry out express grants of power, such as to purchase a site for a courthouse, where the court is expressly authorized to erect a courthouse. These cases are inapplicable to the facts in this case, for the reason the county court did not contract with Crawford to do something

incidental to the exercise of a granted power, but employed him to exercise a power which the law expressly provides must be exercised by the court or by one of the judges thereof, to wit, by an actual and personal examination and count.

I therefore think the judgment should be reversed and the alternative writ made perpetual, and dissent from the opinion of the majority of the court, and ask that the case be certified to the Supreme Court for final decision.

YONGUE v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. June 23, 1908.)

1. NEGLIGENCE—PROXIMATE CAUSE—CAUSE OF INJURY.

An injured person cannot recover for the negligence of another, unless a causal connection is shown between the negligence and the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-81.]

2. MASTER AND SERVANT—DEATH OF SERVANT—JUMPING FROM TRAIN TO ESCAPE PERIL.

If the conductor of a freight train jumped from the train to escape the peril in which the company's negligence had placed him, by permitting a defective track, his act was no defense to an action against the company for his death caused thereby.

3. DEATH—ACTIONS—PROOF OF CAUSE OF DEATH.

In a death action, plaintiff is not bound to produce eyewitnesses who can testify exactly how the death happened, but it is sufficient to prove circumstances which indicate that it might be ascribed, with reasonable probability, to the causes alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 94.]

4. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTIONS FOR JURY.

Whether negligence of a railroad company in permitting a defective condition of its track and brakes was the proximate cause of the death of an employé held for the jury, under the evidence.

5. MASTER AND SERVANT—SAFE APPLIANCES AND PLACE TO WORK—ASSUMPTION OF RISK.

A master must use ordinary care to furnish servants a reasonably safe place to work, and safe appliances to work with, and a servant, by retaining his position after becoming aware of danger in either respect, does not, as a general rule, assume the risk of injury, but only assumes such risks as are incident to his job after the master has fulfilled his primary duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

6. SAME—RIGHT OF MASTER TO CHOOSE METHOD OF CONDUCTING BUSINESS.

The right of a master to conduct its business in its own way, and use such instrumentalities as it chooses, is not absolute, but circumscribed by its duty to provide for the safety of its employés.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174.]

7. SAME—LINE OF DUTY—CONDUCTOR OF FREIGHT TRAIN.

Where a freight train approached a downgrade, and it was necessary for some member of the crew to ride the cars so as to control their

speed, and the brakeman, when ordered to do so, refused, an emergency arose which compelled the conductor to undertake the task himself, and he was not acting outside the line of his duty in so doing, where it entailed no neglect of his duties as conductor.

8. SAME—INSTRUCTION—REQUESTS—NECESSITY.

In an action for the death of a railroad conductor, alleged to have been caused by defective brakes, where all the evidence bearing on that question was introduced by defendant, and tended to show that the decedent had examined the brakes to "see they were all right," decedent could not be held by the court to have omitted to inspect, and if any inference could be drawn from the evidence that he had failed to do so, the issue should be submitted by a hypothetical instruction.

9. SAME—RULES OF EMPLOYMENT—DUTY OF SERVANT TO OBEY.

Employers operating a railroad should make rules for its management, to protect employes, passengers, and property, and if the rules are reasonable and known to an employé, he must obey them, and failure to do so, resulting in an injury to him, is negligence, and a defense to his action for damages.

[Ed. Note.—For cases in point see Cent. Dig. vol. 34, Master and Servant, §§ 759-775.]

10. SAME—EFFECT OF INFRACTION OF RULES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Though a railroad has prescribed rules for the inspection of cars and the handling of defective cars, a minor discretion in that respect is left to employes operating trains; and, in view of the rule requiring employers to use ordinary care to furnish reasonably safe instrumentalities, the question of the breach of the rules by an employé, in an action for his death, is an element of the defense of contributory negligence and is for the jury, where his acts were not obviously negligent.

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Death action by Mattie Yongue against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James Orchard, for appellant.

GOODE, J. This plaintiff declares on sections 2865, 2866, Rev. St. 1899 (Ann. St. 1906, pp. 1644, 1646), for damages for the death of her husband, alleged to have been caused by defendant's negligence. Deceased was the conductor of a train which ran on defendant's railway between the towns of Brownwood and Bloomfield. He was killed on the evening of October 24, 1904, while engaged in the performance of his duties. The train was a mixed one, hauling both freight and passengers. When it reached the station of Zadoc early in the evening, deceased found standing on a spur or side track two flat cars loaded with stave bolts, which were to be taken to Bloomfield, the terminus of the line south of Zadoc, whither the train was going. There had been brought to Zadoc by the train two cars which were to be set out on the side track; and in order to do this, and take up the two loaded with stave bolts, it was necessary, in the first place, to move the latter cars from the spur and shunt them

on the main line to the south, after which the cars intended to be left at Zadoc could be put on the switch. The grade of the road descends from said station to the south for about a mile, the fall in that distance being 60 feet. When cars were to be shunted ahead of the train, as the two in question were, it was the practice to allow them to roll to the foot of this grade, with their speed under the control of brakes, so as to prevent them from running away. They would be picked up when the train moved south. A traluman would go along with the cars and set the brakes to keep their speed in bounds. Two ranks of stave bolts were piled on the two cars in question to the height of 6 feet. These bolts were 52 inches long, and made of oak timber and quite heavy. They were not fastened, but were held in place by standards on the sides of the cars near the ends. The north one of the two cars was much larger than the south one; their respective capacities being 80,000 and 40,000 pounds. At the conclusion of the evidence an order to the jury to return a verdict in defendant's favor was requested and refused. Under the instructions given and the evidence submitted, a verdict was returned for plaintiff for \$4,000. No exceptions were saved to the instructions given; and, though exceptions were saved to the refusal of some requested by defendant, the assignments of error in the brief do not call in question the rulings on specific instructions, but relate to supposed errors in the admission of testimony, and to several propositions of law relied on in support of the contention that a verdict for defendant should have been directed. These propositions are lack of evidence to prove defendant's negligence was the cause of the death of the deceased, and, indeed, of any proof about how he came to his death, and that he was shown to have been guilty of negligence contributing to the casualty and to have assumed the risk of injury from the defects of the roadbed and the brakes on the two cars, said in the petition to have been negligently permitted by defendant, and constituting the gravamen of the cause of action. The case laid was that defendant had suffered its railroad to be in an unsafe and dangerous condition from a lack of ballast, and from some of the ties under the rails being so rotten the rails were without sufficient support, which faults caused cars passing over the road to swing violently from side to side as the rails yielded. Negligence was also alleged in requiring the deceased to handle the two cars when the brakes on them were so out of repair they would not hold when set. In consequence of these defects in the railroad and cars it is charged plaintiff's husband was jostled or thrown to the ground, and sustained injuries from which he died in a few hours.

1. We will first notice the facts in proof

relied on to establish the negligence of defendant, and that it was the proximate cause of the death of the deceased. Just south of Zadoc the railroad ran through a cut 600 feet long and 8 feet deep, then over a fill about 400 feet long and $7\frac{1}{2}$ feet high, and a little further south over a trestle 100 feet long and $14\frac{1}{2}$ feet high. The track curved rather sharply to the east a short distance below the station, and had a grade of about 60 feet to the mile. There were rotten ties in the roadbed, which would break in two occasionally as trains ran over them, and the track was so uneven as to cause trains running at ordinary speed to rock from right to left with sufficient oscillation to set the engine bell ringing. The brake on the larger of the two cars which were loaded with staves, to be taken into the train at Zadoc, was situate at the center of the north end of the car, and the brake on the smaller or south car was at the northeast corner—the right-hand corner of the north end. Hence the brakes of the two cars were not immediately opposite each other. The rod of the brake on the larger car had been bent, and, moreover, staves were piled about the rod, and in consequence of these facts, the wheel whereby the brake was wound up would only revolve halfway around, and it could not be set tight. The ratchet of the brake on the smaller car was broken off. This ratchet was arranged to catch in notches, in a small stationary wheel around the brake rod on the floor of the car, so as to prevent the chain from flying loose after it was wound up. As the ratchet was gone, the only method of controlling the speed of the car was to hold the brake in place by main strength after it had been set; and the evidence tends to prove it was possible to do this. The foregoing description of the condition of the railroad and brakes agrees with the testimony for plaintiff. That for defendant inclines to prove the track was in fair condition for the quantity of traffic which passed over it, though an expert in defendant's employ refused to testify it was in first-class condition. As regards the condition of the brakes, the testimony for defendant indicates the ratchet of the brake on the smaller car was in place, and the rod of the other brake straight; in other words, tends to prove the brakes were in good order. One of the train crew testified he had examined them two days before when the cars were set on the spur at Zadoc, and they were then in proper condition; and the same witness, or another one, swore he inspected the two cars before they were taken off the spur on the evening of the accident, and found them fit to move. This witness also testified deceased himself examined the brakes to see if the cars "were all right to cut off," before they were taken from the spur. One witness swore the brakes were in good condition to set and hold the cars on

the grade south of Zadoc, unless the person handling them "allowed them to get the start of him," an expression we understand to mean the brakes would control the speed, if set before the cars acquired momentum. After the two cars had been shunted on the main track on the evening in question, and had started rolling down the grade, deceased ordered one of his crew to ride them down. The brakeman refused to do this, and uttered a profane exclamation indicating resentment at the order, so a bystander testified; but the brakeman denied he was ordered or refused to ride the cars. The deceased got on the smaller of the cars to accompany them to the foot of the grade, and in a few minutes disappeared from the sight of the trainmen and persons about the station. One of the crew swore he saw deceased in the act of setting the brake of the smaller car as it started. When the train went southward from the station, the crew found deceased lying on the right side of the track unconscious, and with injuries on his body, including a wound in his head, which caused his death from concussion of the brain the next day. Blood was detected on the ends of the ties for 20 feet north of where he was lying. It is contended for plaintiff her husband, because of the bad repair of the brakes, was unable to control the speed of the cars as they went down the grade, and they ran away, and he was thrown to the ground by their oscillating movement as they ran rapidly along the curved track. Stave bolts were found scattered here and there for a distance of a mile south of the station, and it is said they might have knocked deceased from his position on the car. He was found about a mile, or three-quarters of a mile, from the station. As the cars neared the foot of the grade, they were running very rapidly; some witnesses, who dwelt near the right of way and heard them, estimating their speed at 45 or 50 miles an hour.

We are not asked to say the foregoing evidence contains no proof of negligence on the part of the railroad company with respect of its track and the brakes on the two cars; defendant's contention being the evidence fails to prove or indicate the proximate cause of the death of the deceased. It is argued the evidence touching this issue is so uncertain as to render it a mere matter of surmise or conjecture whether the deceased was thrown from the car by reason of the bad order of the track and the brakes, or jumped or fell off from some cause unconnected with the negligence charged in the petition. Unless a causal connection was shown between the negligence charged and the injury, no case was made. *Harper v. Railroad*, 187 Mo. 575, 86 S. W. 99. The defective track and brakes may have had nothing to do with the casualty and the deceased may have fallen off the car through carelessness, or jumped off with suicidal intent. Those events are within the

range of possible occurrences. Nevertheless the evidence sufficiently inclines to prove neither happened, and that deceased was hurled off the car by its rapid and oscillating motion, due to the condition of the track and brakes, as to warrant the jury to find the latter was the manner of his death. His position and behavior, when last seen by the persons about the station, are to be taken into account, and he was then in his usual spirits, and intent on his duty as conductor of the train; for he was seen to climb on the smaller car and work with the brake at its northeast corner just at the two cars started away. It is unlikely he would have ceased from this work before reaching the foot of the grade, and no one can believe he threw himself from the car, unless he did so to escape the peril in which defendant's negligence had placed him; and if he did this, it is no defense. *Root v. Railway Co.*, 195 Mo. 348, 357, 92 S. W. 621, 6 L. R. A. (N. S.) 212. It must strike every mind, on reading the facts we have recited, as highly probable he was thrown from the car while it ran away, as were the stave bolts, found at intervals on the same side of the track where his body lay. The facts in proof do not point so vaguely to the proximate cause of the casualty as to make the finding of the jury a mere guess, but fall within the requirements of the law as to the certainty of the evidence essential to establish a causal connection between alleged negligence and damage. Plaintiff was not bound to produce witnesses who had their eyes on her husband when he fell or was thrown from the car, and could testify exactly how the accident happened. It was enough for her to prove circumstances which indicated his fall might be ascribed, with reasonable probability, to the causes stated in the petition.

In this state the leading case on the degree of proof exacted to show the proximate cause of the death of a person found dead, and connect his death with the negligence charged against a defendant, is *Buesching v. Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503. The facts therein were enough like those before us to make the decision a precedent for our guidance. Mrs. Buesching's husband was found dead at the bottom of an open area in front of the Gaslight Company's building in the city of St. Louis. No one saw him fall, or knew how his death occurred; but his body lay at the foot of a stairway leading from the sidewalk to the floor of the area. In the opinion of the Supreme Court these propositions were, in effect, declared as law: The gas company was guilty of negligence in leaving the area unguarded adjacent to a sidewalk. Though the circumstances were consistent with murder, it was fairly inferable the deceased was not murdered. There was no presumption of suicide; but, as the evidence failed to show how the deceased came to be where he was found, it was to be presumed he fell there accidentally, and a jury would be

justified in finding this was the mode of the accident, inasmuch as men always have been accustomed to reason and draw conclusions from such facts in the ordinary affairs of life. It is presumed, in the absence of evidence to the contrary, the deceased was in the exercise of ordinary care when he fell, and this presumption was not overthrown by the bare fact of the accident, but the burden was on the Gaslight Company to establish contributory negligence on the part of the deceased, either by positive testimony or circumstances. As there was no direct testimony regarding his conduct when he fell, it was for the jury, not the court, to draw inferences to overthrow the presumption that he had observed due care. These doctrines have been followed ever since they were announced, and were approved, in dealing with the question of the proximate cause of an accident to a person found dead, in the recent decision of *Goff v. Transit Co.*, 199 Mo. 694, 98 S. W. 49, 9 L. R. A. (N. S.) 244.

In *Settle v. Railroad*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633, it appeared the husband of the plaintiff had been killed by a fall from a box car while he was making a running switch. He was seen to take a position on the side of the car, with his feet on a metal foothold which projected below the side and with one hand grasping a handhold. This handhold when in proper condition stood out two or three inches from the car, but had been mashed in at the middle, so the space between it and the car at said point was less than an inch, but leaving some five or six inches unbent at either end. Settle was next seen hanging from the hold by his hand, his feet having slipped off the foothold on which he had been standing. After hanging a minute his hand gave way, and he fell on the track and the car ran over him. The negligence assigned was permitting the handhold to remain bent inward so it could not be readily grasped by the hand, by reason of which negligence it was alleged Settle lost his hold and fell from the car. On the appeal counsel for the railroad company insisted the evidence failed to show any causal connection between the bent condition of the handhold and Settle's death. We regard the facts of that case as pointing less directly to the proximate cause of the casualty than the facts before us; for it was possible to get a good grasp on either end of the handhold, and hence, to connect its bent condition with Settle's death, the jury had to find he had endeavored to grasp it in the middle, had obtained an insecure grip, and in consequence could not hold on. In discussing the contention the Supreme Court conceded the necessity of proving the negligence charged had led to the accident, and, further, that the evidence relied on to do this must not leave the conclusion open to speculation or conjecture. It was held, too, the law required no direct proof of the causal connection, but was satisfied if

facts were shown from which such connection might be inferred. The court then examined the evidence, and held it was adequate to justify the jury in finding Settle lost his life in consequence of the condition of the handhold. These cases, and others which might be cited, require us to rule the facts we have recited sufficed for a finding that the negligence charged against defendant, in respect of the condition of its track and brakes, was the proximate cause of the death of plaintiff's husband, and warranted the submission of the issue to the jury. Counsel for defendant invoke cases like *Trigg v. Lumber Co.*, 187 Mo. 227, 86 S. W. 222, wherein plaintiffs, who asked damages for injuries which as well might have happened from some other cause as from the acts alleged, were denied recoveries for failure to trace the injuries to those acts. The doctrine of such cases is everywhere recognized as sound in proper limits, but it does not extend to requiring a plaintiff to furnish demonstrative proof that the dereliction of which he accuses a defendant caused the damage, and to exclude, by the same character of proof, the possibility of the damage having resulted from any other cause. 1 *Shear. & Redf. Neg.* (5th Ed.) §§ 57, 58; *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927.

2. The proposition is presented in several forms that plaintiff's case must fail because her husband assumed the risk of injury from the bad repair of the railroad and the brakes. Counsel for defendant support this position with these arguments: Deceased had been working for the company on this road for 10 days. Defendant was conducting its business in the usual and ordinary way, as it had the right to do, and with machinery and appliances of its own selection. The opportunity of deceased to know the condition, both of the track and the brakes, was equal or superior to the opportunity of the other agents and servants of the company. Further, it was his duty, as manager of the train, to investigate and inspect the brakes, and not take the cars out if they were in bad condition. Defendant was not an insurer of deceased against accidents. It furnished certain rules relating to the inspection of tools and appliances, and refraining from the use of them if they were in a defective condition, which rules deceased disobeyed, and his death was the consequence of his disobedience. Putting aside for the present the question of how far plaintiff's right to recover is affected by the failure of her husband to observe the rules of the company, we will consider the other arguments. In the Settle Case the same defense was made, and on much the same grounds. It was contended Settle had assumed the risk of injury from the bent handhold, as the condition of the appliance was obvious. The Supreme Court said, in effect, that as an employé Settle had assumed the risk of all

dangers incident to his employment, but the company was bound not to subject him to other hazards by failing to use ordinary care to provide secure appliances for his use and keep them in good condition, which duty was a continuing one, and any neglect of it entailed a risk the servant did not assume. As to his remaining in the company's service knowing he would have to use the handhold, the court said, if this fact was allowed to defeat the action, a master would be relieved of the duty to furnish safe appliances as soon as the servant became aware the duty was violated; and that the retention of service after becoming apprised of a defective appliance was relevant only to the defense of contributory negligence. There are some cases of both earlier and later dates which lend countenance to defendant's position on this point, but the doctrine of those cases is not at present in force; for the latest decisions dealing with the defense of assumption of the risk are in accord with the *Settle* opinion. An employer must use ordinary care to furnish his employes a reasonably safe place to work and appliances safe to work with; and an employe, by retaining the job after he becomes aware of danger in either respect, does not, as a general rule, under such circumstances as are before us, assume the risk of injury. He only assumes such risks as are incident to his job after his employer has fulfilled the primary duty of using care to furnish proper working places and appliances. *Blundell v. Elevator Co.*, 189 Mo. 552, 88 S. W. 103; *Kennedy v. Railroad*, 190 Mo. 24, 89 S. W. 370; *Phippin v. Railroad*, 196 Mo. 321, 93 S. W. 410; *Charlton v. Railroad*, 200 Mo. 413, 98 S. W. 529; *Longree v. Mfg. Co.*, 120 Mo. App. 478, 97 S. W. 272; *Obermeyer v. Mfg. Co.*, 120 Mo. App. 59, 96 S. W. 673. In answer to the contention that defendant had the right to conduct its business in its own way and use such instrumentalities as it chose, we point to the opinion in *Curtis v. McNair*, 173 Mo. 270, 283, 73 S. W. 167, where the Supreme Court held those rights of an employer are not absolute, but circumscribed by the duty the law lays on him to provide for the safety of his employes. The court below gave several instructions which presented the defense of assumption of the risk in a light very favorable to defendant. As said, no error is assigned for the refusal of instructions, and those refused on this branch of the case were properly refused, because they declared, in effect, it was a defense if deceased accepted and continued in defendant's service knowing the condition of its tracks and brakes.

3. It is insisted the judgment should be reversed because the evidence shows conclusively deceased, in handling the cars in question, violated certain rules of the company intended for the security of employes, and thereby brought about the accident. It is

fair to presume from the evidence these rules were known to the deceased. Indeed want of knowledge or notice of them is not asserted against their enforcement. The rules are as follows:

"The rules herein set forth govern the railroads operated by the St. Louis & San Francisco Railroad Company. They take effect February 15, 1902, superseding all previous rules and instructions inconsistent therewith. Special instructions may be issued by proper authority. B. F. Winchell, Vice President and Gen. Manager.

"The service demands the faithful, intelligent and courteous discharge of duty.

"To obtain promotion, capacity must be shown for greater responsibility.

"Employes, in accepting employment, assume its risks.

"Employes whose duties are prescribed by these rules must provide themselves with a copy.

"All persons entering into or remaining in the service of this company, are warned that the business is hazardous, and that in accepting and retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in." Rule 410.

"Each employe is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows. Employes of every rank and grade are warned to see for themselves, before using them, that the rolling stock, machinery or tools which they are required to use, are, in safe condition, or that they are put so before using." Rule 411.

"The company does not require or expect its employes to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety." Rule 412.

"Trainmen must know that the cars in their train are in good order before starting, and inspect them whenever they have an opportunity to do so, particularly when entering or leaving sidings, or waiting for other trains. All cars taken in their trains at intermediate stations must be examined with extra care." Rule 286.

"Conductors will see that the words 'Bad Order' are written with chalk on both sides of disabled cars left at stations, and de-

fective parts marked with a cross, and report of same made to trainmaster."

In addition to the foregoing rules of the company, introduced by itself, plaintiff introduced the following:

"When approaching stations, drawbridges, railroad crossings, water or coal stations, and while descending heavy grades, conductors of all freight, mixed or work trains will require their brakeman to be out on top for one-half mile and until train comes to a full stop or has passed such point." Rule 278.

"In trains fully equipped with air, front and rear brakemen should take position on high cars, dividing as nearly as possible the distance between engine and caboose, except that where there are nonair cars, one of the brakemen must take position immediately behind the rear air brake car." Rule 278.

There is no evidence of whether defendant's regulations were closely or loosely followed, or of the interpretation put on them in practice.

(a) The rules last copied were introduced by plaintiff to show deceased was in the line of his duty when he rode the cars down the grade, as they made conductors responsible for their trains, required them to protect the company's property, and directed conductors of freight or mixed trains to keep a brakeman on top of a train as it descended heavy grades. These rules are said to have made it proper for deceased to ride the cars in order to control their speed and prevent damage. The point is made that deceased got on the car of his own volition, and a witness swore it was no part of a conductor's duty to ride cars or set brakes. We find no difficulty in holding, independently of the rules invoked by plaintiff, the deceased was in the line of duty when he took charge of the cars. Some member of the crew had to manage them as they ran down the grade, and it was not amiss for him to do so, if it entailed no neglect of his duties as conductor. When the brakeman who was ordered to ride the cars refused, an emergency arose which compelled deceased to undertake the task himself. The point that deceased must be regarded as guilty of contributory negligence in so doing, or as having assumed a gratuitous risk, is devoid of merit, unless the risk was more than a prudent man would face.

(b) It is contended the rules required deceased to ascertain the condition of the cars before moving them, and as he must have seen the bad repair of the brakes if he inspected them, he broke the rules by taking the cars out; whereas, if he omitted to inspect, he violated the rules. This position raises a dilemma which is said to stand in the way of plaintiff's recovery on either view of the matter. All the evidence bearing on the question was introduced by defendant, and goes to show deceased examined the brakes "to see they were all right." It follows he could not be held by the court to

have omitted to inspect, and if an inference might be drawn from the evidence that he failed to do so, it suffices to say no hypothetical instruction was asked on the issue.

(c) But it is said the unsafe condition of the brakes was obvious, if the witnesses for the plaintiff testified truly, and must have been observed in even a casual glance, and that, this being true, knowledge of their condition ought to be imputed to deceased, and hence he was guilty of an infraction of the rules in attempting to handle the cars. Several circumstances are to be considered here. It is taking much for granted to say deceased must have realized the state of the brakes. This matter will be adverted to again. It is worthy of note that the rules contain no explicit command to the conductor or train crew not to take up at a way station a car in bad order, though perhaps rules 286, 411, and 412 may be interpreted to forbid this if the car is unsafe. Rule 286 says cars taken into trains at intermediate stations must be examined with extra care, and conductors must mark disabled cars left at stations with the words "bad order," and report the same to the trainmaster. Rule 411 warns employes of every rank to see that appliances and rolling stock are in a safe condition before using them, and protect themselves by the exercise of judgment and personal care. Rule 412 says the company does not require or expect employes to incur any risk from which they can protect themselves by judgment and care. The inquiry at this point is as to whether, viewing the conduct of deceased with reference to those rules, he must be regarded as guilty of contributory negligence, or as having assumed the risk of injury in operating the cars with the brakes as they were. Employers who conduct a complicated business, like the operation of a railroad, ought to promulgate rules for its management which will tend to protect employes, passengers, and property; and, of course, if the regulations are reasonable and known to the employes, it is the duty of the latter to obey them. Speaking generally, disobedience of a rule by an employe, resulting proximately in an injury to him, constitutes contributory negligence, and a defense to his demand for damages. 20 Am. & Eng. Ency. Law (2d Ed.) 105; 26 Cyc. 1267; 1 Shear. & Redf. Neg. 207b; 3 Elliott, Railroads, § 1282. Instances occur in which the breach of some simple rule was so manifestly the sole cause of a servant's injury that redress should be denied by the court; as where a brakeman, in contravention of a rule to the contrary, goes between moving cars to couple them, or jumps on the front of a moving engine. *Schaub v. Railroad*, 106 Mo. 74, 16 S. W. 924; *Francis v. Railroad*, 110 Mo. 387, 19 S. W. 935. And plaintiffs have been nonsuited by courts where the causal connection between the breach of a rule and the injury was not so plain, including instances of a failure to

inspect brakes before handling cars. We cite a series of decisions dealing with this subject: *La Croy v. Railroad*, 132 N. Y. 570, 30 N. E. 391; *Alexander v. Railroad*, 83 Ky. 589; *Karrer v. Railroad*, 76 Mich. 400, 43 N. W. 370; *Chicago, etc., Railroad v. Fry*, 131 Ind. 319, 23 N. E. 989; *Ft. Wayne, etc., Railroad v. Gruff*, 132 Ind. 13, 31 N. E. 460; *Terre Haute, etc., R. R. v. Pruitt*, 25 Ind. App. 227, 57 N. E. 949; *Quinn v. Railroad*, 175 Mass. 150, 55 N. E. 891; 111. Cent. R. R. v. *Jewell*, 46 Ill. 99, 92 Am. Dec. 240; *Railroad v. Eddy*, 72 Ill. 138; *Chicago, etc., Ry. v. Bragonier*, 119 Ill. 51, 7 N. E. 688; 111. Cent. Ry. v. *Barslow*, 94 Ill. App. 206; *Brooks v. Railroad (C. C.)* 47 Fed. 687.

Great injustice will result if, regardless of the circumstances, nonobservance of rules like those invoked in the present case is held to preclude a recovery of damages by the servant. In the management of enterprises wherein many operatives are employed, and especially in railroad operation, certain employes are intrusted with the inspection of instrumentalities and the decision of their fitness for use. Railway companies have car inspectors, whose duty it is to know cars are in good order before they are sent on runs. Railroads could not be operated if a conductor or brakeman could substitute, at pleasure, his judgment for the regular inspector's and refuse to take a car into a train which had been pronounced roadworthy. Trainmen are not allowed such a prerogative; yet companies ought to require of conductors and crews some attention to the condition of the cars they handle, because those in good order at points where regular inspectors work may get out of order on runs or at way stations. Therefore a minor discretion must be left to employes who operate trains. These practical considerations have a bearing on the effect to be given the rules in question, and this effect is to be measured, too, by the doctrines of the law requiring employers to use care to furnish reasonably safe instrumentalities. The law in this state imperatively exacts this duty, and does not permit an employer to escape liability for its neglect by proving an employé, injured by a defective instrumentality, used it knowing it was in bad order, unless the use of it was rash. *Blundell v. Elevator Co.*, and other cases cited supra.

If railway companies were exonerated, ipso facto, from liability to employes for injuries caused by defective appliances, because of rules throwing responsibility for the condition of appliances on the employes, the policy of our law in this regard would be defeated. How, then, can the doctrine that it is the primary, nondelegable duty of railway companies and other employers to furnish safe appliances be reconciled with the other doctrine that it is the duty and right of employers to make reasonable rules concerning the management of their affairs and the

duty of employes to obey these rules? So far as we can see, only by treating the breach of such rules as an element of the defense of contributory negligence—a fact connected with said defense. So regarded, if the breach was coerced by no necessity, but was purely voluntary, and obviously the proximate cause of the injury for which the culprit sues, he ought to be defeated as a matter of law. But it may be doubtful on the evidence whether the employé properly observed the rule, or under the circumstances, and consistently with the exigencies of business, could observe it, or doubtful whether non-observance caused the injury. In either contingency there is a case for the jury, as there is when the issue of contributory negligence arises on other classes of disputed facts.

Though we find no Missouri case sufficiently like this one to serve as a precedent, we think our conclusion that the effect of the rules on the right of recovery is for the jury is in accord with the law as laid down in standard treatises and by courts of authority. *Labatt, Master & Servant*, §§ 229, 417; *Louisville, etc., Railroad v. Orr*, 91 Ala. 548, 8 South. 360; *Memphis, etc., R. R. v. Graham*, 94 Ala. 545, 10 South. 283; *Louisville, etc., R. R. v. Pearson*, 97 Ala. 211, 12 South. 176; *O'Malley v. Railroad*, 67 Hun, 130, 22 N. Y. Supp. 48; *Myers v. Railroad*, 44 App. Div. 11, 60 N. Y. Supp. 422; *M. K. & T. R. R. v. Wood (Tex. Civ. App.)* 35 S. W. 879; *Railroad v. Nicholson (Tex. Civ. App.)* 57 S. W. 693. Some of the cases supra (e. g., *R. R. v. Bragonier*, 119 Ill. 51, 7 N. E. 688) relieved the company from liability for an accident due to defective brakes, on the ground the parties injured were specially charged to look after the brakes. The case of *Chicago, etc., R. R. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259, should be compared with those cases. There the duty of the employé to see that the brake was in order was secondary to the same duty intrusted to inspectors, and the employé had but a poor opportunity to detect the defect. The Texas courts hold the question of contributory negligence, for breach of a rule by a servant, is always for the jury, unless the rule violated is a statute. The Alabama Supreme Court said, in *Railroad v. Orr*, that railroads, like other corporations, had the right to adopt regulations for the protection of their employes, but one which threw on an employé the task of providing for his own safety contravened the law itself. If this remark refers to some Alabama statute, the statute is not different from the law as declared by the decisions in this state. In the same connection the court said it was the duty of the company to furnish suitable appliances, and in the absence of notice to the contrary, an employé had the right to presume the duty had been performed, unless the character of the employment devolved on the servant

the risk of examining appliances and seeing they were in proper condition; that if this was his task, and he neglected it, and in consequence was injured, he would be guilty of contributory negligence. In *Memphis, etc., R. R. v. Graham*, the court considered a rule quite like those before us, and requiring employes, before working with cars, engines, machinery, and tools, to examine their condition for his own safety, and promptly report any defect to his superior officer, giving the right to an employé to make such examination before taking a risk, and the right to refuse to obey an order which would expose him to danger. That was a case in which a widow sued for the death of her husband alleged to have been caused by a defective drawhead of a car, it being set up in defense the death was caused by the deceased violating a rule of the company requiring trainmen to examine the condition of drawheads before coupling cars. The court held that whether the deceased was negligent in not making an examination, or the defect was of a kind not discoverable on such an examination as it was his duty to make, or whether he obeyed the rule, were questions for the jury; further, that in so far as the rule of the company required the contrary, it was opposed to a statute of the state, and contravened the doctrine of law which required an employer to furnish safe appliances in the prosecution of its business and hence was inoperative. A similar doctrine was declared in *Railroad v. Pearson*, 97 Ala. 211, 12 South. 176, wherein an employé had been injured or killed by the giving way of a defective handhold on a car.

The reasonable conclusion to be derived

from the authorities is that, except in obvious cases, such as where a trainman violates a rule against coupling moving cars, a breach by an employé of a regulation intended to secure his safety is a circumstance to be weighed by the jury in passing on the defense of contributory negligence. Taking this as the law, we will apply it to the facts before us. To our minds the contributory negligence of the deceased is not clear enough to make it the duty of a court to nonsuit plaintiff. We do not know that the cars, when they were sent out from inspection points, were in good order, and no hypothetical instruction was asked and refused on the theory that they were. They had been loaded to be taken by the train of deceased to Bloomfield. We are unwilling to say no conclusion can be drawn from the evidence save that, by such an inspection as deceased ought to have made at night and while stopping at a way station, a man of ordinary prudence and skill would have seen both brakes were out of repair, and have declined to haul the cars over the short distance to Bloomfield, or that an employé of only 10 days' experience on that run must have been familiar enough with the curves and grade to realize the difficulty of controlling cars on it. One witness swore it was possible to control the speed of the two in question by holding one of the brakes wound tight. All these facts are to be weighed in connection with the rules, and in our opinion, made the issue of the negligence of the deceased a jury matter.

There being no assignments of error because of rulings on the instructions, the foregoing disposes of the appeal, and the judgment will be affirmed. All concur.

YOUNG v. RUHWEDDEL.

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

APPEAL AND ERROR (§ 1195*)—FORMER APPEAL—DECISIONS—LAW OF THE CASE.

The opinion of the Court of Appeals on a prior appeal is the law of the case on retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Appeal from Circuit Court, Randolph County; Hon. W. P. Cave, Judge.

Action by J. E. Young against Conrad Ruhweddel. Judgment for defendant, and plaintiff appeals. Affirmed.

P. H. Cullen, J. W. Delventhal, and E. Rosenberger & Son, for appellant. Robertson & Robertson, for respondent.

JOHNSON, J. Action by a real estate agent to recover a commission. The first trial of the cause resulted in a verdict for plaintiff, which the court set aside on motions for new trial and in arrest of judgment, and plaintiff appealed to this court. We affirmed the judgment, holding that no error was committed in granting a new trial. 119 Mo. App. 231, 96 S. W. 228. At the second trial, verdict and judgment were for defendant, and plaintiff again appealed.

We do not find any material difference in the evidentiary facts adduced at the two trials, and, since the law of the case was fully discussed and determined in our former opinion, and we find that the rules and principles announced were followed and applied at the second trial, we perceive no good reason for retraveling ground once thoroughly covered.

Accordingly, the judgment is affirmed. All concur.

EDIE et al. v. KANSAS CITY SOUTHERN RY. CO.

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

1. RAILROADS (§ 411*)—INJURY TO ANIMALS—LIABILITY.

It is the point at which cattle enter upon a railway right of way which determines the company's liability for injury to them, and not the point at which collision occurs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1429-1432; Dec. Dig. § 411.*]

2. RAILROADS (§ 411*)—CATTLE GUARDS—DUTY TO MAINTAIN.

Rev. St. 1890, § 2867 (Ann. St. 1906, p. 1649), making railway companies liable for injury to animals occurring where the track is uninclosed, does not make a company liable for killing stock which enters the right of way from a public road at a point where to maintain a cattle guard or fence would seriously impede transaction of business and endanger the safety of employes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1422; Dec. Dig. § 411.*]

3. RAILROADS (§ 446*)—CATTLE GUARDS—NECESSITY—QUESTION FOR JURY.

Whether a cattle guard at a particular point on a railway right of way would be an obstruction to the company's business and endanger employes is to be determined in the light of particular circumstances, and, when essential facts are in dispute or reasonable minds might differ as to the inference to be drawn from conceded facts, the question is for the jury, but, where the conceded facts show a necessity for noninclosure, the court should hold as a matter of law that the company is not liable for noninclosure.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1634; Dec. Dig. § 446.*]

Appeal from Circuit Court, Cass County; Nick M. Bradley, Judge.

Action by James E. Edie and others, revived in the name of Charles E. Edie, administrator of the partnership estate of James E. Edie & Son, against the Kansas City Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. A. Whitsitt, for appellants. C. W. Sloan and Cyrus Crane, for respondent.

JOHNSON, J. Four steers belonging to plaintiffs escaped from their farm to a public highway, and found their way to defendant's railroad, where they were killed by a passing train. Plaintiffs brought suit for single damages, alleging in the petition that "defendant failed and neglected to erect and maintain lawful fences and cattle guards on the sides of its said railroad at said point, but suffered said railroad track on both sides thereof to be and remain unfenced, and without cattle guards, at the time and place where said steers got upon said railroad track and were killed," etc. The answer is a general denial. At the conclusion of the evidence introduced by plaintiffs, and at the conclusion of all the evidence, defendant asked the court to instruct the jury to return a verdict in its favor, but these requests were refused and issues of fact were submitted in the instructions given. The verdict was for plaintiffs, but it was set aside on the hearing of the motion for a new trial, on the grounds that the court erred in refusing to give the instruction in the nature of a demurrer to the evidence. A new trial was ordered, and plaintiffs appealed.

The animals were killed near defendant's station at West Line. The station and yards at this place are in the country, outside the limits of the town of West Line, which is three-fourths of a mile distant. The railroad runs north and south, and is crossed by a public road, the south line of which is 60 feet north of the station building, and is abutted by the station platform. South of the road and adjacent to the tracks are the section house, toolhouse, and stockyards. North of the road, and on the right of way, are a mail crane and the station privy. The station and other improvements, with the exception of the

stockyards, lie between the main track and the side, or spur, track, to the west thereof. The stockyards are immediately west of the side track. The side track diverges from the main line at a switch which is 668 feet north of the public road. Its south end does not join the main track, and is several hundred feet south of the station. The first cattle guard north of the station is at a point 402 feet north of the switch. Between that point and the public road, defendant maintains no right of way fences, but the farmer through, whose land the railroad runs has good fences on each side thereof. These fences form an inclosure for the tracks, which, on account of the cattle guard at its apex and the absence of one at its base, is a cul-de-sac into which live stock may enter from the public road, and from which they cannot escape at the sides or apex without breaking through the farmer's side fences or defendant's cattle guard. Plaintiffs' cattle were in an inclosed lot south of the public road and east of the station. They broke out at night, traveled west on the public road to the open end of the inclosure, and thence north up the right of way to a point 30 or 40 feet south of the cattle guard, where they were struck and killed by a south-bound passenger train. Defendant employs an agent at the station, and transacts considerable business, both passenger and freight, with the public at that point. The spur track is used for freight cars to be loaded, unloaded, or stored for switching, and as a passing track for trains scheduled to meet at that point. The principal part of the business of loading and unloading cars was done on that part of the track south of the public road. The upper end of the track was used chiefly by trains in passing and switching.

The cause of action pleaded in the petition is founded on section 2867, Rev. St. 1899 (Ann. St. 1906, p. 1649), which provides: "When any animal or animals shall be killed or injured by the cars, locomotives or other carriages used on any railroad in this state, the owner of such animal or animals may recover the value thereof in an action against the company or corporation running such railroad after any proof of negligence, unskillfulness or misconduct on the part of the officers, servants or agents of the company; but this section shall not apply to any accident occurring on any portion of such road that may be inclosed by lawful fences or in the course of any public highway." Since the evidence of plaintiffs, as well as that introduced by defendant, shows beyond question that the animals entered the inclosure described from the public highway, we think that is the point, where they must be deemed to have entered defendant's right of way; and the question at issue is whether or not defendant should have fully inclosed that section of its right of way by closing the gap at its base with a cattle guard and wing fences. We approve what was said by the St. Louis Court of Appeals in *Kirkpatrick v. Railroad*, 120 Mo. App.

416, 96 S. W. 1036: "It is well settled in the jurisprudence of this state that it is the point at which the cattle enter upon the right of way of the railroad which determines the liability or nonliability of defendant in these cases (*Snider v. Railway*, 73 Mo. 465; *Acord v. Railway*, 113 Mo. App. 84, 87 S. W. 537), not the point at which the actual collision occurred. It is wholly immaterial that after going upon the right of way at a point which would affix liability against the railroad the cattle afterwards, in their wanderings, passed a half mile north on the track, and over a point where a cattle guard should have been constructed." We do not believe defendant could have maintained a cattle guard at the place where the cattle entered—i. e., the north line of the public road—without seriously impeding the transaction of the business of the station with the public; and, what is still more serious, endangering the safety of its employes in the performance of the work necessary to be done in switching and handling cars and trains. Construing section 2867, we said in *Gilpin v. Railroad* (Mo. App.) 77 S. W. 118: "It is well settled that if cattle guards could not have been placed at the crossing where animals go onto the track, without endangering the life or limb of the railway's employes in transacting the business of the road with the public, and in performing the necessary work connected with the operation of the cars, such as switching cars, trains, etc., no liability arises for omitting to so place them." And in the same case the Supreme Court said (197 Mo. 319, 94 S. W. 869): "According to the interpretation that this court and our Courts of Appeal have in several cases put upon that statute, no liability will attach to a railroad company for failure to put a cattle guard in a place where to do so would endanger the lives or limbs of its employes. There is no such express exception written in the statute, but to construe it otherwise would make its meaning unnatural." The question of whether the presence of a cattle guard at that place would have proved to be an obstruction to the transaction of business with the public, and a menace to the safety of defendant's employes, was not one to be left to the decision of defendant, but is for the determination of the courts, and is to be solved in the light of all the facts and circumstances of the situation. The rule is that where essential facts are in dispute, or where the inference to be drawn from conceded facts might be a subject of difference among reasonable minds, the question of whether a necessity did exist for the tracks to be uninclosed at the point in controversy should be sent to the jury as an issue of fact; but, where the conceded facts admit of no other reasonable conclusion than that such necessity did exist, the court should hold as a matter of law that the railroad company cannot be held liable on account of the omission to inclose the tracks. Manifestly defendant would have laid a veritable mantrap in the station yards

had it bisected them at the public road with a cattle guard. We quote again from Gilpin v. Railroad Co., supra: "The court trying the fact was not bound to say that there was no evidence that a cattle guard in that position was dangerous to the lives of the railroad employes simply because there was no expert evidence introduced on the subject. The thing itself spoke. Men know by common experience what a cattle guard is, as well as they know what a fence is. They also know what a switch in a railroad is. They know the purposes of those things, and how they are used. We need no expert testimony to tell us that a cattle guard in a switchyard would endanger the lives of the men working there."

With these principles in mind, the learned trial judge was right in holding that the demurrer to the evidence should have been sustained. Accordingly the judgment is affirmed. All concur.

CARTER v. OSTER et al.

(St. Louis Court of Appeals. Missouri. April 14, 1908.)

1. TORTS—INTERFERENCE WITH EMPLOYMENT—LIABILITY.

Third persons are answerable for keeping a man out of employment by unlawful means.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, § 10.]

2. MASTER AND SERVANT—INTERFERENCE WITH RELATION—PROCURING DISCHARGE—THREAT OF STRIKE.

The threat of a strike which will sustain a cause of action to an employe who is discharged in consequence thereof must be of a substantial character, and adapted to influence a person of reasonable firmness and prudence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1286.]

3. TORTS—"INTERFERENCE WITH EMPLOYMENT"—PREVENTING EMPLOYMENT—THREATS.

Where a nonunion laborer was kept out of employment by threats of violence to his person, made by union laborers, there was an interference with the employment of the nonunion laborer, within Rev. St. 1899, § 2155 (Ann. St. 1906, p. 1385), prohibiting interference with lawful employment by threats.

4. MASTER AND SERVANT—PROCURING DISCHARGE OF SERVANT.

The act of union men in procuring the dismissal of a nonunion man from various employments by means of strikes and the extortion of penalties from employers, adopted as a method of preventing him from following his trade, is illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1286.]

5. SAME.

Where a nonunion laborer was discharged solely in consequence of the illegal methods of union men, the nonunion laborer had a cause of action within the general doctrine that third persons are liable for inducing breaches of contracts by unlawful methods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1286.]

6. SAME—WRONGFUL DISCHARGE—MEASURE OF DAMAGES.

In an action for a wrongful discharge from service, the damages are, as a general rule,

confined to what the employe would have earned if at work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 50-53.]

7. DAMAGES—MENTAL SUFFERING—PHYSICAL INJURY.

In an action for negligent wrongs, lacking the elements of malice, insult, or inhumanity, there can be no damages for mental suffering apart from physical injury, but in cases of torts of which mental distress is the proximate and natural result, such as malicious prosecution, slander, and willful trespass to the person, damages for mental suffering alone may be assessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

8. SAME.

The rule that mental suffering cannot be considered in an action for tortious injury to property or for a breach of contract does not apply in cases of torts against property when the acts complained of are malicious, where breaches of contracts are such as to cause mental pain as a proximate and natural result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

9. SAME.

Where a nonunion laborer was discharged from various employments as a result of the unlawful, malicious, and oppressive acts of union men, adapted to cause him fear and anxiety about his personal safety and his means of earning a livelihood, the jury, in an action of tort by him against the union men, might award damages for mental suffering.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

10. SAME.

In an action by a nonunion man against union men for acts pursuant to a conspiracy resulting in his discharge from various employments, the question whether the acts of defendants were willful and malicious so as to justify damages for mental suffering *held*, under the evidence, for the jury.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Frank Carter against Otto Oster and others. From an order granting a new trial after verdict for plaintiff, he appeals. Affirmed.

F. W. Imseipen and Jno. M. Dickson, for appellant. John A. Talty, for respondents.

GOODE, J. Plaintiff is by trade an ammonia, steam, and hot water fitter, and at the dates hereafter mentioned had followed that employment for about 12 years. Defendants are alleged to be, and the proof tends to show they are, members of a trade union in the city of St. Louis denominated "Local Branch No. 29 of the National Association of Steam and Hot Water Fitters of America." This association and a score or more of other trades unions connected with the building and equipment of houses are affiliated with a larger association called the St. Louis Building Trades Council. The membership of the latter body consists of about 40 representatives from each of the different trades unions of the city, whose members follow crafts connected with the construction and equipment of buildings. The St. Louis Building Trades Council, as shown by the preamble to its constitution and by-laws, is designed to con-

trol all work on, and all workmen who have anything to do with, the building and repairing of houses "from the foundation to the roof." Artisans, such as carpenters, plumbers, steam fitters, and others, are required by said constitution and by-laws to be members of their respective trades unions, and to have a card or license from the central organization, the St. Louis Building Trades Council, in order to be recognized by the latter or by union men, or have the benefits expected to be obtained by the organization of this branch of labor. Business agents, or walking delegates, were appointed by the different unions for the performance of several duties, of which one was to ascertain when and where nonunion workmen were employed by building contractors. Two of these agents or delegates who served said Local Branch No. 29 of Steam and Hot Water Fitters were defendants John Riegert, Jr., and Henry Brammeyer, who appear prominently in the evidence as the active agents in causing the grievances of which plaintiff complains. The evidence in the record, including the constitution and by-laws of the Building Trades Council, shows that the purpose of both said council and the subordinate unions which it dominates was to gather into a compact and effective organization all building mechanics for mutual assistance, so as to remove injurious competition, prevent the interference of outside influence in the building business, shorten the hours of labor, protect the members of each craft against encroachments by the advance of science and invention on their ability to earn a livelihood, co-operate with other labor associations for defense against the misuse of capital, effect adjustments between employers and employes, and generally to secure improvement in the condition of artisans. Section 3 of article 6 and section 5 of article 7 of the constitution and by-laws make plain that one purpose of the Building Trades Council was to induce building contractors to employ as laborers only union mechanics by insuring the contractors a certain measure of immunity from strikes, and by forbidding men to work on any job where work was done by nonunion men, or while grievances between a union and a contractor were unsettled. When the business agents or walking delegates of Local Branch No. 29 of the Steam and Hot Water Fitters, or the agents of the Building Trades Council, discovered a nonunion artisan at work on a job where union men were also employed, the agents would demand of the contractor or employer that the nonunion workman be discharged, and also compel such contractor to pay a fine for having employed him; and in this way contractors were coerced into employing only union workmen. The evidence tends to show, too, that, in furtherance of this aim, threats of bodily harm to nonunion men and verbal abuse of them were occasionally resorted to by members of the union and sometimes the threats were carried out; but

as to how far such violent methods were indorsed by the order or were acts of individual passion is not conclusively shown. The foregoing is a correct statement in a general way of the purposes and usages of the trades organizations with which the testimony deals.

In December, 1903, plaintiff Carter was at work for the Missouri Heating & Construction Company at a wage of \$5.50 a day for eight hours' work. While he was installing an ammonia plant for his said employer on Morgan street, Riegert and Brammeyer discovered him. The Missouri Heating & Construction Company had in its employ at the time union mechanics connected with said Local Branch No. 29, and Brammeyer and Riegert, walking delegates of said branch, notified Barr, the manager of the Missouri Heating & Construction Company, to discharge Carter and another nonunion workman who was in the company's employ on pain of a strike by the union men. Carter and the other workman were discharged, in consequence of this notice, on December 24th. Afterwards Riegert and Brammeyer served notice on Barr that his company had been fined \$200 for employing Carter. Barr at first refused to pay the money, but the union men in the company's employ quit work forthwith, and the company was compelled to pay in order to go on with its contract. After his discharge by the Missouri Heating Company and until February 29, 1904, when the present action was instituted, Carter procured work from several contractors, who, in turn, were forced by the action of Local Branch No. 29 to discharge him after he had worked a day or two, and in one or more instances fines were imposed on the contractors for employing him. His last job was on some work at the Louisiana Purchase Exposition grounds, and for a contractor by the name of Burgrobe. Burgrobe was compelled to dismiss the plaintiff by a strike of the union men instigated by said local branch's walking delegates, and on this occasion the evidence tends to show that plaintiff was menaced with an assault by union men, and forced to call on the guards of the fair grounds for protection. After this he made an arrangement with a contractor by which the two were to do business on their own account, and plaintiff was to get a commission for his work; but the unions prevented them from getting any business. The essence of the testimony is that plaintiff's employers were forced to discharge him in from three to five instances between December 24, 1904, and February 29, 1905, by threats of strikes and fines, that contumelious epithets were applied to him by union workmen, and threats of violence, and that he was told he would not be allowed to work on jobs. It is alleged that the wrongful and coercive methods of the defendants are still in force, and all employers of such labor as plaintiff performs have been terrorized into refusing to employ plaintiff, who, therefore, can obtain no work, and is held up to scorn and ridicule

by defendants and other workmen. To recover for these torts to his person, and interferences with his means of getting a livelihood, all alleged to have been wrongfully, maliciously, and willfully made, plaintiff prayed damages; and under the instructions of the court the jury returned a verdict in his favor for \$750 actual and \$250 punitive damages. The court granted a new trial on two grounds. The first was that error had been committed in the reception of evidence of an assault made by one Malloy on a nonunion workman named Hoblitzell. Malloy is not a defendant, but was a member of Local Branch No. 29. Hoblitzell had worked with plaintiff for the Missouri Heating & Construction Company, and was assaulted by Malloy on the street. Plaintiff was not connected with this episode, and no doubt it was irrelevant, and evidence about it ought to have been rejected; but, in view of the abundant evidence to prove the acts for which plaintiff asks redress, the irrelevant testimony in question is hardly ground for setting aside the verdict. The other ground on which the court sustained the motion for a new trial is that the instruction on the measure of damages was erroneous, in that it permitted plaintiff to recover, in case of a verdict for him, not only his pecuniary loss, but for mental pain and suffering due to fear, anxiety, wounded feelings, and distress of mind caused by defendants' tortious acts.

1. Counsel for defendants contends no case was made for the jury, and insists that we pass on the question of whether there was or not. His position is that at the utmost, whatever was done by defendants, or any of them, which caused plaintiff to lose employment, was within their lawful rights, and therefore afforded no ground of action. Perhaps this position would be tenable, if, as counsel says, the evidence showed no more than that the members of Local Branch No. 29 of Steam Fitters, acting through their delegates, caused members of that order to cease working for contractors when plaintiff was employed on the job. The lower court instructed the jury that it was not unlawful or a conspiracy for workmen merely to combine together to quit an employment, unless an adjustment of differences between themselves and their employer was made, nor to refuse to associate or work with any man they saw fit. Many decisions, and perhaps the weight of authority, uphold the right of employes, either individually or in combination, to quit working because some fellow servant is obnoxious to them when they are not governed by a contract of service of definite duration. This is on the principle that employes may choose both their employer and their working associates; and it may well be that, if not under contract, they may leave an employment when they please for any purpose they conceive to be for their welfare, or likely to aid in the amelioration of the lot of the laboring classes, if

their conduct is dominated by such a motive rather than by a malicious desire to injure some one else. In recognition of this principle, the right of artisans to strike for an increase of wages or for shorter hours, or because a co-employe is obnoxious to them, has been often adjudged, though perhaps it cannot be said that the current of authority is unbroken in favor of the right to strike when the immediate purpose is to cause the discharge of an obnoxious fellow servant, even though the ultimate purpose may be the attainment of better economic and social conditions. The decisions most favorable to defendants are those which were given in *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Id.*, 53 App. Div. 227, 65 N. Y. Supp. 946. That cause was decided in the court of last resort by a divided bench. In a minority opinion which was concurred in by three judges out of seven, it was insisted that the opinion of the majority went further in excusing acts done pursuant to a conspiracy to cause nonunion workmen to be discharged from employment than the current of authority would warrant; and that the decision was in conflict with the one given by the same court in *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. All the judges concurred, in the main, regarding the propositions of law involved, but differed as to whether the defendants had been guilty of illegal conduct. Without dwelling further on the case, suffice to say there was no proof, as there is in the present record, of the menace of personal violence to nonunion workmen, or of abusive epithets being applied to them, or of personal molestation and insulting remarks while they were attending to their duties, or of the imposition of "fines" (so-called) on contractors who hired them, and which had to be paid to a union before its members would work for the offending contractor. Hence the decision is only in point by analogy in the present appeal.

The principal discrepancies among the authorities in cases like this are: (a) As to what means may lawfully be used by a collection or order of workmen to cause the discharge of other workmen; but most courts hold the means must not pass beyond persuasion, and take on a coercive, violent, or punitive character. *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; *Nat. Protect. Ass'n v. Cumming*, *supra*; *Curran v. Galen*, *supra*; *Allen v. Flood*, L. R. App. Cas. (1898) 1; *Quinn v. Leathem*, L. R. App. Cas. (1901) 495, explaining *Allen v. Flood*; *Bowen v. Hall*, 6 Q. B. Div. 633; *Wunch v. Shankland*, 59 App. Div. 482, 69 N. Y. Supp. 349; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499; *Lucke v. Clothing Cutters Ass'n*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep.

421; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783; *Casey v. Typo. Union* (C. C.) 45 Fed. 135, 12 L. R. A. 193; *Old Dom. Steamship Co. v. McKenna* (C. C.) 30 Fed. 48; *Barr v. Union*, 53 N. J. Eq. 101, 30 Atl. 881; *Eddy, Combinations*, 415, 427. (b) Whether means which would be lawful if used by an individual become unlawful and amount to a conspiracy when used in combination. 3 *Wharton, Crim. Law*, § 2322; 1 *Tiedeman, State & Fed. Cont.* pp. 426, 436, inclusive; 1 *Eddy, Combinations*, § 461 et seq; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Mapstrick v. Range*, 9 Neb. 390, 2 N. W. 759, 31 Am. Rep. 415; *Crumph v. Commonwealth*, 84 Va. 927, 936, 6 S. E. 620, 10 Am. St. Rep. 895; *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *State v. Donaldson*, 32 N. J. Law, 157, 90 Am. Dec. 649. (c) Whether acts which might lawfully be done simply to further the welfare of those who participate in them become unlawful when inspired by a malevolent design to injure obnoxious workmen. 1 *Eddy*, § 469; *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165; *Allen v. Flood*; *Bowen v. Hall*, supra; *Thomas v. Railroad* (C. C.) 62 Fed. 803, 821; *Walker v. Cronin*, 107 Mass. 555. But there can be no difference of legal opinion on one proposition—that third parties are answerable for keeping a man out of employment when the means employed to do so are unlawful—and on this all the authorities agree. *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; 1 *Tiedeman, State & Fed. Cont.* 440. In the present case we have no occasion to inquire concerning the responsibility of the defendants further than to ask if the methods resorted to by them to prevent plaintiff from obtaining and retaining employment were illegal. It was proved that, as soon as he was known to have work on a job, the agents of Local Branch No. 29 would notify his employer to discharge him on pain of a strike, and would, moreover, extort from the employer a heavy fine for having hired him. The activity of the building business in St. Louis and the demand for labor were so great that contractors were coerced into dismissing Carter. If they refused to do that or to pay the fine, the union men in their service would strike, thereby preventing them from completing their contracts, and threatening them with losses and perhaps ruin. A sort of duress was brought into operation which contractors were powerless to resist.

Not every threat of a strike, or other attempt to intimidate, will afford a cause of action to an employé who is discharged in consequence of it. The threat must be of a substantial character, and adapted to influence a person of reasonable firmness and prudence. 1 *Eddy, Comb.* § 504. In so far as Carter was kept out of work by threats of violence to his person, his case is within

the statute; for interference in that manner with employment is a statutory crime. *Rev. St. 1899*, § 2155 (*Ann. St. 1906*, p. 1385). Plaintiff was also molested by offensive remarks and abusive epithets. These acts may have exerted an influence over contractors, as well as the threats to strike, and have been partly instrumental in causing him to be discharged. As to the tortious and illegal character of such conduct, see 1 *Eddy, Comb.* § 506; *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702. Procuring plaintiff's dismissal from various employments by means of strikes, and the extortion of penalties from contractors, were adopted as methods of preventing him from following his trade, and were likewise illegal. No doubt the members of the union had an economic purpose in view, namely, to unionize all building craftsmen, and thereby render laborers more independent in treating with contractors and capitalists. We need not decide whether or not it was unlawful for the defendants simply to cause a strike in order to procure plaintiff's discharge; for we have the further fact that money was extorted from those who gave him work, which was a method of intimidating contractors, devoid of semblance of legal right. We have found no case on the subject wherein either the point in decision or the reasoning of the opinion would tolerate such methods of depriving a workman of employment. See cases, supra. Nor is it material that plaintiff may not have been dismissed from a service wherein he was hired for a definite time. If his discharge was procured by the defendants by illegal methods when otherwise he would have been retained by his employers, his cause of action is complete; this being one phase of the general doctrine that third parties are liable for inducing breaches of contracts by unlawful methods. *Lumley v. Gye*, 2 *Ellis & Black*. 216; *Lucke v. Clothing Cutters*, supra; *Angle v. Railroad*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Chiple v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Benton v. Pratt*, 2 *Wend. (N. Y.)* 385, 20 Am. Dec. 623.

2. On some phases of the evidence we think plaintiff would be entitled to damages for mental suffering. If nothing more was established than that defendants tortiously induced breaches of his contracts of employment, thereby keeping him idle, perhaps his damages might be confined to what he would have earned if at work. This is the general rule for the measurement of damages in an action for a wrongful discharge from service. 2 *Wood, Master & Servant*, 246. But, as already said, the testimony conduces to show the conduct of the defendants was not only wrongful, but willful, malicious, and oppressive; and it is generally held that the mental suffering due to torts of that nature is an element of damages. Defendants' counsel contends there can be no award for men-

tal suffering unconnected with a physical injury, which is true in actions for negligent wrongs, and wherein the conduct of the defendants does not exhibit malice, insult, or inhumanity. *Trigg v. Railroad*, 74 Mo. 147, 41 Am. Rep. 305. But there are torts of which mental distress is the proximate and natural result, and for which damages may be assessed. Such are malicious prosecutions, slanders, and willful trespasses to the person, either with or without physical injury; for instance the unlawful ejection of a passenger from a train. *Randolph v. Railroad*, 18 Mo. App. 609; *McGinnis v. Railroad*, 21 Mo. App. 399; *Smith v. Railroad*, 23 Ohio St. 10. In the present case plaintiff suffered a pecuniary loss in consequence of defendant's acts, and, if that circumstance is essential to a recovery, it existed; that is to say, if his mental suffering standing alone would not constitute a case for damages, and can be considered only as the concomitant of actual or special damages. It is generally said that mental suffering cannot be taken into consideration in an action for tortious injury to property or for a breach of contract. 8 Am. & Eng. Ency. Law (2d Ed.) pp. 671, 672, and citations in notes; 1 Sedgwick, Damages (8th Ed.) §§ 44, 45. But the rule is not without exceptions resting on the quality of the tort committed, or the nature of the contract breached. In *West and Wife v. Forrest*, 22 Mo. 344, the case was one for the beating of a negro woman—a slave of the plaintiffs. The slave was violently whipped by a third person in the presence of Mrs. West, and the court told the jury that, if they believed the assault was intentionally and recklessly made, they might take into consideration in assessing damages the mental suffering and wounded feelings of Mrs. West, which charge was approved. That is a case in which damages for mental suffering were allowed in an action for injury to property because of the character of the tort. In *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476, the action was for damages for an unlawful ejection of plaintiffs from a house, accompanied with malicious and oppressive conduct; and it was held damages should be assessed, not only for the inconvenience and expense to which the plaintiffs were put, but for the bodily and mental suffering, the shame, and humiliation induced by turning plaintiffs out of their home into the street. In *Fillebrown v. Hoar*, 124 Mass. 580, the cause of action was similar; an illegal eviction of plaintiff and his family from demised premises. It was proved the conduct of the defendant was willful and in gross disregard of the rights of the plaintiff. It was held the defendant was bound to compensate, not only for the pecuniary loss, but for wounds inflicted on plaintiff's feelings. So it has been held that a malicious and unfounded use of the process of attachment may give ground for the award of damages for humiliation. *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep.

519; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Byrne v. Gardner*, 33 La. Ann. 6. We glean from the decisions and treatises that the rule is to compensate for mental suffering due to torts against property when the acts complained of were wrongful and malicious, and, in actions on contracts, if the breaches were of a sort which would cause mental pain as a proximate and natural result. 1 Sedgwick, Damages (8th Ed.) §§ 44, 46; *Wells Fargo Ex. Co. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824; *Kimball v. Holmes*, 60 N. H. 163; *Coffin v. Braithwaite*, 8 Jur. 875; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249; *Chicago, etc., R. R. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133. We have found no case in which the question was raised regarding the right to such damages for wrongfully and maliciously keeping a person out of employment. But a man's trade and the contracts by which he is employed to exercise it are in the nature of property. He has the right to use the former and get the benefit of the latter without tortious interference. We see no reason why the rules applicable in actions for injuries to tangible property should not be applied in the case of an active and relentless conspiracy to prevent a mechanic from earning a living. It is true the present action is neither on a contract for its breach, nor is it, strictly speaking, for an injury to property. It sounds in tort for acts done pursuant to a conspiracy to prevent the plaintiff from following his trade. There is evidence to prove the methods employed to bring about this result were, as we have seen, unlawful; and, moreover, that they were continuous, willful, malicious, oppressive, and well adapted to cause plaintiff fear and anxiety about both his personal safety and his means of earning a livelihood. The evidence tended to show the defendants, or some of them, cherished a bad animus toward him. He had applied for and been refused admission to the order, though the testimony goes to show he was a competent workman, and certainly he never was discharged for lack of skill. After his application for membership in the union had been denied, he was followed by the delegates, and his contracts of employment interfered with in every instance. Several inferences might be drawn from the evidence regarding the reason why he was rejected by the union: That he was examined by its examining board and found to lack skill, or that he had not previously served an apprenticeship of five years as helper, or that the order only received applications for membership one month out of the year, and he applied at the wrong time, or that an increase of the number of steam fitters in the city of St. Louis was deemed undesirable. Whatever the cause, his subsequent treatment by the union was harsh and oppressive.

3. While we think there was evidence to justify the court in instructing the jury that they might give plaintiff damages for mental

suffering for the willful and malicious acts of defendants, we think a retrial was rightly granted because the instruction on the measure of damages did not leave it to the jury to find the quality of defendants' acts. Some of the testimony tended to vindicate at least a portion of them from the charge of willful and malicious conduct, if not from any connection with plaintiff's grievances.

The judgment is affirmed and the cause remanded. All concur.

BLAKE v. ROYAL INS. CO.

(Kansas City Court of Appeals. Missouri.
Oct. 19, 1908.)

NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE.

Refusal of new trial for newly discovered evidence, which is merely cumulative, is not error.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.*]

Appeal from Circuit Court, Jackson County; Walter H. Powell, Judge.

Action by Daniel F. Blake, trustee, against the Royal Insurance Company. Judgment for plaintiff. Motion for new trial denied, and defendant appeals. Affirmed.

Fyke & Snyder, for appellant. Karnes, New & Krauthoff, for respondent.

JOHNSON, J. This suit is on a fire insurance policy issued by defendant to S. B. Hearsh, a merchant at Independence. Plaintiff is the trustee in bankruptcy of Hearsh. The policy in suit was for \$2,000, and covered the stock of merchandise owned by Hearsh. The stock, valued in the petition and in the evidence of plaintiff at approximately \$9,000, was destroyed by fire while the policy was in force. It is conceded that Hearsh had other insurance on the property to the amount of \$4,500, and defendant alleges in its answer that it was procured "contrary to the terms and conditions of the policy sued on herein." Another defense interposed in the answer is that the insured, with the intent of cheating and defrauding defendant, shortly before the fire, removed the larger part of the stock from the place where it was insured, and defendant denies that the property destroyed was of the value alleged in the petition. Evidence introduced by defendant tended to show that a large quantity of goods was removed from the store the day before the fire, and that, before this was done, the stock was worth only \$4,500. This evidence is contradicted by that introduced by plaintiff. The issues of fact thus presented by the pleadings and evidence were submitted to the jury in instructions conceded to be free from error, and were decided by the jury in favor of plaintiff.

One of the grounds on which defendant

asked the court to grant a new trial is that of newly discovered evidence, and the only error in the trial now claimed by defendant is the refusal of the trial court to sustain the motion for new trial on this ground. The newly discovered witness was the agent of a commercial agency who called on Hearsh "some time before the fire" to obtain a statement from him for use as the basis of a commercial report and rating. Hearsh declined to give the statement. A short time afterward the witness (whose affidavit was filed with the motion for a new trial) called at the store for the purpose of making an estimate of the value of the stock. Hearsh was absent from the store on this occasion, and witness looked over the stock. He estimated the value at \$4,000, and states that in his opinion the estimate was correct. We perceive no good reason for saying that error was committed in overruling the motion. "The granting of new trials because of evidence subsequently discovered rests for the most part with the trial court, and any doubt as to whether the discretion vested in this regard in that tribunal has been soundly exercised is to be resolved in favor of its ruling. It is only in a case entirely free from any element of uncertainty as to the impropriety of such ruling that appellate courts feel themselves called upon to interfere." *Cook v. Railroad*, 56 Mo. 380; *State v. Sansone*, 118 Mo. 1, 22 S. W. 617; *State v. Morgan*, 96 Mo. App. 343, 70 S. W. 267. A new trial should not be granted on newly discovered evidence which is merely cumulative. *Beauchamp v. Sconce*, 12 Mo. 57; *Dollman v. Munson*, 90 Mo. 85, 2 S. W. 134; *Culbertson v. Hill*, 87 Mo. 553. "The rule of law is that the discovery of parol evidence to a point tried in the issue and upon which there was evidence is not sufficient to authorize the court to grant a new trial, because such a practice would inevitably lead to fraud, subornation, delay, and vexatious uncertainty." *Beauchamp v. Sconce*, supra. The value of the goods being one of the issues contested in the evidence and sent to the jury, the newly discovered evidence was but cumulative. Were we vested with the right to exercise the discretion vested by law in the trial judge, we would rule on the motion as he did. Certainly there is no ground for us to hold that he abused his discretion.

The judgment is affirmed. All concur.

LANDRUM v. ST. LOUIS & S. F. R. CO.

(Kansas City Court of Appeals. Missouri.
Oct. 5, 1908.)

1. APPEAL AND ERROR (§ 995*)—REVIEW—INTERPRETATION OF EVIDENCE.

In interpreting the testimony of a witness as to its sufficiency to make out a case, it should be looked at in the light of all that has

been said and the surrounding circumstances, and not merely considered by itself.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 995.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where the evidence is conflicting, the appellate court is bound by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. TRIAL (§ 219*)—INSTRUCTIONS—DEFINITION OF NEGLIGENCE.

Where the jury are practically told what facts could constitute negligence, it is not necessary to define the term, especially in view of the rule that it is not necessary in all cases to define "negligence," as the jury are supposed to understand its meaning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.*]

4. TRIAL (§ 244*)—INSTRUCTIONS—REFUSAL OF REQUESTS—SINGLING OUT FACTS.

A requested charge that the jury should consider with the other facts and circumstances the fact that plaintiff requested defendant's station agent not to report the accident, and the fact that plaintiff made no claim against defendant on account of her alleged injuries for over a year, etc., was properly refused, as singling out certain facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Metta Landrum against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans and Woodruff & Mann, for appellant. McPherson & Hilpert and Thomas Hackney, for respondent.

BROADDUS, P. J. The plaintiff's suit is to recover damages for the alleged negligent act of defendant's employé, whereby she was greatly injured. It appears from her testimony that in November, 1905, at night, she went upon defendant's platform at Aurora, Mo., to take passage on defendant's cars; that she hurriedly walked along until she came near the cars then at the station, and about to depart, when she was struck on her hip by a heavily loaded truck which was shoved against her without any warning of its approach, whereby she was knocked to the platform, and, as she attempted to rise, she threw out her hands against a car which was then moving, and was again thrown down. She and others testified that she was severely injured. The defendant contends that the court, upon the plaintiff's own showing, as her case depended almost solely on her own evidence, should have sustained the demurrer to her testimony, and instructed the jury to return a verdict accordingly. The plaintiff's evidence in some instances was seemingly inconsistent and indefinite; but, considering it altogether, and after making a reasonable allowance for her somewhat excitable temperament, it is reconcilable

with the statement we have made. The defendant's counsels have copied into their brief much of her testimony for the purpose of showing that she failed to make out a case; but we do not believe that such a method is the proper way to interpret the evidence of a witness or the testimony in a case. We have applied to this case another and different test which we believe to be just; and that is to look at the testimony in the light of all that has been said and the surrounding circumstances, and then form a conclusion. And we are also satisfied that the person in charge of the truck was an employé of the company, for all the circumstances indicate that he was. It is true defendant's testimony greatly preponderates in favor of the defendant's theory that the plaintiff was not injured as she claims she was, but that she was thrown down and injured while attempting to board the moving train. It became a question of credibility as to who told the truth—the plaintiff or other witnesses. We are bound by the verdict.

Instruction numbered 1, given at the instance of plaintiff, is criticised on the ground that it is argumentative. The instruction is quite lengthy, and its purpose was to present all the issues raised in the case for the jury to pass upon. We do not see that it submits other questions and facts than disclosed by the pleadings and the testimony; and it is in no sense argumentative. The attention of the jury is merely called to certain facts of which there was evidence, and which were necessary to plaintiff's right to recover. There is nothing whatever to be found in the instruction of argumentative character.

Another objection is that it uses the term "negligence" without defining it, and that there is no other instruction in the case that supplies the defect in that particular. We do not think it was necessary, especially as the jury were practically informed as to what facts would constitute negligence. And the rule now is in this state that it is not necessary in all cases to define "negligence" as the jury are supposed to understand what the term means. *Sweeney v. K. C. Cable Ry. Co.*, 150 Mo. 385, 51 S. W. 682; *Wilson v. K. C. Southern R. Co.*, 122 Mo. App. 667, 99 S. W. 465; *Hooper v. Met. Street Ry. Co.*, 125 Mo. App. 329, 102 S. W. 58; *O'Leary v. Kansas City*, 127 Mo. App. 77, 106 S. W. 94. We do not think the holding in *Magrane v. Railway*, 183 Mo. 119, 81 S. W. 1158, is in conflict with the foregoing decisions.

The defendant asked the following instruction, which the court refused to give, which action of the court is assigned as error, to wit: "The court instructs the jury that in passing on this case and the evidence they may consider, with all the other facts and circumstances in evidence, the fact that plaintiff requested defendant's station agent not to report the accident, and the fact that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff made no claim against defendant on account of her alleged injuries for over a year thereafter, as bearing on the question of the manner in which her injuries were received." This instruction is an example where certain facts are singled out for the consideration of the jury, and therefore given special importance, over other facts of equal or greater importance. It is sufficient to say that no instances can be found where such a practice has not been condemned by the appellate courts of this state.

We have noted all the important points raised on the appeal.

Affirmed. All concur.

BURNS et al. v. MOORE.

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

BROKERS (§ 86*)—ACTION FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In an action for brokers' commissions, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by James Burns and another against Elwood G. Moore for broker's commissions. Judgment for plaintiffs, and defendant appeals. Affirmed.

Brown, Harding & Brown, for appellant. William Moore, for respondents.

JOHNSON, J. This action was brought before a justice of the peace by plaintiffs, who are partners engaged in the business of real estate agents in Kansas City, to recover a commission alleged to be due them for defendant. A trial in the circuit court resulted in a verdict and judgment for plaintiffs, and the cause is here on the appeal of defendant.

We are called upon to decide the single question of whether the court erred in overruling the demurrer to the evidence offered by defendant. It is argued by defendant that the evidence, even when considered in the light most favorable to plaintiffs, shows that plaintiffs were not the procuring cause of the sale which gave rise to this controversy. Defendant owned real property in Kansas City which he sold to Katherine Wolfe on April 27, 1904, for \$6,350. He recognized a real estate agent named Houlehan as his agent in the transaction, and paid him a commission for making the sale. The evidence of defendant tends to show that Houlehan was the agent of defendant, and that by his efforts the purchaser became interested in the property, and was induced to buy it. On the other hand, it is conceded by defendant that plaintiffs also were authorized to sell the property as his agents, and the evidence

of plaintiffs is to the effect that they were the procuring cause of the sale, though they were not permitted to close it. Indeed, all the facts and circumstances in proof afford room for a reasonable person to conclude that Houlehan, in fact, was the agent of the purchaser, and not of defendant, and that his claim to a commission from defendant was not presented by him nor acknowledged by defendant in good faith, but was a mere device concocted to deprive plaintiffs of their just reward.

We find in the record substantial evidence supporting the respective positions of the parties. In such state of case the question of which agent was the procuring cause of the sale was an issue of fact for the jury to determine, and it follows that no error was committed in overruling the demurrer to the evidence.

The judgment is affirmed. All concur.

GILBERT v. CHICAGO, R. I. & P. RY. CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908.)

1. CARRIERS (§ 228*) — TRANSPORTATION OF HORSES—DELAY—BURDEN OF PROOF.

Where plaintiff's horses were transported under a special contract exempting the carrier from liability for delay, the burden was on plaintiff to show that the delay was unreasonable, and resulted from defendant's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 958; Dec. Dig. § 228.*]

2. CARRIERS (§ 228*) — TRANSPORTATION OF HORSES—DELAY—EVIDENCE.

Though evidence of mere delay is not sufficient to support an inference of the carrier's negligence, additional circumstances, though only slightly tending to show negligent origin of unusual delay, will support an inference of negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 960; Dec. Dig. § 228.*]

3. CARRIERS (§ 213*) — TRANSPORTATION OF HORSES—DELAY—NEGLIGENCE.

Where there was an unusual delay of more than 24 hours in the transportation of plaintiff's horses, and at least half of the delay was apparently inexcusable, and occurred while defendant's agent knew that plaintiff was keeping a sharp lookout for the arrival of the horses, in order to give them needed attention, the carrier was negligent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 922; Dec. Dig. § 213.*]

4. CARRIERS (§ 211*) — TRANSPORTATION OF HORSES—FAILURE TO FEED.

Where during a delay in the transportation of plaintiff's horses at a junction, the carrier's agent accepted compensation from plaintiff to pay for necessary food and water for them, the carrier was responsible for its failure to perform such service, whether the delay was negligent or unavoidable, and notwithstanding the transportation contract provided that plaintiff assumed the risk and expense of feeding, water, etc.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 926, 928; Dec. Dig. § 211.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. CARRIERS (§ 228*)—INJURY TO HORSES—FAILURE TO FEED AND WATER—PROXIMATE CAUSE—EVIDENCE.

Evidence held to warrant a finding that one of plaintiff's horses that died, and the other two that became sick and depreciated in value, contracted their diseases as the result of the negligence of defendant carrier in failing to properly care for them during delay in transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Buchanan County.

Action by Henry A. Gilbert against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Dolman, for appellant. L. C. Gabbert, for respondent.

JOHNSON, J. Action by a shipper of live stock against a common carrier to recover damages for injuries to the property, alleged to have been caused by the negligence of the carrier. On June 3, 1906, plaintiff delivered three horses to defendant, at its station at Dearborn, Platte county, for shipment to Lincoln, Neb. He alleged in the petition that when the animals were delivered to defendant, they were properly loaded in the car and were in a sound, healthy condition, and that it became the duty of defendant to transport them to their destination within a reasonable time, and "to properly care for and feed and take care of and to exercise all reasonable care and diligence for the preservation and the soundness and healthfulness of the said horses." Breach of this duty is charged in the following language: "That the defendant, on the contrary, failed to exercise due care and diligence in properly feeding, watering, and taking care of said horses, and did carelessly and negligently fail to do and provide for said horses, and carelessly and negligently failed to feed and water said horses, and carelessly and negligently failed to transport them within a reasonable time; that, whereas said horses should have arrived at Lincoln, Neb., under ordinary travel, at 11 a. m., June 4, 1906, they did not arrive at Lincoln, Neb., until 10 a. m., June 5, 1906; that during all the time from the time they were received at Dearborn, Mo., until they arrived at Lincoln, Neb., defendant carelessly and negligently, by and through its agents, servants, and employes, failed to water and feed and care for said stock, so that upon arrival at Lincoln of said stock, they had, on account of said carelessness and negligence of defendant, its servants, agents, and employes, become sick and weakened and unsound to such an extent that one horse of the value of \$257 died in consequence of such careless and negligent treatment on the part of defendant; that one horse of the value of \$350, the price and value of said horse when he was so placed up-

on the cars of the defendant at Dearborn, Mo., so depreciated in value that he was worth only the sum of \$150 when he arrived at Lincoln, Neb., in consequence of said careless and negligent treatment on the part of defendant; and one horse of the value of \$300 * * * so depreciated in value that upon his arrival at Lincoln, Neb., he was only of the value of \$150, on account of the careless and negligent treatment of said horse by defendant." The answer of defendant, in addition to a general denial, interposed defenses founded on the terms of a written contract which, it is conceded, was entered into by the parties at the time the property was delivered for shipment. Among the provisions of this contract, designed to limit the common-law liability of the carrier, those chiefly relied on by defendant are the following: "Second. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market. Third. That the first party shall be exempt from liability for loss or damage to the person or persons and property covered by this contract, arising from derailment, collision, fire, escapement from car, heat, suffocation, overloading, crowding, maiming or other accidents or causes, unless the injuries arising from said causes are the direct result of negligence on the part of the carrier. Fourth. That the second party shall assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock covered by this contract, while in cars, yards, pens or elsewhere, and shall load and unload the same at his own expense and risk."

Plaintiff testified that he loaded the horses in the car on Saturday morning, June 2, 1906, and delivered them to defendant in time for the car to be put in a train which left Dearborn at 9:35. The horses had been fed and watered that morning, and were sound and in good health. They were saddle and harness horses, and plaintiff was taking them to Lincoln to sell them at that place. He rode in the car to Rushville, where he left the train and proceeded to St. Joseph by passenger train. The horses reached defendant's yards at St. Joseph at about 11 o'clock that morning, and remained there during the day. Plaintiff fed and watered them there, and at 8 o'clock that evening left for Lincoln on a passenger train, where he arrived about 1 o'clock that night. Early the next morning he inquired of the agent of defendant at Lincoln if the horses had arrived, and received a negative answer. At noon he inquired again. We quote from his testimony: "After I went down there and inquired three or four times as to these horses, and he didn't seem to know, I told him, 'You must find those horses; they must be fed and watered.' He said he didn't know whether he could or not. I said, 'I will have to request you to wire down and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

find the horses,' and he finally got at it, and found them at Jansen (an intermediate junction point) about 1:30 Sunday afternoon. He said, 'If you will guarantee the charges, I will wire the agent to feed and water the horses.' I said, 'I not only will guarantee the charges, but I will give you the money,' and I asked him how much it was, and he said: 'A dollar,' and I pitched him a dollar, and said, 'Here's the money. Attend to those horses.'" At 4 o'clock Sunday afternoon, 1 o'clock Monday morning, and again at 8 o'clock, he repeated his inquiries about the shipment, and on each occasion was informed by the agent that it had not arrived. At about half past 10 o'clock, he was informed by the agent that the horses were in the yards, and he went at once to their relief. He found them in a badly damaged condition from lack of food and water. Their appearance and actions indicated that they had received no attention after they left St. Joseph. Two of them were suffering from "shipping fever," from which they recovered in about five days. The third had pneumonia, and died on the following Monday.

Plaintiff introduced evidence tending to show that 23 hours would have been a reasonable time to consume in the transportation. The agent of defendant at Dearborn testified: "Q. What is the schedule time between Dearborn and Lincoln for shipment of freight, horses, at that time. A. About 23 hours." The evidence of plaintiff does not attempt to show the cause of the delay. On the part of defendant the evidence is to the effect that the transportation was accomplished in schedule time, that the horses were fed and watered at Jansen by its agent at that place, and that they arrived in Lincoln at about 12 o'clock Sunday night. It is denied plaintiff was misinformed by any one in the service of defendant relative to the time of arrival of the shipment at Lincoln. The issues of negligence submitted to the jury are thus defined in the first two instructions, given at the request of plaintiff. They are as follows: "The jury are instructed that, if you find from the evidence that the plaintiff on June 2, 1906, delivered three horses mentioned in evidence to defendant's agent at Dearborn, Mo., for shipment to Lincoln, Neb., and that defendant accepted said horses for shipment, then it became and was the duty of defendant to transport said horses in a reasonable time, and if you further find that the defendant carelessly and negligently failed to transport said horses within a reasonable time to Lincoln, Neb., and further that plaintiff paid or guaranteed to defendant's agent at Lincoln, Neb., the money demanded for the feeding and watering of said horses at Jansen, Neb., and that defendant agreed to do so, and that defendant's agents and servants failed to so feed and water said horses, and that by reason of said unreasonable delay in transportation, if you so find there was unreasonable

delay, and further the negligent failure to feed and water, if you find there was such failure as above stated, said horses became sick and unsound and of less value, to plaintiff's damage, you will find for the plaintiff. The court instructs the jury that, even though they may believe from the evidence that the horses mentioned in evidence arrived at Lincoln at 12 p. m. on Sunday June 3d, yet if you believe from the evidence that after repeated inquiries by the plaintiff of defendant's agents at Lincoln, after the arrival of said horses, said agents informed plaintiff that said horses had not arrived, you may compute the time of delay in notifying the plaintiff, pursuant to this inquiry of the arrival of the horses after they had so arrived, as a part of the time of their transportation." On behalf of defendant, the jury were instructed: "The jury are instructed that the defendant was under no obligation to feed and water the horses in transit, but that that obligation rested upon the plaintiff; and, in the absence of any special agreement or understanding on the part of the defendant, its servants or agents, to perform such service, it is not liable for a failure to feed and water. The burden of proof is upon the plaintiff, before he can recover in this case, to show by a preponderance of the evidence that the injury, if any, to plaintiff's horses was due to the neglect or carelessness of the defendant in failing to transport the horses in the manner and form, and within the time, prescribed by the contract introduced in evidence, or in failing to feed and water said horses, and unless you so find, your verdict must be for the defendant. The jury are instructed that plaintiff is not entitled to recover for the sickness or death of any of said horses, unless you find said sickness or death was caused by a failure, on the part of the defendant, to feed and water said stock, and a failure to transport said horses within a reasonable time to their place of destination; and, before plaintiff is entitled to recover on account of any failure of the defendant to water and feed said horses, you must believe from the evidence that the defendant, by its agents or servants, undertook and agreed to feed said horses at Jansen, Neb. If you find from the evidence that plaintiff's horses were fed and watered at Jansen, Neb., then defendant was guilty of no negligence in that respect." The jury returned a verdict for plaintiff in the sum of \$200, and defendant appealed.

First, we shall dispose of the questions arising from the contention of defendant that the court should have peremptorily directed a verdict in its favor. Since it is conceded the shipment was made under a special contract, which exempted defendant from liability on account of delay, the burden of proof was on the plaintiff, and remained with him to the end of the case, to show that the delay was unreasonable, and

was the result of negligence on the part of defendant. "While it may be granted that evidence of mere delay, standing alone, is not sufficient to support a reasonable inference of negligence, which is a positive wrong and always must be proven affirmatively, yet from the very nature of the relation of carrier and shipper circumstances that even slightly tend to show a negligent origin of the unusual delay will support an inference of negligence. It is enough for plaintiff to disclose circumstances sufficient to raise a fair inference of negligence, and especially is this so where the means of showing how the delay occurred is with the defendant, and not the plaintiff." *Bushnell v. Railroad*, 118 Mo. App. 618, 94 S. W. 1001; *Anderson v. Railroad*, 93 Mo. App. 677, 67 S. W. 707; *Witting v. Railroad*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636; *Otis Co. v. Railroad*, 112 Mo. 622, 20 S. W. 676; *Sloop v. Railroad*, 93 Mo. App. 605, 67 S. W. 956; *Botts v. Railroad*, 106 Mo. App. 397, 80 S. W. 976; *Fulbright v. Railroad*, 118 Mo. App. 486, 94 S. W. 992. We think the evidence as a whole does support a reasonable inference of negligence. Not only was there an unusual delay of more than 24 hours, but at least half of it apparently was inexcusable. The uncontradicted evidence of defendant established the fact that the horses reached the yards in Lincoln at midnight on Sunday. An hour later plaintiff, who had been exhibiting the utmost anxiety concerning their welfare, was told by the agent that they had not arrived. The agent knew plaintiff thought the horses were in need of attention, and was keeping a sharp lookout for their appearance, and it was his duty to exercise reasonable diligence to learn of their arrival, and to inform plaintiff of that fact when he applied for information. If the jury believed the testimony of plaintiff, they were entitled to infer that the agent was negligent in the performance of this duty, and that had he discharged it properly, plaintiff could and would have relieved the suffering of the animals, and thereby prevented the injury to them.

Whether the delay was negligent or unavoidable, defendant should be held liable for the injurious consequences of its failure to feed and water the horses at Jansen on Sunday afternoon. In accepting compensation for such attention, defendant modified the contract of transportation to the extent of making the giving of such attention one of its duties. The evidence of plaintiff tends to show that the horses were not fed and watered at Jansen, and that this omission was the direct cause of the injury. No error was committed in overruling the demurrer to the evidence, and we find the issues of negligence were properly submitted in the instructions given to the jury.

It is argued by defendant that "the evidence is insufficient to warrant the finding that the horse which died contracted pneumonia, or that the other two which became sick, contracted the fever as the result of any negligence on defendant's part," but we must rule against defendant on this point. The expert evidence introduced by plaintiff is to the effect that, when animals suffer from deprivation of food and drink, they are more susceptible to the ravages of disease germs than they otherwise would be. Obviously inability to resist the attack of a disease should be regarded as a direct cause of the injurious results of such attack. Under all the facts and circumstances of the situation disclosed it is reasonable to infer that the animals sickened because of their weakened powers of resistance, and that the negligence of defendant was the direct cause of that condition.

The trial of the cause was free from error, and it follows that the judgment must be affirmed. All concur.

KISER v. SUPPE et al.

(Kansas City Court of Appeals. Missouri.
Oct. 19, 1908.)

1. MASTER AND SERVANT (§ 316*)—EXISTENCE OF RELATION.

Where defendant engaged J. to sink a shaft, paying him so much per foot, and J. hired plaintiff to help him, and agreed to pay him one-third of the compensation received from defendant, J. having the exclusive right to employ, control, and discharge his helpers, plaintiff was not defendant's servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1242; Dec. Dig. § 316.*]

2. MASTER AND SERVANT (§ 316*)—THE RELATION—"SERVANT."

In strictness, a servant is one who, for a consideration, engages in the service of another and undertakes to observe his directions, and the relation does not depend on whether the master was to pay anything, or whether the service was permanent; the right to control the action of the servant, which implies the power to discharge, being the essential element.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1242; Dec. Dig. § 316.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6422-6429; vol. 8, p. 7798.]

3. MASTER AND SERVANT (§ 316*)—EXISTENCE OF RELATION—INDEPENDENT CONTRACTORS.

Where defendant engaged J. to sink a shaft at so much per foot, reserving the right to discontinue the work at any time, and agreed to furnish a cable, etc., to do the work, but J. was to furnish the necessary materials required, and employ the necessary help, with the right to direct the manner of their work and discharge them at will, J. was an independent contractor, and not defendant's servant; and that defendant could discontinue the work at any time did not of itself make J. his servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1242; Dec. Dig. § 316.*]

4. MASTER AND SERVANT (§ 316*)—EXISTENCE OF RELATION—SUBCONTRACTOR.

Where an independent contractor hired plaintiff to assist in sinking a shaft, retaining

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

control over the manner in which plaintiff should do the work, and the right to discharge him at will, plaintiff was a servant, and not a subcontractor, though he was to be paid for the work by the foot, on the basis of the contractor's compensation, and not by the day.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1242; Dec. Dig. § 316.*]

5. MASTER AND SERVANT (§ 321*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTORS—DEFECTIVE APPLIANCES—MASTER'S LIABILITY.

Though defendant owed no contractual duty to the servants of an independent contractor employed by him, defendant's agreement with the contractor to furnish a cable to do the work, with knowledge that he would employ others to assist him, bound defendant to exercise reasonable care to furnish a cable reasonably safe for the intended use, and his failure to do so was a breach of duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1262; Dec. Dig. § 321.*]

6. MASTER AND SERVANT (§ 321*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTORS—DEFECTIVE APPLIANCES—MASTER'S LIABILITY TO CONTRACTOR'S SERVANTS.

While one employing an independent contractor to do work is not liable for the contractor's negligence, if the latter has entire freedom as to the means of doing the work, where the employer furnishes any of the instrumentalities of work, he owes the contractor and his employes the duty of care as to the matters over which he retains control, but that duty ends when he has furnished safe instrumentalities, and does not continue throughout their use by the contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1262; Dec. Dig. § 321.*]

7. MASTER AND SERVANT (§ 102*)—INJURIES TO SERVANT—MASTER'S DUTY—APPLIANCES.

Plaintiff's employer owed him the duty to exercise reasonable care to furnish reasonably safe appliances to perform the work, and to continue the exercise of such care during the progress of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 172, 173; Dec. Dig. § 102.*]

8. MASTER AND SERVANT (§ 117*)—INJURIES TO SERVANT—MASTER'S NEGLIGENCE.

Where plaintiff's employer knew that a cable used to carry a heavy load in sinking a shaft was rusty and worn when he received it, and was warned that it might need repairs, and the defect could have been discovered and remedied by removing the cloth around it and cutting off the end of the cable, he was negligent in not repairing it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 208; Dec. Dig. § 117.*]

9. MASTER AND SERVANT (§ 129*)—INJURIES TO THIRD PERSONS—NEGLIGENCE OF INDEPENDENT CONTRACTOR—PROXIMATE CAUSE OF INJURY.

Though an employer furnished an independent contractor with a defective cable for use in the work, knowing the contractor's servants would use the appliance, the contractor having been warned of the defect, and having continued to use the cable in its defective condition, his negligent failure to repair it was the proximate cause of injuries to his servant by reason of the defect, and not the employer's action in furnishing the defective cable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by John D. Kiser against W. H. Suppe and others. From a judgment for plaintiff, defendants appeal. Reversed.

Maher & Threlkeld, for appellants. C. H. Montgomery, for respondent.

JOHNSON, J. Action for damages resulting from personal injuries alleged to have been caused by the negligence of defendants, who are sued as partners. Plaintiff had judgment against all of the defendants for \$650, and defendants appealed.

At the time of the injury, September 22, 1906, plaintiff was working as a miner in sinking a shaft on mining property owned by defendants in Jasper county. He was at the time in a shaft which was over 100 feet deep, when a wire cable used in hoisting, broke under the strain of the load being hoisted, thereby permitting the loaded tub to fall to the bottom, severely injuring him. The negligence charged in the petition is the breach of a duty defendants owed to plaintiff to exercise reasonable care to provide a reasonably safe cable, and the evidence of plaintiff tends to show that at the time of the injury the cable had become weakened where it was attached to the hook by which the tub was suspended; that it was in an unsafe condition; that the defect was due to the ravages of rust, which were greater at this than at other parts of the cable, because of the fact that the cable was bare except at the place mentioned, where it was covered with cloth, or leather, for the space of a few inches; and that the defect was concealed from plaintiff by the covering, but would have been discovered by defendants had they removed the cloth, or leather, and examined the cable end with reasonable care. The subject of the nature of the relationship of plaintiff to defendants established by his employment is one of vital importance. The facts material to this issue are not in dispute. It appears that some 10 days before the injury, defendants, having concluded to sink to a greater depth a prospect shaft on their property, then about 112 feet deep, entered into an agreement with a miner named Johnson to do the work. By the terms of the contract, which was not in writing, Johnson first was to clear out the old shaft, and "to crib six feet of it." For this service he and his assistants were to be paid day wages. After that was done, Johnson was to proceed to sink the shaft, for which he was to receive \$10 per foot, was to employ and pay the miners he found it necessary to employ to do the work, and was to furnish the powder and other material consumed in the operations. Defendants, in addition to the consideration mentioned, agreed to furnish Johnson, for use in the work, a derrick, a hoister, a cable, and a tub owned by them.

The number of feet to be sunk was not specified, and we find, in effect, defendants reserved the right to discontinue the work at any time. Johnson hired plaintiff and another miner to help him, and agreed to pay plaintiff for his work one-third of the compensation received from defendants less the cost of the powder and other material consumed. Johnson alone had the right to employ and discharge the miners, and to control the manner in which their work should be done. Defendants had no control over such matters.

We are not overlooking the fact that, in answer to a question asked by the court, Johnson testified: "He [meaning one of defendants] said he would give us \$10 a foot to sink the shaft." But the testimony of this witness, taken as a whole, indisputably shows that the contract of defendants was with him alone, and that it was immaterial to them what assistants he might employ, or what consideration he might pay them. He was given a free hand to employ and discharge, to pay wages, or, as was done, to divide his profits with those who worked for him. On this subject, plaintiff testified: "Well, sir, Mr. Johnson came over and told me he got the job from Mr. Suppe, and wanted me to go out and help him work, and he says we will go out and put up the holster and get everything ready. * * * The Court: How were you working there with Johnson? A. He told me he would give me a third of what was left after the expenses was paid, powder bill, and blacksmith bill, and such." It hardly would be contended by any one that defendants, under such circumstances became personally bound for the payment to plaintiff of his compensation. His contract was with Johnson, and we do not hesitate in rejecting the suggestion that the relation between defendants and plaintiff was that of master and servant. Without any right to employ or discharge plaintiff, to give orders to him, or to control his work, and with no obligation to pay him, how can it be said defendants were in the position of plaintiff's master? We approve what was said on this subject by the Court of Appeals of Kentucky in a very similar case: "The lute state was neither employed, controlled, nor paid by the appellant. It had neither the authority to employ him to work in the shaft, direct him while there, nor to discharge him. If he had been the servant of the appellant, he would have been entirely under its control and direction. In *Cooley on Torts* (pages 531, 532), it is said: 'A preliminary remark is essential regarding the employment in the law of the words "master and servant." The common understanding of the words and the legal understanding are not the same. The latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes—perhaps only for a single purpose. In strictness, a servant is one who, for a valuable considera-

tion, engages in the service of another, and undertakes to observe his directions in some lawful business. * * * It could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial. * * * The plaintiff, not being employed, controlled, or paid by the defendant, would seem not to be their servant, so that they would be liable for his acts, or their liability to him be governed by the rules applicable as between master and servant. *Johnson v. Boston*, 118 Mass. 114.' In *Robinson v. Webb*, 11 Bush (Ky.) 404, the court quotes with approval a definition of 'master' as follows: 'He is to be deemed the master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in details.'" *Central Coal & Iron Co. v. Grider's Adm'r*, 115 Ky. 745, 74 S. W. 1058, 65 L. R. A. 455. Applying these principles to the facts and circumstances before us, we must hold, as did the Kentucky court in the case under review, that plaintiff was not the servant of defendants.

The next subject to engage our attention is the character of the relation between defendants and Johnson. Was the latter an independent contractor, or the servant of defendants? Plaintiff argues that Johnson was the servant of defendants, since the contract gave them the right to discontinue the prosecution of the work of sinking the shaft at any time. But we think this fact is not conclusive, though it should be considered as tending to support plaintiff's position. Other provisions of the contract so predominate as to constrain us to say, as a matter of law, that Johnson was an independent contractor. Not only was he to be paid "by the piece" instead of by wages—another important but not conclusive fact—but he was to have full control over the manner of conducting the work, and was to employ, discharge, and pay his assistants. He owed defendants no obedience, and consequently they had no right to discharge him for disobedience. Their right to discontinue the sinking of the shaft, and thereby terminate his employment, was not the legal equivalent of the right to discharge him; and, as long as work was conducted by him under the contract, he was a contractor, independent of their control. "In every case the conclusive test to be sought after, by which to determine whether or not the immediate actor was the servant of the defendant, is whether the defendant reserved control over him as to the manner of doing the work. * * * The power to control implies the power to discharge for disobedience, and accordingly the power to discharge has frequently been regarded as the test by which to determine whether the relation of master

and servant existed. * * * A person who, skilled in a particular employment, engages with another to do a particular job of work for a round sum, reserving to himself the right to determine by what methods he shall accomplish the work, is regarded as an independent contractor, and not as the servant or agent of the other contracting party in the sense which makes the latter responsible for any wrong he may commit in the doing of the work." *Fink v. Furnace Co.*, 10 Mo. App. 81. In *Central Coal & Iron Co. v. Grider's Adm'r*, supra, the contract for the sinking of a mining shaft in all features was similar to that under consideration. The court, manifestly moved by the reasons we have just stated, held that the relation to the mine owners of the persons who undertook to perform the work was that of an independent contractor, and not of servant. We refer especially to that case for the reason that it is exactly parallel to this in the respects now under discussion. Numerous other authorities have been consulted, but we do not deem it necessary to refer to them. A careful analysis of the contract can lead to no other conclusion than that Johnson occupied the position of independent contractor. For the same reasons that impel this conclusion, we must reject the contention of defendants that plaintiff was a subcontractor. He was the servant of Johnson, the contractor, since Johnson not only had the right to control the manner in which plaintiff's work should be done, but to discharge plaintiff for disobedience or for any other reason. The fact that plaintiff was to be paid by the foot, and not by the day, was not inconsistent with the relation of master and servant, nor did it operate as a restriction on the right of his employer to discharge him at any time.

With the question of the relationship of the parties settled, we now proceed to consider the subject of whose negligence was the proximate cause of the injury. The evidence of plaintiff tends to show that the cable was rusty, somewhat worn, and rather too small for the use to which Johnson subjected it. Its real insufficiency for the work, however, resulted from the defective condition of the few inches under cover, at the end to which the hook was fastened. There, on account of moisture being held by the covering, the metal had been rusted to a greater extent than at any other part of the cable. All that it was necessary to do to remedy this defect was to cut off about six inches of the cable end and to reattach the hook. The managing defendant told Johnson where the cable might be found, and he went to get it, accompanied by plaintiff. He testified that the man who was in possession of the place "told us that the cable had not been used for some time, and that we had better look it over; that it was a little bit rusty—said we had better look it over." It would have been an easy and simple task to

remove the covering at the hook, but Johnson did not do this, and therefore did not inspect that part of the cable, though it appears to be a matter of common knowledge among miners that the weakest part of a wire cable is at the hook end, where it is covered. We quote from his testimony: "The Court: Now you were going to use that cable, and have a man work under it, and you took no precaution, did not untwist it to see if it was all right? A. No; they ought to know what they are using. * * * Q. I thought you said the young man told you to look at it? A. Yes." Plaintiff testified that he did not hear the caretaker tell Johnson to inspect the cable, but explained that his hearing is impaired. His negative statement, therefore, is of no weight, and will not be considered as contradicting the statement of Johnson, his witness. During the 9 or 10 days preceding the injury, Johnson made no inspection of the cable end. The cable was in constant use, doing heavy work, and of course it is impossible for any one to say what effect such use produced on the defect, but obviously to some extent it must have had a deteriorating effect. Though plaintiff was not the servant of defendants, and they owed him no contractual duty, their agreement with the independent contractor to provide him a cable, with knowledge on their part that he would employ miners to assist him, imposed a duty on them, to the servants he might employ, to exercise reasonable care to furnish a cable reasonably safe for the intended use. The rule thus is stated in *Roddy v. Railway*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333: "It is now well established that the employer of a contractor is not responsible for the negligence of the contractor or his servants, in case the contractor is given entire freedom in the use of means to accomplish the result. Where the employer, however, reserves the right to direct the manner of the performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the duty of care in respect to such matters over which he retains control, or undertakes to perform. * * * We think each of these contracting parties owed to the other, and his employes, the duty of properly discharging his part of the joint undertaking, in respect to any matter exclusively devolving upon him." To the same effect is the opinion of this court in *Fassbinder v. Railway*, 126 Mo. App. 563, 104 S. W. 1154.

But there is nothing to be found in either of these cases to sustain the position that the duty of the owner of the instrumentality to the servant of the contractor continues during the use of the instrumentality by the contractor, where such use is of a nature to affect its safety. Certainly the owner discharges his full duty when he furnishes a reasonably safe appliance, and thereafter it is the sole duty of the contractor to employ

reasonable care to keep it safe. After the owner provides the appliance under a contract that he will provide it, his control over it ceases. Without any right to inspect and repair it it would be most unjust to call him to account for the neglect of the contractor to perform that duty. It is true the evidence tends to show that the cable was in a defective condition when Johnson received it, and consequently that, under the rules we have stated, defendants were guilty of a breach of their duty, but it is very clear that such negligence was the remote, not the direct, cause of plaintiff's injury. Johnson, his master, owed him the duty, first, to exercise reasonable care to furnish him with a reasonably safe cable; and, second, to continue in the exercise of such care during the progress of the work. Knowing that the cable was being used in a way that might make it unsafe, it was his duty to inspect it at reasonable intervals to ascertain its condition. This duty he wholly failed to perform. He took a rusty and worn cable, with warning that it might need repairs, made no inspection in the first instance, and then used it without any thought or care. For aught he knew or seemed to care, it might be, and doubtless, was, becoming more and more dangerous from day to day, yet he did not even remove the covering to look at it. Such conduct was culpable in the highest degree, and it was the proximate cause of the injury. Defendants' negligence, as we have just said, was but a remote cause, since it would have been rendered innocuous had plaintiff's master performed his subsequent duty.

The judgment is reversed. All concur.

DOVE v. FANSLER.

(Kansas City Court of Appeals. Missouri.
Oct. 5, 1908.)

1. EVIDENCE (§ 408*)—INTENTION—EVIDENCE.

Acceptance of a check on which the drawer had written the words "in full to date" did not preclude the payee from showing, by evidence aliunde, the existence of a different intent from that which the words indicated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.*]

2. ALTERATION OF INSTRUMENTS (§ 20*)—ERASURES—EFFECT.

Where plaintiff accepted defendant's check with the words "in full to date" written thereon, and thereafter erased such words without defendant's consent before cashing the check, the words so erased should be construed most strongly against plaintiff, precluding a recovery for alleged pre-existing items of indebtedness as a matter of law.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 158-174; Dec. Dig. § 20.*]

Error to Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Ben Dove against W. D. Fansler. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Barnett & Barnett, for appellant. C. C. Lawson and Jesse L. England, for respondent.

JOHNSON, J. Plaintiff sued defendant before a justice on an account of \$51.25. Defendant answered that he had paid all claims or demands of plaintiff in full, and presented a counterclaim of \$20. Trial to a jury in the circuit court, where the cause was taken by appeal resulted in a verdict and judgment for plaintiff in the sum of \$31.25, and defendant appealed.

Plaintiff occupied a farm of defendant as tenant, and the items of his alleged demand grew out of that relationship. All of them except \$10 accrued in 1905. The excepted item arose in 1906. In April, 1906, the relations between the parties were somewhat strained. One of the matters in dispute between them related to some plowing plaintiff claimed he had done for defendant, for which he demanded \$3. Under date of April 9th defendant wrote plaintiff: "You bring my sickle and clover seed and sacks to Mr. Roberts, and he will give you a check for \$3.00 for the pretended plowing; the sickle is worth \$3.00; 2 sacks is worth 40c; 16 sacks is worth 80c; 2 gal. clover seed \$2.00. The \$3.00 I offer for the pretended plowing is in the way of a compromise, as you have no lease at all on my place, and I don't want you inside by fields any longer than it takes to get what you have there away. Your brush scythe is at the house." The next day plaintiff received from defendant the following check: "Sedalia, Mo. 4, 10, 1906. Sedalia National Bank: Pay to the order of Ben Dove three dollars. \$3.00. In full to date. E. D. Fansler." Plaintiff kept the check until August 13, 1906, when he cashed it. Shortly after receiving it, he presented an account of \$12.25 to defendant, and demanded payment. Defendant replied by shaking his fist at plaintiff, and the latter withdrew. The items of this account appear in the statement in suit. In explanation of his long delay in cashing the check, plaintiff testified: "I did not go back and ask Dr. Fansler to give me another check before I cashed this. I laid it away and could not find it, and I told him so, because there was a receipt on it that I would not take that receipt. I would not let him give me the money without paying me the whole rest. He told me when I lose it he would give me another one. He would not give me another because he wanted me to find it back, and I hunted and found it." When he found it, he took it to his lawyer, who erased the words "in full to date" from its face. This, it is admitted, was done without the knowledge or consent of defendant, and before the check was paid by the bank.

The court permitted plaintiff to testify that the check was not intended to cover the

items of the account in suit which had accrued before its date, and refused to give the following instruction asked by defendant: "The court instructs the jury, that under the evidence in this case, you cannot find anything for plaintiff on any item or items of the account accruing prior to the date of April 10, 1906, the date of the \$3 check which expressed to be in full to that date." At the request of defendant, the court did instruct the jury: "It is admitted in this case that the plaintiff's attorney in this case altered the \$3 check dated April 10, 1906, given by defendant to plaintiff by erasing the words 'in full to date' therefrom, and that too without the knowledge or consent of the defendant, and the court instructs you that in law he is presumed to have done so for the wrongful purpose of altering the legal effect of said check, and to destroy its effect as evidence of a settlement in this case between plaintiff and defendant, and from such fact you are justified in presuming that the said check was given by defendant and accepted by plaintiff as full settlement between said parties, and full payment of all claims due plaintiff at that date, and that plaintiff, through his attorney, was wrongfully attempting to destroy the evidence thereof." We think the trial court erred in not giving the peremptory instruction to find against plaintiff on the items of the account in existence at the date of the check. The words "in full to date" written on the check were prima facie evidence of a mutual intention to treat the payment as a complete satisfaction of all claims held by the payee against the payor. Had plaintiff refrained from erasing them, he would have been in position to show by evidence allunde the existence of a different intention from that which they indicated. He might have shown that the parties did not intend that the payment evidenced was given or accepted in satisfaction of the demand in suit. *Bigbee v. Coombs*, 64 Mo. 529; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Tate v. Railroad* (Mo. App.) 110 S. W. 622. But the fact that plaintiff attempted to destroy the written evidence bearing on the issue of what was the real intention of the parties brings into operation the maxim, "*Omnia præsuntur contra spoliatores*." As a matter of law every presumption must be indulged against the despoiler. When plaintiff admitted the wrongful erasure of the words, he thereby confessed that they should receive the strongest interpretation against his interest; i. e., that they were inserted as evidence of a mutual intention that the payment should operate as an extinguishment of all demands held or claimed by plaintiff at that time. "It is because of the very fact that the evidence of the plaintiff, the proofs of his claim or the monuments of his title, have been destroyed, that the law in hatred of the spoiler baffles

the destroyer, and thwarts his iniquitous purpose by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong." *Pomeroy v. Benton*, 77 Mo. 64. So, when the evidence attempted to be destroyed is produced at the trial, the presumptions by which its interpretation is to be determined are of the same nature and governed by the same rules as those which pertain to cases where the evidence is destroyed and cannot be produced. As the words erased from the check were susceptible of the interpretation we have placed on them, the court should have placed such construction on them as a matter of law, and not treated the question of intention as an issue of fact for the jury.

The judgment is reversed, and the cause remanded. All concur.

MOSELEY v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals, Missouri.
Oct. 5, 1908.)

1. ACTION (§ 48*)—JOINDER OF CAUSES OF ACTION.

In an action against a carrier for failure to deliver a shipment, plaintiff, to meet different phases of proof, may plead in separate counts a breach of the common-law duty of the carrier to deliver, a conversion of the property, and a breach of contract to deliver in a reasonable time; the causes of action not being inconsistent, since proof of one does not necessarily disprove either of the others.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 48.*]

2. TRIAL (§ 330*)—VERDICT—GENERAL VERDICT ON SEVERAL CAUSES OF ACTION—SUFFICIENCY.

The rule that, when the petition sets out several distinct causes of action, a verdict for the gross sum cannot be sustained, but there should be a separate verdict on each cause that the court may know how the issues were found, does not apply where there is but one cause of action stated in a different manner in different counts so as to meet any possible state of facts that may be shown by the evidence, since in such case a finding upon any one of the counts would be a bar to further recovery on any count.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 777; Dec. Dig. § 330.*]

3. APPEAL AND ERROR (§ 204*)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS TO EVIDENCE.

Objections to evidence not made when it was offered will not be considered on appeal, and hence, when a letter was objected to by defendant only because written after suit was brought and because an offer of compromise, the objection that the letter was hearsay, admissible only on the theory that it contained an admission against the interests of defendant, while it did not appear that the writer had authority to make an admission binding defendant, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1253-1280; Dec. Dig. § 204.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. EVIDENCE (§ 213*)—COMPETENCY—OFFER OF COMPROMISE.

A letter by a railroad officer in reply to another, stating that the writer was entitled to the proceeds of sale of a shipment which had been refused on delivery, and requesting information as to the amount thereof, which stated such amount and that it was in the company treasury subject to claim, was not inadmissible as an offer of compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 746; Dec. Dig. § 213.*]

Error to Circuit Court, Jackson County; Edw. P. Gates, Judge.

Action by W. J. Moseley against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Elijah Robinson and Harris Robinson, for plaintiff in error.

JOHNSON, J. On June 24, 1903, plaintiff delivered a car of corn to defendant railroad company at the station of Levasy, Mo., and defendant undertook for hire to transport the corn to Ennis, Tex., and there to deliver it to plaintiff, the consignee. Plaintiff alleges that the property was not delivered, and prays judgment for its value. The petition is in three counts—in the first, a breach of the common-law duty of the carrier to deliver is alleged; in the second, a conversion of the property; and, in the third, a breach of a contract to deliver in a reasonable time. Defendant alleges in its answer that it permitted plaintiff to load the corn in a car at Levasy on June 12, 1903, as an accommodation to him; that the property at the time was in danger of destruction by the great flood of the Missouri river then prevailing, and that it would have been destroyed had it been left in the crib where it was stored; that on June 24th plaintiff requested defendant to issue him a bill of lading for the transportation of the car to Ennis, Tex., and defendant complied with the request on the understanding and agreement that the shipment was received subject to delays, as defendant's railroad was in a crippled and congested condition from the ravages of the flood, and was disabled from forwarding the car promptly; that on July 17th the car was started on its journey, and in due time was delivered at Texarkana, the end of defendant's line, to a connecting carrier, and was hauled without delay from that place to Ennis. Further, it is stated that plaintiff refused to receive the corn at Ennis, and the connecting carrier sold it, paid the freight charges out of the proceeds, and retained the remainder for the benefit of the owner of the property. It appears from the evidence that, immediately after he received the bill of lading, plaintiff indorsed it to the Linton Grain Company of Kansas City, which was acting as plaintiff's broker and had sold the corn at Ennis. At the time of this transfer the grain company advanced plaintiff \$208. Because of the great delay in transportation

of the car, the purchaser at Ennis refused to accept the corn, and threw it back on the hands of the Linton Grain Company, which, in turn, required plaintiff to refund the amount of the advancement, and returned to him the bill of lading. Evidence introduced by defendant shows that the delay in forwarding the car was agreed to by plaintiff, but this is contradicted by the evidence of plaintiff. It was shown that from four to seven days would have been a reasonable time to consume in the transportation, and it is conceded that the corn was not delivered to plaintiff or on his order, but was sold by the connecting carrier, and net proceeds of \$39 realized for the owner, which, however, is still in the hands of the connecting carrier.

At the request of plaintiff, the court instructed the jury as follows: "The court instructs the jury that, under the pleadings and undisputed evidence in this case, defendant on June 24, 1903, received of plaintiff the car load of corn described in plaintiff's petition, and issued a bill of lading therefor; that said car of corn remained at Levasy station from said 24th day of June until July 6, 1903, when it was sent by defendant to Myrick station, on defendant's line, and there remained until July 17, 1903. If, therefore, you further find and believe from the evidence that such delay in the transportation of said corn was without plaintiff's consent or knowledge, and that the same was unnecessary and unreasonable, and that, by reason of said delay, plaintiff's consignee of said corn at Ennis, Tex., refused to accept the same, and that defendant thereupon failed or refused to comply with its contract by retaining said corn for plaintiff as warehouseman, or storing said corn in a public warehouse at plaintiff's risk and expense and notifying plaintiff thereof, and otherwise disposed of said corn without accounting to plaintiff for its value, then defendant was guilty of breach of contract with plaintiff and of conversion, and liable to plaintiff for all damages sustained by reason thereof in a sum not to exceed the sum of \$208, with 6 per cent. from July 22, 1903, and you will so find on third count of plaintiff's petition. The court instructs the jury that, under the terms of the bill of lading introduced in evidence, the defendant contracted with plaintiff to carry the car of corn in question from Levasy, Mo., to Ennis, Tex., and thereby became responsible to plaintiff and liable for the acts of defendant's connecting carriers over whose lines said corn may have passed. And, if you find that said corn was converted without accounting to plaintiff for the value thereof, then your verdict must be for plaintiff on third count of petition, even though you further find that said corn was converted by some other road than the defendant. The court further instructs the jury that, in case you find for plaintiff, you will assess plaintiff's damages at such amount as you may believe from the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence to be the reasonable and fair market value of corn at Ennis, Tex., at the time defendant agreed to deliver the same; and you may also allow to plaintiff interest at the rate of 6 per cent. of the value of said corn from said time."

The following instructions were given at the instance of defendant: "The court instructs the jury that defendant was not bound to transport plaintiff's corn to its destination in any particular length of time or by any specified date, and your verdict, therefore, must be for the defendant, unless it has been proven to your reasonable satisfaction by the greater weight of all the evidence in this case that defendant did not transport said corn to its destination in a reasonable time, taking into consideration the then existing circumstances." "The court instructs the jury that it devolves upon plaintiff to prove to your reasonable satisfaction by the greater weight of all the credible evidence in this case that defendant did not deliver the corn in controversy here to the consignee at Ennis, Tex., and, unless you believe plaintiff has so proven said failure to deliver, your verdict must be for the defendant."

The jury returned a general verdict for plaintiff in the sum of \$347.50.

Defendant argues that the court erred in refusing its request for an instruction directing a verdict in its favor on the first and second counts of the petition, but we think the evidence was sufficient to support a verdict on each of these counts as well as on the third count, and that the causes of action pleaded in the several counts might be joined in one action. Recently we held that "the owner of goods lost in transportation by a cause which will not relieve the carrier from liability may have several different causes of action, any one of which he may elect to prosecute. He may sue, as we have said, in tort for breach of the common-law duty to deliver, or for breach of the contract of transportation, or, by treating the carrier as a mere bailee, may allege the specific tortious act by which the goods were lost, and found his right to recover on that." *Creamery Co. v. Railroad*, 128 Mo. App. 420, 107 S. W. 462. No good reason appears for saying that plaintiff may not plead such different causes in one petition but in separate counts in order to meet different phases of proof. Certainly they are not inconsistent, since proof of one does not necessarily disprove either of the others.

But defendant contends, further, and we find the point preserved in the motion in arrest of judgment, that the verdict, being general, is not responsive to all the issues tendered in the petition. It has been held repeatedly that, when the petition sets out several distinct causes of action, a verdict for the entire and gross sum cannot be sustained. There should be a separate verdict on each cause or count in order that the court may know how the issues were found. But it is just as well settled that this rule

does not apply "where there is really but one cause of action stated in a different manner in different counts so as to meet any possible state of facts that may be shown by the evidence. In such case a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for the plaintiff would be sufficient." *Owens v. Railroad*, 58 Mo. 386; *Brownell v. Railroad*, 47 Mo. 239; *Campbell v. King*, 32 Mo. App. 38; *Burbridge v. Railway*, 36 Mo. App. 669; *Lancaster v. Insurance Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739. The different counts in the petition before us deal with the same transaction, the same subject-matter, call for the assessment of the same damages, and the verdict on one undoubtedly would afford a complete bar to the prosecution of a future action on a cause pleaded in either of the others. We deem the verdict sufficient to support the judgment.

Point is made that the court erred in admitting in evidence, over the objection of defendant, the following letter written by the freight claim agent of defendant: "St. Louis, Mo., November 9, 1903. Linton Grain Co., Kansas City, Mo.—Gentlemen: In reply to your favor August 23d, beg to advise corn from I. M. 11376 was sold, with a net result of \$39.00, which amount is in the treasury of the H. & T. C. R. R. subject to claim. Please send your claim direct to W. H. Taylor, acting general freight agent, Houston, Texas, giving reference in your letter of transmittal to W. T. 5443 and my R. C. 57568. Yours truly, J. S. Tustin, F. C. A." This letter was in response to one written Mr. Tustin by the Linton Grain Company, in which the writer said: "We are advised by your commercial office here that car 11376 billed by W. J. Moseley, Levasy, Mo., to W. J. Moseley, Ennis, Texas, has been by your orders sold at public auction at Houston, Texas. We hold, and always have held, the bill of lading on this car dated June 24, '03. Will you kindly furnish us the amount received by the Missouri Pacific from the sale of this car?" The first objection urged against the admissibility of Mr. Tustin's letter is that it was "hearsay evidence, and only admissible on the theory that it contained an admission against the interests of defendant, and it was not shown that J. S. Tustin, who wrote it, had any authority to make any admission binding defendant, or that the scope of his duties was such that such authority might be inferred." This ground cannot be considered, for the reason that it was not included in the objection made at the trial when the letter was offered. The only ground of objection, then, was that the letter was inadmissible "because it was written after the suit was brought and is an offer of compromise. It is a privileged communication, and we object to it." Objections to evidence not interposed at the time the

evidence is offered will not be considered in the appellate court. There is nothing in the point that the correspondence related to the subject of compromise, and consequently that the letter should be treated as a privileged communication. The letter of the Linton Grain Company contained nothing but a statement that the writer, as the holder of the bill of lading, was entitled to the proceeds of the sale of the grain and a request to be informed of the amount of such proceeds; and the letter of Mr. Tustin contained nothing more than a proper answer to the inquiry. In no sense was it an offer of compromise.

Further, it is urged that there is no evidence in the record of the market value of the grain at Ennis, Tex., at the time when it should have been delivered to the consignee had delivery been made in a reasonable time. Mr. Linton, introduced as a witness by plaintiff, testified that the reasonable market value of the grain at that time and place was 73 cents per bushel, the price at which it had been sold, and we are of opinion he showed himself to be qualified to testify as an expert.

Other points are made, but they are clearly without merit, and need not be noticed. A careful inspection of the whole record convinces us that the case was fairly tried, properly submitted in the instructions given the jury, and that the verdict is for the right party.

Accordingly the judgment is affirmed. All concur.

JOLLY v. HUEBLER et al.

(Kansas City Court of Appeals. Missouri.
Oct. 19, 1908.)

1. APPEAL AND ERROR (§ 990*)—REVIEW—SCOPE—EQUITY CASE.

On appeal in an equity case, issues of fact, as well as of law, are reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3896, 3898; Dec. Dig. § 990.*]

2. PRINCIPAL AND AGENT (§ 123*)—AUTHORITY OF AGENT—EVIDENCE.

Evidence held to require a finding that P. was plaintiff's agent to make loans for him, and was authorized to make a loan to defendant H.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

3. PRINCIPAL AND AGENT (§ 122*)—AUTHORITY OF AGENT—BURDEN OF PROOF.

Where defendants claimed that P. had authority to act as plaintiff's agent in accepting payment of a deed of trust, the burden was on defendants to establish the existence of such agency by proof other than the declarations of P.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 416; Dec. Dig. § 122.*]

4. PRINCIPAL AND AGENT (§ 105*)—FRAUD OF AGENT.

P., acting as plaintiff's agent, made a loan to defendant H., receiving a note secured by a deed of trust therefor. P., instead of sending plaintiff the genuine note, forged one like it, which he delivered, and, after recording the deed of trust, in some manner got possession of it. P. collected interest on the debt, and afterwards assigned it in plaintiff's name, and converted the proceeds. Held that, while neither the possession of the papers nor the fact that P. was plaintiff's agent to negotiate the loan gave him authority to transfer the note and deed, such transfer was in effect a payment thereof as against plaintiff within P.'s authority to receive payment by virtue of his possession of the papers.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 299, 300; Dec. Dig. § 105; Bills and Notes, Cent. Dig. § 1243.]

5. BILLS AND NOTES (§ 433*)—PAYMENT—INDORSEMENT.

Payment of a note may be made without the payee indorsing it.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 433.*]

6. BILLS AND NOTES (§ 524*)—POSSESSION—EVIDENCE OF OWNERSHIP.

Mere possession of an unindorsed negotiable note made payable to order by a person other than the payee is not prima facie evidence of ownership.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1828-1829; Dec. Dig. § 524.*]

Appeal from Circuit Court, Callaway County; A. H. Waller, Judge.

Action by Samuel T. Jolly against Fred E. Huebler and others. Judgment for plaintiff, and defendants appeal. Reversed.

David H. Harris, for appellants. Robert McPheeters and N. D. Thurmond, for respondent.

JOHNSON, J. Action in equity to obtain the cancellation of a release of a deed of trust in the nature of a mortgage, on the ground that the release was made and entered on the margin of the record without authority from plaintiff, the owner and holder of the instrument, and of the promissory note, the payment of which it secured. Personal judgment for the amount of the debt against the makers of the note and foreclosure of the lien of the deed of trust are included in the relief prayed for in the petition. Plaintiff prevailed in the trial court, and the cause is here on the appeal of defendants.

Material facts disclosed by the evidence are as follows: Plaintiff is a very old man living in Fulton, who invested his money in real estate loans. In 1892 he loaned \$1,200 to a Mr. Smith, and received as security a deed of trust on 80 acres of land in Callaway county. When interest on this loan matured, it was paid by Smith to W. R. Penn, a real estate agent and loan broker in Fulton, and plaintiff received the proceeds of such payments from Penn. In September,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1897, Smith sold the farm to defendant Huebler for \$1,850, with the understanding that Huebler should pay \$650 in money, and obtain a transfer of the loan in a way to release Smith from his obligation to plaintiff. Huebler was a stranger to plaintiff, and Smith went with him to Fulton to assist in procuring a loan for him. They called on Penn at his office, stated their business, and were informed by him that it was not necessary for them to see plaintiff, as he (Penn) was plaintiff's agent. In answer to the suggestion made by Huebler's brother, who was present, Penn said: "There is no use. I am his agent. I do all of his business, collect his interest, and make his notes." Penn, acting for plaintiff, then agreed to loan Huebler \$1,200 on the land, and prepared a negotiable promissory note for that amount dated September 10, 1897, due one year after date, payable to the order of plaintiff and bearing interest at the rate of 8 per cent. per annum payable annually. Huebler immediately signed the note, and left it with Penn. A deed of trust was prepared by Penn and given to Huebler, who took it to his home in another town for the signature of his wife, and, after execution and acknowledgment by both him and his wife, delivered it to Penn at Fulton, who, in turn, delivered it to plaintiff. But plaintiff was not given the note executed by Huebler. Penn fraudulently kept that in his possession, and, to satisfy plaintiff, made a duplicate note to which he forged the names of Huebler and his wife, and gave it to plaintiff as the original note. Plaintiff filed the deed of trust with the recorder of deeds, but, after it was recorded, it fell into the hands of Penn in some manner not disclosed, and thereafter Penn had possession of both note and trust deed, and plaintiff had nothing but the forged note. Penn released the Smith deed of trust on the margin of the record. In March of the following year Huebler agreed to sell the land to a Mr. Callicott, who, in order to make payment of the purchase price, tried to secure a loan of \$1,250. Huebler and Callicott applied to plaintiff personally for the loan. Huebler testified: "Mr. Callicott and I went to Mr. Jolly to see him about the loan, if Mr. Callicott could get this money that I had. Mr. Jolly told us that he could not do anything for us; that Mr. Penn was transacting his business, and was his agent, and that he could not do anything for us, for us to go to Mr. Penn; that he would do the business, and whatever he did was satisfactory to him. Q. What else did he say with reference to Mr. Penn collecting the interest and note? A. He told us that when it came due to go to Mr. Penn. Q. That interest was to be paid to Mr. Penn? A. Yes, sir." They went to Mr. Penn, who refused the loan, and the proposed sale was abandoned. Huebler paid interest on the note as it matured for three years, and then quit paying. All of the payments were made to

Penn, the first one at his office, and the others by remittance. After the note became due, no demand was made for the principal, but Penn wrote some letters to Huebler of a severe tenor, threatening to foreclose if the interest were not paid. In 1902 Huebler made arrangements to have the loan carried by August Toedtmann of Hermann, and had his attorney write to Penn to forward the deed of trust and note to a bank at Hermann for collection. Penn indorsed on the back of the note, "For value received, I hereby assign the within note to August Toedtmann without recourse," and signed plaintiff's name to the indorsement, and forwarded the note and deed of trust to the Hermann bank. Toedtmann paid the full amount then due on the note to the bank, and the proceeds were forwarded to Penn, who converted them to his own use. Toedtmann then indorsed and delivered the note to Robert Walker, and delivered the deed of trust to him. Walker took the papers to the office of the recorder of deeds, and released the deed of trust on May 8, 1902. In 1904 Huebler procured a new loan from defendants W. D. Townley and R. J. Bryan, and gave them a deed of trust on the land to secure its payment. In 1905 Penn committed suicide on the eve of the discovery that he had perpetrated many crimes and frauds similar to that under consideration.

The facts we have stated are most favorable to defendant's side of the controversy. Plaintiff in his testimony denies that he employed or recognized Penn as his agent in the transaction at any stage, and states facts which tend strongly to support his contention that Penn was Huebler's representative. He testified: "Q. What were the circumstances under which the loan was made? A. Mr. Huebler and some other man—I don't know who it was—came to my house at the time. I am not so certain but what it was Mr. Smith. I don't know who it was. But Smith was connected with it. I had a note and deed of trust on this land from Smith. Smith either sent him or come with him. Huebler wanted to know if I would turn these over; what money Smith owed me, and let him give a new deed of trust and note on the place, and I told him I thought so. He wanted—I forget—\$1,250 is all I have any recollection of now. If I am not mistaken, he come twice; but I will not be certain about that. Q. After he applied for money, what did you tell him then? A. I told him that I could, but that I would have to see something about the value of the place 'before I loan you that; but you can get it. I have no use for it, and you can get it.' And he says to me, he says: 'I live a good ways and have my work to do, and I will make Mr. Penn my agent, and have him fix that all up and deliver them to you when I get the money, or deliver the whole thing to Mr. Penn.' * * * I told him he could get the money, and in a day or two Dick

Penn fixed up the papers. Huebler said for him to do it and I consented." Plaintiff is quite positive that he received the deed of trust from Penn and took it to the recorder's office, but is unable to tell how it became lodged in the possession of Penn. He admits that Huebler and Callicott called on him, but, beyond denying that he referred them to Penn or that he stated Penn was his agent, states nothing at all with reference to what occurred at that interview. Callicott, who was introduced as a witness by defendants, said: "Mr. Huebler and I were on a trade, and, if I got the money, was going to buy. Went to Mr. Jolly, and asked him about the money. He said he didn't care how long it stood on the place, just so he got the interest. I didn't have enough money, and I could not get any more on the place, and so could not make the trade. He said that he could not do any business with me, that Penn was his agent, and he says: 'Mr. Penn does my business, and collects my interest, and attends to my business all through.'" When the note matured, plaintiff did not care to collect the principal, but took the forged note to Penn's office and collected the amount of interest due, and Penn indorsed the payment on the back of the note and returned the note to plaintiff. This was done every year, the last payment being indorsed by Penn on October 10, 1904. There is no room to doubt that Penn fraudulently concealed from plaintiff the fact that he had transferred the papers to Toedtmann, had received the principal of the note, and that the deed of trust had been satisfied of record. To prevent the arising of any cause for suspicion, Penn paid the interest himself after the transfer to Toedtmann, and plaintiff had no knowledge of the deception practiced until after the death of Penn. The explosion that followed that event brought the facts to light, and, in the excitement after the discovery, plaintiff exclaimed (so witnesses for defendant say): "This is the way Penn has treated me. I trusted him with my business, he was my agent, and this is the way he has done me."

Bearing on the issue of agency, as well as on the question of the strength and accuracy of plaintiff's recollection, is the following portion of his cross-examination: "Q. During the time that Mr. Huebler got behind in his interest, you instructed Mr. Penn to stir him up? A. I don't remember. Q. Didn't you tell Mr. Penn to write to him, and tell him you would foreclose the deed of trust if he didn't pay? A. I don't remember. Q. Didn't you say if he didn't pay that— A. (interrupting) I don't remember. Q. You don't deny that you did tell Penn to write to Huebler? A. If I did, I don't recall it. Q. All your loans were made through Mr. Penn? A. Most of them were. Q. You collected your interest through Mr. Penn? A. Some, and some came to me. Q. The biggest portion was paid you through Mr. Penn? A.

I expect they did. Yes, sir; I think so." From the recitation of facts in the judgment rendered, it is evident the learned trial judge believed the note delivered by Penn to Huebler was a forgery. He found that interest had been paid to plaintiff to October 10, 1904, but made no finding on the issue of whether Penn was the agent of plaintiff or of Huebler in making the loan or in collecting the interest. The theory on which he decided in favor of plaintiff appears in the following extract from the judgment: "The court doth further find that one J. R. Penn, about the ——— day of April, 1902, falsely and fraudulently indorsed the name of S. T. Jolly on either the said original note given by said Fred E. Huebler to Samuel T. Jolly, as aforesaid, or on a counterfeit and forged imitation of said note, and did sell the same to one August Toedtmann, who subsequently assigned and transferred same to one Robert Walker, and that Robert Walker on the 8th day of May, 1902, duly presented same to the recorder of Callaway county, Mo., for cancellation, and the said Robert Walker entered satisfaction of said note and deed of trust upon the margin of the record thereof in said recorder's office; that said cancellation of said note and satisfaction entered thereon was without authority from said S. T. Jolly, and the same is without effect, and void as to the rights of the said S. T. Jolly, the plaintiff."

This being an equity case, issues of fact as well as of law are before us for review. We approve the findings of fact made by the trial judge, believing, as does he, that the indorsement of the note to Toedtmann was without the knowledge of plaintiff and made in execution of criminal purpose, but we find it important to state the result of our solution of issues of fact which were warmly contested by the parties, but not mentioned in the findings of fact. We are of opinion that Penn was agent of plaintiff duly authorized to conduct the transaction of making the loan to Huebler. Plaintiff's testimony relating to this issue, though no doubt honestly given, fails to impress us. While he speaks positively about the most important facts, his memory relating to incidents of less importance is defective. This is not surprising, considering his great age and the length of time that elapsed between the events about which he testified and the trial. Not only does the testimony of Huebler and his witnesses bear the stamp of greater accuracy, but it is strongly supported by facts and circumstances about which there can be no real contention. Plaintiff and Penn lived in the same city, were well acquainted, and for years the large part of plaintiff's loan business had been intrusted to and transacted by Penn. In permitting Penn to conduct the negotiations with Huebler, to prepare the papers, and collect the interest, plaintiff pursued his usual course of business. On the other hand, Huebler was a stranger to both

Penn and plaintiff, was introduced by Smith, who transacted his business with plaintiff through Penn, and, when assured that Penn had plenary authority from plaintiff, it was only natural that he should conclude it was useless for him to interview plaintiff. Neither necessity nor convenience compelled him to employ an agent through whom to pay interest or principal. If he came to Fulton, he could transact business with plaintiff as well as with Penn, and, if he made remittances, it would not have been more convenient to send them to Penn than to plaintiff. Other circumstances are worthy of notice. Not only did Penn collect the interest on this loan as on others made by plaintiff, but he satisfied the Smith deed of trust of record, and, either with the consent of plaintiff or by his neglect, was suffered to obtain and keep the Huebler deed of trust. We are not saying that these facts and circumstances either singly or in combination are enough in themselves to establish the fact that Penn was the agent of plaintiff, but we do say they tend to support the evidence of defendants, and add enough to its weight to give it a clear preponderance over the evidence of plaintiff. We recognize the rules that throw the burden of proof on defendants to establish the fact of the existence of such agency, and require other proof of that fact than the declarations of the alleged agent, and we find that defendants have fully satisfied the rules. In giving credit to the testimony of Huebler, we adopt his version of the interview he had with plaintiff in March following the making of the loan, and about which the recollection of plaintiff seems to be wholly deficient. On that occasion plaintiff stated to Huebler and Calcott that Penn was his agent in all loan matters, and directed Huebler to pay interest to Penn when it became due. This statement in itself is convincing proof of the fact of agency. The scope of that agency will be discussed later on. The delivery to Penn of the note and deed of trust duly executed was a delivery to plaintiff, his principal, and, if through the fraud of the agent the note failed to reach the hand of plaintiff, but, instead, a spurious note was palmed off on him by his agent, Huebler should not be held responsible for the consequences of that fraud. Plaintiff must bear the brunt of it, since it was a wrong done by his agent in the course and scope of the employment. Certainly, after being informed by plaintiff that Penn was authorized to collect the interest, Huebler was justified in assuming that Penn had rightfully obtained possession of the note and deed of trust, and was the proper person to receive payments of interest. We agree with plaintiff that neither the possession of the papers nor the declaration of plaintiff to Huebler clothed Penn with authority to sell the note and indorse it with the name of plaintiff, the payee. These fraudulent acts did not operate to transfer the legal title to Toedtmann, the

purchaser, because the sale and indorsement of the note were outside the apparent, as well as the real, scope of his authority. But it does not follow that these acts were wholly without effect. After the maturity of the note, Huebler was entitled to indulge in the presumption that Penn was authorized to collect principal as well as interest. The rule is settled that a debtor is authorized to infer that an agent employed to negotiate a loan is empowered to receive both the principal and interest from his having possession of the securities. Not only did Penn hold continuous possession of the securities for a period of years after the debt became due, and collect interest apparently with the authority of plaintiff, facts known to and acted upon by Huebler, but all that time Huebler had the unrecalled instruction of plaintiff to transact with Penn all business connected with the loan. The collection of the principal thus fell within both the actual and apparent scope of the agency, and, though the note was made payable to the order of plaintiff, authority to collect it could be, and, in fact, was conferred on Penn without indorsement of the note. Had Huebler called at the office of Penn, found the unindorsed note in his possession, paid to him the amount due thereon, and received the note, that would have constituted a payment to plaintiff, and the subsequent misappropriation of the proceeds by Penn would have been plaintiff's loss. In effect, this is exactly what was done. Huebler exercised his unconditional right to pay his past-due note. Payment could be made without the payee indorsing the note. The indorsement forged by Penn was void. Toedtmann acquired no legal title under it, but, as Huebler paid the amount due to an agent authorized by plaintiff to receive such payment, and the securities were surrendered by the agent who had them in his possession, such payment to the agent was payment to the principal, and the loss resulting from the agent's dishonesty must be borne by the principal. Authorities in point are as follows: *Sharp v. Knox*, 48 Mo. App. 169; *Whelan v. Reilly*, 61 Mo. 565; *Reynolds v. Railroad*, 114 Mo. App. 670, 90 S. W. 100; *Quigley v. Bank*, 80 Mo. 289, 50 Am. Rep. 503; *Dawson v. Wombles*, 111 Mo. App. 532, 88 S. W. 271; *Northwestern Savings Bank v. Bank*, 90 Mo. App. 205; *Webster v. Wray*, 17 Neb. 579, 24 N. W. 207; *Bailey v. Rawley*, 1 Swan (Tenn.) 295; *Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; 1 A. & E. Encyc. of Law (2d Ed.) 1026; *Mechem on Agency*, § 373.

What we decided in *Hair v. Edwards*, 104 Mo. App. 213, 77 S. W. 1089, cited by plaintiff, is not in point. It is true that the mere possession by a person other than the payee of an unindorsed negotiable promissory note made payable to order is not *prima facie* evidence of ownership. It is not claimed by defendants that Penn held himself out as the

owner of the note but that he was the agent of plaintiff, and, as such, appeared to hold possession of the paper with authority to collect it.

It follows from what we have said that, since plaintiff has been paid in full, he has no cause of action, and the judgment must be reversed. All concur.

NELSON v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri.
Oct. 5, 1908.)

1. RAILROADS (§ 275*)—LICENSEES ON TRACKS—COMPANY'S DUTY.

One employed to look after Pullman cars while standing in railway yards is entitled to the same care as to his safety at the hands of the railway company as is required of it as to its own employes; he being a licensee by invitation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 874; Dec. Dig. § 275.*]

2. RAILROADS (§ 278*)—LICENSEES ON TRACK—DUTY.

Licensees on railway tracks by invitation may give their undivided attention to their duty, and assume that the company will not endanger them without notice or warning; they not being compelled to be on the lookout for unusual dangers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 895; Dec. Dig. § 278.*]

3. RAILROADS (§ 282*)—LICENSEES ON TRACK—INJURY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in an action against a railway company for injury to a Pullman employe while he was standing on a track in railroad yards held to sustain a verdict for him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 914; Dec. Dig. § 282.*]

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Personal injury action by Frederick Nelson against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. Minnis, Frank P. Sebrer, and John D. Wendorff, for appellant. Frederick J. Chase and Wm. H. Hazel, for respondent.

BROADDUS, P. J. This is an action by plaintiff to recover damages for personal injuries alleged to have been received through the negligence of the defendant on the 31st day of March, 1905, at Kansas City, Mo. The plaintiff received his injuries in defendant's yards in said city on one of its switch tracks. These yards are about one-fourth of a mile in length, and located just north of St. Louis avenue and east of Santa Fé street, and consist of about a dozen parallel railroad tracks running from Santa Fé street east to what are called the "Bluffs," and also parallel with St. Louis avenue. The north one of these tracks was used for storing coaches, Pullman cars, ice cars, and cabooses, and was designated as the "coach track."

Passing over these tracks were the tracks of the elevated railroad company. The plaintiff was in the employ of the Pullman Car Company as foreman of a small crew of men, whose business it was to clean, repair, and get the Pullman sleeping cars ready for their next trip, and it was also the duty of plaintiff to see that there were no outside causes likely to injure the Pullman cars. He had been employed as such foreman for about one year, but had been in the employ of the Pullman Car Company in and about its cars in said yards for more than a dozen years previously. A short time prior to the accident, which occurred at about 11 o'clock a. m., the plaintiff started from the west end of the railroad yards to go to the east end of the coach track, at which time he noticed two cabooses standing on the said coach track near to Santa Fé street. He remained there a short time, and then turned to go back east, and while he was passing he noticed a telegraph wire lying on, and slacked directly across, the top of a Pullman car. From his position at the side of the car he was unable to see to what point the wire extended, and whether it would be necessary for him to have it removed to avoid injury to the car, and, in order to trace the direction of the wire, he walked along the side of the track to a point about 20 feet west of the west end of the car. At this point he looked west, and discovered the two cabooses standing about 100 feet away in the same place they had been standing when he noticed them before. He then stepped over on the north rail of the coach track in order to see where the telegraph wire extended. After having located the wire, and just as he was turning around, he was struck by the east end of one of the cabooses which was being moved by a switch engine going eastward, and was thrown down, and injured. The engine at the time was being moved slowly towards the Pullman cars with the fireman on the south and the engineer on the north side of the engine, looking east, the direction they were going. Before the caboose struck plaintiff, a man about 100 feet north of the track attracted the attention of the engineer by hallowing and waving his hands, whereupon the engineer stopped his engine as quickly as possible, in about the distance of 12 feet, but not until after plaintiff was struck and knocked down. None of the train crew saw plaintiff before he was struck. Mr. Clifford, who attracted the attention of the engineer as stated, first saw plaintiff on the track about 30 feet west of the elevated road, at which time the caboose was about the same distance west of plaintiff. Clifford tried to attract plaintiff's attention by whistling and hallowing at him, but did not succeed in doing so, but plaintiff turned and was proceeding to start across the track without looking to-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ward the caboose. It was also shown that it was not usual to place cabooses on the coach track until in the afternoon, but that sometimes they were placed there in the forenoon.

The vital question in the case is: Was plaintiff entitled to recover under the testimony? The position of the plaintiff is that "the defendant's engineer was guilty of negligence in suddenly backing the cabooses which had been standing still for twenty minutes or more on the track without having given any warning or signal of his intention to thus move them; or without having any person in a position to signal the engineer when to stop." In *Lanning v. Railroad*, 196 Mo. 647, 94 S. W. 491, the facts were "that the engineer in charge of an engine in the trackyards backed cars up an incline of a coal dock striking other cars, from which plaintiff and his crew had emptied their coal into the bins, and caused them to move backward and injure plaintiff while he was using his crowbar as a prize to move said cars out of the way, and forcing said crowbar down on plaintiff. * * *" There was no warning of any kind given. The court held "that an instruction which permitted plaintiff to recover if the engineer caused the engine to collide with the cars behind which plaintiff was working 'without giving any warning or signal that would be reasonably calculated to notify and warn plaintiff of the approach of said engine' was not error." "The general rule is that, as to persons lawfully upon the track engaged in labor, the railroad company owes a duty of active vigilance; and such persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains, relying, as they may, upon the duty imposed by law with reference to them." *Gessley v. Mo. Pac. Ry. Co.*, 32 Mo. App. 413. The facts of that case were the owner was unloading his freight from a car on a side track where it has been placed for that purpose, and, while he was so engaged, the defendant backed its cars against the car plaintiff was so unloading without giving any warning, whereby he was injured. "A consignee engaged in unloading a car placed on an unloading track is on the railway track by invitation of the company, and he is not compelled to be on the lookout for unusual dangers, but the employes of the company engaged in switching cars on the unloading track must give warning of the approach of the cars." *Lovell v. Railway Co.*, 121 Mo. App. 466, 97 S. W. 193. The holding was similar in *Spotts v. Railway Co.*, 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531. The authorities in general are to the same effect, for which reason it is not necessary to cite them.

The appellant contends, however, that the principle has no application to this case, as it relates to instances of persons loading or unloading cars at the invitation of the company, or who were so placed that they were unable to look out for their own safety. As

plaintiff was not in the employ of defendant, but was merely permitted to go onto the defendant's railroad yards for his own convenience and that of his company, it is argued that he was, at most, only a licensee, and that as such defendant owed him no duty except not to willfully or wantonly injure him. It is held that "a railroad company owes no other or greater duty to a naked licensee, exercising the privileges of such in walking on a pathway along the side of the track, than not to negligently or wantonly injure him." The pathway mentioned was generally used by the people in going to church. *Carr v. Railway Co.*, 195 Mo. 214, 92 S. W. 874. "One who enters into a caboose which carries passengers for the purpose of bearing a lunch to the trainmen, with no intention of becoming a passenger, there being no contract expressed or implied to that effect, and no recognition of him as such, but under a general arrangement between his mother and the conductors to supply them with lunches, with which the company had nothing to do, and under a general direction from the conductor of the particular train to take the lunch into the caboose, is a mere licensee, to whom the railroad owes no other duty than not to negligently or wantonly injure him, since his business was with the trainmen, and not with the company." *Wencker v. Railway Co.*, 169 Mo. 592, 70 S. W. 145. We think that these two and kindred authorities cited by appellant have no application to the question under consideration. The appellant has failed to make the distinction between a licensee by sufferance and a licensee by invitation. The authorities last cited apply to the former, and not to the latter, class of licensees. The plaintiff was in defendant's switchyards, not as a naked licensee, or, as stated otherwise, by mere permission or sufferance, but he was there by the invitation of the defendant. The evidence showed that the cars of the Pullman Company had been regularly placed upon defendant's tracks for many years, where they were deposited until they were sent out again, from which we may infer that they were there not by mere sufferance, but by invitation, presumably by reason of some agreement between the two companies. And we believe we are justified in the inference that these cars were operated by the defendant in its passenger service on its line of railroad; and, further, that it must have been the understanding that they were left on the coach track under the care and control of the servants of the latter. With this view of the case, plaintiff as the employe of the Pullman Company was while engaged in the business of his employer entitled to the same care as to his safety at the hands of defendant as the law accorded to its own servants.

We are cited to *Taylor v. Railway Co.*, 86 Mo. 457, as a parallel case. The plaintiff, as the wife, sued to recover the statutory penalty of \$5,000 for the death of her husband,

whose death was alleged to have been caused by the negligence of defendant. The deceased was in the employ of the Union Railway & Transit Company as a lamplighter, whose duty it was to put up lamps in the evening and take them off the targets in the morning, in the St. Louis Union Depot yards, which contained 13 parallel tracks, connected by many switches, upon and from the targets of which he put up and took down the lamps. Deceased was walking on one of the tracks at the time he was struck by an engine and killed. He was not engaged in attending to the lamps at the time, but was going towards his shanty near Fourteenth street bridge which crossed said tracks. The engine was going at the rate of 15 miles an hour, and gave no signal of its approach. There was no evidence that deceased looked or listened for an approaching train. The court held that "one who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching train, and is thereby killed, when by looking or listening he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was at the time running at a rate of speed forbidden by an ordinance of the city in which the accident occurred and also failed to ring its bell." There are material distinctions in the two cases. In the Taylor Case the deceased went upon the tracks of the railroad company over which the company transacted its business as a carrier, and where he was liable at any time to encounter moving cars, without the necessary precaution of looking or listening for their approach. There is no dispute but what it is the duty of a person before he goes upon a railroad track to use due care to avoid danger of injury from passing engines and cars. In the case under consideration, the coach track was not so used by the company. Its cars and engines did not pass over it in coming and going, nor was it used generally for switching purposes. It was used principally as a place of deposit for cabooses, ice, and Pullman cars when not in actual service. The latter were in the care of plaintiff and his gang. He was to see that they were kept clean and in repair, and guarded within and without from injury. In order to a proper performance of his duty, it was necessary that he, or some of his gang, should be on or near the track. When it became necessary to move any of these cars, whether in bringing them on or taking them off the track, it was the duty of defendant to give the usual signal or other necessary warning of the intended movement as a proper precaution for the safety of the persons employed in and about them. These could not always know when such cars would be switched on or off the tracks without previous warning. The case in that respect is more nearly like that

of Gessley v. Railway Co., supra, and that of Lovell v. Railway Co., supra. Undoubtedly plaintiff at the time he was struck, or just a moment before, was entirely engrossed in inspecting the telegraph wire that was lying across the car, and was wholly unconscious of the approach of the engine and cabooses attached. And while, as said in the Gessley Case, that persons engaged in similar employment "are not permitted to close their eyes to what comes in range of their senses, yet they may give their undivided attention to their work, and are justified in assuming that the company will not molest them or render their position hazardous without such notice or warning." And, as was held in the Lovell Case, a person by invitation of the company on its premises is not compelled to be on the lookout for unusual dangers. Such seems to be the general rule.

We believe that the plaintiff made out a case which under the law, as we understand it, justified the verdict and judgment. The action of the court in overruling the defendant's demurrer to plaintiff's case as made out by the evidence is affirmed.

Judgment affirmed. All concur.

DAY v. MISSOURI, K. & T. RY. CO.

(Kansas City Court of Appeals. Missouri.
Oct. 5, 1908.)

1. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—ACTIONS—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY—STATUTORY PROVISIONS.

Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), requires operators of locomotives to signal for country road crossings by ringing the bell for a distance of 80 rods from the crossing, or by sounding the whistle at least 80 rods therefrom, and makes the railroad company liable for all damages sustained at the crossing when neither precaution is taken, but provides that the company may show that the failure to signal as required was not the cause of the injury. Held, that neglect to give the signal is made prima facie evidence that the negligence was the direct cause of the injury where a plaintiff is injured by a collision at a public road crossing, but the presumption may be overcome, and, where it appears that the failure to signal was not a producing cause, plaintiff cannot recover by reason of the failure, and, where defendant's evidence, while tending to overthrow the presumption, is opposed by facts adduced by plaintiff showing that failure to signal was the proximate cause, the issue is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1161, 1190; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—ACTIONS—QUESTION FOR JURY—PROXIMATE CAUSE.

Whether the failure of those operating a locomotive to signal its approach to a highway crossing was the proximate cause of an injury in a collision with plaintiff's wagon at the crossing held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1161, 1190; Dec. Dig. § 350.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—ACTIONS—EVIDENCE.

Evidence held to support a finding that the negligence of a railroad company in failing to keep a highway crossing and approaches covered with six inches of macadam or gravel, as required by Rev. St. 1899, § 1103 (Ann. St. 1906, p. 943), was the proximate cause of an injury resulting from a collision with plaintiff's wagon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1139, 1140; Dec. Dig. § 348.*]

4. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—ACTIONS—NEGLIGENCE.

Plaintiff approached a highway railroad crossing at night. The railroad curved, 250 feet from the crossing, and crossed the highway at a tangent. The beaten tracks of the road were sinuous, and the approaches and crossing were not graveled. He stopped, looked, and listened for a train which he knew had not passed, and, receiving no warning, started toward the crossing, when one wheel ran off a culvert into a mud hole, and his team became stalled on the railroad track. He hastily began unhitching, but before he had finished he saw the headlight of a locomotive, which had not signaled, emerge from the curve and abandoned the team, and tried to run out of danger, but was struck by a sack of bran hurled against him when the engine collided with the wagon. Held, that he was not negligent as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Personal injury action by T. N. Day against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. Scott & Bowker, for respondent.

JOHNSON, J. This suit is for damages resulting from personal injuries received by plaintiff at a crossing of defendant's railroad and a public highway in Vernon county. Negligence of defendant is pleaded as the direct cause of the injury. The answer is a general denial and a plea of contributory negligence. The trial resulting in a judgment for plaintiff in the sum of \$1,975, the cause is here on the appeal of defendant.

The principal contention of defendant is that its demurrer to the evidence should have been sustained for the reasons that the evidence does not accuse it of negligence causing the injury, and does show that the injury was the direct result of plaintiff's own negligence. The crossing where plaintiff's mishap occurred is about three-fourths of a mile west of the town of Clayton, in Vernon county, and perhaps six miles east of Ft. Scott, Kau. Plaintiff, a farmer living near Clayton, drove to Ft. Scott in a low-wheeled farm wagon on August 7, 1906, obtained a load of sacked bran, and started to return home in the evening. The wagon road he traveled runs east and west, and from Ft. Scott east to the crossing in controversy is a short distance south of defendant's railroad, which runs between Ft.

Scott and Clayton. Going eastward, the railroad, at a point about 250 feet west of the crossing, curves to the southeast, and runs in that direction on a tangent over the crossing. The public roadway keeps to a straight east and west course where it crosses the railroad, but at the time of the injury the road therein traveled by vehicles—the beaten path—was decidedly sinuous at the crossing and its approaches. Railroad and wagon road were practically on the same level, the former being a little higher than the latter. The crossing was constructed in the manner required by statute, except in the particulars presently to be noted. A small ditch to the west of the railroad track and along the foot of the roadbed was filled at the crossing by a small wooden culvert 20 feet long. The northwest end of this culvert was about six feet from the railroad track, and was so placed that, in going eastward along the traveled road, drivers of vehicles, to avoid having the wheels on the north side run off that end of the culvert into a mud hole, were compelled to make a slight turn to the southeast. After making this turn, the road then turned to the northeast, and continued in that direction over the crossing to a point near the fence on the north side. Then it changed abruptly to the southeast until it reached the middle of the roadway, where it changed to straight east. The last turn described was made necessary by the presence of an embankment of earth, about three feet high, thrown up by defendant, which began at a point in the public roadway about midway between its center and north lines, and extended southeastwardly parallel to the railroad track. Plaintiff approached the crossing at about 10 o'clock at night. He stopped his team, looked and listened for an approaching train, and, receiving no warning that one was coming, started forward to the crossing. It was dark, and in making the first turn he failed to go far enough to the southeast. The front wheels of his wagon passed over the culvert, but the north hind wheel dropped into the mud hole. The off horse fell to his knees, and the team stopped. The horse quickly regained his feet, and plaintiff urged the team forward. They could not move the wagon, and the off horse again fell to his knees. The team stood on the railroad track, and, realizing that he and his property were in a place of danger, plaintiff hastily alighted, and began unhitching. He had detached three of the tugs when the glare from a reflected headlight warned him that a train was coming from the west. Looking up, he saw the engine at the curve, and, forsaking his property, turned and ran southward to get out of danger. He had not run over 15 or 20 feet before the engine struck the tongue and front end of the wagon. He was struck and severely injured by a sack of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bran hurled in his direction by the force of the collision. The engine did not signal for the crossing, and plaintiff did not know the train was coming until about the time the engine reached the curve. The train was "the Flyer," a fast passenger train, and was running at from 45 to 50 miles per hour. There was no macadam or gravel between the rails at the crossing nor on the approaches, and recent rains had made the public road muddy. On account of the darkness, plaintiff could not see that he was making the first turn in a manner to throw the hind wheel beyond the end of the culvert.

The facts stated are those most favorable to plaintiff, and are all that need be considered in the discussion of the question of whether plaintiff was entitled to go to the jury on the issue that negligence of defendant was the proximate cause of his injury. The petition charges that defendant was negligent "in failing to construct and build a good and sufficient and proper railroad crossing and approach thereto, and failing to build a culvert of sufficient length on said right of way, and in obstructing a portion of the public highway at such public crossing, and in failing to give the statutory signals and warnings as required by law." The issues of negligence submitted to the jury are thus stated in plaintiff's first instruction: "The court instructs the jury that if you believe and find from the evidence that the place where plaintiff alleges that he received his injuries was a public road, and that the same was crossed by defendant's track and line of railroad, and that on the 7th day of August, 1906, the plaintiff, while attempting to use said crossing with his team and wagon, that his wagon was struck by one of defendant's trains, and that a sack of bran contained in plaintiff's wagon was thrown against him by said collision, and that the plaintiff was injured thereby, and if you further find from the evidence that the defendant's agents, servants, and employes in charge of said train failed to ring any bell or sound any whistle 80 rods from said crossing, and to ring said bell or sound said whistle at intervals, as it approached said crossing, and if you further believe and find from the evidence that defendant failed and neglected to place and maintain macadam or gravel between the rails of its said track as aforesaid at said crossing, and failed and neglected to make and maintain good and sufficient approaches to their said rails at said crossing, and to cover the same with gravel or macadam to a depth of not less than 6 inches, and if you further find from the evidence that the defendant knew of the condition of said crossing, or might have known by the exercise of reasonable care and caution, in time to have repaired the same prior to plaintiff's alleged injury, if any, and if you further believe and find from the evidence that the sole cause of the injuries of the plaintiff, if you find he was injured, was the failure of the defendant

to ring its bell or sound its whistle at intervals, as aforesaid, as it approached said crossing, at least 80 rods before it reached the same, and the failure of the defendant, if you so find, to place and maintain said gravel between its said rails at said crossing, and to construct and maintain proper approaches thereto, and to cover the same with gravel or macadam, as aforesaid, and if you further find from the evidence that the plaintiff himself was in the exercise of due care at the time he alleges he was injured—then your finding must be in favor of the plaintiff."

It is conceded, in effect, that the evidence adduced by plaintiff supports the charges of negligence pleaded in the petition and submitted in the instruction quoted, but it is argued by defendant that none of these delinquencies was the direct cause of the injury.

First we shall consider the question of whether the failure to sound the whistle or ring the bell might reasonably be said from the facts and circumstances in evidence to have been a proximate cause of the injury. Section 1102, Rev. St. 1899 (Ann. St. 1906, p. 938), requires the operators of locomotives to signal for road crossings in the country either by ringing the bell for a distance of 80 rods from the crossing or by sounding the whistle at least 80 rods therefrom, and provides that "said corporation shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung or such whistle sounded as required by this section, provided, however, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury." Neglect to give the required signal thus is made *prima facie* evidence of the fact that such negligence was the direct cause of the injury in cases where the plaintiff is injured by a collision with an engine or train at a public road crossing. But this presumption may be overcome by evidence, and, where it appears from all the evidence that such negligence was not a producing cause, the plaintiff should not be permitted to predicate a right to recover on the fact that the signal was not given. Where, however, the evidence introduced by the defendant tends to overthrow the presumption, but is opposed by facts and circumstances adduced by the plaintiff to the effect that the failure to give the signal was a proximate cause, an issue of fact is presented that should be solved by the triers of fact. Applying these rules to the evidence before us, we find that the question under consideration was one of fact for the jury. It may be true that plaintiff's team and wagon became stalled at the crossing before the locomotive reached the signal point, and that it would have been impossible for plaintiff to extricate his property had the signal been given; but, on the hypothesis that plaintiff while in the exercise of reason-

able care had no warning of the coming of the train at the time he became entrapped in a place of danger, we can see plainly that the omission to give the signal played a very direct and prominent part in the production of the injury. Had the signal been given, it is but fair to plaintiff to give credit to his assertion that he would have abandoned his property at once, and sought a place of safety for himself. In doing this he would have had ample opportunity to protect himself, but, with no warning until the engine was not over 400 feet away, he was caught in a trap, and could not escape.

We pass now to the question of whether the very manifest negligence of defendant with respect to the construction and maintenance of the crossing may reasonably be considered as a proximate cause. Under the provisions of section 1103, Rev. St. 1899 (Ann. St. 1906, p. 943), defendant was negligent in not properly covering the crossing and approaches with macadam or gravel to a depth of six inches. Considering the tortuous course vehicles were compelled to pursue over the crossing and approaches, the failure to provide a statutory roadway was likely to throw a driver out of the narrow and crooked path, especially in the dark. Except in complete darkness, a paved road is visible to some extent, and a driver can tell both by his senses of sight and hearing if his vehicle is keeping to the prepared roadway. It is quite different from travelling on a muddy dirt road, where one even in partial darkness cannot always know whether or not he is keeping in the road. In the circumstances depicted in evidence, we think the jury was entitled to find that plaintiff's wagon wheel reached the mud hole because of the fact that the approach was left uncovered by defendant. This misfortune caused his team to become stalled, and, had it not befallen him, he would have passed over the crossing in safety. The failure to comply with the statute appears as a producing cause of the injury.

Further, it is contended by defendant that plaintiff was guilty in law of negligence which directly contributed to his injury. We do not think so. While he knew that the train had not passed, he did not know that it was due to arrive at that moment. He satisfied the requirements of reasonable care by stopping, looking, and listening. Hearing or seeing nothing of the train, he certainly cannot be pronounced negligent for proceeding to the crossing. We do not agree with defendant that plaintiff's testimony on this subject is at war with the plain physical facts of the situation, and that he must have seen and heard the train had he looked and listened. It appears that between the wagon road and railroad there was a thick growth or rank weeds and underbrush, and to the

westward there was timber. The engine carried an electric headlight, the reflection of which could be seen for several miles under favorable conditions, and it is a matter of common knowledge that the rumble of a train running across country at night may be heard a long distance when there are no obstructions; but the evidence shows there were many obstructions between plaintiff and the train which might have prevented him from seeing or hearing it. He was in a low wagon, and the weeds doubtless kept him from seeing the glare of the headlight. The noise might have been deadened by such obstructions as weeds, trees, and embankments along the railroad. (The country was rolling.) Frequently the rumble of an approaching train will be heard very distinctly, and then it will cease altogether because of the passage of the train from a clear space into a cut or a forest. We cannot say as a matter of law that plaintiff's testimony must be false, and think it was for the jury to say whether he stopped, looked, listened, and received no warning that the train was coming. The demurrer to the evidence was properly overruled.

No other error being claimed by defendant, it follows that the judgment must be affirmed. All concur.

ATKINSON v. CITY OF NEVADA.

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

DEDICATION (§ 35*)—ACCEPTANCE.

Dedication of a way to public use by the owner of the soil and public use of it does not per se make it a public highway, so as to require the municipality to keep such way in a reasonably safe condition for such use, without proof of acceptance by the corporation, and the adoption of an ordinance establishing the grade of a dedicated street is insufficient to show such an acceptance.

[Ed. Note.—For other cases, see Dedication Cent. Dig. § 70; Dec. Dig. § 35.*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by E. J. Atkinson against the city of Nevada. From a judgment for plaintiff, defendant appeals. Reversed.

A. J. King, for appellant. Lee B. Ewing and J. R. Moss, for respondent.

JOHNSON, J. This is an action against a city of the third class to recover damages for injuries to a horse owned by plaintiff, which were caused by the driving of the horse into a barbed-wire fence at the side of a public street. The injury occurred in the night of December 9, 1906, in Nevada, Mo., at a point on Hunter street (which runs east and west) about midway between Tower and Perkins streets, parallel streets crossing Hunter street at a right angle. Owing to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

darkness, the driver of the horse, who was unacquainted with the locality, did not become aware of the fact that the horse had left the traveled road until the animal became entangled in the barbed-wire fence along the south side of Hunter street. The negligence alleged in the petition is "that the injuries to said animal and the damages arising therefrom were caused by the negligence of defendant in failing to light Hunter street, and in permitting the erection and maintenance of the barbed-wire fence as aforesaid." The answer traversed the allegations of the petition and pleaded affirmative defenses, the nature of which we find it unnecessary to state in the view we entertain of the law of the case. The cause was submitted to the jury, verdict and judgment were for plaintiff, and defendant appealed.

The place of the injury was in Prewitt's addition to the city of Nevada. This addition was in the corporate limits of the city, and had been regularly platted some years before. The streets and alleys shown on the plat, among them Hunter street, had been used as thoroughfares by the public, but no work of any kind had been done on them by the city. The locality was in a sparsely settled part of the city, and, until eight or nine months before the injury, the land on both sides of Hunter street, between Tower and Perkins streets, was vacant and unfenced. At the time last stated the owner of the block south of Hunter street inclosed it with a fence for use as a pasture. The fence with which the horse came in contact was the north boundary of this inclosure, and was about the south line of the street as platted. In 1899 the city, by ordinance, established the grade of various streets, including Hunter. This was the only act of the city which evidenced an intention to accept jurisdiction over the streets and alleys in Prewitt's addition. Defendant argues that the court should have peremptorily directed the jury to return a verdict in its favor on the ground that the city had not become bound to keep the street in proper condition for travel. The rule is well settled "that the dedication of a way to public use by the owner of the soil, and the public use of it, does not per se make it a public highway, and devolve upon the municipality the duty of keeping such way in a reasonably safe condition for such use without some proof of acceptance by the corporation." *Melners v. City*, 130 Mo. 274, 32 S. W. 637. It was said by the Supreme Court in *Downend v. Kansas City*, 156 Mo., loc. cit. 68, 56 S. W. 904, 51 L. R. A. 170: "A statutory dedication vests the fee to the street in the city, but, until the properly authorized city officers do some act evidencing an intention to assume jurisdiction over the same, the obligation of the city to keep it in repair does not begin, and consequently it is not liable for a failure to do so. And the

mere approval of the plat is not such an act of jurisdiction." And in reviewing the *Downend Case* we observed in *Foster v. Kansas City*, 114 Mo. App., loc. cit. 730, 90 S. W. 751: "It was further held that user by the public was not an act of the municipality, and therefore not of itself binding upon the city, and the basic principle underlying that decision is that it requires a voluntary, not a compulsory nor perfunctory, act of the city to bind it as an acceptor of the street." The application of these rules to the facts of the present case requires us to hold that neither the dedication of Hunter street to public use by the owner of the addition platted nor the use of the street by the public as a thoroughfare had the effect of imposing on the city the duty of keeping the street in safe condition for travel.

In *Melners v. City*, supra, the Supreme Court expressed the view that a municipality would charge itself with the burden of maintaining a dedicated street in proper condition by acts which evidenced an acceptance of the street for public use. We quote further from the opinion: "No formal acceptance by the corporate officials, however, is necessary. And such acceptance is sufficiently indicated in many cases by showing that the way as dedicated was thereafter opened, accepted, and continuously used by the public as a common public thoroughfare. * * * The proof of such acceptance becomes more satisfactory when the way has been used as a public street, has been occupied and built up to as only public streets are used and builded to for many years, and has become a well-known, generally recognized, and much-traveled thoroughfare, as was the one in question in this case, as to which the fact of acceptance may be said to have been established beyond question by the further proof that the street as thus dedicated, opened, and used was expressly recognized and adopted by the corporate authorities, by ordinances fixing its grade, and extending it as dedicated by condemnation over other lands." But in *Moore v. City*, 103 Mo., loc. cit. 476, 15 S. W. 755, *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168, and *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612, it was made clear that in such cases a city does not assume liability for the safe condition of a dedicated street by acts of a purely legislative character, such as the enactment of an ordinance accepting the grant, or of one establishing the grade of the streets and alleys. There must be some further act, such as the making of some improvement of the street, from which may be implied an invitation to the public to use it. Without such invitation, use by the public imposes no obligation on the part of the city with respect to the street. . Discussing this subject, the court, speaking through Judge Valliant, said in *Ely v. St. Louis*, supra: "A municipal corporation on which is conferred the power to

establish public streets, and, when established, to construct them for public use, in the exercise of that power acts in two capacities: First, governmental; second, ministerial. When the municipality by ordinance declares that land embraced within certain lines is a public street, then, when the city obtains the title to or easement in that land for that purpose, either by gift or condemnation, it becomes a public street, but it is not necessarily then opened to the public for use. And if after that the city passes an ordinance providing for the improvement of the street so as to render it fit for use, even then it is not, by the mere passing of the ordinance, opened for use. In passing those ordinances the city acts in its governmental, legislative capacity. * * *

An ordinance establishing the grade of a street is a legislative, not a ministerial, act, and implies no invitation to the public to use the street as a way prepared for safe travel.

These considerations compel a reversal of the judgment in the present case. Beyond the passage of an ordinance fixing the grade, the city did nothing to show that it had assumed jurisdiction over the street, and since that act was legislative, and carried no invitation to the public nor notice that the street was safe for travel, the public in using it did so at its own peril.

The judgment is reversed. All concur.

FRISBIE v. FIDELITY & CASUALTY CO.
(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

1. INSURANCE (§ 427*)—CAUSE OF LOSS—INSURANCE OF PROPERTY—PROXIMATE CAUSE OF LOSS.

In an action on a plate glass insurance policy which exempted the company from liability for loss happening by or in consequence of any fire, whether on the insured premises or not, where the glass was broken by the dynamiting of the building by the town authorities or by concerted action of property owners, including the rental agent of the building, to prevent the spread of fire which began elsewhere and burned up to the dynamited building, the fire was the proximate cause of the loss so as to prevent a recovery under the policy; the dynamiting of the building being one of its natural results.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1139-1143; Dec. Dig. § 427.*]

2. INSURANCE (§ 424*)—CAUSE OF LOSS—ACCIDENT.

The loss was not the result of accident within a provision of the policy requiring the breakage to be the result of accident, but was the result of design.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 424.*]

3. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

Proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and

the responsible ones, though they may be nearer in time to the result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

Action by Alvin C. Frisbie against the Fidelity & Casualty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Aleshire, Herrick & Gundlack, for appellant. Harkless, Crysler & Histed, for respondent.

JOHNSON, J. Action on a policy of insurance. A jury was waived, the cause submitted on an agreed statement of facts, judgment was entered for defendant, and plaintiff appealed. The policy was for what is called "plate glass insurance," and by its terms defendant undertook to insure plaintiff against loss by "breakage of the glass" in a store building owned by plaintiff in the town of Hale. Among the conditions of the contract were the following: "(1) That such breakage shall be the result of accident and due to causes beyond the control of the assured. * * * (4) That this company is not liable to make good any loss or damage which may happen by or in consequence of any fire (whether on the premises above described or not) or of invasion, insurrection, riot, or of any military or usurped power."

The following facts appear in the agreed statement: "That on the night of September 1, 1906, a disastrous fire broke out in the town of Hale, Mo. That the glass insured under said policy was situated in the one-story brick veneer building on lot 8, block 9, of said town of Hale, Mo. That said building was in the middle of a solid or practically solid block of brick and frame buildings. That two or three buildings were on fire at one end of said block, and the fire was sweeping toward the other end of said block. That Hale, Mo., has but meager fire protection, and no regularly organized and paid city fire department. That said building in which said glass was located was dynamited, either by the town authorities of Hale or a concerted action of the property owners, including the rental agent of the building dynamited, to prevent the further spread of the fire. That the fire burned up to said building, scorched a small portion of said building, and spread no further. * * * That Hale, Mo., is a town of 800 to 1,000 inhabitants. That the reasonable value of the glass broken is \$80, the amount sued for." The fact that the glass was broken in the destruction of the building by the town authorities or property owners acting in concert, and for the apparently necessary and praiseworthy purpose of check-

ing the advance of a destructive fire, compels us to hold that the loss was not due to a cause covered by the policy. In any reasonable view that may be taken of the facts, the loss was not the result of accident, but of design. The persons who wrecked the building were actuated by no wrongful motive, but by the apparently well-founded apprehension that the building, if not removed, would be destroyed by fire, and would be the vehicle for spreading the destructive agency. Their act should not be regarded as the proximate cause of the loss, and the rule is well settled that the insurer is liable only for loss happening to the property insured against when the peril covered by the policy is the proximate cause of the loss. 1 Wood on Fire Insurance (2d Ed.) § 106. In the leading case of *Aetna Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 895, the policy contained the clause: "The company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." The time of the insurance was during the Civil War. Union military forces were in possession of the city, and were about to be driven therefrom by a hostile army. To prevent military stores from falling into the hands of the enemy, the Union commander set fire to the city hall. The fire spread to and destroyed the property insured. The Supreme Court of the United States held that the proximate cause of the loss fell within the scope of the clause we have quoted. It is said in the opinion: "The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim, '*Causa proxima, non remota, spectatur.*' The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. * * * The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping

power, and what that power must have anticipated as a consequence of its action."

The basic principle of this decision was applied by this court in *Laub v. Railroad*, 118 Mo. App. 488, 94 S. W. 550. In that case a passenger was induced to leave his train by the misdirection of the carrier. The train pulled ahead a short distance, and stopped at an eating house. The passenger, being left in the dark at an unilluminated station, attempted to regain his train. At the invitation of the conductor of a train operated by another carrier who offered to show him the way, he crossed over to the platform where the conductor was standing, and, following his guidance, stepped into a hole negligently left on its premises by the last mentioned carrier, and was injured. He sued the carrier whose passenger he was for the damages sustained, and we held that the negligent misdirection or that carrier was the proximate cause of the injury, saying: "It failed in the performance of a contractual duty when it negligently invited him to temporarily leave the train at the wrong place, and then went off, leaving him standing there. It put him in a place of comparative danger, and left him to his own resources to extricate himself. He was under the necessity of overtaking his train if he could, and the problem confronting his dazed understanding was how best to reach the train. In the darkness ahead of him both available ways—the one down the track and that he attempted to take—were equally obscure to his vision. He could not know of the possible dangers that lurked in either path. The hole into which he fell, a culvert, which for aught he knew might have been in the railroad track, rough and uneven ties therein, the darkness around him, his entire ignorance of the locality, were all elements of the single danger into which he was plunged by the negligent act under consideration, and as such were purely incidental and auxiliary, and only served to furnish a condition for the operation of the negligent act. The negligence, if any, of the Rockport conductor should be placed in the same category. One who is compelled to grope blindly forward is to be expected to avail himself of chance human aid, and, if thereby he encounters fresh perils, they are but incidents or offshoots of his general danger. The conclusion is irresistible that defendant's negligence act was the sole producing cause of the injury." This principle applied to the facts of the present case points to the fire as the proximate cause of the loss. It was the *causa causans* and the dynamiting of plaintiff's building was one of its natural and necessary results, not an independent, supervening cause.

The judgment is affirmed. All concur.

WINKLE et al. v. GEORGE B. PECK DRY GOODS CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908.)

1. DEATH (§ 76*)—ACTIONS FOR CAUSING—EVIDENCE—CAUSE OF DEATH.

Evidence held to warrant a verdict finding that decedent was killed by the fall of a counterbalance weight following the fall of a dummy elevator.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 94; Dec. Dig. § 76.*]

2. MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—CAUSE—EVIDENCE.

Where injury to a servant may be the result of one of several causes, for only one of which a master is liable, the servant must show with reasonable certainty that that cause produced the injury in order to establish a case for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

3. EVIDENCE (§ 587*)—NATURE OF PROOF—CIRCUMSTANTIAL EVIDENCE.

The existence of an ultimate fact need not be shown by direct evidence, but may be proved by circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.*]

4. MASTER AND SERVANT (§ 129*)—DEATH OF SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

Where the brake on a dummy elevator was not used at the time the elevator fell, resulting in the death of decedent, the fact that the brake was defective and would not control the elevator when descending with a heavy load was immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 259; Dec. Dig. § 129.*]

5. MASTER AND SERVANT (§ 270*)—EVIDENCE—OTHER ACTS OF NEGLIGENCE—APPLICATION.

The rule that evidence of other independent disconnected acts of negligence are inadmissible to show negligence in the particular case does not apply to actions for injuries to servants, where the prior occurrences sought to be shown have a direct bearing on the question whether the instrumentality by which the servant was injured was defective to the master's knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 919; Dec. Dig. § 270.*]

6. MASTER AND SERVANT (§ 270*)—DEATH OF SERVANT—EVIDENCE.

In an action for death of a servant by being struck by a dummy elevator counterbalance weight which fell after the fall of the elevator, evidence that, on three or four prior occasions when the box fell, the weight fell as plaintiff claimed it did in the present instance, and that witness had reported the occurrence to defendant's superintendent, was admissible to show that the elevator was defective, and that defendant had knowledge of the defects in time to have corrected them by the exercise of reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 919, 923; Dec. Dig. § 270.*]

7. MASTER AND SERVANT (§ 117*)—DEATH OF SERVANT—DUTY OF MASTER.

Where decedent, 13 years old, and other girls, were employed in defendant's department store, and were required to lower bolts of cloth on a defective dummy elevator, defendant, was bound to anticipate that decedent might

place herself in such a position that her head would be within the range of one of the elevator weights if it should fall down the shaft, and therefore owed decedent the duty to use reasonable care to prevent such occurrence, though defendant posted a notice at the elevator reading: "Keep heads out."

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 117.*]

8. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Decedent, 13 years old, and other girls, were employed in defendant's department store. They overloaded a dummy elevator with bolts of cloth they were directed to lower therein, so that the elevator fell. Immediately after the fall, decedent and her companion placed their heads in the elevator shaft, in violation of a notice, and were struck by the fall of a counterbalance weight. Held, that decedent was not negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1127, 1128, Dec. Dig. § 289.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Samuel W. Winkle and another against the George B. Peck Dry Goods Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Grant I. Rosensweil, for appellant. A. S. Lyman, for respondents.

JOHNSON, J. Plaintiffs, who were the parents of Irene Winkle, deceased, a minor, brought a statutory action for damages on the ground that the death of their daughter was caused by the negligence of defendant. The trial to a jury resulted in a verdict and judgment in their favor in the sum of \$1,500, and the cause is here on the appeal of defendant.

At the time of her death, which occurred on the 10th day of September, 1904, Irene was 13 years old, and was employed as a cash girl by defendant, the proprietor of a large department store in Kansas City. She and two other cash girls of about the same age, Katie Epp and Olivia Hummes, were working on the second floor, and had been directed to carry some bolts of sheeting to a dummy elevator, and to send them thereon to a lower floor. The girls carried the bolts to the elevator door, called down to the operator, who was stationed at the foot of the shaft, to send up the car, and, when it arrived, put on the entire load, which weighed about 80 pounds—a weight greatly in excess of that which the elevator was designed to carry. The loaded car fell to the bottom of the shaft. The girls at the time were at the door, looking into the shaft, and in an instant after the car fell Katie and Irene fell to the floor unconscious. It was found that Katie had received a wound on the forehead, consisting of a bruise and a slight abrasion of the skin. Irene's skull was fractured, and she died in a few hours. It is alleged in the petition that "said Irene

Winkle was directed by the servants and employes of defendant in charge of said second floor of defendant's said store building to assist in loading into said elevator or hoist a quantity of sheeting to be sent down to the said 'delivery' or 'send' office, and that when 80 pounds weight of said sheeting had been so placed on said elevator, and which said Irene Winkle was then and there standing close to said elevator in the act of arranging said goods therein, the said elevator, by reason of being overloaded with said 80 pounds of goods, suddenly fell to the bottom of the shaft, and in consequence of the sudden fall of said hoist or elevator to the bottom of said shaft it rebounded, and the balance weights at the other end of the rope holding said hoist or elevator, being then at the top of the top or sixth floor, also rebounded, and such rebound caused one of said weights, weighing about 25 pounds and made of cast iron, to break off from said rope, and to fall into and down through the shaft of said hoist or elevator, striking the said Irene Winkle upon the head, directly over her forehead, fracturing her skull, and so injuring her that she died a few hours thereafter as the result of said injury. That said death of the said Irene Winkle was caused by the negligence and carelessness of the defendant, its agents, and servants in permitting the use and operation of said hoist or elevator while the same was in the unsafe and dangerous condition, owing to its method of construction, as aforesaid; also in negligently permitting the said hoist or elevator to be overloaded so that it suddenly fell as aforesaid; also in permitting said hoist or elevator to be used and operated without having provided safety checks or appliances therefor to prevent the sudden fall thereof; also in permitting said elevator or hoist to be used and operated with the insufficient check upon the rope holding up said elevator, when said defendant, its agents, servants, and employes well knew of the insufficiency thereof, or when they, by the exercise of ordinary care and caution, might have known of the insufficiency thereof in time to have avoided the accident and injury to plaintiff; and also in failing and neglecting to provide proper and secure fastenings by which to fasten the balance weights aforesaid to the rope which held up the said hoist or elevator." The answer was a general denial.

Defendant contends that the court erred in refusing its request for an instruction peremptorily directing a verdict in its favor, and argues that the evidence, even in the light most favorable to plaintiffs, does not accuse defendant of negligence either in the construction and maintenance of the elevator or in its operation, but does show that the death of the child was the direct result of her own negligence and of the negligence of her two companions—her fellow servants. No one saw what caused Katie and Irene to fall.

The door of the elevator shaft in front of which the girls were standing was 2 feet square, and its base was about 2½ feet above the floor. Olivia testified that, immediately after the car or box started to fall, her companions put their heads into the opening, and looked downward into the shaft. Instantly they fell backward, and the head of Irene struck the floor violently. One witness standing a few feet away saw the girls fall, but did not see the cause. It is certain that Irene received a violent blow on the head. The skin was not broken, but the right eye and the forehead over it were badly swollen. The physician who first examined her testified: "The right eye was puffed and swollen. * * * It was bulged quite considerably, so that it seemed even to protrude from its socket—both the ball and the lid." After making an incision and laying back the scalp, he found a fracture of the skull extending over the right eye diagonally backward to the base of the skull, and another fracture across the forehead. Fragments of bone were found along the lines of these fractures. The dummy shaft extended from the basement of the building to the sixth floor, and was entirely inclosed. It contained two compartments, one for the box and the other for the counterbalancing weights. They were separated by a board partition which extended from a point about five feet above the basement floor to the top of the shaft, which was midway between the sixth floor and the ceiling. The box was suspended by a small wire cable which ran over two pulleys placed near the ceiling and down into the other compartment, where it held the weights suspended. The weight attached to the cable was an iron block provided at the bottom with a hook. Below was another weight, an iron sash weight, which weighed about 20 pounds and at each end was provided with an eye. This lower weight was hooked on to the other, or was fastened with a piece of wire. Witnesses differ about this. A small cotton rope attached to the bottom end of the sash weight was looped under the lower end of the partition into the other compartment, where it was fastened to the bottom of the box. A boy stationed in the basement at the bottom of the shaft operated the dummy. On receiving a signal that the box was wanted at a particular floor, he elevated it to the required position by pulling on the rope. This pulled down the weights, and, of course, raised the box. When he stopped pulling, the box stopped because the box and the counterbalancing weights were of equal weight. Twenty-five pounds was the maximum load the dummy was intended to carry. The descent of the box could be controlled by a brake which the operator worked by means of a treadle, and which consisted of an arm hinged to the building immediately over the pulleys and a wooden shoe affixed to the underside of the arm. A cord con-

nected the outward end of this arm with the treadle, and, when the operator pressed on the treadle with his foot, it pulled down the end of the arm in a manner to cause the shoe to bear tightly against the top of the pulleys.

There is no evidence that the brake was out of order. It was not set, nor was the operator signaled to lower the box. The first warning he had was when the box came crashing down the shaft and fell to the floor in front of where he stood. He testified that its fall was followed by that of the sash weight, which also came down the main shaft and struck the floor in front of where the box was lying. This statement is stoutly denied by defendant's witnesses, who say that the weight did not fall. Other witnesses (some of whom were introduced by defendant) stated that after the accident a sash weight was found on the floor at or near the bottom of the shaft. The evidence introduced by defendant tends to show that the sash weight in use remained in its place and did not fall, but we find the evidence of plaintiffs to the effect that it became detached from both the fastenings and fell to be substantial, and, in considering the demurrer to the evidence, must accept it as true, unless we should agree with defendant that the statement of the operator that the weight fell down the main shaft is so at variance with the conceded physical facts of the situation that its acceptance would overtax credulity. The conclusion drawn by counsel for plaintiffs is that, when the rapid descent of the overloaded box was suddenly arrested by striking the basement floor, the sash weight which had been ascending to the top of the shaft with equal rapidity, and had reached a point above the top of the partition, was whipped over the partition by the force of inertia, became unhooked from the upper weight, tore loose from the small rope when it reached the end of the slack therein, and fell down the main compartment, turning over in its descent and rebounding between the walls of the shaft, and, in passing the opening into which the girls were looking, struck Irene on the forehead, and grazed the forehead of Katie.

We do not agree with counsel for defendant that the testimony of the operator should be disbelieved and accorded no probative value. It was not physically impossible for the sash weight to be detached and projected over into the main compartment. Considering the facts that it was heavy and comparatively small, was moving upward with great speed, and was loosely hooked to its support, it seems very reasonable that it should become unhooked and continue in its flight, which necessarily would incline it towards the top of the main compartment, and, when it reached the end of its tether, we think it would have been surprising if the force of a projectile of such character

had not proved sufficient to sever its attachment to the small rope. The statement of the operator that the weight fell down the main shaft appears to be strongly supported by the physical facts and circumstances rather than to be opposed by them, and we regard it as possessing evidentiary value.

Nor do we perceive any reason for saying as a matter of law that Irene could not have been struck by the falling weight. It is the theory of defendant that the girls, crowded in front of the opening, accidentally tripped or collided with each other, causing two of them to fall, and that Irene's skull was fractured by the blow she received when the back of her head struck the hard floor. That theory is most improbable and speculative. In the first place, had anything of the kind occurred, the eyewitnesses, Olivia in particular, would have known of it. There was no indication of any struggle or even movement preliminary to the fall, but the unfortunate girls dropped before the eyes of the witnesses as though stricken by lightning. Both fell backward, and both were wounded in the forehead. These circumstances seem inconsistent with the supposition that a collision or similar mishap was the cause of the fall. Equally inconsistent with this theory is the nature of the injury to Irene. The physician to whom we have referred testified that her skull was extraordinarily thin and weak, and point is made that the hard fall to the floor could have fractured it. The fractures themselves afford the strongest kind of evidence of the nature of the blow received. Can it be doubted by any reasonable mind that the radial point on the forehead where the fractures intersected was a traumatic center—the place where a violent blow was received? How could a blow on the back of the head not violent enough to cause more than a single fracture at that place result in the production on the forehead of a center such as that described, and in the splintering of the bone along the radiating lines? We no more would be justified in indulging in speculation to aid the defense than to aid the cause asserted by plaintiffs, and we must reject this theory of defendant as being wholly improbable and at war with the plain physical facts and circumstances before us. We are not overlooking the rule that the burden is on plaintiffs, not the defendant, to show by evidence the producing cause of the injury, and we turn now to the question of whether the hypothesis of plaintiffs that the injury was the result of a blow on the head received from the falling weight should be regarded as speculative or as a reasonable inference to be drawn from the facts and circumstances in proof. Having before us indubitable evidence that the child was struck on the forehead while her head was in range of the falling weight, we could not pronounce the hypothesis of plaintiffs to be conjectural

without saying, in effect, that they were bound to prove their cause by direct evidence, and would not be heard to rely on facts and circumstances, however strong. We give full sanction to the rule so often followed by the courts in this state that "where injury may be the result of one of several causes, for only one of which the master is liable, the servant must show with reasonable certainty that that cause produced the injury, and, where the evidence leaves the cause in doubt and uncertainty, there is no cause for the jury." *Caudle v. Kirkbride*, 117 Mo. App. 412, 93 S. W. 868; *Trigg v. Ozark*, 187 Mo. 227, 86 S. W. 222; *Goranson v. Ritter*, 188 Mo. 307, 85 S. W. 338. But plaintiffs have satisfied that rule by producing evidence from which the conclusion not only is reasonable, but is irresistible, that the injury was caused by the falling weight. But one cause of injury is shown by that evidence. The jury were not required to choose between two or more probable causes, but, in accepting as true the evidence adduced by plaintiffs, were confronted by a single forced conclusion. It is hardly necessary to state that the existence of an ultimate fact need not be shown by direct evidence, but may be proved by circumstantial evidence. The inferred fact under consideration is not left by the evidence in the realm of uncertainty.

The next subject to engage our attention is whether or not the evidence discloses that the fall of the weight was due to one or more of the negligent acts of defendant pleaded in the petition. The boy who operated the dummy testified that the box had fallen repeatedly, and that the brake was defective and would not control the descent of the box when it carried a heavy load; but, since it appears that no effort was made to set the brake, because of the fact that the operator was not signaled that a load was ready to descend, and the box fell without warning, the condition of the brake had nothing to do with the accident, and the trial court properly refused to treat it as an issue to go to the jury. Further, the operator testified that, on three or four occasions when the box fell under heavy loads, the sash weight fell as it did in the present instance, and that each time he reported the occurrence to the superintendent, who told him to get the carpenter to fix it or to fix it himself. Counsel for defendant argue that this testimony should be ignored, first, because it is overwhelmed by the weight of contradictory evidence; and, second, because it is incompetent, being addressed entirely to collateral and irrelevant issues. In answer to the first proposition, it is enough to say that the evidence of the falling of the box and weight on prior occasions is substantial. To say the least, it is consistent with the physical facts disclosed, and, this being true, the fact that it is contradicted by a number of witnesses introduced by defendant does not rob it of probative

strength. *Pickens v. Railway*, 125 Mo. App. 669, 103 S. W. 124. The second point also must be ruled against the contention of defendant. The rule is followed in this state that in negligence cases evidence of other independent and disconnected acts of negligence is not admissible to show negligence in the particular case. *Franklin v. Railway*, 97 Mo. App. 473, 71 S. W. 540. The rule is founded on the idea that, as such acts have no direct bearing on the issue of negligence in a given case, they are collateral and irrelevant, but it has no application to master and servant cases, where prior occurrences sought to be shown appear to have a direct bearing on the questions of whether the instrumentality from which the servant received his injury was in a defective condition and of the master's knowledge, either actual or constructive, of the existence of such condition. We quote with approval from *Labatt on Master and Servant*, § 137: "A jury, therefore, is always warranted in inferring from the evidence of the previous defective operation of an instrumentality that the master was negligent in not seeing that the instrumentality was properly constructed and adjusted so as to be safe when it was originally put in use or in not discovering its dangerous condition, and making it safe before the accident." On the same subject, we said in *McGinnis v. Printing Co.*, 122 Mo. App. 227, 99 S. W. 4: "The rule established by the authorities cited is that, although isolated instances of negligence are not competent proof, yet, where such instances go to show the existence of a condition, they are competent." In such cases they are not collateral, but are germane, to the issue. The evidence under consideration was admissible, and it tends to establish the existence of two facts: First, that the dummy was in a defective condition, both in the means provided for controlling the movement of the box while heavily loaded and in the manner of attaching the sash weight which permitted it to become detached readily and to fall through the shaft; and, second, that defendant had actual or constructive knowledge of the existence of these defects in time to have corrected them had reasonable diligence and care been observed. But in these omissions was defendant guilty of any breach of duty to Irene, its servant? Was it bound to anticipate that she might place herself in a position where her head would be within the range of the weight when it fell down the inclosed shaft? Over each opening of the shaft defendant had posted a notice reading: "Keep heads out." Evidently the posting of this notice was prompted by the belief that without it children employed in the establishment—of whom there were many—might do the thing the notice warned them not to do, and thereby place themselves in danger of being struck by any object that might pass up or down the shaft. Considering the proneness of children recklessly to

defy the master's orders when his back is turned, or, when innocent of intentional wrongdoing, to act thoughtlessly and impulsively in opposition to adult admonition, defendant should have known that it was highly dangerous to the safety of its youthful servants to maintain the dummy in the condition described in plaintiffs' evidence, and its failure to rectify that condition can be regarded in no other light than as a negligent breach of duty it owed its servants, including the unfortunate Irene. The question of defendant's negligence was an issue of fact to be solved by the jury.

We do not give our approval to the argument of defendant that we should pronounce the child guilty of contributory negligence as a matter of law. She participated with her companions in the overloading of the box, but the jury were entitled to infer that in doing this she and her companions acted after the manner of children of their age. Likely enough they thought it would be fine sport to make the box fall, but they did not know, nor had they any reason to believe, that a 20-pound iron weight would be hurled down the shaft to their great peril. What they did might have been culpable in a person of mature years, but in a child of 13 years we think the characterization of such conduct falls clearly within the province of the jury. What we said in *Mann v. Railway*, 123 Mo. App. 486, 100 S. W. 566, is pertinent: "The conduct of a boy 12 years old should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces not only an imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but, when possessed of these elements necessary to the exercise of reasonable care, it still lacks the discretion, thoughtfulness, and judgment presumed to be an attribute of the ordinarily prudent adult, and which may be said to come only with experience. Thoughtlessness, impulsiveness, and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of a child." In that case we pronounced the boy negligent in law on the ground that he must have known that to go to sleep where he did would place him in great danger from a passing train. In the present case we have no reason to say that the child should have anticipated that her act in overloading the box and in looking into the shaft to see the box fall would place her in the path of a falling weight. She would not have been in peril had defendant properly secured the weight in its position. The learned trial judge committed no error in overruling the demurrer to the evidence, and, as the cause was submitted to the jury in conformity to the views ex-

pressed, we have no occasion to interfere with the judgment.

Point is made that the verdict is excessive, but a careful consideration of the evidence bearing on the subject convinces us that the damages awarded are within proper bounds.

The judgment is affirmed. All concur.

VENCILL v. QUINCY, O. & K. C. R. CO.
(Kansas City Court of Appeals. Missouri.
Oct. 19, 1908.)

1. CARRIERS (§ 218*) — TRANSPORTATION OF LIVE STOCK—INJURY—NOTICE—TIME.

Where notice of injury to plaintiff's cattle was mailed in time to have reached defendant's claim agent within the time limited by the transportation contract in the ordinary course of mail, there was a reasonable compliance with the contract provision to give notice within 10 days of the time the cattle were unloaded.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 947; Dec. Dig. § 218.*]

2. CARRIERS (§ 218*)—WAIVER.

Notice of injury to cattle, having been mailed in time to reach defendant's claim agent within the time limited by the contract, was not delivered until two days beyond the time so fixed. Defendant's general freight agent acknowledged receipt of the notice, did not mention that it had been received too late, but asked for further information, promising to endeavor to arrange an equitable settlement without delay. *Held* to indicate an intention to waive notice entertained prior to the expiration of the period prescribed therefor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 948; Dec. Dig. § 218.*]

3. NOTICE (§ 8*)—TIME—WAIVER.

Waiver of notice required to be given within a specified time to be effective must be made within the time limited for such notice, but whether such waiver has been accomplished is a question of intention.

[Ed. Note.—For other cases, see *Notice*, Dec. Dig. § 8*]

4. CARRIERS (§ 213*)—INJURY TO CATTLE—DELAY—SNOWSTORM.

A carrier was not liable for injuries to cattle by delay in transportation caused by a snowstorm obstructing the tracks.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 922; Dec. Dig. § 213.*]

5. CARRIERS (§ 213*)—LIVE STOCK—DELAY IN TRANSPORTATION—DEFECTIVE ENGINE.

Where the injury to an engine which caused a delay in the transportation of plaintiff's cattle was due either to negligence of defendant's employees in making couplings or to a defective engine end sill, and there was no evidence that the engine had been properly inspected before it left defendant's division point, defendant was responsible for such delay, under the rule that only such causes as cannot be reasonably anticipated, controlled, or avoided by reasonable care will excuse a carrier's unusual delay.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 922; Dec. Dig. § 213.*]

6. CARRIERS (§ 230*) — TRANSPORTATION OF LIVE STOCK—DELAY—QUESTION FOR JURY.

Evidence of a carrier's unnecessary delay in the transportation of plaintiff's cattle resulting in injury to them *held* to require submission of such issue to the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 962; Dec. Dig. § 230.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. CARRIERS (§ 219*) — TRANSPORTATION OF CATTLE — DELAY — CONNECTING CARRIERS — STOCKYARDS COMPANY.

Where plaintiff's cattle were consigned to a commission firm to receive the cattle from the chutes at the stockyards, the carrier was liable for a delay of 1½ hours while the stockyards company transported the cattle as a connecting carrier from the original carrier's terminal station to the cattle chutes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

8. DAMAGES (§ 62*)—DUTY TO REDUCE—EVIDENCE.

Evidence that defendant's station agent informed plaintiff, after his cattle had been placed in a train, of a breakdown which would cause delay, that defendant would not be able to deliver the cattle in time for market on the next morning, and that he had better unload the cattle and wait for the next day's train, was admissible to show that plaintiff refused to avail himself of an opportunity to minimize his damages under the rule that a party is bound to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and at reasonable expense.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.*]

9. APPEAL AND ERROR (§ 1058*)—EXCLUSION OF EVIDENCE—CURING ERROR.

Erroneous exclusion of evidence of an offer by defendant's agent to permit plaintiff to unload his cattle and wait for transportation until the succeeding day was cured by the subsequent admission of evidence of such offer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4204; Dec. Dig. § 1058.*]

10. WORDS AND PHRASES—"DOUBLE HEADER."

The term "double header," as used in the operation of railroads, means a train drawn by two engines.

Appeal from Circuit Court, Grundy County; Geo. W. Wannamaker, Judge.

Action by Robert L. Vencill against the Quincy, Omaha & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. G. Trimble and Hall & Hall, for appellant. Hugh C. Smith, for respondent.

JOHNSON, J. Plaintiff sued defendant, a common carrier, for damages alleged to have resulted from defendant's negligent failure to transport his cattle, consisting of 47 head, from Galt to South St. Joseph, within a reasonable time. Plaintiff claims the cattle were received by defendant for shipment at 4 o'clock in the afternoon of December 11, 1904, and should have arrived at their destination at 10 o'clock or earlier on the same day, but, on account of defendant's negligence, they did not arrive until 12 o'clock the next day—too late for the morning market; that he thereby lost the benefit of the morning market, and in the afternoon he sold 33 head of the cattle, at which time the market had declined; that he was unable to sell all of said cattle on that day, but was compelled to keep 14 head, which were sold on the market the following day, the price in the meantime having fur-

ther declined; that, owing to the careless manner in which the cattle were transported, they were bruised and depressed, which produced a shrinkage in weight, thereby causing plaintiff additional loss; and, further, that he was subjected to the expense of feeding the cattle that were not sold the day of arrival. The answer was a general denial and the further defense that plaintiff shipped his cattle over defendant's railroad under the terms of a certain written contract (attached to and made part of the petition), the terms of which plaintiff failed to keep and perform, and that any damages which may have been sustained were caused by plaintiff's own negligence and lack of care and attention to said cattle. Further, it was claimed that plaintiff failed to give to defendant notice of damages as required by the terms of the contract. To this answer plaintiff replied by a general denial. It appears from the evidence that the cattle were loaded between 5 and 6 o'clock in the evening of the day mentioned, and the train that was to take them arrived at Galt about 7 o'clock, the cars in which they were loaded were placed therein, and the train pulled on to the main line. The train was what is called a "double header"; i. e., drawn by two engines. In putting these cars in the train and switching, the end sill of one of the engines was broken, which disabled the front drawbar so that it became unsafe to use the engine. The employes of defendant telegraphed to Milan for another engine which came in time for the train to start about 11:30 p. m. The night was stormy, and enough snow fell to retard the progress of the train. Some time was lost at Pattonsburg, and the train did not reach Osborn until about 8 o'clock the next morning, when the cattle were switched to the Hannibal & St. Joseph Railroad, reaching the Burlington station in South St. Joseph about 10 o'clock a. m., and being delivered to the stockyards company about one hour and a half thereafter. They were received by plaintiff's consignees about 12 o'clock, were put upon the market, 33 head sold that day, and the remaining 14 head held over and sold the next day. The evidence tended to sustain plaintiff's allegation of damages in the most important particulars, and, further, to show that the injury to the engine was occasioned by a defect in the timber or by striking too hard in coupling. There was no positive proof that the damaged engine had been inspected before it left Milan. The evidence of defendant tended to show that, owing to the condition of the track caused by the snow, eight hours would have been a reasonable time for the train to have arrived at St. Joseph after it left Galt. There was a controversy at the trial as to whether plaintiff had given defendant proper notice of the injury to his stock. It was shown that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hugh Smith, attorney for plaintiff, mailed such notice in an envelope properly addressed and deposited in the post office at Trenton on December 21, 1904, and that in the usual course of transmission it should have been delivered to the person addressed the next morning. This notice was addressed to the freight claim agent of defendant, but it was shown that it was received by L. F. Moore, the general freight agent, who acknowledged its receipt on December 25th and asked for further information; and it was further shown that subsequent correspondence was had between said agent and plaintiff concerning the claim. By the terms of the written contract to which reference was made in the answer of defendant, it was provided that "the said railroad company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing by the owner or owners thereof, or his or their agents, and delivered to a general freight agent of the said railroad company, or to the agent of said railroad company, at the station from which the animals are shipped, or to the agent at the point of destination, within ten days from the time the said animals are removed from the cars." Further, it was stipulated: "In consideration of free transportation for — persons, designated by the first party, hereby given by said railroad company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons for the purpose of attention to and care of the said animals, and that the said railroad company shall not be responsible for such attention and care." The jury returned a verdict in favor of plaintiff for \$118.16, upon which judgment was rendered, and defendant appealed.

At the close of defendant's testimony, and again at the close of all the testimony, defendant offered a demurrer to the evidence, which was overruled. This demurrer was offered upon the theory that plaintiff was not entitled to recover because he had failed to prove that he had given to defendant notice of his damages within 10 days from the time the cattle were unloaded from the car. It is unnecessary to say that the courts of this state have upheld such contractual provisions as being reasonable and enforceable. But we are not satisfied that plaintiff did not reasonably comply with this requirement of the contract. He mailed his notice at the post office in Trenton in time for it to have reached defendant's claim agent at Kansas City within the prescribed limit in the ordinary course of mail delivery. The evidence of defendant tends to show that, in fact, it was not delivered until December 24th, two days beyond the limit fixed by the contract. The letter of the general freight agent acknowledging receipt did not mention the fact that it had not been received in due

time, and it is fair to presume that it was received, or that such notice was waived. Defendant, however, insists that, as this letter of the general freight agent was written after the expiration of the 10 days, it was not a waiver. It has been held in numerous cases that a waiver, to be effective, must be made within the time limited for such notice. *Mensing v. Insurance Co.*, 36 Mo. App. 602; *Maddox v. Insurance Co.*, 39 Mo. App. 198; *Hamilton v. Wabash Railway Co.*, 80 Mo. App. 597. There are also other cases in point. But in the last case cited it was held that a waiver was a question of intention, and it was so held in *Stiepel v. Insurance Co.*, 55 Mo. App. 224; *Fink v. Insurance Co.*, 60 Mo. App. 673. It was said in *Hamilton v. Wabash*, supra, that "acts or declarations happening or made after the time prescribed for the performance of the condition might be shown, provided they had any tendency to prove a previous intention to waive the condition." It was held, however, in that case that the rule did not apply, "for the reason that the defendant in the letters denied all liability which could not at that time be treated as a waiver of anything." In the case before us we believe the letter of the general freight agent indicated a previous intention to waive said notice. In a letter to Mr. Smith, attorney for plaintiff, he says: "Will you be good enough to send me the live stock contracts and the account of sales for the shipment, and advise me in detail how the amount of the claim is arrived at? That is, whether it is based on shrink, decline in market, or rough treatment. If you will be good enough to do this, I will endeavor to arrange an equitable settlement of the claim without delay." We think the court acted properly in overruling the demurrer from the facts stated. If the general freight agent had not intended to waive the notice, he should not have offered to negotiate a settlement, but should have stood upon the right of the defendant under its contract. It is clear there had never been any intention upon the part of the defendant company to deny liability for want of such notice.

The defendant contends that it cannot be held liable for the delay caused by the snow-storm which had the effect of obstructing its tracks, nor for the delay occasioned by the breaking down of the engine. We concede the first proposition, but it was a question for the jury to determine whether the breaking down of the engine was unavoidable, for there was evidence tending to show that this condition was due to the negligence of the employes of the company in making couplings with too much force, or to a defective end sill. There was no substantial evidence that the disabled engine had been properly inspected before it left defendant's division point at Milan. Frequently it has been said that the only causes that will excuse an un-

usual delay of a carrier in forwarding a shipment are those that cannot be reasonably anticipated, controlled, or avoided by the exercise of reasonable care. *McFall v. Wabash Railway Co.*, 117 Mo. App. 477, 94 S. W. 570; *Schwab v. Union Line*, 13 Mo. App. 159; *Guinn v. Wabash*, 20 Mo. App. 453; *Dawson v. Railway*, 79 Mo. 296. There was evidence of other unnecessary delays which was properly a subject for the consideration of the jury. There was a stop of unusual length at Pattonsburg, and the stock were kept at a station in South St. Joseph about one hour and a half before they were delivered at the stockyards, the place of destination. It was fairly a question for the jury to say whether, under all the facts and circumstances of the case, the delay in the transportation of plaintiff's cattle could have been avoided by the exercise of proper care upon the part of defendant. The offer of defendant to show that it was the invariable custom to have its engines inspected before they were sent out on the road was not accepted by the court, but in our consideration of the question we have treated it as though that evidence had been admitted, and, even conceding that the delay occasioned by the breaking down of the engine was unavoidable, we think there was sufficient evidence of unnecessary delay to take the case to the jury.

Exception is taken to the action of the court in allowing plaintiff to prove the length of time it would take to ship the cattle from Galt to the commission firm of Sager & Young at South St. Joseph stockyards, for the reason that the contract was to ship them from Galt to St. Joseph, consigned to Sager & Young, and the defendant was in no way responsible for the delivery of the cattle to this firm. The evidence shows that Sager & Young received the cattle in question from the chutes at the stockyards in South St. Joseph. It also shows that they received them from the stockyards company. This contention seems to be based upon a ruling in the case of *Ratliff Bros. v. Railroad*, 118 Mo. App. 644, 94 S. W. 1005, wherein it is held: "When the carrier placed the cars at the unloading platforms in a position to be unloaded, and delivered the billing to the stockyards company, it performed every act required of it as a carrier to complete the delivery, and defendant is not liable for damages that resulted from a subsequent delay caused either by the failure of the stockyards company to post on the bulletin board the arrival of the stock or of the consignee to receive it promptly." In this case it was shown that the stockyards company received the cattle at the Burlington station in St. Joseph as stated, after a delay of 1½ hours at said station, but that was not the place of unloading, and consequently not the place of delivery. The case cited has reference to the unloading of the cattle after they have arrived at the stockyards, and therefore has no application here. And whether the delay at said station was occasioned

by the negligence of the defendant or the stockyards company is immaterial, since it was the duty of the stockyards company, as a part of defendant's connecting line, to deliver the cattle at the place of unloading. While plaintiff was on the witness stand, counsel for defendant asked him on cross-examination: "Didn't Ben King [defendant's agent] inform you in the depot there that evening, owing to the delay on account of the breakdown, the company would not be able to deliver the cattle into St. Joseph for the market next morning, or might not be able to deliver them into St. Joseph for the market that morning, and that you had better unload the cattle and wait for the train next day?" Counsel for plaintiff objected to the question on the ground that, "if such conversation took place after the signing of the contract and after the stock were delivered to the railroad company, that is no consideration for the release of their obligation to transport these cattle to St. Joseph, and under the contention of the gentlemen, if the conversation took place before the signing of the contract, would merge in the written contract, and this testimony is incompetent." The objection was sustained, and this ruling is assigned as error. The evidence was admissible for the purpose of showing that plaintiff refused to avail himself of the opportunity to minimize his damages. The rule is well settled that "it is the duty of a party to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and care and at a moderate and reasonable expense, and for such reasonable exertion and expense in that behalf expended he may charge the wrongdoer; and where, by the use of such means, he may limit and prevent further loss, he can only recover such loss as could not thus be prevented." *Field on Damages*, p. 19; *Dietrich v. Railway*, 89 Mo. App. 36. One injured by the wrongful act of another must use reasonable diligence to protect himself and thereby prevent additional damage. *Logan v. Railway*, 96 Mo. App. 461, 70 S. W. 734. But we find the error was cured in the subsequent proceedings. The agent of defendant was permitted to testify without objection: "To the best of my knowledge I told Mr. Vencill he had better unload the cattle. He said they were as well off in the car as they would be in the storm in the stockyards. He did not unload them." Later defendant offered to prove by another witness that, "after the accident to the engine occurred, the defendant, by its agent, offered the plaintiff the opportunity to save himself from any damage or any further damage that might have resulted from the delay in the shipment of the stock by offering to allow him to unload his cattle and wait for the train the next day, or to take them over to another railroad and ship them out that day." The court ruled: "The position of the court is that you may ask him about the offer to unload his cattle with the object of lessening his

damages, but that you can't offer evidence to show that that would release him from the contract of shipment and let him take the cattle off. I admit evidence as to the fact of his offering to unload his cattle to lessen damages." Thus it appears the court finally took the proper view of the law, and under the ruling defendant was entitled, if it chose, to recall plaintiff for further cross-examination, and to interrogate him about the offer of the agent to permit him to unload the cattle. As this was not done, defendant is in no position to complain of the preceding refusal to admit the evidence.

The judgment is affirmed. All concur.

MORIARTY v. SCHWARZSCHILD & SULZBERGER CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908.)

1. NEGLIGENCE (§ 121*)—PROOF OF SURROUNDING FACTS—RES IPSA LOQUITUR—APPLICATION OF RULE.

Where all facts connected with an accident show a condition from which it might be reasonably inferred that the accident was due to other causes than defendant's negligence, plaintiff cannot rely upon mere proof of surrounding facts, nor need defendant purge itself of the inference of negligence nor explain the accident; the doctrine of *res ipsa loquitur* not being applicable.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—ACTIONS—PROOF—PROXIMATE CAUSE.

Proof of a defect in appliances, in itself, does not give an injured servant a right of recovery, but it must appear affirmatively that the defect was the proximate cause of the injury, and that the master was chargeable with knowledge of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 905; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

Evidence held to show that the placing by a fellow servant, of a barrel on a floor, inclined toward an open elevator door combined with the defect in the floor and the master's failure to guard the elevator opening, was the direct cause of a servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

4. MASTER AND SERVANT (§ 107*) — SAFE PLACE TO WORK.

It is the duty of a master to afford a servant a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 201*)—INJURIES TO SERVANT—ACTIONS—COMBINED NEGLIGENCE OF MASTER AND FELLOW SERVANT.

If a master was negligent in maintaining a floor which inclined toward an elevator shaft where barrels were handled, and in failing to guard the open elevator shaft, he was not excused because a fellow servant's negligence in placing a barrel on the inclined floor, where it rolled into the shaft, contributed with the master's to a servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 518; Dec. Dig. § 201.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Personal injury action by Maurice Moriarty against the Schwarzschild & Sulzberger Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Warner, Dean, McLeod & Timmonds, for appellant. Walsh & Morrison, for respondent.

BROADDUS, P. J. This is a suit for damages, as the alleged result of the negligence of defendant. The defendant owns and operates a meat-packing establishment in Kansas City. The plaintiff was in its employ as a common laborer at the time of his injury. At the time he and another employé were engaged in removing barrels of meat from one part of the establishment to another. The barrels were on the second floor, from which they were being removed by means of an elevator to the first floor. The manner of doing the work was for one man to remove the barrels of meat, one at a time, from what is known as the "cooler," and, rolling them out of the door, which was about 16 feet from the elevator, leave them about six feet from the elevator. Three barrels made a load, to be put and carried on the elevator. A workman by the name of Flisk was loading the elevator, and plaintiff was unloading it on the floor below. While plaintiff would be unloading the elevator, Flisk would be rolling out three barrels onto the floor, as stated, to have them in readiness to load when the elevator returned. There was a decline in the floor for a distance of 6 or 8 feet from the door of the elevator. It was the aim and practice of Flisk to rest the barrels on the floor before they reached the decline in the floor. On the day of plaintiff's injury, after about three loads had been sent down, and plaintiff was unloading, one of the barrels placed upon the floor rolled down the incline in the floor into the open door of the elevator, and fell upon the plaintiff and severely injured him. Flisk was at a loss to account for the barrel leaving its position on the floor, as he was of the opinion that he had left it at the usual place, and not on the incline. No one saw it start or what caused it to start. The door of the elevator was open at the time, and the evidence is that it had been left open at all times, and that there were cleats used to keep it open. Neither Flisk nor plaintiff had the management of the elevator. Flisk, who was a witness for plaintiff, stated that plaintiff had at times loaded the elevator on the second floor, but plaintiff stated that he had no remembrance of ever having done so, and denied that he had. It seems that Flisk knew of the incline in the floor, but did not appreciate that it was dangerous. It was shown that Mr. Pickett, the overseer, was around

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when the work was in progress; also that different employes, otherwise engaged at work and handling heavy material, were passing and repassing between the place where the barrels were placed and the elevator. It further appeared that the barrel had been placed on the floor but a very short time before it commenced its descent toward the elevator. The judgment was for plaintiff, and defendant appealed.

The defendant's position is that: "Where all the facts connected with the accident fail to point to the negligence of the defendant as the proximate cause of the injury, but show a state of affairs from which an inference could as reasonably be drawn that the accident was due to a cause or causes other than the negligent act of defendant, the plaintiff cannot rely upon mere proof of the surrounding facts and circumstances, nor is defendant called upon to explain the cause of the accident or purge itself of the inference of negligence. The doctrine of *res ipsa loquitur* does not apply in such cases." And such was literally the holding in *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872, and the same rule was applied to the case of *Cothron v. Cudahy Packing Co.*, 98 Mo. App. 343, 73 S. W. 279. And it is also a well-established rule that: "Proof of the existence of a defect in appliances, in itself, does not establish a right of recovery. It must further appear, not as the result of bare conjecture, that the defect was the proximate cause of the injury, and that the matter was chargeable with knowledge of it." *Breen v. Cooperage Co.*, 50 Mo. App. 202. And if the appliance is defective, the plaintiff must do more. He must show that the defect was the direct and immediate cause of the injury. Applying these rules to the facts in the case as made out by plaintiff, we must come to the unavoidable conclusion that the defect in the floor and the failure of defendant to guard the opening into the elevator connected with the act of Flisk in placing the barrel that fell upon plaintiff as the combined and direct cause of plaintiff's injury. That there was a defect in the floor, and that the gate to the elevator was left open, are undisputed. But the controversy arises as to the question of what caused the barrel to leave its place upon the floor and roll down into the elevator shaft. We think, viewing all the circumstances connected with the transaction, that there can be but one reasonable conclusion as to what caused the barrel to roll down the incline. In the first place, it must have been placed on the incline,

where it rested for a short time, and was started by a slight motion of the floor, caused by workmen who were engaged at work upon it, and the force of gravitation carried it down the incline after it was started from its position. It is not a question of mere surmise. People passing over the floor and engaged in work thereon would cause some vibration of the floor. It is not reasonable to suppose that the barrel started by other means. It is possible, however, that it may have done so, but it will not do to indulge in mere supposition of what might have been the probable cause. It was the duty of defendant to afford plaintiff a reasonably safe place in which to do his work. With an open elevator door, and an inclining floor leading thereto, upon which the barrels by the slightest mistake in the calculation of the workmen handling them might be placed, the place of the plaintiff while unloading on the floor below was rendered one of unsafety. What did occur might have been in the reasonable contemplation of any person of ordinary care. Pickett, the overseer of defendant, who was present while the work was going on, ought by the exercise of ordinary care to have been familiar with the conditions and of their unsafety, and to have caused the door of the elevator shaft to be closed, as he certainly must have known that it was open and a menace to the workmen below. If this door had been closed, the injury would not have happened notwithstanding the defect in the floor. And it might also be said that, if there had been no incline in the floor, the plaintiff would not have been injured notwithstanding the elevator door was left open; and also that it might not have been caused by reason of either, or both, had not Flisk by mistake placed the barrel on the incline, which he must have done. And whether the mistake or carelessness of Flisk contributed to the result is immaterial, as his negligence, combined with that of defendant, renders the defendant liable for the result. If the master is negligent, his negligence is not excused by the fact that the negligence of the fellow servant of plaintiff contributed with that of the master to cause the injury. *Cole v. Transit Co.*, 183 Mo. 81, 81 S. W. 1138.

The case has been fully and ably briefed on both sides, but we deem what has been said is sufficient to express our views upon the main and controlling questions presented. We believe the cause was properly tried, and that the judgment is for the right party. It is therefore affirmed. All concur.

**HALBERT v. TERRELL, Land Office Com'r,
et al.**

(Supreme Court of Texas. Oct. 21, 1908.)

**1. PUBLIC LANDS (§ 173*)—DISPOSAL BY
STATE—SCHOOL LANDS—RIGHT TO PURCHASE
LEASED LAND.**

That a lessee of public school land who makes application to purchase it, and tenders his lease for cancellation, is not entitled to buy, does not subject the land to purchase by another, but the lease remains in force.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 551; Dec. Dig. § 173.*]

**2. MANDAMUS (§ 172*)—PARTIES—CONVEYANCE
OF PUBLIC LAND.**

On mandamus to compel the Commissioner of the General Land Office to award to relator public land previously awarded to others, the right to land awarded to an applicant not made a party to the proceeding cannot be considered.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 384; Dec. Dig. § 172.*]

Mandamus by L. N. Halbert to compel J. J. Terrell, Commissioner of the General Land Office, to receive relator's application to buy school land and recognize him as the purchaser, in which H. L. Kokernot, shown by the land office records as the purchaser, was made a co-respondent. Refused.

James & Yelser, for relator. R. V. Davidson, Atty. Gen., and Wm. E. Hawkins, Asst. Atty. Gen., for respondent Terrell. Denman, Franklin & McGown and R. L. Ball, for respondents Kokernot.

GAINES, C. J. This is an application to compel the Commissioner of the General Land Office to receive the application of relator to buy a section of school land, and to recognize him as the purchaser thereof. H. L. Kokernot, who is shown upon the records of the land office as the purchaser of the land, is made a co-respondent.

The undisputed facts as shown by the pleadings in the case are as follows: On the 28th day of August, 1899, the section of land in controversy, which is section 97 of the Galveston, Harrisburg & San Antonio Railway Company surveys, and together with several other sections, were leased to J. W. & H. L. Kokernot for the term of 10 years from the 26th day of August, 1899. The Kokernots on the 24th day of February, 1902, transferred their lease to part of the leased lands to one Henderson, and on the same day another part to one Gillett, and on another date not given another part to one Winders. Sales of the lands the leases to which were so transferred were made by virtue of the preference right so given by said assignment. On the 11th day of June, 1903, the leases on section 97 and other sections were transferred to S. D. Cawthon. On the 11th day of January, 1907, Cawthon transferred the lease on that section to H. L. Kokernot, who thereupon made application to purchase the section as the holder of the

lease. His application was accepted, and the land awarded to him as a purchaser.

We have been cited to no statute, nor after a search here have we found any, which provides that an attempted purchase of leased land by a lessee forfeits all rights in the leased land in case he is not entitled to buy. It is difficult in this case to say that H. L. Kokernot was entitled to purchase section 97. It would seem to be the duty of the Commissioner in such a case to say to the applicant to purchase: "I cannot recognize your right to purchase, and therefore you must hold to your lease." Therefore we deem it unnecessary to pass upon the question whether H. L. Kokernot is entitled to buy; for, if not, his lease is good and the land was not on the market at the time relator made his application to purchase. The tender of the lease being in consideration and in expectation that he will be permitted to purchase the land, if the purchaser be refused, it is evident the offer to cancel is not accepted. Since in no aspect can we see that the land was on the market for sale at the time of relator's application to purchase, the writ of mandamus must be refused.

The respondents seem at a loss to ascertain whether the relator is seeking a mandamus as to section 99. But, if the purpose of the proceeding is in part to have a mandamus to compel the Commissioner to award the land to the relator, we cannot consider that question, because it appears that that section has been awarded to another applicant who is not made a party to the suit.

The mandamus is refused.

**GALVESTON, H. & S. A. RY. CO. v.
MATZDORF.**

(Supreme Court of Texas. Oct. 23, 1908.)

**CARRIERS (§ 304*)—INJURY TO PERSON AT DE-
POT—PERSONS ACCOMPANYING PASSENGER.**

A person who goes to a depot merely as an acquaintance of and to say good-by to a departing passenger, and not as an attendant or to assist her, is not there on an implied invitation of the carrier, but as a mere licensee, to whom it owes no duty to keep the waiting room and its approaches in a safe condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1110, 1111, 1142; Dec. Dig. § 304.*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Ida Matzdorf against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (107 S. W. 882), and defendant brings error. Reversed and rendered.

Baker, Botts, Parker & Garwood, Newton & Ward, and Teagarden & Teagarden, for plaintiff in error. John Sehorn, for defendant in error.

WILLIAMS, J. The judgment in this case was recovered against the plaintiff in error by defendant in error, plaintiff below, on account of a fall which she received in entering the waiting room for passengers kept by the railroad company at San Antonio. The fall was caused by a piece of wire projecting from a door mat, which penetrated plaintiff's shoe as she stepped upon it. Plaintiff was not a passenger, and had not gone to the station upon any business with the company or with any passenger. One Mrs. Simpson, intending to take passage for a temporary absence, went to the station accompanied by her husband and children. Mrs. Nicholls and plaintiff went with them; plaintiff going upon the invitation of Mrs. Nicholls to accompany her, and to bid Mrs. Simpson goodbye. Upon these facts the question is whether or not the plaintiff has a cause of action arising from a failure of the defendant to keep the waiting room and its approaches in safe condition, which is the only theory upon which the judgment is defended. If she is to be regarded as there upon an implied invitation from the defendant, the question should be answered affirmatively. If she was no more than a mere licensee, it should be resolved in the negative. *City of Greenville v. Pitts* (Tex.) 107 S. W. 50, 16 L. R. A. 679.

Those who keep premises for the carrying on of business with the public impliedly invite people to come and transact business with them, and from this invitation arises the duty to keep the premises in suitable condition for use by those accepting it. Common carriers of passengers in this way extend invitations to persons desiring transportation as passengers and owe to them the resulting duty. The attendance and assistance of others is often necessary or convenient to passengers, and the invitation to them includes the right to have others with them to assist them in attending to the details incident to departure or arrival. Hence such persons are entitled, in right of the passenger, to the use of the carrier's premises. The domestic relation and the ties of kinship and the usages incident thereto make it so customary as to be looked upon as a matter of course for persons sustaining such relations to attend the arrivals and departures of each other upon and from journeys. The existence of such relations, therefore, may often properly be regarded as sufficient to include within the invitation to the traveler those who so naturally are to be expected to attend his going or to await his coming. In the authorities stating the rule the invitation is said to include those who go to "welcome the coming, speed the going, guest." This suggests the existence of the relation of host or entertainer and guest, and is based upon social custom, which exacts the extension of certain courtesies and attentions by one to the other of those sustaining such a relation. Business relations may exist between passengers and others, which will en-

title both to be at the station and upon the premises of the carrier. We believe that these classes will be found to embrace all who have been held, by actual decisions, to be included by implication in that invitation which is extended by the carrier to the traveler himself. It is sometimes said generally that friends who go to stations to see passengers off or to await their arrival are in the invited class; but it will be found, in examining the facts of cases, that such expressions refer to those who sustain some special relation to the passenger, such as attendant, assistant, member of his family, host, or the like.

In the case of *Railway Company v. Thompson*, 77 Ala. 457, 54 Am. Rep. 72, the rule is stated thus: "All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train, to aid them in getting on, in procuring tickets, and in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveler is to leave the train. To persons filling these classes the railroad corporation owes special obligations of duty different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go."

We are not disposed to draw narrowly the line defining those entitled to the benefit of the principle; but that line must be drawn somewhere, and we find no authority for the proposition that the invitation extends to those who have no business with the carrier or passenger and sustain no relation to the latter but that of friendship or acquaintanceship. If it includes one merely because he is a friend or acquaintance, it includes all friends and acquaintances, not of one passenger only, but of all. Not only that, but it is held that the invitation to those included in it is not simply to the station houses, waiting rooms, or platforms, but to the trains and any other places where the discharge of the duty of the attendant to the passenger makes it proper for the former to go. The consequences of such an extension of the doctrine may easily be seen. That which is really a mere incident of the relation of the carrier to the passenger would

become the principal thing, and, instead of facilitating, would seriously impede, the discharge of the duties of that relation.

In not a few of the cases in which the doctrine has been referred to, the real ground on which the carrier was sought to be held liable was that of active negligent conduct of its employes towards persons at stations or upon trains. It is scarcely necessary to say that we have before us no such case, or that our decision would not affect a right of recovery of that kind. Persons who go to such places upon occasions like that which took plaintiff to defendant's waiting room are not there unlawfully or wrongfully, and their rights as licensees to complain of active negligence by which they are injured is unquestioned. The question here is whether or not the carrier owes them the affirmative duty of keeping its premises safe for their use as persons invited by it to go there, and we must hold that it does not owe that duty.

Reversed and rendered.

DOTY et al. v. MOORE.

(Supreme Court of Texas. Oct. 23, 1908.)

ATTACHMENT (§ 117*)—AFFIDAVIT.

The statute provides that the affidavit for attachment shall state that the attachment is not sued out to injure or harass defendant; and Rev. St. 1895, art. 3268, provides that in construing a statute the singular and plural shall each include the other, unless otherwise expressly provided. *Held*, that the affidavit need not add the words "or either of them" to the statement that the affidavit was not sued out to injure or harass "defendants."

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 241; Dec. Dig. § 117.*]

Certified Question from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Sam Moore against N. B. Doty and others. From a judgment for plaintiff, defendants appealed to the Court of Civil Appeals, which certifies a question to the Supreme Court. Question answered in favor of plaintiff.

Crook, Da Ponte & Lanham, for appellants. Fleming & Fleming and Glass, Estes & King, for appellee.

WILLIAMS, J. A certificate from the Court of Civil Appeals presents a case and a question which may be stated briefly as follows: Appellee brought the suit against several defendants, who are the appellants, claiming an indebtedness from them to him, and sued out an attachment, in the affidavit for which the statement was made that the attachment "is not sued out for the purpose of injuring or harassing the defendants." The question is certified whether or not the affidavit was bad because the words "or either of them," or others of like meaning, were not inserted after the word "defendants," so as to show that the purpose did not exist as to either of the defendants. The question

is made pertinent by the suggestions contained in the opinions in *Perrill v. Kaufman*, 72 Tex. 215, 216, 12 S. W. 125, and *Kildare Lumber Co. v. Bank*, 91 Tex. 103, 41 S. W. 64. It was not authoritatively determined in either of those cases, and we are free to decide it as an open question.

The attachment statute provides that the affidavit shall state "that the attachment is not sued out for the purpose of injuring or harassing the defendant." By article 3268, Rev. St. 1895, it is provided that in the construction of all civil statutes "the singular and plural number shall each include the other unless otherwise expressly provided." That this rule obtains in the construction of the attachment law is expressly held in *Lewis & Baker v. Stewart*, 62 Tex. 352. We must therefore read the quoted clause of the last-named statute as if it read "defendant or defendants," and it follows that an affidavit using "defendants," when there are more than one, strictly complies with the provision. We should have to go beyond the legislative requirement to hold that the words "or either of them" must be added. This we do not feel that we have the right to do. When the party have sworn as much as the Legislature has required him to swear, and has done the other prescribed things, he is entitled to the writ, and the courts cannot properly require him to do more. It is true that sometimes it will not do to follow literally the language of the law. For instance, several grounds for an attachment are stated in the statute alternatively; but it is not permissible to follow this language in the affidavit, so that it will mean only that the one or the other of such grounds exist. The authority for this holding is found in the statute itself, which means that the affiant must swear positively to the existence of the particular cause or causes for which he asks the process. It is generally true, nevertheless, that it is sufficient if the affidavit contain all the statute requires. When the affiant makes such an oath, he should be held to mean what the statute means when it uses the language adopted by him. When he swears that his purpose is not to injure or harass the defendants, he means what the statute means when it uses that language.

We must therefore answer that the affidavit is sufficient.

ÆTNA LIFE INS. CO., OF HARTFORD, CONN., v. WIMBERLY.

(Supreme Court of Texas. Oct. 23, 1908.)

1. TIME (§ 9*)—INSURANCE PREMIUMS—PAYMENT OF PREMIUMS—TIME OF PAYMENT.

The annual premium became due on October 1st, and the policy provided that it should cease if the premium was not paid before that time, but allowed 30 days' grace for its payment. The 1st day of October was Sunday, and insured died on November 1st; the premium not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

being paid by him. *Held*, that the fact that the law made the premium payable on Monday, instead of Sunday, did not add a day to the 30 days allowed by the policy, and under the rule that the day on which the act is to be performed will be excluded in determining the time when some other act is to be done thereafter, and the last day given for performance of the later act will be included, the 30 days' grace began to run at midnight on October 1st, and terminated at midnight on the 31st, so that the policy was forfeited before insured's death.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 11-32; Dec. Dig. § 9; * *Criminal Law*, Cent. Dig. § 2861.]

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Lillie M. Wimberly against the Ætina Life Insurance Company, of Hartford, Conn. From a judgment for plaintiff, affirmed by the Court of Civil Appeals (108 S. W. 778), defendant brings error. Reversed, and judgment rendered for defendant.

W. J. Moroney, for plaintiff in error. J. M. Ralston and Moore & Moore, for defendant in error.

BROWN, J. On the 1st day of October, 1904, the plaintiff in error issued to Garee A. Wimberly a life insurance policy in the sum of \$1,000, payable at his death to his wife, Lillie M. Wimberly. The policy provided that the premiums should be paid annually in advance on the 1st day of October, at or before 5 o'clock, and the first premium was paid upon the issuance of the policy. The policy contained this provision: "Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of 30 days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken." The 1st day of October, 1905, was Sunday, and the premium which fell due on that day was never paid by the deceased, who died on November 1st of that year. The plaintiff in error contends that the 30 days of grace expired with the 31st day of October, while counsel for defendant in error contends that the 30 days of grace began at the expiration of the 2d day of October and embraced all of the 1st day of November. If there had been no provision for days of grace in the policy, the assured would have had the right to pay the premium on the 2d day of October, Monday. This proposition of law is not disputed by the plaintiff in error. It is claimed by counsel for the defendant in error that because the day of payment fell upon Sunday, and the assured had the right to pay the premium on Monday, that made Monday the day of maturity, just as if it had been named in the policy, and that the 30 days of grace ran from that day. If the plaintiff in error's contention is correct, it determines this

case, and it will be unnecessary for us to pursue the investigation of the other questions presented.

The 1st day of October in the year 1905 being Sunday, if the days of grace had not been allowed by the contract, the assured would have had the right to pay the premium on the following Monday, because the law does not require payment to be made on Sunday. It is contended by the defendant in error, and so held by the honorable Court of Civil Appeals, that this constituted Monday the day for the payment of the premium, and that the 30 days which the contract allowed for the payment of that premium commenced to run at the close of Monday, instead of at the close of Sunday, and therefore the 1st day of November was within the 30-day limit for the payment of the premium. We are of opinion that the fact that the law granted to the assured the right to pay on Monday did not have the effect to add a day to the 30 days allowed by the contract. The contract prescribes that the premium shall be due on October 1st, but the policy would not be forfeited if paid within 30 days thereafter. The construction placed upon the contract by the Court of Civil Appeals would give to the assured 31 days from the 1st day of October, instead of 30, as expressed in the contract. *Wooley v. Clements*, 11 Ala. 220. In the case cited suit was upon a note to which the law gave three days of grace. The note fell due on Sunday, and was protested on Wednesday. It was contended, as in this case, that the days of grace began to run at midnight of Monday, and that the note was not protestable until Thursday; but the court held that the days of grace were not enlarged by the fact that the note matured on Sunday.

The rule for computation of time under a state of facts like those set out in this case is well settled to be that the day on which an act is to be performed is to be excluded in determining the time when some other thing is to be done thereafter, and that the last day of the time given for the performance of the latter act is to be included in the computation. *Hill v. Kerr*, 78 Tex. 217, 14 S. W. 566; *Lubbock v. Cook*, 49 Tex. 100. Applying this rule to the facts of this case, the 30 days' grace allowed by the policy of insurance began to run at midnight of Sunday, October 1st, and terminated at midnight of the 31st day of that month, which gave 30 full days from the day on which the payment was expressed to be made, and fulfilled every provision of the contract between the parties. It follows that since Wimberly did not pay the premium at all, and died after the expiration of the time allowed within which to make the payment, the policy was forfeited before his death,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and there was no right of recovery as against the insurance company.

It is unnecessary to discuss the other questions which are raised, and it is hereby ordered that the judgments of the Court of Civil Appeals and district court be reversed, and that judgment be here rendered that the defendant in error take nothing by the suit, and that the insurance company go hence without day, and recover of the defendant in error all costs of this proceeding.

BURNETT et ux. v. FT. WORTH LIGHT & POWER CO. et al.

(Supreme Court of Texas. Oct. 28, 1908.)

1. NEGLIGENCE (§ 65*)—CONTRIBUTORY NEGLIGENCE.

The fact that one, suing for the neglect of the provisions of a statute or ordinance, proves such violation and his injury as the proximate cause thereof, does not preclude defendant from showing contributory negligence.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 65.*]

2. ELECTRICITY (§ 15*)—INJURIES INCIDENT TO USE—TRESPASSERS.

An electric light company was not liable for the death of a trespasser on the roof of a building through coming in contact with a live wire, which had become charged with electricity through the failure of the company to comply with city ordinances.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by Peter Burnett and wife against the Ft. Worth Light & Power Company and others. Judgment for defendants, and plaintiffs appeal. Question certified to Supreme Court by the Court of Civil Appeals for the Second Supreme Judicial District. Question answered.

Booth & Knight, for appellants. R. L. Carlock and Capps, Cantey, Hanger & Short, for appellees.

GAINES, C. J. This is a certified question for our decision by the Court of Civil Appeals for the Second Supreme Judicial District. The certificate is as follows:

"On January 15, 1908, the judgment in this case was reversed and the cause remanded in an opinion that day filed by us, a copy of which accompanies this certificate, wherein the case was thus briefly stated: 'A negro boy about 12 years old went with a companion near the same age to the roof of the Dundee Building, in Ft. Worth, Tex., passing up a stairway and out through a trap-door, and was there instantly killed by coming in contact with a live guy wire, which had become charged with electricity through the failure of the appellees to comply with one or more or the penal ordinances of the city of Ft. Worth. This suit was brought by the parents of the deceased boy against the appellees to

recover damages on account of their failure to observe said ordinances. The court instructed the jury to return a verdict in favor of the appellees, and to this the errors are assigned.'

"Since then the case of *City of Greenville v. A. C. Pitts*, 107 S. W. 50, 14 L. R. A. 979, has been decided by your honors and brought to our attention by the appellees, who have filed a motion for rehearing, which is now pending. We are inclined to distinguish this case from the one before us on the ground that the case cited was one of common-law liability, whereas in the one we have to deal with the liability is exclusively statutory, and also, upon closer examination of *Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898, to further distinguish that case on the same ground, since it was there held that the statutory liability should have been eliminated on demurrer; our inclination being, as said in *Clements v. La. Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, to treat the ordinance or ordinances relied on as 'a contract with each and every inhabitant of the city,' and on the alleged trespass feature to follow *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536. See, also, *Hayes v. Mich. Cen. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

"But inasmuch as we entertain serious doubts as to whether this course would finally be sustained by your honors, and as this could not be determined without another trial and appeal, after considerable delay and expense, we deem it advisable to now certify to your honors for decision the question raised by the counter propositions, other than the first, set out and discussed in our opinion above referred to, and particularly by the third counter proposition, which denied liability on the ground 'that the roof of the Dundee Building was not a place to which the public had a right to resort, that in going out upon said roof the boy was an intruder or trespasser, and that from all the circumstances the appellees could not reasonably have anticipated or expected that some trespasser would go out upon the roof of said building and come in contact with said wire'; that is, did the court err in instructing a verdict on that ground, the evidence showing that the boy had no business on the roof and had no permission from the owner to be there, although a way of access had been provided by means of a stairway from the street and a trapdoor to the roof?

"For a fuller statement of the question involved we respectfully refer to our opinion and the briefs of both parties."

In the case of *City of Greenville v. Pitts* (Tex.) 107 S. W. 50, 14 L. R. A. (N. S.) 979, referred to in the certificate, it was distinctly held that the city was not liable for the in-

jury inflicted in that case, for the reason that the plaintiff went upon the building in pursuit of his own business, without invitation or express permission from the owner thereof. This was in accordance with the ruling in the case of *Brush Electric Light & Power Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898, which is also referred to in the certificate. The reasoning of the court upon which that opinion is based is that, since there was not a scintilla of evidence that the awning over which the wires were stretched "had ever been used by any person as a place of resort, either for pleasure or business," therefore the injury could not have been anticipated, and the defendant was not liable. In that case there was an attempt to plead an ordinance, making it the duty to keep its wires insulated, but a special demurrer was sustained to the allegation for vagueness of pleading. There is not a suggestion in the opinion in the case that if the ordinance had been well pleaded it would have made any difference. It is almost universally held that the violation of a statutory duty is negligence per se. But as we understand it this is the difference between negligence at common law, usually a question of fact, and the violation of a statutory duty—"only this and nothing more." When a plaintiff sues for the neglect of the provisions of a statute or of the ordinance of a city, and proves such violation, and that he has been injured as the proximate cause thereof he has established the first postulate in his case; that is, the negligence of the defendant. But does this preclude the defendant from showing that he has been guilty of contributory negligence?

We have been unable to find any authority which countenances a contrary doctrine in any of the books. We find nothing in the case of *Clements v. Louisiana Electric Company*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, to sustain the doctrine. In that case *Clements* was employed to go upon the roof of a gallery to make some repairs, and while there without negligence on his part came in contact with an electric wire belonging to the defendant company, which was not insulated as required by an ordinance of the city of New Orleans. The defendant, having a right to be upon the roof and not being shown to be guilty of contributory negligence, was held entitled to recover. The case of *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, is sufficiently shown by the following part of the headnote: "An electric light company, causing the death of a person by negligently leaving a live wire on the ground, cannot escape liability because such person was at the time on a path leading across a vacant lot, where the owner had for many years permitted the public to use the path, so that the deceased might be regarded as a licensee." It is evident from this that the point we have under consideration could not have been decided in

that case. So in *Hayes v. Michigan Central Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, it was held, where a person was injured by falling into an excavation along the line of the track of the company, which it had been required to fence by an ordinance of the city, that "if a railroad company, which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits, for the purpose of protecting against injury to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence."

On the other hand, the doctrine is laid down in England that a person who sues for damages for an injury resulting from the failure of defendant to comply with a statutory duty cannot recover if it be shown that he is guilty of contributory negligence. "That a person guilty of contributory negligence should not recover, even when the injury arises from neglect to observe a statutory duty, is not only reasonable, but clear law." 1 *Beaven on Negligence*, p. 337. In the case of *Caswell v. Worth*, 5 *Ellis & Blackburn*, 849, Mr. Justice Coleridge says: "The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law; and one of those is that a want of ordinary care, or willful misconduct, on the part of the plaintiff, is an answer to the action." See, also, *Britton v. Great Cotton Co.*, L. R. 7 Ex. 130; *Caswell v. Worth*, 5 *El. & Bl.* 849. The same doctrine is laid down in the following American cases: *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; *O'Donnell v. Providence & Worcester R. R. Co.*, 6 R. I. 211. In the Tennessee case and the Rhode Island case just cited it was held, although the duty of the defendant was statutory, contributory negligence was a defense to the suit.

We have found no case, except those of *Greenville v. Pitts* and *Lefevre v. Galveston*, which decides the proposition that a trespasser is without remedy in such a case; but in neither of the cases last mentioned was there any other defense, and in neither was the plaintiff held entitled to a recovery. We fail to see how a trespasser acquires any right by reason of the negligence arising from the violation of an ordinance of a city or a statute, rather than from negligence at common law. In *Bishop on Written Laws* the author sums up the law on the subject discussed as follows: "One who disobeys the law subjects himself to any proceeding, civil or criminal,

which the same law has ordained for the particular case, in the absence of which ordaining, or in the presence of it when not interpreted as excluding other methods, he is liable to those steps which the common law has provided for cases of the like class, as to an indictment, or to a civil action, or to both, according to the nature of the offending. The civil action is maintainable when, and only when, the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court." Bishop on Written Laws, par. 141. See, also, cases there cited.

We answer that in our opinion, since the deceased boy was clearly a trespasser upon the roof of the building where its wires were strung, the plaintiffs are not entitled to recover.

HYMAN et al. v. GRANT.

(Supreme Court of Texas. Oct. 28, 1908.)

1. CONTINUANCE (§ 23*)—ABSENCE OF WITNESS—COMPETENCY OF TESTIMONY.

A continuance to obtain testimony of an absent witness to explain a lease will not be granted, where the lease is not in evidence, since the testimony would not be admissible.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 68, 69; Dec. Dig. § 23.*]

2. CONTINUANCE (§ 23*)—ABSENCE OF WITNESS—COMPETENCY OF TESTIMONY.

In trespass to try title, where plaintiff claimed that defendants' possession, if any, was as tenants of plaintiff or his vendor, and defendants claimed by limitation, and the evidence showed that they were holding over after the expiration of a lease, a continuance to obtain testimony to show defendants' repudiation of the relation of landlord and tenant was properly refused, where neither the evidence offered nor that of the absent witness tended to show that the repudiation was ever communicated to the lessor, since the proposed testimony would not have established a defense.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 23.*]

3. CONTINUANCE (§ 23*)—ABSENT WITNESS—MATERIALITY OF TESTIMONY.

A continuance to obtain testimony of absent witnesses is properly denied, where it does not appear with reasonable certainty that they would testify to any fact material to any issue.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 69; Dec. Dig. § 23.*]

4. WITNESSES (§ 200*)—COMPETENCY—COMMUNICATIONS TO ATTORNEY—CONFIDENTIAL CHARACTER OF COMMUNICATION.

To be privileged as a confidential communication by a client to his attorney, a fact must have been communicated to the attorney while engaged in professional services for him; and hence, in trespass to try title, where plaintiff claimed that defendants held as tenants of himself or his grantor, and defendants claimed by limitation, testimony that witness had acted as attorney for defendants' predecessor, who had held the land by lease, that he wanted to buy the land and had witness negotiate for its sale

or a new lease, and that, to protect the predecessor's improvements, witness, who owned no interest, made him a deed to the land without consideration, which was forwarded for record for the purpose of acquiring title by limitation, was admissible; it not appearing that witness' acts were done in discharge of his duty as an attorney.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 752; Dec. Dig. § 200.*]

5. WITNESSES (§ 201*)—COMPETENCY—COMMUNICATION TO ATTORNEY—PRIVILEGE.

The witness' act, if done in his professional character, would not be privileged, since it was wrongful and for the purpose of aiding in the perpetration of a fraud.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 755; Dec. Dig. § 201.*]

6. WITNESSES (§ 198*)—COMPETENCY—PRIVILEGED COMMUNICATIONS.

The purpose of the rule excluding evidence of communications by a client to his attorney, acting in a professional capacity, is to secure to the client free communication with his attorney on matters involved in litigation or the transaction of business; and, as it tends to prevent full disclosure of the truth, it should be limited to cases strictly within the principle.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 747; Dec. Dig. § 198.*]

Certified questions from Court of Civil Appeals of Second Supreme Judicial District.

Trespass to try title by John A. Grant against Sarah Minna Scott Hyman and others. Judgment for plaintiff, and defendants appealed. On certified questions from the Court of Civil Appeals. Questions answered.

McLean & Carlock and Miller & Dycus, for appellants. C. H. Earnest, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals for the Second District. The statement and questions are as follows:

"This is a suit in trespass to try title, instituted by appellee on January 14, 1907, against Mrs. Sarah Minna Scott Hyman, formerly wife of W. T. Scott, deceased, and against her present husband, Harry Hyman, and against her minor children by said former marriage, to recover a section of land in Mitchell county. Mr. and Mrs. Hyman on May 24, 1907, answered by pleading not guilty and the statutes of limitation of three, five, and ten years. On June 5, 1907, John P. Scott, guardian of said minors, interposed like pleas. On June 26, 1907, appellee filed a supplemental petition, to the effect that defendants' possession, if any, was that of tenants of appellee or his vendor. The trial was on June 27, 1907, and resulted in a judgment for appellee, from which this appeal has been prosecuted.

"The undisputed evidence shows that appellee claims the section of land in controversy to be one of 400 patented to the Southern Pacific Railway Company on the 26th day of July, 1862, as a bonus for the completion of the first 25 miles of its railroad, and by said railway company conveyed to W. T.

Scott, M. J. Hall, and Alexander Pope, trustees, and by said trustees to John T. Grant & Co., through and under which appellee claims as a vendee. It seems also undisputed in the evidence that W. T. Scott, the father of the minor appellants and the former husband of Mrs. Hyman, some time about the year 1884 purchased a cattle ranch, within the boundaries of which the section in controversy was situated; that W. T. Scott thereafter continued to use the land as a pasture until the year 1888, when he entered into formal written contract for the lease of the section of land in controversy with L. P. Grant, appellee's vendor, for the term of one year, from October 15, 1888, to October 15, 1889, for grazing purposes and for a rental of \$50. This lease was dated in December, 1888, signed by both Scott and L. P. Grant, and is unimpeached in the record. No renewal of this lease, or new lease, was ever made, so far as the record discloses; nor does it appear that W. T. Scott, or any of the appellants, ever paid rent after the expiration of the lease above referred to. W. T. Scott, however, retained possession, and on March 27, 1899, received a deed, executed by M. Carter, purporting to convey the absolute title to the land, which deed Scott caused to be registered in due form in Sterling county in May, 1899. There is a conflict in the evidence as to whether any part of the land is situated in Sterling county, but none as to the fact that after the record of the Carter deed W. T. Scott retained possession and regularly paid all taxes due in Sterling county, where the land was assessed, until the time of his death, which was in April, 1901, since which time appellants have held possession and paid all taxes due. The evidence also tends strongly to show that, after the execution of the deed by M. Carter in 1899, W. T. Scott in his lifetime, and appellants since then, have openly claimed and used the land as their own, and have held adverse possession thereof, unless estopped from so claiming by reason of the execution of the lease by W. T. Scott in 1888, as before stated. In this connection, however, it should be stated that the record fails to show that L. P. Grant or appellee was ever actually notified by W. T. Scott of a repudiation of said tenancy.

"Among other errors assigned was one to the action of the court in overruling appellants' motion for continuance presented on the day of the trial. This motion was a first application, and seems to embody all statutory requirements, save that it was not alleged that due diligence had been exercised. Surprise, however, was suggested, and reasons given why diligence to procure the desired testimony had not been used, all of which, together with other statements hereinafter made relating to said motion, will more fully appear by reference to said motion, which is hereby made a part of this certificate. The testimony desired was that

of Mrs. Hyman, who was alleged to be in the Dominion of Canada by the advice of her physician; W. W. Marshall, residing at Dulzura, Cal.; and C. A. O'Keefe, of Tarrant county—who were all alleged to be material witnesses for the appellants. The evidence sought of Mrs. Hyman and C. A. O'Keefe was expected to controvert or to show repudiation of the tenancy charged by appellee, and the testimony of Marshall tends to show that the land in controversy, or part thereof, was located in Sterling county, where W. T. Scott's deed from M. Carter was recorded. Error is also assigned to the action of the court in permitting the witness Carter to testify as follows, over the appellants' objection that the communications were privileged: 'That he was the attorney for W. T. Scott for a number of years prior to his death, and attended to his business in connection with his land matters; that he was well acquainted with the land in controversy, and had had frequent talks with Scott about said survey; that Scott had built a fine house, with other improvements, on the land, costing about \$3,000. He was anxious to buy said land, and witness wrote a number of letters for him and at his instance, prior to the year 1899, in an effort to secure the purchase or the lease of the land. Scott was very anxious about the valuable improvements that he had placed on said land, and desired to protect the improvements, and for that purpose witness made him the deed, bearing date March 7, 1899, conveying the land, and witness forwarded the same to Sterling county for record, inclosing a dollar to pay the recording fee, which Scott afterward paid back to the witness. Although this deed recites the consideration of \$1,000, nothing was ever paid to witness; not a single dollar. The purpose of the deed was to protect Scott's interest on the land in the event somebody else bought the land or leased it. Witness had no claim or right to the land and had no unrecorded deed to it. Up to that time Scott did not claim to own the land. Scott had the land leased, and witness knew that he had it leased, from conversations with Scott, and from the fact that Scott was in possession of the land.'

"On original hearing the majority of the court as then constituted concluded that all assignments of error, including those above mentioned, should be overruled, especially in view of the undisputed proof that shows that 'plaintiff was recognized by defendants and defendants' ancestor as the owner of the land by lease contract and acts of tenancy, and there has never been any repudiation of tenancy brought home to the knowledge of the landlord, or any surrender of the land.' With this view, however, Chief Justice Conner dissented, as will fully appear from the opinion on original hearing, which will be forwarded, together with this certificate; it being his contention that reversible error was committed by the court in overruling the

said application for a continuance and in overruling appellants' objection to the said testimony of the witness Carter.

"Appellants in due time have filed a motion for rehearing, which is yet pending before us, and the court as now constituted yet remains unable to agree upon the questions presented upon original hearing; the majority of the court as now constituted being of the opinion that the judgment should be reversed for the reasons indicated in said dissenting opinion. We therefore deem it advisable to certify to your honors for determination:

"First. Whether, under the facts stated and otherwise undisputed in the record, the court committed reversible error in overruling appellants' application for a continuance?

"Second. Whether the court's action in admitting the testimony of M. Carter was erroneous and prejudicial?"

There was no reversible error committed by the court in the rulings submitted by the two questions copied above. The filing of the supplemental petition does not affect the question presented, because the proof could have been introduced without the pleading. The lease of 1896, signed by Scott and mentioned in the application for continuance, does not appear to have been introduced in evidence upon the trial. Therefore Mrs. Hyman's testimony to explain it would not have been admissible. Neither the evidence offered nor that of the absent witness tended to prove that the repudiation by Scott of the relation of landlord and tenant was ever brought to the knowledge of the lessor, Grant. Therefore the proposed testimony would have been insufficient to constitute a defense. The application did not show with reasonable certainty that either Marshall or O'Keefe would testify to any fact material to any issue presented in the case. Therefore it was proper to deny a continuance for such testimony.

The evidence of Carter discloses no fact that he learned while acting as attorney for W. T. Scott. To be privileged, the fact must have been communicated by Scott to Carter, or must have been learned by Carter, while the latter was engaged in the performance of professional services to Scott as his client. 23 Am. & Eng. Ency. Law, p. 626; Ency. Pl. & Pr. 751. The making of the deed by Carter to Scott, in order that the latter might place it upon record and acquire title by limitation, was certainly not the act of an attorney which would be privileged; for, if done in his professional character, it was a "wrongful act," aiding Scott to perpetrate a fraud upon the owner of the land by making a pretense of title through a recorded deed, when in fact no claim whatever existed. 23 Am. & Eng. Ency. Law, 76; 6 Ency. Pl. & Pr. 754; Mathews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054. It is not

made to appear by the application that Carter as an attorney undertook to procure a lease or to make a purchase of the land for Scott, and that the letters were written in discharge of such professional duty. Therefore it is not shown that the evidence comes within the definition of privileged communications. "As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave it birth." Am. & Eng. Ency. Law (2d Ed.) p. 71. The purpose of the rule is to secure to the client free communication with his attorney upon all matters involved in litigation or in the transaction of business about which professional services are sought. The facts testified to by Carter do not come within the rule thus laid down by the authorities and therefore were not privileged.

SIMMANG v. PENNSYLVANIA FIRE INS. CO. et al.

(Supreme Court of Texas. Oct. 28, 1908.)

1. COURTS (§ 247*)—JURISDICTION OF SUPREME COURT—GARNISHMENT.

The Supreme Court is not without jurisdiction of a writ of error in a garnishment proceeding because the amount in controversy was within the jurisdiction of the county court, as such proceeding, being merely ancillary to the judgment of the district court for the creditor against the debtor, could have been brought only in the district court, and not in the county court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 247.*]

2. EXEMPTIONS (§ 45*)—"APPARATUS" BELONGING TO TRADE.

Even if keeping a restaurant is a trade, shelving, safes, furniture, tableware, and kitchen utensils used in a restaurant are not "apparatus," within Rev. St. 1895, art. 2395, subd. 5, exempting to every family apparatus belonging to any trade.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 1, pp. 439-440.]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Garnishment proceedings by Frank Simmang against the Pennsylvania Fire Insurance Company, as garnishee of Otto Gelse, who intervened. Judgment for plaintiff was reversed by the Court of Civil Appeals (107 S. W. 555) on appeal by Gelse, and plaintiff brings error. Reversed and directed.

Sallway & McAskill, for plaintiff in error. Webb & Goeth and Reagan Houston, for defendants in error.

BROWN, J. In the district court of Bexar county, Forty-Fifth district, Frank Simmang recovered a judgment against Otto Gelse for about \$600. The Pennsylvania Fire Insurance Company owed Gelse on a

fire policy \$341.20, which was not contested by the company. Simmang sued out in the district court of the Forty-Fifth district for Bexar county a writ of garnishment against the Pennsylvania Fire Insurance Company, calling upon it to answer what it was indebted to Otto Geise; and the company answered, stating the amount due. Otto Geise filed a plea of intervention, in which he claimed that the sum due him upon the policy of insurance was exempt from the writ of garnishment, because the policy under which the debt accrued was upon property owned by said Geise which was exempt from forced sale. Upon a trial judgment was rendered in favor of Simmang. Upon appeal to the Court of Civil Appeals, that judgment was reversed, and judgment rendered in favor of Geise. The honorable Court of Civil Appeals makes this statement of the property insured: "Lunch counter, back counter, shelving, safe, stools, stove, fans, cash register, two ice boxes, crockery, tableware, linen, knives, forks, and kitchen utensils, together with similar articles constituting the tools and apparatus of his trade or profession as a keeper of a restaurant, and being entirely property used, designed, and intended for said business, and necessary for the purpose of conducting the same, and this being the only property of this character owned by this intervener, and that the money in the hands of the garnishee was due him on its policy insuring him against loss on the property described. The foregoing matters were pleaded by Geise and admitted to be true by Simmang."

Defendant in error filed a motion to dismiss the writ of error because the amount in controversy is within the jurisdiction of the county court and the proceeding might have been had in that court. Therefore it is claimed that this court has no jurisdiction of this case. The garnishment proceeding is not an original suit, but ancillary to the judgment of the district court, which was rendered in favor of Simmang against Geise, being a process for the enforcement of said judgment. Therefore the garnishment could not have been sued out from any other court than that in which the judgment was rendered. *Kelly v. Gibbs*, 84 Tex. 148, 19 S. W. 380, 583; *Kreisle v. Campbell*, 89 Tex. 104, 33 S. W. 852; *Townsend v. Fleming* (Tex. Civ. App.) 64 S. W. 1006.

It is claimed that under article 2395, subd. 5, of the Revised Statutes of 1895, the property insured, and for the destruction of which the money was due from the Pennsylvania Fire Insurance Company, was exempt from forced sale for the debts of Geise. Therefore the proceeds of such property in the shape of insurance money is exempt from the process of garnishment for the payment of his

debts. The article referred to reads as follows:

"Art. 2395. The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: * * * (5) All tools, apparatus and books belonging to any trade or profession."

Granting that the keeping of a restaurant is a trade within the meaning of the law, the question arises: Were the things insured "apparatus," as the term is used in the statute? In *Heidenheimer v. Blumenkrom*, 56 Tex. 314, a mortgage had been given upon articles such as were insured in this case by the keeper of a hotel, and, suit being instituted to foreclose the mortgage, the defendant claimed that the articles embraced in the mortgage were exempt from forced sale under the terms of the statute above quoted. The court held that such articles, when not used by the family of a hotel keeper, were not exempt from forced sale, and therefore were subject to sale under the mortgage. *Dodge v. Knight* (Tex.) 16 S. W. 626, involved the same question as that at issue here. *Dodge and Martin* were keepers of a restaurant, and were indebted to *Knight and Dickson*, who sued out a writ of attachment against *Dodge and Martin* and caused the same to be levied upon the furniture, fixtures, etc., of the restaurant, being such articles as are involved in this proceeding. Afterwards *Knight* sued for damages upon the ground that the property levied upon was exempt under the statute from forced sale; but this court approved the opinion of the Commission of Appeals, which held that it was not embraced within the terms of the statute. In *Frank v. Bean*, 3 Willson, Civ. Cas. Ct. App. 258, the Court of Appeals held that the furniture, dishes, etc., used by the keeper of a restaurant in carrying on the business, were not exempt under the statute as quoted above. That court said: "Such property does not come within the meaning of 'tools' or 'apparatus,' as used in the statute of exemptions, and cannot be claimed as exempt under that clause of the statute. The common signification of said words does not embrace furniture used in hotels and restaurants."

We conclude that the property which was destroyed by fire, and for which the insurance money was due from the Pennsylvania Fire Insurance Company, was not exempt from forced sale, and that the Court of Civil Appeals erred in reversing and rendering the judgment in this case.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that judgment of the district court be affirmed.

WANDELOHR et al. v. GRAYSON COUNTY
NAT. BANK et al.

(Supreme Court of Texas. Oct. 21, 1908.)

1. HUSBAND AND WIFE (§ 81*)—DISABILITIES
OF WIFE—REPLEVY BOND.

That a husband is joined, as authorized by statute, in an action to recover separate real estate of the wife, does not affect her right to execute a replevy bond in sequestration proceedings; nor is such right affected by the fact that the husband might be benefited by the possession and profits while the land was held under the bond.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 332; Dec. Dig. § 81.*]

2. SEQUESTRATION (§ 20*)—REPLEVY BOND—
LIABILITY OF SURETIES.

A bond, with sureties, given to replevy property belonging to a wife in her separate right in a sequestration proceeding, the principals in which were the husband and wife, provided that the obligors and each of them would pay the value of the rents of the property replevied in case either of them should be compelled to do so on the trial of the contest of the right to the property. Judgment was entered against the principals for the property, but only against the husband and the sureties for the rents. *Held* that, the wife being liable on the bond, judgment against her was necessary to a correct judgment against the sureties.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 49; Dec. Dig. § 20.*]

On rehearing. Former opinion affirmed in part, and reversed and rendered in part.

For former report, see 108 S. W. 1154.

WILLIAMS, J. The original opinion holds that the sureties, Waples and Gunter, are entitled to make the objection that the judgment for damages was not rendered against Mrs. Wandelohr. This proposition is correct, and we have concluded that proper effect was not given to it in the disposition made of the case. It is true, as we held, that in such a proceeding judgment may properly be rendered, upon a replevy bond to which the names of two persons are signed as principal obligors, against only one of them and against the sureties, when the other principal, by reason of coverture, is not legally bound. *Shipman v. Allee*, 29 Tex. 17. In such a case those only who are legally liable upon the bond are, in the true sense, obligors therein, so as to fall within the statutory provision relied on by plaintiffs in error. And it may also be true that the decision of the trial court, for such a reason, that the discharged principal was not bound, would be conclusive on the sureties in any proceeding but an appellate one; but that proposition is not essential to this decision. This is an appellate proceeding, in which the holding of the trial court that Mrs. Wandelohr was not liable on the bond is assigned as an error committed against the sureties, and the question as to the correctness of that ruling is properly raised and must be decided, in order to determine whether or not the judgment against the sureties is correct. If Mrs. Wan-

delohr was liable for the damages adjudged to the defendant in error, she was an obligor in the bond in the sense of the statute, and judgment against her was essential to a correct judgment against the sureties.

On reconsideration, no doubt is entertained that the trial court erred in holding that Mrs. Wandelohr was not liable. *Chapman v. Allen*, 15 Tex. 285; *Ryan v. Ryan*, 61 Tex. 473; *Cayce v. Powell*, 20 Tex. 768, 73 Am. Dec. 211. The fact that the husband is joined in an action cannot justly be held to affect the power of the wife to execute such a bond, or not, as she, or the two together, may deem essential to the proper prosecution of her claims to the property involved. The statute authorizes the joinder, and when such a suit is prosecuted against husband and wife, and property claimed by her is taken from the possession of both by sequestration, she is a defendant, to whom the right to replevy is expressly given. Nor does the fact that the property may go back into the possession of the husband, and that he may be entitled to receive the rents and profits while it is held under the replevy bond, at all limit the right given to her by the statute. As is well argued by counsel, she has the right to execute the bond that the property may be restored to the custody and management in which the law places it; and there is no doubt in our minds that she may execute it jointly with her husband in a suit against both, as this one was, because the power results from the statute as an incident to her capacity to sue and be sued in the courts in respect of her separate property. Her power to give such obligations must be exercised at the commencement, or during the pendency of, the action, and hence cannot be made to depend upon the final decision as to her title involved in the cause, for that would defeat the purpose of the bond, since upon such a theory it would be held valid in case of her success, which would in itself relieve her of liability, and invalid in case of her failure to maintain her title, the very case in which the bond is intended as a security to the opposite party. Her presence as a party in litigation about property claimed in her separate right constitutes the condition of things in which she is entitled to follow the procedure provided for litigants generally in like cases. It follows that the district court should have rendered judgment against Mrs. Wandelohr for the damages found by the jury, and we think it also true that the failure to do so was error which entitles the sureties to a reversal.

It is unnecessary to determine whether or not a separate action could be maintained on the joint and several bond against Wandelohr, and against Waples and Gunter, as being severally his sureties, as well as jointly the sureties of himself and Mrs. Wandelohr. That proposition does not decide this case.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Such a suit, if maintainable, would leave unimpaired the rights and remedies of both the obligee and of the sureties against the principal not sued. Here, under a statute requiring a judgment against all the obligors liable in the bond, and where all are parties, judgment is taken against one of the principals only, which has the effect of adjudicating that the other is not liable. This was an error against the sureties, as well as against the obligee in the bond. The latter has caused the judgment to be affirmed as between it and Mrs. Wandelohr, while the former, unaffected by that affirmation, are now complaining of the error. Following *Sartain v. Hamilton*, 14 Tex. 348, we must reverse the judgment against the sureties and adjudge that the defendant in error, the bank, take nothing against them; otherwise, the judgment is affirmed.

Affirmed in part; reversed and rendered in part.

GUTTA PERCHA & RUBBER MFG. CO. v. CITY OF CLEBURNE.

(Supreme Court of Texas. Oct. 28, 1908.)

1. SALES (§ 364*)—FAILURE OF CONSIDERATION—SUBMISSION OF ISSUE.

Where, in an action for price of fire hose, sold with a warranty that it would not give out within 36 months from any mechanical defect in manufacture and that it would stand a certain pressure, the defense was failure of consideration, in that the hose was not as warranted and was worthless, instructions to find for defendant if the hose gave out or became worthless within 36 months, or if, when delivered, it was not capable of standing the stipulated pressure, are erroneous, in depriving plaintiff of the right to have the question of partial failure of consideration submitted, when there was evidence that the hose, if not up to standard, had some value, and giving to facts consistent with partial failure of consideration the effect of a total failure.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

2. SALES (§ 355*)—FAILURE OF CONSIDERATION—PLEADING.

The plea of total failure of consideration, in an action for the price, raised the issue of partial, as well as total, failure.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 355.*]

3. SALES (§ 357*)—FAILURE OF CONSIDERATION—BURDEN OF PROOF.

The burden of proof as to consideration, where defendant claims a failure thereof, is on him, and not on plaintiff, so that defendant, showing only a partial failure, must furnish the evidence from which the extent of the failure may be determined.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 357.*]

4. SALES (§ 358*)—FAILURE OF CONSIDERATION—EVIDENCE.

The value of the hose delivered, and so the amount of the failure of consideration, may be determined by the jury, from proof of the value of the hose contracted for, the time it ought to last, and the service it ought to perform, and

evidence as to the use and endurance of that delivered.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 358.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the Gutta Percha & Rubber Manufacturing Company against the city of Cleburne. Judgment for less than claimed was affirmed by the Court of Civil Appeals (107 S. W. 157), and plaintiff brings error. Reversed and remanded.

J. D. Goldsmith and Walker & Baker, for plaintiff in error. F. E. Adams and Phillips & Daniels, for defendant in error.

WILLIAMS, J. Leaving out details not essential to our decision, we may state this case as follows: Plaintiff in error brought the action on two promissory notes executed to it by the city for the prices of two lots of hose sold by plaintiff to the city for use in its fire department. The defendant pleaded that the consideration of the notes had failed, in so far as that consideration consisted of the price of one of the lots of hose, for the reason that the hose was not such as the contract of sale warranted it should be and was worthless. The sale and delivery were made under the following warranties: "The Gutta Percha & Rubber Manufacturing Company, of New York City, hereby warrants and agrees that should any of the Baker fabric rubber-lined cotton fire hose, mentioned in said annexed proposal, fail or give out within 36 months from the date of purchase from any mechanical defect in manufacture, to replace the same free of charge on return of defective lengths. And the said Gutta Percha & Rubber Manufacturing Company further warrants that said hose shall stand a pressure test of 400 pounds to the square inch when delivered." The delivery was made to defendant in May, 1900, and the hose was retained and used by defendant without complaint until February, 1901. At that time complaint was made (the defendant in the meantime having secured an extension of time for the payment of the notes), and correspondence and negotiations ensued, lasting until the institution of this suit and continuing afterwards. No return was ever made of any of the hose until the spring of 1902, when it was sent to plaintiff for an inspection with a view to a settlement. The evidence on the part of the defendant, however, tended to show that lengths of it burst at the first fire at which it was used, a few months after its purchase, and that others burst whenever it was used, the pressure being only 65 to 80 pounds to the square inch; and some of the evidence tended to show the worthlessness of the entire lot in question. On the other hand, the evidence for plaintiff tended to show that the hose was such as it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was warranted to be and that its failure resulted from the lack of proper care in its use. It is very evident that the jury could have found that, if not up to the contract standard, the hose had some value; and it seems quite as plain that, if such was the fact, there was not a total failure of consideration. The defendant, having kept and used the property, was accountable for such value as it possessed.

In the sixth paragraph of its charge the court instructed the jury, in substance, to find for defendant, "on the plea of failure of consideration," if any of the hose in question gave out or failed from any mechanical defect in manufacture within 36 months after the purchase, and if defendant returned the defective lengths for the purpose of having them replaced, and if plaintiff failed to replace them within a reasonable time, and if the hose in question gave out or became worthless within 36 months from the date of purchase. In the seventh paragraph the charge further instructed a verdict for defendant, "on its plea of failure of consideration," if the hose, when delivered, was not capable of standing a pressure test of 400 pounds to the square inch. In the ninth paragraph the jury were instructed to deduct from the notes the entire contract price of the lot of hose in question, if they should find for defendant "on its plea of failure of consideration." The vice of these instructions is that they permit no finding of a partial failure of consideration, and give to facts consistent with such a view of the evidence the effect of a total failure. To justify a finding of total failure of consideration the instructions do not require that the property should have been worthless when delivered, but only that it should have failed or become worthless within 36 months thereafter, or that, when delivered, it was not capable of standing the stipulated pressure. Those facts would show breaches of the warranties, but not necessarily a total failure of consideration. Consistently with them the hose may have been valuable and useful to defendant when delivered and up to the time when it finally became worthless. It is said that the issue joined between the parties was as to total failure only, and that the charge was correct in submitting it alone. But the plea of total failure included that of partial failure, and the evidence was such as to make it proper to submit both. *Brantley v. Thomas*, 22 Tex. 275, 73 Am. Dec. 264.

The contention of plaintiff is that the deduction that should be made in case of a partial failure is the difference between the contract price and the market value of the hose delivered at the time of delivery. This is correct, if the hose delivered had a market value, as to which there seems to have been

no evidence introduced. In the absence of evidence on this point, counsel for defendant claim, and the Court of Civil Appeals held, that the trial court was justified in refusing to submit the question of partial failure. But we think this is not true for two reasons: First. Whatever may be the rule elsewhere, it is settled by the decisions of this court that the burden is on the defendant, claiming failure of consideration, to prove its defense, and not on the plaintiff to prove a consideration for the notes. *Williams v. Balles*, 9 Tex. 61; *Drew v. Harrison*, 12 Tex. 279; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Insurance Co. v. Wicker*, 93 Tex. 396, 55 S. W. 740. The remark in *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356, was a mere dictum. And this is true, also, of the cases of *Franklin v. Smith*, 1 Posey, Unrep. Cas. 243, and *Solomon v. Huey*, 1 Posey, Unrep. Cas. 267. The two latter decisions, moreover, were not made by this court and are not binding authority. *G. & W. Ry. Co. v. City of Galveston*, 90 Tex. 407, 39 S. W. 96, 36 L. R. A. 33. Under this rule it was incumbent on the defendant, if it failed to prove a total failure, but succeeded in showing a partial failure, to furnish evidence from which the jury could determine the extent to which the consideration had failed. Second. There was evidence from which the jury might have formed some opinion as to the value of the hose delivered, in the absence of proof that it had a market value. If it was such as defendant claimed it was, it is not probable that it had a market value, but nevertheless it may have had some value. There was proof of the value of the hose contracted for, and of the time it ought to last, and the service it ought to perform, and there was evidence as to the use and endurance of that which was delivered. In the absence of more definite evidence the jury might have reached some conclusion as to the comparative values of that contracted for and that furnished. While it may not have been error for the court to refuse the instruction, requested by plaintiff, submitting the question as to difference between contract price and market value, for want of evidence of the latter, it was error to exclude entirely the question of partial failure, and to refuse other instructions requested which were in line with what we have said.

The court also erred in charging generally that the burden of proof was upon plaintiff, the burden being on the defendant on the only issues made by the pleadings, and in refusing plaintiff's requested instruction stating the rule as we hold it to be. What we have said indicates the assignments of error which we sustain and is sufficient for the purposes of another trial.

Reversed and remanded.

COLEMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

1. INTOXICATING LIQUORS (§ 146*)—UNLAWFUL SALE—MISTAKE—EFFECT.

Under the statute making a mistake of fact no excuse for an offense where it arises from a want of proper care, to entitle one to an acquittal of unlawfully selling beer on the ground that he mistook it for a nonintoxicating drink, it must appear that the mistake arose through no want of proper care on his part.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 161; Dec. Dig. § 146.*]

2. INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALE—PARTIES.

Evidence held to show sale of liquor to the alleged purchaser.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 318; Dec. Dig. § 236.*]

Appeal from Coleman County Court; F. M. Bowen, Judge.

Dave Coleman was convicted of violating the local option law, and he appeals. Affirmed.

Woodward & Baker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$50 and 50 days' imprisonment in the county jail.

Appellant was indicted for selling whisky to W. E. Edgerton. The witness Edgerton testified that he, in company with a man named Dickinson, about sundown drove up to the club house of appellant and found him sitting in front of the door, and the house was locked. Dickinson asked appellant if he had anything to drink. Appellant replied, "Yes, if you have got the money." The witness and Dickinson were in a buggy at the time. Dickinson said he did not have any money, but that Edgerton had a check book, and asked if that would do. Appellant replied, "Yes," and the witness and defendant went into the house, and defendant delivered to him six bottles of Budweiser beer, for which the witness gave him a check on the First National Bank of Coleman, Tex., for 90 cents. Appellant's defense was that he had Ino and beer in the same ice box, and that he kept the beer on one side and the Ino on the other; that the beer was intoxicating and Ino was not, and that by mistake he delivered the witness beer for Ino; but that he intended to deliver him Ino, and that he did not intend to sell him the beer. The court in substance charged the jury that if appellant intended to deliver Ino, and through mistake delivered him beer, and that the same grew out of no want of proper care on his part, they would acquit the appellant. Appellant asked a special charge to the effect that if the liquor delivered by appellant was Budweiser, but appellant thought or through a mistake delivered to said Edgerton the same under the belief that he was delivering Ino, they would acquit.

The statute provides that, in order for a man to avail himself of a mistake of fact, the same must arise from no want of proper care. We think the charge was correct, and there was no error in refusing appellant's special charge.

Appellant insists there is a variance in the proof, and that the sale was made to Dickinson, and not to Edgerton; but we do not see proper to set this matter out in detail, but suffice it to say the evidence clearly shows that the sale was made to Edgerton. He received the goods and paid the check for same.

Various other matters are urged, but we do not deem it necessary to discuss them further in this opinion. For a further discussion of them, see *Dave Coleman v. State* (No. 3,840, decided at last Austin term) 111 S. W. 1011.

Finding no error in the record, the judgment is affirmed.

THOMAS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

TRESPASS (§ 89*)—CRIMINAL RESPONSIBILITY—EVIDENCE—INSTRUCTIONS.

Where, on a trial for cutting trees on the land of prosecutor, the evidence of accused showed a mistake of fact on his part as to the boundaries of prosecutor's land and his good faith in believing that the trees belonged to a third person, who had directed him to cut them, the failure to charge the substance of Pen. Code, arts. 45, 46, providing that, where a person laboring under a mistake of fact shall do an act which would otherwise be criminal, he is guilty of no offense, was reversible error, though there was no request therefor.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 89.*]

Appeal from Sabine County Court; H. C. Maund, Judge.

Charles Thomas was convicted of unlawfully cutting down trees on the land of another, and he appeals. Reversed and remanded.

Hamilton & Minton, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by indictment in the county court of Sabine county, Tex., with unlawfully cutting down, destroying, and carrying away trees and timber upon land not his own, but which was alleged to be the land of Martin Thomas and known as the "D. O. Ford survey." On trial he was convicted, and a fine of \$10 assessed against him.

It was admitted on the trial by appellant that he cut a tree which it is claimed stood upon the land of and belonged to Martin Thomas, but it was claimed that this was done in the belief and on the assurance that this timber was on the Albert Brister survey and was owned by one J. O. Toole. Toole testified that he owned the Albert Brister survey and told the defendant to get out some

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

boards for him and to get the timber on this survey, or on other land owned by him, advising appellant where the several tracts owned by him were located. Albert Brister testified that he was the son of the original patentee of the Albert Brister survey, which, since his father's death, had been sold to Toole, and that, from his knowledge of the line dividing this survey and the D. O. Ford survey, it was his belief that the tree cut by appellant was on the Brister survey and belonged to Toole; that he had known this line for 25 years, and had been on the ground recently; and that the tree cut by appellant was on Mr. Toole's land. Appellant testified in his own behalf that he had asked Albert Brister who owned the tree cut by him, and was told that it was on Mr. Toole's land, and that he cut the tree believing it to be on the Albert Brister survey and the property of J. O. Toole, and in the belief that he had a right to cut it under the direction and instructions given him by Mr. Toole.

In addition to the doctrine of reasonable doubt and that the jury were the judges of the facts proven, the credibility of the witnesses, and weight to be given the testimony, the court instructed the jury substantially to the effect: "If any person, without the consent of the owner, shall knowingly cut down or destroy any tree or timber upon any land not his own, he shall be fined not less than \$10 nor more than \$500. You are instructed that if you believe from the evidence beyond a reasonable doubt that Charles Thomas did, in the county of Sabine, state of Texas, on or about the 1st day of September, A. D. 1907, unlawfully cut down or destroy any tree or timber upon the land of Martin Thomas, you will find him guilty, and assess his punishment at a fine of not less than \$10 nor more than \$500."

It will be seen, from a recital of the testimony given above, that the defense of mistake of fact and the good faith and belief of appellant in the ownership of the tree by Toole was not only raised by the testimony, but to our mind was strong, if not convincing, evidence of his good faith and belief. Articles 45 and 46 of our Penal Code are as follows:

"Art. 45. No act done by accident is an offense, except in certain cases specially provided for, where there has been a degree of carelessness or negligence which the law regards as criminal.

"Art. 46. No mistake of law excuses one committing an offense; but if a person laboring under a mistake, as to a particular fact, shall do an act which would otherwise be criminal, he is guilty of no offense."

Counsel for appellant, as appears from his motion for a new trial, requested a special instruction giving in substance these provisions. However, such special requested instruction does not appear in the record, ex-

cept as copied in the motion for new trial. However, whether requested or not, it seems to us that it is too clear for discussion that the substance of these articles of our Penal Code should have been given in charge to the jury. *Neely v. State*, 8 Tex. App. 64; *Reynolds v. State*, 32 Tex. Cr. R. 36, 22 S. W. 18; *Lackey v. State*, 14 Tex. App. 164; *Smedly v. State*, 30 Tex. 214; *Donahoe v. State*, 23 Tex. App. 457, 5 S. W. 245; 1 *Bishop, Cr. Law*, 384; 4 *Blackstone*, 232.

The judgment is reversed, and the cause remanded.

CORNELIUS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1908. Rehearing Denied Oct. 21, 1908.)

1. CRIMINAL LAW (§ 1169*)—EVIDENCE—ADMISSIBILITY.

In a manslaughter trial, it was not prejudicial error to allow a physician to state that the fatal bullet ranged from the entrance wound upwards and toward the exit wound, though he had stated that he passed the probe "up so far it could have been passed any other way on account of the lung tissue"; it not appearing that witness was not an expert on gunshot wounds.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 8137; Dec. Dig. § 1169.*]

2. CRIMINAL LAW (§ 1128*)—APPEAL—RECORD—OBJECTIONS—EFFECT AS STATEMENT OF FACT.

An objection that a witness was not an expert is insufficient to establish that fact in the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1128.*]

3. CRIMINAL LAW (§ 547*)—EVIDENCE—STENOGRAPHIC NOTES OF FORMER TRIAL.

It was proper, in a manslaughter trial, to allow the court reporter, who took stenographic notes of accused's testimony at a former trial, to state parts of such testimony, where he testified to the accuracy of his report.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1239; Dec. Dig. § 547.*]

4. HOMICIDE (§ 188*)—EVIDENCE—DECEDENT'S REPUTATION.

One accused of manslaughter having shown threats by decedent, under Pen. Code, art. 713, the state could show that decedent was peaceable, etc.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 397; Dec. Dig. § 188.*]

5. CRIMINAL LAW (§ 1091*)—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions to a refusal to exclude testimony because it did not tend to support the charge is insufficient, where it does not state the testimony nor refer to the part of the record where it can be found.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2832; Dec. Dig. § 1091.*]

6. CRIMINAL LAW (§ 1192*)—APPEAL—STATEMENT OF FACTS—RIGHT TO REFER TO.

The Court of Criminal Appeals cannot refer to a statement of facts to supplement a bill of exceptions, unless the bill refers to it.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1192.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. HOMICIDE (§ 349*)—ACQUITTAL OF MURDER—NEW TRIAL FOR MANSLAUGHTER—EVIDENCE.

The degrees of homicide are not distinct offenses, but merely grades of one common offense; and on a new trial after acquittal of murder and reversal of a conviction of manslaughter is a *de novo* trial so far as concerns the introduction of evidence, and evidence tending to show accused's guilt of murder is admissible, though under Code Cr. Proc. art. 762, he cannot be convicted of a higher degree than manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 349.*]

8. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

Instructions, in a murder trial, that reasonable apprehension of death or great bodily harm warrants all necessary force to protect one's self, it being unnecessary that there be actual danger, and that if decedent's attack upon accused, their relative strength, and accused's knowledge of decedent's disposition led him to reasonably fear death or serious injury, and accused killed decedent in acting under such fear, he should be acquitted, sufficiently covered the law of self-defense, based upon real and apparent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 800.*]

9. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

It is not error to refuse instructions covered by those given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. HOMICIDE (§ 300*)—EVIDENCE—SELF-DEFENSE.

Where the evidence in a manslaughter trial showed that accused approached and violently insulted decedent, and shot him when he resented the insult, the court properly refused to instruct on the law of retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. § 300.*]

11. HOMICIDE (§ 348*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Under Code Cr. Proc. art. 723, preventing reversals for nonprejudicial error, one convicted of manslaughter on a theory submitted cannot complain of the court's refusal to submit another theory.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 348.*]

12. HOMICIDE (§ 341*)—HARMLESS ERROR.

One accused of manslaughter was not prejudiced by the court's failure to instruct as to what offense accused was guilty of, if he provoked the difficulty with intent to commit a breach of the peace.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 841.*]

13. HOMICIDE (§ 276*)—PROVOKING DIFFICULTY—EVIDENCE—SUFFICIENCY.

Evidence in a manslaughter trial held sufficient to raise an issue as to provocation of difficulty by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

14. HOMICIDE (§ 300*).

Any words tending to provoke and provoking a difficulty, being so intended, justify a charge in a homicide case on provoking a difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 623; Dec. Dig. § 300.*]

15. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTION.

One accused of manslaughter was not prejudiced by an instruction that, if the relative strength of decedent and accused led accused to reasonably fear death, etc., he must be acquitted, though the record did not disclose decedent's size.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 840.*]

16. HOMICIDE (§ 116*)—SELF-DEFENSE.

On an issue of self-defense in a homicide case, the jury must look at the facts from accused's standpoint; he being entitled to defend against fear of death or serious bodily injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

Davidson, P. J., dissenting.

Appeal from District Court, Donley County; J. N. Browning, Judge.

H. T. Cornelius was convicted of manslaughter, and he appeals. Affirmed.

Veale & Crudgington, A. T. Cole, and Jno. J. Hiner, for appellant. F. J. McCord, Asst. Atty. Gen., H. S. Bishop, Dist. Atty., C. B. Reeder, and H. H. Cooper, for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at five years' confinement in the penitentiary.

1. Bill of exceptions No. 3 complains that the state was permitted to prove by Dr. G. T. Vinyard the following: "Q. From the examination you made there, what is your best judgment as to the entrance and range of that bullet? Appellant's Counsel: We object to that. Let him state the facts, and let the jury draw their conclusions. The Court: Did he state he passed the probe clear through the entrance to the exit? A. No, sir; I passed it up from the entrance wound. After it got up so far it could have been passed any other way on account of the lung tissue. Q. What was the direction of the track of the bullet? What I want to get at is, what was the range of that bullet from the place where you begun to probe from the entrance wound, with reference to the exit? (Appellant objected on the ground that it was a conclusion.) The Court: That is a matter for the jury to pass upon, and I will admit the testimony. A. The range of the bullet from where I begun to probe from the entrance wound was upward and to the right, and was in the direction of the exit wound"—"to which said last question and answer the defendant objected for the reason, first, that it was but the opinion of the witness on a matter, not the subject of expert testimony; second, the witness had shown by his first answer to said question that the direction from whence said bullet came was speculative and uncertain, had for its object the relative position of the parties, he could only state actual conditions and not leave the impression from the manner and verbiage of his answer as to what his opin-

ion was, as to the relative position of the parties." We see no objection to this testimony. The witness appears to have been a physician. The court does not certify that he was not an expert on gunshot wounds, and hence the bill to that extent is defective. While it is true appellant objects to same on the ground that he is not an expert, yet an objection is not a statement of a fact. Furthermore, the testimony, under no viewpoint, as we understand it, could be hurtful in this case.

2. Bill of exceptions No. 4 shows that the state placed A. M. Works, Jr., the official stenographer of said court, upon the stand, and after proving by him that he had reported the two former trials of this cause in the district court of Potter county, and after proving by said witness that he had transcribed the notes of the defendant's testimony given at the first of said trials, and after testifying that such transcription was a correct statement of the testimony of said witness Cornelius, thereupon the witness was permitted to state various things that the defendant testified on a former trial, to all of which appellant objected on the ground that it was not shown that the paper from which the witness was reading had ever been signed by the defendant as a signed statement, that no testimony whatever was offered to show that the defendant had admitted to any person that such question and answer had been asked him and answered by him as stated in said document, and that it was not shown that he had at any time admitted the correctness of said question or answer. The bill is approved with this explanation: "This witness testified on his voir dire examination that he was a competent and experienced stenographer, that he had been the official court reporter for this judicial district for the last two years and was still occupying said position, that he was present and acting as official stenographer and reporter for the district at a former trial of this cause in Amarillo and heard the defendant testify in his own behalf at said trial, that witness took stenographic notes of the testimony of defendant at said trial and that he knew he had taken the testimony correctly, that he transcribed his notes of said defendant's testimony correctly and knew that it was a correct statement of defendant's evidence, but as to some of the testimony shown in the bill he had no independent recollection of it." There was no error in admitting the stenographer's notes to be introduced as above pointed out. This question has been decided by this court adversely to appellant's contention. See *Casey v. State*, 50 Tex. Cr. R. 392, 97 S. W. 496, 17 Tex. Ct. Rep. 169, and *Stringfellow v. State*, 42 Tex. Cr. R. 588, 61 S. W. 719.

3. Bill of exceptions No. 5 shows that while the witnesses Mrs. George Highfill, wife of deceased, Frank Harrington, and R. D. Wilson, were on the stand, in behalf of

the state, the court, over appellant's objection, permitted each of said witnesses to testify that the deceased was an inoffensive, quiet man and peaceable citizen, of a kind and inoffensive disposition, to which testimony on the part of each of said witnesses the defendant in open court objected for the reason that said testimony was offered for the purpose of proving the character and general reputation of deceased as being a violent, dangerous man or a man of quiet disposition, when such issue had not at that time nor any other time during the progress of the trial been raised by the defendant, and deceased's character had not been attacked. The court overruled the objection for the reason that he permitted it to go before the jury on the issue of threats alleged to have been made by deceased against the life of defendant, as raised by the testimony offered by the defendant. This bill is approved with this explanation: "The defendant had offered testimony of numerous threats made by deceased against the life of defendant, some of which are shown to have been communicated to defendant and some were not. After the defendant had rested his case the state offered the testimony of the above three witnesses in rebuttal, and this evidence was admitted under authority given in article 713 of the Penal Code, and was directly in rebuttal to said evidence of previous threats of deceased." Said article justified the court in the ruling complained of. *Arnwine v. State*, 50 Tex. Cr. R. 254, 96 S. W. 4.

4. Bill of exceptions No. 6 shows the following: After the state had introduced the witness Burwell and he had testified, appellant presented the court the following motion: "Now comes the defendant, by his attorneys, and moves the court to exclude from the consideration of the jury the testimony of the witness W. M. Burwell concerning the statements made by defendant to Highfill on the morning of the killing and immediately preceding the killing, for the following reasons, to wit: First. The defendant in this case is on trial for manslaughter only, he having been acquitted of murder, and said testimony does not raise, or tend to raise, or support the charge or issue of manslaughter. Second. Because said testimony raises, and tends to raise, only the issue of murder of the first or second degree only, and not manslaughter, the charge upon which defendant is now upon trial, and same tends to and does prejudice the rights of the defendant before the jury, and does not support or tend to support its charge for which he is now upon trial, but does tend to show that, if guilty at all, he would be guilty of murder, an offense of which he has already been acquitted by the jury in a former trial of this cause." This bill is wholly defective. It does not state what the witness Burwell testified to. Under the rules of this court we are not permitted to look at a statement of

facts, unless the bill refers to the statement of facts to complete or make perfect a bill of exceptions. Reasons for objecting to testimony is not stating that said testimony is subject to objections made. In other words, in order for this bill to be complete, it will be necessary either for the testimony complained of from the witness Burwell to be embodied in the bill, or for the bill to refer to the testimony of Burwell in the record before us. Neither was done. Therefore, in the shape this bill is presented, there is no error authorizing this court to review said testimony.

5. Bill of exceptions No. 7 complains that the court erred in not excluding the testimony of H. A. McDonald for the same reason urged in the testimony of the witness Burwell; but the bill is defective in the same particular complained of in bill No. 6, in that it does not state what the testimony of the witness McDonald was. Bill of exceptions No. 8 is in the same condition and complains of the failure of the court to exclude the testimony of A. M. Works.

The question attempted to be covered by appellant's bill of exception, which we hold is defective, is, however, properly raised by bill of exceptions No. 12. This bill complains that the court erred in failing to give the following charge to the jury: "The defendant requests the court to charge the jury to return a verdict for the defendant, and acquit him, for the reason that the testimony does not raise nor tend to raise—does not support nor tend to support—the charge of manslaughter against him, he being on trial herein for that offense." Appellant in this case had on a previous trial been acquitted of the two degrees of murder, and upon this trial was convicted of manslaughter, and his insistence, as stated in the bill, is that, the evidence showing nothing but murder in the first or second degree, he is entitled to an acquittal, and cites us to the cases of *Parker v. State*, 22 Tex. App. 105, 3 S. W. 100, and *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108. This question has also been before this court in the case of *Turner v. State*, 41 Tex. Cr. R. 329, 54 S. W. 579, and *Pickett v. State*, 43 Tex. Cr. R. 1, 63 S. W. 325, 2 Tex. Ct. Rep. 722, as also in other cases. In view of the confusion growing out of the rendition of said opinions, we deem it necessary to review the question presented in the light of the Constitution and laws of this state.

Section 10 of the Bill of Rights provides that a defendant in all felony cases shall have an indictment preferred against him by a grand jury, which indictment must show the nature and cause of the accusation against him, and he is entitled to a copy thereof. Section 14 of the Bill of Rights provides that "no person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a ver-

dict of not guilty in a court of competent jurisdiction." Judge Hurt, in the case of *Hirshfield v. State*, 11 Tex. App. 207, in passing upon the words "same offense" in the last-cited article of the Constitution, uses this language: "Under the Constitution no person shall be twice put in jeopardy for the same offense. What is meant by the term 'same offense'? Does it mean the same offense eo nomine, or the same act or acts? Let us consult our Code. From it we learn that an offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed by this Code. 'An act forbidden,' etc. From this we are not to infer that a single act in every case constitutes an offense. These, however, under this definition, are considered the act which is forbidden or punished by law. To these acts or omissions the Code, in most of the cases, has given names. This, however, is conventional. To the act constituting larceny under the common law the Code gives the name of 'theft.' But, back to the proposition: The Constitution prohibits placing a citizen twice in jeopardy for the same offense. Is the name given to the act or acts which constitutes the offense to control when we are seeking to determine whether it be the same offense or not, or must we not look to the act or acts, or the omissions, prohibited and punished by the Code, in order to determine this question? We must, in determining whether they are the same offense or not, look to the act, acts, or omissions; for these, and not the name by which they are called, are denounced by the Code. We therefore conclude that a person shall not be twice put in jeopardy for the same act, acts, or omission, which are forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in the Code." See, along the same line, *Adams v. State*, 16 Tex. App. 162. Then, under an indictment for murder what is the act, acts, or omission that appellant is being tried for? It is the homicide. It is the killing. If he is acquitted of the killing—that is, any and every form of unlawful homicide—by a verdict of the jury, there is a constitutional inhibition against a new trial for said act, omission or offense. In other words, the Constitution does not contemplate that appellant can invoke the same unless he has had a jury to say by a verdict in a court of competent jurisdiction that he is not guilty of any personal violence to another, where he is indicted for murder. In other words, there is no constitutional inhibition against using what is ordinarily denominated murder evidence to convict one of manslaughter.

If murder in the first and second degrees and manslaughter are different offenses, within the contemplation of the Constitution of this state, then under the first-cited clause of the Constitution one could not be tried for murder and convicted for manslaughter, since the Constitution provides that he must

have an indictment, which indictment must state the nature and cause of the accusation against him. If murder is a distinct offense within the contemplation of the Constitution, then one could not be legally indicted for murder and tried for manslaughter no more than he could be indicted for burglary and tried for arson. He must have an indictment charging the nature and cause of the accusation against him. The degrees of homicide are not distinct offenses, but are merely grades of one common offense, to wit, homicide. Before appellant could ask the charge above quoted, we would have to hold that one could not be indicted for murder and tried for manslaughter. If appellant, as stated, has a jury to return a verdict of not guilty under an indictment for murder or manslaughter, then he can plead this in bar of his subsequent prosecution for the grade of offense for which he is so indicted; but upon the trial of a case of murder, where the jury returns a manslaughter verdict, and it returns for a new trial by reason of reversal or otherwise, it is a *de novo* trial as far as the introduction of evidence is concerned. There is a statutory inhibition, however, against the court, upon the subsequent trial, inflicting upon appellant the punishment for the grade of the offense of homicide of which he had been previously acquitted; but there is neither constitutional nor statutory inhibition against using the same evidence to prove the homicide upon the subsequent trial, and the conviction of appellant of any lower grade of homicide than that of which he had been previously acquitted. Article 782 of the Code of Criminal procedure reads as follows: "If a defendant, prosecuted for an offense which includes within it lesser degrees, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered as an acquittal of the higher offense; but he may upon a second trial be convicted of the same offense of which he was before convicted, or any other inferior thereto." This is the only inhibition against a homicide trial in this state, where a new trial has been granted, the trial thereafter being in every instance *de novo*.

Were it not for this statute, every trial for homicide under the Constitution of this state would be a *de novo* trial, regardless of the previous verdict of the jury, since, as we have seen, there is no constitutional inhibition against the same being a *de novo* trial for every grade of the offense, but the inhibition is simply statutory. It will be seen, from reading the above-cited article, that it only inhibits the penalty for the grade of offense for which he had been acquitted from being imposed in the second trial. If appellant on the first trial is acquitted of murder, how could he be convicted upon a subsequent trial for manslaughter upon evidence

that only suggests murder in the first or second degree, without using the evidence that was introduced upon the first trial in the subsequent trial? We know in practice that the state insists upon getting the witnesses who are cognizant of the facts. Having secured said witnesses, they introduce them on the trial in the first instance. It is left to the judgment of the jury in the first instance to find appellant guilty of either murder in the first or second degree or manslaughter. Then the identical same evidence is alone the proof that the state can adduce upon the second trial, and this statute recognizes that fact, and says that upon the second trial he cannot be punished for the grade of offense of which he has been acquitted, but can be punished for the same or any lower grade of which he has been previously convicted. When a party is indicted for murder under that form of criminal pleading, he can be convicted of any grade of culpable homicide thereunder. This conclusion is fortified by subdivision 9 of article 817 of the Code of Criminal procedure, which reads as follows: "Where the Verdict is Contrary to the Law and Evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as the offense proved." This statute is in line with the reasons above stated, and precludes any other conclusion than that the evidence in each instance can be used to convict of the lower grade of offense, regardless of the previous verdict. If a party cannot get a new trial on the ground that he had been convicted of a lesser grade of offense than he is guilty of, then it follows as night follows day that you can use murder evidence to convict one of manslaughter. If murder is a distinct offense from manslaughter, and not merely a different grade of homicide, and an acquittal of a grade of murder is an acquittal of manslaughter, then, under the Constitution of this state you could not use murder evidence to convict for manslaughter; but they are not different offenses within the contemplation of the Constitution, but, as stated above, simply grades of one common offense, to wit, homicide.

Furthermore, the decisions of this state have uniformly enforced the provision of the last-cited article, and held that where one is being tried for an offense which contains grades, and he is acquitted of the higher grade and convicted of the lesser one, he cannot come to this court and ask a reversal of the case on the ground that the evidence does not support the lesser grade. The authorities are so numerous on this question we do not deem it necessary to cite them. If the grades of homicide are different offenses within the contemplation of the Constitution, why cannot appellant complain that he is convicted of a lesser grade than he was charged with by evidence that only proves

the higher grade? Certainly, if one was indicted for murder and convicted of disturbing the peace, it would not be any answer to his motion for a new trial to say that he had been punished for a lesser offense than he was guilty of under the evidence. We would promptly reply to that character of motion that he had been convicted of an offense of which he had no indictment against him, and it is only on one theory, and one theory alone, that you can indict a man for murder and convict him of aggravated assault, and that is on the legal and constitutional theory that an indictment for murder includes within its legal scope all grades and character of unlawful violence to the person of another, and the different penalties attached to the different grades are not a reason for saying that there is an inhibition in the statutes or Constitution of this state against using evidence of the higher grade to convict of the lower. *Burnett v. State* (decided at the present term and not yet officially reported) 112 S. W. 74. We accordingly hold that appellant's charge was not correct in law, and the court did not err in refusing to give same; and we further state that, to whatever extent any decisions conflict with the views herein stated, they are hereby overruled.

6. Bill of exceptions No. 9 complains that the court erred in failing to give a charge upon self-defense based upon real and apparent danger. This charge was fully covered by the main charge of the court. The charge of the court appears quite full and is as follows:

"(8) A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.

"(9) If from the evidence you believe the defendant killed the said George Highfill, but further believe that at the time of so doing the deceased had made an attack on him which, from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed, and was making such attack on defendant, and if the weapon used by him and the manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant."

In the light of this charge we do not think it was necessary to give appellant's special charge.

7. Appellant further insists the court should have charged on the law of retreat. The evidence in this case does not suggest said issue. It shows that deceased was sitting in appellant's butcher shop, when appellant went in and offered him a violent insult, which deceased immediately resented, and appellant shot deceased to death. Neither of them left the room. There was no retreat on the part of either evidenced by the record, and the law of retreat, therefore, is not involved in this case.

8. Bill of exceptions No. 10 complains that the court erred in failing to give charge No. 3, which in substance tells the jury that if appellant provoked the difficulty with the intention to take the life of deceased he would be guilty of murder, and if they so find they should acquit appellant. We have discussed this question above, and there is no merit in same. The bill further complains that the court erred in not charging the jury as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant provoked the contest with the deceased without any intention of killing or doing deceased any serious bodily injury, and that he suddenly and without deliberation did the act of killing, under the immediate influence of sudden passion arising from an adequate cause, as that term is defined in the main charge of the court, the homicide would be manslaughter. On the other hand, however, if the defendant did not provoke the difficulty with George Highfill with the intention of killing him or doing him serious bodily injury, or if you have a reasonable doubt as to whether or not he did, and further believe from the evidence that defendant shot and killed the said George Highfill to prevent the said Highfill from murdering or inflicting serious bodily injury upon him, the defendant, and not in a sudden transport of passion arising from an adequate cause, then and in either event you will acquit the defendant and say by your verdict not guilty." The latter part of said charge, with reference to self-defense, was covered in the main charge of the court. That portion of the requested charge which presented the issue of manslaughter was pertinent, and should have been given; but, in view of the verdict in this case, it is rendered entirely harmless not to have given same, since the verdict of the jury in this case is for manslaughter.

The court gave the jury the following charge on the question of provoking a difficulty: "A person may have a perfect right of self-defense, though he may not be entirely free from blame, or wrong in the transaction. If the blamable or wrongful act was not intended to produce the occasion, nor an act which was under the circumstances reasonably calculated to produce the occasion or provoke the difficulty, then the right

of self-defense would be complete, though the act be not blameless. But you are instructed that a party cannot avail himself of a necessity which he has knowingly and willingly brought upon himself. Wherever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his safety that he should take life or do serious bodily harm, then the law imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of his offense (if any), which but for such acts would never have been occasioned. Now, if you find and believe from the evidence, beyond a reasonable doubt, that the defendant made use of abusive language to and in the presence and hearing of the deceased, George Highfill, at the time of the fatal difficulty, concerning him, the said George Highfill, under circumstances reasonably calculated to provoke a breach of the peace, and that such language was used for the purpose and with the intent, on the part of the defendant, to provoke the deceased to attack him (defendant), and that said language used by defendant, if any, towards the deceased, was calculated to and did provoke the said George Highfill to make an attack upon the defendant, and that it thereby became necessary or was apparently necessary for defendant (viewed from his standpoint) to take the life of said deceased, then and in that case the defendant would not be justified, upon the ground of self-defense, in killing said George Highfill. But if you, on the other hand, find that the language used by defendant to and in the presence and hearing of deceased was not calculated or intended to provoke a breach of the peace, then and in such case the defendant's right of self-defense would not in any wise be abridged or lessened."

9. The court did not charge on any issue except manslaughter and self-defense. It is true this charge does not tell the jury of what offense appellant would be guilty if he provoked the difficulty with intent to commit a breach of the peace; but this could not injure appellant, since he was only being tried for manslaughter. Now, if the court had given the charge insisted upon by appellant, to wit, that if deceased provoked the difficulty without the intent to kill he would be guilty of manslaughter, it would have been in substance the same charge that the court did give, since appellant, upon this trial, was only being tried for manslaughter. Furthermore, it would have been an offensive instead of a defensive charge, and in the light of the verdict in this case is rendered entirely harmless, since the jury found appellant guilty of manslaughter. To say that appellant could complain that the jury were not charged upon another theory than that which was charged upon, upon which manslaughter could be predicated, is a complaint without merit, and is a matter upon which appellant

cannot be heard to complain. We have before us this kind of a case: The jury found appellant guilty of manslaughter upon one theory that was presented to the jury by the court. Now appellant comes to this court and complains that the trial court should have presented another theory of manslaughter, and asks this court to reverse the case therefor. The above-quoted charge of the court shows that, if appellant provoked the difficulty, he could not justify on the ground of self-defense. In addition to that, the court gave a complete charge on manslaughter. Now, if the jury had been given the theory complained of, could it be rationally argued that they would have disregarded the theory upon which they convicted him and taken the theory that the court neglected to charge? We think not. But the converse would be the more rational conclusion; that is, appellant would have had a better chance to escape punishment in this case by only presenting the theory that the court did present than he would have had if appellant's charge had been given. Under article 723 of the Code of Criminal Procedure of this state, we are not authorized to reverse a case unless the error was calculated to injure the rights of appellant; and by no process of reasoning can we hold that the omission to charge upon the theory of manslaughter suggested by appellant in his bill of exceptions was calculated to injure him, but would simply have served to give the jury additional grounds of convicting him of manslaughter, of which offense he was found guilty.

10. The only other question we deem necessary to review is whether or not the issue of provoking a difficulty was suggested by the evidence in this case. On the trial of the case *W. M. Burrell* was placed upon the stand, and, among other things, testified that he was on the former jury that tried appellant for this homicide. In that trial the defendant testified that somebody, a boy, he thinks, came up to his house and told him to come down to the shop; that he put on his overcoat and went down to the shop; that he went in the back door of his shop, and he found deceased (Highfill) sitting on the opposite side of the room on a stool. Deceased had a pocketknife in his hand, pecking on the bottom of the stool or whittling. He said deceased spoke to him, and said he was sorry to get him out a day like that and he sick. The language used by the deceased was, "I am sorry to drag" or "pull you out a day like this, old man, and you sick; but I have got to have my money," or something to that effect. The language he used was, "Tuck, old man, I am sorry to drag you out a morning like this and you sick; but I have got to have my money," or "I want some money." Appellant testified his reply to deceased was that he (deceased) had robbed or stole out his business, and that he could not pay him any money, or had no money for him—something

like that; that immediately after the defendant made this statement deceased got up out of his chair or off the stool and started towards him (appellant); that he (appellant) pulled his pistol and shot at him. He said he had his pistol in his right-hand overcoat pocket; that he had his hand on his pistol when he walked to the door, or when he stepped to the door, and had his hand on his pistol in his pocket when he used the language he said he used to the deceased. On the trial counsel for the state asked defendant if he thought Highfill would resent what he said to him about robbing and stealing the business out, and he answered that he believed Highfill would resent it. "You asked him whether or not he thought Highfill would resent the remark used as to his robbing or stealing the business out, and defendant answered that he thought Highfill would resent it; and then you asked defendant what he intended to do if Highfill did resent the remark, and he answered that he intended to protect himself if Highfill did resent it. That may not be the exact words, but it is the substance of what he said." This testimony was also reproduced by the stenographer, who took defendant's evidence down at the former trial, and the stenographer's notes show substantially the same as above. Under every decision that has ever been rendered in any court, this evidence clearly shows a provoking of the difficulty. Here we are not left to conjecture as to whether words were intended to provoke a difficulty, but appellant himself admits he used the language expecting that it would provoke a difficulty; that he had his pistol in his pocket and his hand on his pistol, expecting to use same if deceased did resent the insult offered. It is true that the statutes of this state say no verbal provocation shall justify an assault; but we are not discussing that question here. If deceased had been living, and had cut the defendant because defendant said he had robbed him, the insult could only be used in mitigation of deceased's punishment; but any words that are calculated to provoke and do provoke a difficulty, and are so intended, will be and are a basis for a charge on provoking a difficulty. The record before us shows that defendant knew it would provoke a difficulty, or at least thought it would; that he used it for that purpose, and had his weapon ready to shoot if it did cause a difficulty.

11. The court gave the following charge on self-defense: "A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant. If from the evidence you believe that the defendant

killed the said George Highfill, but further believe that at the time of so doing the deceased had made an attack on him which, from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed and was making such attack on defendant, and if the weapon used by him and the manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant."

Appellant complains that this charge is erroneous, because of the following phrase therein: "And the relative strength of the parties and defendant's knowledge of the character and disposition of the deceased"—appellant insisting that the record before us does not show the knowledge on the part of the defendant and the character and disposition of the deceased, and that the relative strength of the parties has nothing to do with this case, since it was a killing by the use of a firearm. We have held that the strength of parties, where firearms are the instruments used to commit the homicide, is not a basis for passing upon the guilt or innocence of the parties. But certainly this clause could not have injured appellant in this case. The record does not show the size of the deceased, and the defendant was before the jury, and they could judge of his size; but certainly no juror could form any conclusion from said statement injurious to the rights of appellant in this case, and, furthermore, the defendant's knowledge of the character and disposition of deceased is made clearly manifest by this record, since they had been partners in the butcher business. The charge is a correct presentation of the law of self-defense. It informs the jury that they must look at the facts from the defendant's standpoint, and that he could defend against an apprehension or expectation or fear of death or serious bodily injury. The charge being ample to protect appellant's rights in this case, it certainly was not error not to give another charge on the question.

There is nothing in this record that requires a reversal of this case, and the judgment is in all things affirmed.

DAVIDSON, P. J. (dissenting). I am unable to concur, and file some of the reasons for my dissent.

Appellant was convicted of manslaughter and allotted the maximum punishment in the penitentiary for that offense. A brief statement of the facts shows that appellant and deceased, George Highfill, had been partners

in the butcher business. Owing to trouble arising between them, appellant had bought the interest of Highfill and continued the business. Just before purchasing Highfill's interest, there came up some words between them, during which conversation appellant said to the deceased that he (deceased) was robbing the business. Deceased drew his knife and threatened to cut the throat of appellant. Shortly afterwards appellant bought out Highfill's interest, and continued to run the same under his own name. A part of the purchase price was credit. Deceased called on appellant several times for money before the deferred payments were due, and at the time of the killing appellant still owed the deceased a deferred payment of \$75, which was not due. Deceased made quite a number of threats against the life of appellant on account of his not paying this money, such as that he would "kill the old ball-headed son of a bitch, and that he would cut his head off," etc. Most of these threats were communicated to appellant. These continued up to within 24 hours of the homicide. On the morning of the homicide appellant was sick, and remained at his residence. Deceased went to the market, and, failing to find appellant, requested appellant's son, who was in charge of the market at the time, to send for his father; that he wished to see him. In response to this call appellant came to the market, where Highfill had located himself in the rear room of the market. Appellant went to the room where deceased was sitting on a chair or stool. A conversation ensued.

Appellant's son was the only witness to the conversation and immediate occurrences attending the tragedy, except the reproduced statements of appellant's testimony on a previous trial. These reproduced statements were to the effect that, when he received the message from deceased to meet him, it being cool weather, he donned his overcoat and placed in its right-hand pocket a pistol and proceeded to the point of meeting. He further stated, substantially, that he anticipated trouble, or that maybe deceased would attack him, and therefore he carried his pistol; that, when he entered the room where deceased was, deceased told him he must have his (deceased's) money; that he (appellant) replied, "You have robbed the concern or the business, and I have no money for you," or substantially such language; that the deceased immediately replied, "You are a God damned liar," and started towards him (appellant) with his knife in a threatening manner as if to make an assault upon him; that, at the time he entered the room where deceased was sitting on the stool, deceased had his knife open, and when the deceased got up and started towards him he told him twice to stop; that he did not, and he (appellant) fired two shots, one as deceased was coming towards him, and the second when he was just in the act of turning. Appellant's son,

hearing the conversation, went to the room where they were, and a portion of his testimony is as follows: "When I got back there Highfill was sitting down in a chair, just getting up, near the north wall, about six or eight feet from the back door leading out into the yard. Papa was standing right in the door, but I don't know whether just inside or outside of it. I don't know what had been said between them before I got back there. When I started back there I heard papa say: 'George, you have not treated me right about this money. It is not due.' I do not know just what George said in reply. I think George said: 'You are a God damn liar.' When he said that he was just raising up from the chair, and had his knife in his hand, with it like this (indicating), and then he started to run towards papa. Papa was standing still at that time, I think, and he told George to stop; but he kept coming, and papa shot. When the first shot was fired, Highfill was whirling to the right." This record further shows that appellant had on a previous trial been acquitted of murder in both degrees, and convicted of manslaughter.

Objection was urged to the introduction of the statements of appellant before the former jury, he not taking the stand in his own behalf on the trial which resulted in this conviction. The bills of exception are perhaps not sufficient to raise these questions, as they do not contain the statements introduced in evidence. This is a sufficient statement of the case to review some of the questions thought to be of importance. Quite a number of exceptions were reserved to the charge as given, some to the omission of the court to charge certain phases of the law, and some to the refusal to give requested instructions asked by appellant. These matters are properly presented by bills, as well as made grounds of the motion for a new trial.

The court's charge on self-defense is criticised: That portion is as follows: "If from the evidence you believe the defendant killed said George Highfill, but further believe that at the time of so doing the deceased had made an attack on him which, from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed, and was making such attack on defendant, and if the weapon used by him and the manner of its use was such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant." Then follows a charge on provoking a difficulty. I believe the special charges requested covering these mat-

ters should have been given, inasmuch as, in my opinion, the charge on self-defense was wrong, and that with reference to provoking a difficulty was not called for by the facts. The charge on self-defense is based upon the supposition that the danger was actual, and not apparent. Under our authorities I believe this charge should have submitted not actual, but apparent, danger. See *Phipps v. State*, 34 Tex. Cr. R. 580, 31 S. W. 397; *Stewart v. State*, 40 Tex. Cr. R. 651, 51 S. W. 907; *Curtis v. State* (Tex. Cr. R.) 59 S. W. 264; *Seeley v. State*, 43 Tex. Cr. R. 66, 63 S. W. 310; *Brady v. State* (Tex. Cr. R.) 65 S. W. 522; and *Graham v. State* (Tex. Cr. R.) 61 S. W. 715.

These cases are directly in point as I understand them. In the *Brady* Case the defendant and deceased were at a wagon on opposite sides. A war of words came up between them. The deceased started around the wagon to where appellant was, drawing his knife as he did so. Just as he turned around the wagon towards the side on which appellant was standing, he (appellant) shot and the deceased was killed. A similar charge to the one under consideration was given in that case, and the judgment was reversed. In the *Seeley* Case, *supra*, trouble came up over a charge that appellant had been killing some horses in a certain brand, which he denounced as false, whereupon the deceased either had picked up or was in the act of picking up an iron bar of considerable weight and length for the purpose of attacking appellant, and appellant shot, and deceased was killed. A similar charge as the one in this case was held error. So the question may be pursued through the other authorities already cited, which I deem sufficient without collating a greater number. The charge in the *Brady* Case, as in perhaps other cases subsequent, has been criticised because it made appellant's defensive theory depend somewhat upon the relative size and strength of the parties. This charge has been criticised where there is no evidence of that character in the record. It would make no difference in regard to the relative strength and size of the parties in a fight with deadly weapons, as a general rule; for the deadly weapon would be as dangerous in the hands of a small man as in the hands of a giant, and appellant's defense should not be located in that manner, especially in the absence of evidence in regard to the question. As I understand the record, the only testimony in regard to size of the parties is that the deceased was about 5 feet 7 inches high, and weighed about 135 pounds. As to the relative strength of the parties, nothing is shown, nor could it well be an issue in the case, because of the fact that there was no contest of strength between them. Deceased never reached appellant. Appellant shot him before he could get to him.

As before stated, I am of opinion that the

issue of provoking a difficulty is not in the case. It certainly is not under the testimony of the son of appellant. I suppose the statements of appellant on a former trial were relied upon to make this an issue in the case. Recurring to that testimony for a moment, it would seem that appellant stated on a former trial that he went to the place where there was some anticipation of trouble. This was at the request of deceased, who had threatened to kill him if he did not pay the money demanded. The money was not due. Appellant armed himself in anticipation of this trouble, and went, as he states, if the trouble came up, prepared to defend himself, and that he intended, if the trouble came up, to take care of himself; that when he reached the place deceased demanded payment of the money, and, in substance, he replied, "You have robbed the concern, or robbed me, and I have no money for you." If provoking a difficulty is in the case, it is from this testimony. Our statute (article 701, Pen. Code) is as follows: "Insulting words or gestures, or an assault and battery, so slight as to show no intention to inflict pain or injury, or an injury to property, unaccompanied by violence, are not adequate causes." Pen. Code, art. 595, is as follows: "No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense." If these statutes mean anything, they mean that verbal provocation will not justify an assault, and can only be given in mitigation. That insulting words do not justify an assault, see *Polk v. State*, 30 Tex. App. 657, 18 S. W. 466; *Barbee v. State*, 34 Tex. Cr. R. 129, 29 S. W. 776; *Timon v. State*, 34 Tex. Cr. R. 363, 30 S. W. 808; *White v. State*, 34 Tex. Cr. R. 153, 29 S. W. 1094; and *Cartwright v. State*, 14 Tex. App. 486. See, also, *White's Ann. Pen. Code*, §§ 981, 1201. The *Polk* Case, *supra*, is, in my judgment, directly in point. This opinion was by the lamented former Presiding Judge Hurt of this court, and in my judgment very clearly states the law. He is also the author of the opinion in the *Cartwright* Case, *supra*. See those cases for a full discussion of the question.

Appellant was called upon to meet the deceased, and at the request of deceased did meet him. Anticipating danger from the previous threats of the deceased, he (appellant) armed himself as a precautionary measure; and it seems from the after facts that he was justified, in so arming himself, under the law. Appellant requested a special charge on this phase of the law, which the court refused. The deceased had stated that he intended to kill appellant if he did not pay the money. The money was not due, and he (deceased) had no right to call on appellant for it. Appellant stated to the deceased in effect, "You have robbed the concern, and I have no money for you." The deceased immediately replied, "You are a God damned

liar," and started at appellant with his open knife. The insulting words of appellant did not afford justification for deceased making this, or attempting to make this, assault with the knife upon appellant. Had he (deceased) been upon trial, he could have used the insulting language of appellant towards him as a mitigation of the penalty; but it did not justify his moving on appellant with his drawn and open knife. Appellant's right of self-defense matured at once, and the fact that he may have used insulting language did not eliminate self-defense; for, as Judge Hurt says, "to use such language to a person is not recognized in law as a provocation when the one so insulted proposed to act under it or justify himself for the assault and its consequences." Under this state of facts, from any standpoint, the defendant's statement, and his son's testimony, that deceased was the attacking party, he (deceased) was not justified in making this attack, or approaching appellant with a view of making the attack, because of the insulting conduct, and left appellant the right to act. The cases cited all support this conclusion, as does the statute law itself. Now, appellant was not in the wrong when he met deceased at his (deceased's) request, and the insulting words that are charged up to him by the state did not put him in the wrong to the extent of depriving him of his right of self-defense. See *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. The *Shannon* Case has been approved in the following cases: *Airhart v. State*, 40 Tex. Cr. R. 470, 51 S. W. 214, 76 Am. St. Rep. 736; *Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *Hall v. State*, 43 Tex. Cr. R. 479, 66 S. W. 785; *Thomas v. State* (Tex. Cr. App.) 51 S. W. 1110; *Hall v. State*, 42 Tex. Cr. R. 444, 60 S. W. 769; and *Johnson v. State*, 43 Tex. Cr. R. 476, 66 S. W. 846.

The charge is further criticised because the jury were not charged that appellant had the right to shoot as long as the danger existed. This charge was not given, but should have been. There were two shots fired. There is a little confusion as to the condition of the parties after the first shot. Some of the testimony put deceased in the act of turning, thus leaving his side to appellant. There is no evidence of an abandonment of the difficulty by deceased. The shots came as rapidly as two shots could be fired from a pistol, or practically so. The accused, under all the authorities in Texas, where the question has been discussed, has the right, where self-defense is the issue, not only to shoot in the first instance to protect his life or his body from serious personal injury, but has the further right to continue shooting until relieved of all such danger, and under the circumstances of this case I am of opinion this phase of the law should have been given. A charge was asked by appellant pertinently submitting this issue to the jury, which was refused by the court.

Appellant requested an instruction to the effect that if he had been previously acquitted of murder in the first and second degree, and the jury should find that evidence on this trial raised murder in the first or second degree, they should acquit. This was predicated upon the fact that he (appellant) had been formerly acquitted of both degrees of murder and convicted of manslaughter. The theory of appellant as to the law in that character of case is that if appellant is acquitted of murder altogether, and convicted of manslaughter, and upon the subsequent trial the facts only show murder, he is entitled to an acquittal. This is a very serious question, and one that the writer has not found in any of the cases in this state to have been discussed elaborately. In *Parker's Case*, 22 Tex. App. 107, 3 S. W. 100, it was decided that where a party had been previously acquitted of murder and convicted of manslaughter, and subsequently tried for manslaughter, the court was in error in charging the jury substantially that the evidence sustaining murder would justify the jury in convicting of manslaughter. The court reversed the judgment because of this charge, and correctly so. It is a fundamental proposition in this state about which there can be no contest or discussion, and the statute so provides, that the court must deliver to the jury a written charge in which he distinctly sets forth the law applicable to the case. Code Cr. Proc. art. 715.

It may be pertinent to suggest at this point that the offense of which appellant stood indicted at the time of his trial was manslaughter. He had been acquitted of murder in both degrees, and the case stood, so far as the state was concerned, on manslaughter. The law applicable to the case, then, was the law applicable to manslaughter and not murder. It would hardly require authorities to sustain this proposition. It is the statute and the Constitution, and it is the unbroken current of decisions in the history of Texas. It may arise sometimes that it is necessary to define higher and lower offense, etc., in order to fit the law to the case on trial, and to explain matters so the jury can get a clear conception of the law applicable to the case they are trying and are to decide. However, in a trial for manslaughter, it is not necessary to instruct with reference to the law applicable to murder for the purpose of enabling the jury to understand the law of manslaughter; for it is an offense distinctly defined and explained by the Code, whose elements are essentially different from murder. Murder is the killing of a human being upon express or implied malice; malice being the distinguishing feature that constitutes murder where the death of a human being is brought about, as against manslaughter, which is an intentional and voluntary killing, but in a condition of mind incapable of cool reflection, and which excludes malice, because, if the mind is cool and deliberate, and

the killing occurs, it is murder, and not manslaughter, it being essential to manslaughter that the adequate cause exists as well as the passion, which the law demands, and which renders the mind incapable of cool reflection. Wherever these combinations exist, murder is excluded. To quote from the Parker Case, supra: "It seems to us that, as the defendant has been acquitted of murder, he can only be tried and convicted of manslaughter. If the evidence shows that he is guilty of murder, he cannot be convicted of that offense, because he has been tried therefor and acquitted. He cannot be convicted of manslaughter, because, if guilty of murder, he is not guilty of manslaughter; the two offenses being essentially different, although grades of homicide. It is true that when the indictment charges murder, and the defendant is on trial for that crime, he may be convicted of any grade of homicide, and, if convicted of a lower grade than murder in the first degree, the conviction will not be set aside because the evidence proves that he is guilty of a higher grade than the one of which he is convicted. *Baker v. State*, 4 Tex. App. 223; *Powell v. State*, 5 Tex. App. 234. But here the defendant was not on trial for murder, and could not be convicted of murder, and yet the court tells the jury to convict him of manslaughter if he is guilty of murder. There is a marked difference between this case and the case of a defendant charged with and on trial for murder. Every indictment for murder includes manslaughter, and the jury may acquit of murder and convict of manslaughter, at their discretion. But manslaughter does not include murder, and a party charged with and on trial for manslaughter cannot be convicted of murder, and especially of a murder of which he has been acquitted."

The Parker Case has been indorsed in all subsequent cases so far as the writer is informed. The Fuller Case, 30 Tex. App. 559, 17 S. W. 1108, recognizes the Parker Case as correctly decided, but in that case it was held that, as appellant was only convicted for murder in the second degree, the rule in the Parker Case did not apply. In Conde's Case, 35 Tex. Cr. R. 98, 34 S. W. 286, 60 Am. St. Rep. 20, this rule was again sustained, as it was in the *Mixon Case*, 35 Tex. Cr. R. 458, 34 S. W. 290; and again it was recognized in the *Scroggins Case*, 32 Tex. Cr. R. 71, 22 S. W. 45. In regard to the *Pickett Case*, 43 Tex. Cr. R. 1, 63 S. W. 325; *Pickett* was convicted of manslaughter. The evidence upon the second trial, which was for manslaughter, he having been acquitted of murder in both degrees formerly, showed manslaughter. Appellant undertook to offset the state's case of manslaughter with evidence for murder. It was held that this was not permissible; that appellant would not be permitted to use evidence in a case in which he had been found innocent of the higher offense to offset a case proved by the state of the lower of-

fense. In other words, these authorities establish the rule that, if the evidence raises the issue of manslaughter on the second trial, the state would have the right to have that issue submitted to the jury, and a conviction, being obtained, would be sustained, but that appellant would not be justified in offsetting this case by facts which proved the higher offense. Const. art. 1, § 14; Code Cr. Proc. arts. 9, 20, 561, 762. It has been the universal rule in Texas that where there are degrees in the offense, that the acquittal of the higher results from a conviction of the lower, and that, where the party has been once acquitted of the higher, there can be no trial of the higher by reason of such acquittal. See *Cheek v. State*, 4 Tex. App. 444, *Jones v. State*, 13 Tex. App. 168, and *White's Ann. Code Cr. Proc. art. 9*, and article 20, and notes, with collation of authorities; also section 537, *White's Ann. Code Cr. Proc.* for collation of authorities.

In *Mixon v. State*, 35 Tex. Cr. R. 458, 34 S. W. 290, this matter underwent rather an elaborate discussion; the opinion being by our late Brother Henderson. *Mixon* had been formerly tried and acquitted of murder, and the indictment on appeal was held to be vicious. The judgment was reversed, and prosecution dismissed. Subsequent indictment was found, charging him with murder, for which he was tried and allotted 25 years in the penitentiary for murder in the second degree. The judgment was reversed. This language is found: "It has been heretofore held by this court that indictments of the character on which appellant has formerly been tried were defective indictments, and so the question here presented for our determination is whether or not, in a case in which a defendant has been tried in a court of competent jurisdiction for murder on an invalid indictment, and has been convicted under such indictment of manslaughter, can he again be put on trial for either murder in the first or second degree? It has been held by this court repeatedly that where an indictment includes different degrees, and a defendant is tried and convicted of a lesser degree, he stands acquitted of all higher degrees of said offense; and in such case it is not necessary that the verdict formally acquit him of such higher grades. The effect of a conviction of a minor grade is tantamount to an acquittal of all grades of offense above that." See Code Cr. Proc. arts. 713, 724; *Jones v. State*, 13 Tex. App. 168; *Robinson v. State*, 21 Tex. App. 160, 17 S. W. 632. The conviction in the case before us was of manslaughter. Unquestionably, if the indictment was a good and valid indictment, it acquitted him of all degrees of felonious homicide above that. See *Parker v. State*, 22 Tex. App. 105, 3 S. W. 100; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108; *Conde v. State*, 35 Tex. Cr. R. 98, 34 S. W. 286; *Harvey v. State*, 35 Tex. Cr. R. 545, 34 S. W. 623; *Coleman v. State*, 43 Tex. Cr. R. 280, 65 S. W. 90.

"The proposition now before us is: The indictment in the present case being defective and invalid to the extent that a legal conviction thereunder could not be maintained, does the acquittal under such an indictment of murder in the first and second degrees bar a prosecution on a new and sufficient indictment for said offenses?" To this question there is but one answer, whether viewed from the provisions of the Constitution (article 1, § 14), from legislative enactment (Code Cr. Proc. arts. 9, 20, 561, 762), or judicial opinion; and that is that wherever a party is placed upon trial for murder under a bad indictment, and there has been an acquittal of any offense charged in it, it can be pleaded in bar of a prosecution on a valid indictment. Our Constitution provides that "no person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." It will not be questioned that the district court in which appellant was convicted is a court of competent jurisdiction, nor that he was acquitted of murder in both degrees and upon a valid indictment; and so it is that wherever a party is tried in a court of competent jurisdiction, and an acquittal is secured, it makes that acquittal a bar against subsequent prosecution for the same offense, regardless of the validity of the indictment. See *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40.

But the matter does not rest alone with the constitutional provision, which ought to be and is the controlling law in this state. Wherever the Constitution speaks, the Legislature and the judiciary must bow in submission to the will of the people as therein expressed; but the question does not rest here. Our Code of Criminal Procedure (article 561) provides: "The only special pleas which can be heard for a defendant, are (1) that he has been before convicted legally in a court of competent jurisdiction of the same accusation, after having been tried upon the merits for the same offense; (2) that he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular." This article apparently draws a distinction between conviction and acquittal; but it is not necessary here to notice that difference, nor the reason for the difference. It will not be contended, maintained, or sought to be maintained, that either an acquittal or a conviction under a valid indictment would not constitute a bar to further prosecution for the same offense." This is so under our jurisprudence, as it was at common law. Our Constitution and statutes, however, take one step in advance of that position; for it says, when a party has been once tried by a jury and acquitted in a court of competent jurisdiction, he can never again be put on trial for that offense, and it would make no difference how irregular the pro-

cedure may have been. The state's case is at an end, and the defendant has been acquitted. If this is true, under our Constitution and laws, with reference to an indictment that is bad on its face, how much stronger the reasoning would be that it would constitute a bar where the indictment was entirely valid and formal in all its allegations. There sometimes arises questions where learned or unlearned writers of opinions draw fine distinctions with great ability, or with less shrewdness defining law, seeking to define this expression or that expression used in constitutional provisions or statutes; but we understand such fine distinctions are not to be indulged when they have a tendency to override the plain provisions of the Constitution, or give it some technical meaning which deprives a citizen of the rights that he has reserved to himself in the organic law. In our state it seems to be rather a fundamental proposition, and so stated in our statutory law, that the wording of our written law shall be interpreted or given the ordinary meaning of those words; that is, according to the plain import of the words used. If our Constitution means anything when it says that no person for the same offense shall be twice put in jeopardy of life or liberty, or that he shall not again be put upon trial for the same offense after a verdict of not guilty before a court of competent jurisdiction, it means what it says. The language used is plain, unambiguous, and would hardly need construction. What may be an offense, or the same offense, has been discussed by various courts, but always, or practically so, in connection with the particular statute, or the environments of the case made under the particular statute. The Legislature has been confided, it seems, with rather ample authority to create offenses, and has done so with marvelous energy. That body is authorized to define and classify offenses, and make each independent of the other, and the punishment in each offense dependent upon the particular definition stated, and the courts would not be authorized to interfere with these offenses or give them a different meaning from that intended by the Legislature.

In the case of *Hirshfield v. State*, 11 Tex. App. 207, Judge Hurt went into somewhat of a discussion as to what is the same offense in regard to two statutes involved in that decision. The question at issue in the *Hirshfield Case* was whether or not a party could be convicted for swindling under a certain statute, when that statute provided, if the facts constituted any other offense than swindling, the party should not be charged with swindling; but he should be charged under the other statute and with the other offense. He discussed the subject from the standpoint of these two statutes, that the same acts were necessary to constitute a violation of both. When viewed in the light of the question discussed by that able jurist,

the Hirshfield opinion is correct; but it has no application to a prosecution where the offense has degrees, as is the case here. To quote from Judge Hurt: "But to the proposition. Is the defense, to wit, former conviction of the swindling, a legal one to the indictment for uttering this forged instrument?" After quoting the section of the Constitution already cited, this question was asked: "What is meant by the term 'same offense?' Does it mean the same offense *eo nomine*, or the same act or acts? Let us consult our Code. From it we learn that an offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed by this Code. From this we are not to infer that a single act in every case constitutes an offense. In a great many offenses several acts are necessary to constitute an offense. These, however, under this definition are considered the act which is forbidden or punished by law. To these acts or omissions the Code, in most of the cases, has given names. This, however, is conventional. To the act constituting larceny under the common law, the Code gives the name of 'theft.' But back to the proposition: The Constitution prohibits placing a citizen twice in jeopardy for the same offense. Is the name given to the act or acts which constitute the offense to control when we are seeking to determine whether it be the same offense or not, or must we not look to the act or acts, or the omissions, prohibited and punished by the Code, in order to determine this question? We must, in determining whether they are the same offense or not, look to the act, acts, or omissions; for these, and not the name by which they are called, are denounced by the Code. We therefore conclude that a person shall not be twice put in jeopardy for the same act, acts, or omission, which are forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in the Code. A conviction, therefore, for swindling, which rests upon and is supported alone by the act of passing as true the instrument set forth in this indictment, is a full and complete satisfaction of the law which forbids, and upon conviction prescribes a punishment for, said act. The act of knowingly passing as true a forged instrument is denounced by positive law, with a punishment annexed which is prescribed by the Code. This act, as was foreseen by our lawmakers, enters into and constitutes the vital elements of at least two offenses, to wit, swindling and knowingly uttering a forged instrument as true. The act, however, being the offense, and not the name, a conviction for this act would be a complete satisfaction of the violated law. But we are met just here with the proposition that, as the defendant could not have been convicted, under the indictment for swindling, of the offense of knowingly passing as true a forged instrument, therefore he cannot plead this conviction for

swindling to a prosecution for uttering a forged instrument. We are aware that in *Thomas v. State*, 40 Tex. 36, and the text-books generally, this proposition is stated, and as a general proposition we think it is correct. But it must be borne in mind that there is another principle applicable to this subject of jeopardy, which is quite distinct from that which obtains in pleas of former conviction or acquittal generally. This is the doctrine of carving, and is explicitly recognized and effectually applied in a number of cases by our Supreme Court and Court of Appeals. *Quitow v. State*, 1 Tex. App. 47, 28 Am. Rep. 396; *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *State v. Damon*, 2 Tyler (Vt.) 387; *State v. Williams*, 10 Humph. (Tenn.) 101; *Laupher v. State*, 14 Ind. 327; *State v. Nelson*, 29 Me. 329; *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234; *Rex v. Benford*, Burr. 980; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369."

Without discussing the question of the doctrine of carving as applicable to the plea of former conviction and acquittal, as announced in the *Quitow* and other cases, and followed in a long line of subsequent cases, we pass a portion of the *Hirshfield* Case to this point: "We will not discuss the very perplexing question which arises in a case where the first indictment covered a part only of the acts or grounds which are occupied by the allegations of the second; for a conviction of the swindling in this case required every act, and utilized the whole ground which is covered by the offense of uttering a forged instrument. The knowledge, intent, and acts which constitute uttering a forged instrument were not only the necessary means in this case, but were actually applied to obtain the conviction of swindling. This being the case, the conviction for swindling could be interposed to a prosecution for uttering the forged instrument, and if this can be done the effect would be to take the case out of the operation of article 443, which defines another offense, thus accomplishing the very ends expressly forbidden by article 773 of the Penal Code." Then, to sum up, Judge Hurt says: "We therefore conclude: (1) That under the Constitution, in regard to jeopardy, 'no person shall be twice put in jeopardy for the same act or omission, whether the offense be the same *eo nomine* or not'; (2) that a conviction of the swindling in this case can be pleaded in bar to a prosecution for uttering a forged instrument; (3) and that this conviction (being a good bar to a prosecution for uttering the forged instrument) has the effect to take the case out of the operation of the law defining another offense, and therefore illegal." The case was reversed and the prosecution dismissed. The *Hirshfield* Case was followed in the latter case of *Witherspoon v. State* (Tex. Cr. App.) 37 S. W. 434, and in *Scott v. State*, 40 Tex. Cr. R. 108, 48 S. W. 523. Judge Hurt also participated in the rendi-

tion of the Witherspoon Case, which reaffirms the doctrine announced in the Hirshfield Case.

If I understand the doctrine of the Hirshfield Case, carried to its legitimate end and purpose, the state would be in a very serious condition in regard to appellant's case here, because, whether the conviction was for murder or manslaughter, the identical act had to be economized in order to obtain the conviction; the difference between the two offenses of murder and manslaughter being found in the fact that one requires malice and the other the absence of malice, and by a party whose mind was actuated by a want of sufficient ability to contemplate the nature and consequences of his act. The act of shooting was the same, whether it was manslaughter or murder. The parties engaged in the prosecution are the same. The difference, as before stated, between the offense of murder and manslaughter, is found in the peculiar facts which distinguish the two offenses under the statutory definition of each. To have followed the rule insisted on by the prosecution in this case, as applied to the Hirshfield and Witherspoon decisions, would have exonerated appellant absolutely from all prosecution by reason of his acquittal of the two degrees of murder, if it be a fact that it was the same offense, for the real act was the same. Under that decision appellant should have been discharged. Judge Hurt did not understand the Hirshfield Case, when he wrote it, should have the effect sought to be given it now, and this is found in the further fact that while upon the bench he sanctioned the Parker Case, 22 Tex. App. 105, 3 S. W. 100, and the Fuller Case, 30 Tex. App. 559, 17 S. W. 1108, and the Conde Case and Mixon Case, *supra*, and that question as decided in those cases, as long as he remained upon this court; and that he also adhered to the decision of the Hirshfield Case when the question there involved came again before this court is demonstrated by the decision in the Witherspoon Case, *supra*, and, further, he did recognize both lines of decisions to be correct.

Judge Hurt also rendered an opinion, which it may not be amiss to refer to for a moment—the Whitford Case, 24 Tex. App. 489, 6 S. W. 537, 5 Am. St. Rep. 896. In that case, which was a charge of conspiracy to commit burglary, appellant set up the fact that he had previously been convicted of the burglary. The question came as to whether or not, having been convicted of the burglary, the facts used in convicting of the burglary could be used to prove the previous conspiracy. A plea denominated "former jeopardy" was interposed, which was stricken out by the trial court. The question turned on whether or not the ruling of the trial court was correct. Judge Hurt, speaking for the court, held in the negative, placing it purely and simply upon the statute, which provides that, when the conspiracy to commit a felony

has been agreed to, the offense of conspiracy is complete, whether the crime about which the conspiracy was formed was executed or not; that they were different offenses, made so by the statute, occupying different territory, and usually requiring or based upon different facts—and the doctrine was there laid down that if the same evidence had been required in both cases, conspiracy and burglary, the doctrine of carving would apply, which is but a different way of putting jeopardy, and in such case the accused could not be prosecuted for the second offense. It would hardly be contended, in a homicide case, where the facts show conclusively the homicide was committed in the perpetration of robbery, that appellant could be convicted of manslaughter, because the Legislature has made the offense of murder in the way indicated, and manslaughter with its entirely different intents and constituent elements different offenses. A homicide committed in the perpetration of rape would not support or justify a conviction for manslaughter, simply for the reason the Legislature has provided the other way. The Legislature had the power to carve out offenses and grade them, such as is done in homicide. The Hirshfield Case was not discussing such offenses.

The trial of an accused person, finding him guilty of an offense of the lower grade, rather than the higher charged in the indictment, is such an acquittal of the higher charge as will protect him from danger of conviction of the higher offense on a second trial, and the authorities so hold, and that, when he moves for a new trial, such motion is based on the issue which has been determined against him, and he therefore waives his constitutional guarantee that he shall not be twice put in jeopardy for the offense of which he was found guilty, only so far as is necessary to obtain a new trial on that issue. He does not waive his constitutional right as to those degrees of the offense of which he was by the verdict expressly or inferentially acquitted; nor can he be retried for any higher grade of offense than that of which he was found guilty on the former trial. Const. art. 1, § 14; Code Cr. Proc. arts. 9, 20, 561, 762. The cases in this state have already been cited in the former part of this opinion. See, also, *Lopez v. State*, 2 Tex. App. 204; *Black v. State* (Tex. Cr. App.) 68 S. W. 683; *Coleman v. State*, 43 Tex. Cr. R. 280, 65 S. W. 90; *Davis v. State*, 39 Tex. Cr. R. 681, 47 S. W. 978; Code Cr. Proc. art. 590. In addition to those I desire to cite other cases, as follows: *State v. Leavitt*, 87 Me. 79, 32 Atl. 787; *State v. Leavitt*, 87 Me. 72, 32 Atl. 789; *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *Lewis v. State*, 51 Ala. 1; *Fields v. State*, 52 Ala. 348; *Nutt v. State*, 63 Ala. 180; *Smith v. State*, 68 Ala. 424; *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154; *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; *People v. Backus*, 5 Cal. 275; *People v. Apgar*, 35 Cal. 389;

Jordan v. State, 22 Ga. 545; Brennan v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325; Sipple v. People, 10 Ill. App. 144; State v. Tweedy, 11 Iowa, 350; State v. Clemons, 51 Iowa, 274, 1 N. W. 546; State v. Hornsby, 8 Rob. (La.) 583, 41 Am. Dec. 314; State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599; State v. Desmond, 5 La. Ann. 398; State v. Byrd, 31 La. Ann. 419; State v. Dennison, 81 La. Ann. 847; State v. Lessing, 16 Minn. 75 (Gil. 64); Morris v. State, 8 Smedes & M. (Miss.) 762; Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225; State v. Ball, 27 Mo. 324; State v. Ross, 29 Mo. 32; State v. Kattlemann, 35 Mo. 105; State v. Smith, 53 Mo. 139; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Campbell v. State, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417; Slaughter v. State, 6 Humph. (Tenn.) 410; Livingston v. Commonwealth, 14 Grat. (Va.) 592; Stuart v. Commonwealth, 28 Grat. (Va.) 950; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 121, 14 Am. Rep. 748.

It has also always been held that where an indictment contains different counts, and the accused has entered a general plea of not guilty, and has gone to trial upon the indictment as presented, and was convicted upon one of the counts, and the verdict was silent as to the other counts, the legal effect of such verdict is an acquittal of all other counts except that specified by the jury. See Wharton, Criminal Pleading and Practice, § 740; Nabors v. State, 6 Ala. 200; Nancy v. State, 6 Ala. 483; Bell v. State, 48 Ala. 684, 17 Am. Rep. 40; Stephen v. State, 11 Ga. 225; Hayworth v. State, 14 Ind. 590; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Bitings v. State, 56 Ind. 101. There are several other cases from Indiana holding the same doctrine. See, also, State v. McNaught, 36 Kan. 624, 14 Pac. 277; State v. Phinney, 42 Me. 384; State v. Watson, 63 Me. 128; Edgerton v. Commonwealth, 5 Allen (Mass.) 514; Morris v. State, 8 Smedes & M. (Miss.) 762; Swinney v. State, 8 Smedes & M. (Miss.) 576; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; State v. Cofer, 68 Mo. 120; State v. Gannon, 11 Mo. App. 502; Guenther v. People, 24 N. Y. 100; People v. Dowling, 84 N. Y. 478; Girts v. Commonwealth, 22 Pa. 351; Livingston v. Commonwealth, 14 Grat. (Va.) 592. In this state it is also the settled law that where an indictment contains more than one count, and the court submits but one of the counts, it is tantamount to an election, which is binding upon the state. Of course, the election would be binding if the representative of the state were to make such an election, and it is the settled rule in Texas that, wherever a party has pleaded to an indictment and been placed upon trial, jeopardy attaches at once and as to all counts to which he pleads. See Rudder v. State, 29 Tex. Cr. App. 262, 15 S. W. 717. The fact that under some circumstances the discharge of the jury impairs appellant's right of jeopardy does not infringe the rule stated in the

Rudder Case, as a general proposition. See, also, Powell v. State, 17 Tex. Cr. App. 345.

The doctrine laid down by the Parker Case, and that line of authorities, including Pickett's Case, is believed to be correct by the writer. If the constitutional provisions (article 1, § 14) and the statutory enactments as found in the Code of Criminal Procedure (articles 9, 20, 561, subd. 2, and article 762, and notes) are of any effect, or to be regarded and given effect, then appellant's contention is correct. Article 561, subd. 2, reads as follows: "That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular." Article 20, supra, provides: "By the provisions of the Constitution an acquittal of the defendant exempts him from a second trial or a second prosecution for the same offense, however irregular the proceedings may have been; but if the defendant shall have been acquitted upon trial in a court having no jurisdiction of the offense, he may, nevertheless, be prosecuted again in a court having jurisdiction." Article 9, supra, provides: "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." Article 762 of the Code of Criminal Procedure thus provides: "If a defendant, prosecuted for an offense which includes within it lesser degrees, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him, or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered an acquittal of the higher offense; but he may upon a second trial be convicted of the same offense of which he was before convicted, or any other inferior thereto." Article 9 is a copy of section 14 of the Bill of Rights. Murder of either degree is not the "same offense" as manslaughter. Manslaughter is not the "same offense" as negligent homicide; negligent homicide is not the "same offense" as manslaughter; neither are the "same offense" as assault with intent to murder; and there is a broad distinction between aggravated assault and murder, manslaughter, negligent homicide, or an assault with intent to murder. If an accused party can be convicted of manslaughter on evidence which shows only murder in the first or second degree, then the Legislature used very inapt words to define their intent and purpose, and their power to use appropriate language in defining murder and manslaughter was rather limited. That they made them different offenses is evidenced by the fact that they defined them differently, even giving them different names.

Article 751 of the Code of Criminal Procedure provides: "Where a prosecution is

for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information." Article 752, Code Cr. Proc., provides: "The following offenses include different degrees: (1) Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder. (2) An assault with intent to commit any felony, which includes all assaults of an inferior degree." An indictment charging murder, which means murder in the first and second degrees, under article 752, may also include manslaughter, negligent homicide, and assault with intent to murder, or any other culpable homicide designated in statute. Now, if the party be acquitted of murder, and is again placed upon trial for manslaughter, and the evidence shows murder, and excludes manslaughter, and a conviction can be sustained for manslaughter upon that evidence, then upon the same theory and upon like evidence he could be convicted of negligent homicide in either or both degrees, homicide in either or both degrees, or an assault with intent to murder. This proposition would hardly be maintained as correct, especially with reference to negligent homicide, for under either one of those offenses the intention to kill must be wanting in order to constitute the act negligent homicide, yet culpable homicide is included by virtue of this statute as a degree of murder. *Flynn v. State*, 43 Tex. Cr. R. 407, 66 S. W. 551. There is a marked distinction between the proposition that a party may not be convicted on a subsequent trial of an inferior grade of homicide upon testimony showing only the higher grade, when he has been acquitted of the higher grades on the former trial and the proposition that he may be convicted of the lesser grade when originally on trial on all grades before any acquittal occurs. In the first instance he has been acquitted on all higher degrees; in the second he has not been acquitted of any degree. The main reason for this distinction is found in the doctrine of jeopardy and former acquittal or conviction, as the case may be. There is no constitutional inhibition as to one, but there is positive prohibition as to the other, not only so in the Constitution, but expressly so by reason of the act of the Legislature cited, *supra*. So much for the general proposition. We might pursue comparisons and illustrations in theft, forgery, and other crimes; the principle being the same.

In regard to the question as presented in the case, I do not believe the charge requested by appellant to acquit if the evidence showed murder in the first or second degree should have been given, unless there was wanting evidence to prove the state's case of manslaughter. *Scroggins and Pickett Cas-*

es, supra. But the writer is fully persuaded that where the state has no evidence upon which to predicate a conviction for manslaughter, or negligent homicide, as the case may be, and must rely alone upon evidence of murder, where an acquittal has been obtained for that offense, then the accused would have a right to an instruction of acquittal; otherwise, it occurs to me that the constitutional guaranties and legislative enactments would be more than worthless and idle vagaries. Be it understood that this court did not ordain the Constitution, nor did it include or insert one single plank in it, nor create the acts of the Legislature; but this court's mission as a court is simply to enforce these provisions of law as we find them, and as long as the acts of the Legislature are in accordance with, or rather not antagonistic to, the Constitution, so far as the courts are concerned, they must stand until repealed by legislative authority.

For the reasons indicated in regard to the errors of commission and omission, referred to in this case, the judgment ought to be reversed, and the cause remanded.

GRIFFIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14 1908.)

1. WEAPONS (§ 17*)—CARRYING PISTOL—EVIDENCE.

The state, in rebuttal of defendant's contention, on a prosecution for carrying a pistol, that he was carrying it home, may show he had turned aside from his journey home and become engaged in a personal difficulty.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 27; Dec. Dig. § 17.*]

2. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTION.

Though the complaint, on which was based the information, shows that it was originally filed in a justice court, yet it, with the information, having been filed in the county court many months before the trial there, is to be assumed that the case was legally filed there, where alone it might be properly tried.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1144.*]

Appeal from Nacogdoches County Court; C. D. Mims, Judge.

Cal Griffin appeals from a conviction. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appellant was charged by information in the county court of Nacogdoches county with the offense of unlawfully carrying on and about his person a pistol. On trial he was convicted, and his punishment assessed at a fine of \$125 and 30 days' confinement in the county jail.

The evidence was undisputed that appellant had on his person a pistol. His defense was, in substance, that the pistol had been

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

given to him by one Bishop to carry to his (appellant's) home, and that when discovered with the pistol upon his person he was in the act of carrying the pistol to his home. The record is full of testimony touching a personal difficulty between one I. M. Shepherd and a brother of appellant, in which, to some extent at least, appellant intervened. An objection is made that all this testimony, in respect to the difficulty, was improperly received, and that its effect was to prejudice appellant's cause. We believe that some of the details of this difficulty might well have been omitted, and yet it would have been very difficult, if not impossible, to have shown the facts, and developed the possession by appellant of the pistol and the circumstances of his having the same, without going to some length into the details of this difficulty. Indeed, an intelligent account of the circumstance of appellant's having the pistol would have been incomplete without a substantially full statement of the difficulty in question.

Besides, in view of the contention of the state in rebuttal of the claim of appellant that he was carrying the pistol home, it was, under all the decisions, competent to be shown that he had turned aside from his journey home and become engaged in a personal difficulty. This was submitted to the jury in this language: "You are further instructed that if you believe from the evidence that the defendant was given the pistol by one Lee Bishop, who was stopping at the home of defendant, with the request from said Bishop that he (defendant) take said pistol for him to his (defendant's) home, and you further believe from the evidence that defendant thus came into the possession of said pistol, and that at the time he was seen with the same he was proceeding on his way home along a route a person would usually or ordinarily travel in going from the place where defendant claims to have been given said pistol by the said Lee Bishop to defendant's said home, you will acquit the defendant; and this, although you may believe from the evidence that defendant, while thus proceeding on his way home, became involved in a difficulty with one I. M. Shepherd, or any other person, and that in said difficulty defendant used said pistol as a weapon of offense or defense. The right or wrong of the defendant's said acts in said difficulty will not be considered by you as determining the guilt or innocence of defendant in this case, except in so far as they may show or tend to show the purpose of defendant in having said pistol; and if upon the whole of the evidence (not considering the right or wrong of defendant's acts in said difficulty, or those of his brother, Mart Griffin) you have a reasonable doubt of defendant's guilt, you will acquit him. You are charged that, while the defendant would have the right to carry said pistol home from the place he claims to have obtained it under the circumstances he claims to have received it, it would be his duty

while he so carried it to proceed on his way home with it in a reasonable time after he received it, and along a route a person would usually or ordinarily travel in going to defendant's home from the place he claims to have received the pistol from said Lee Bishop, and he would not have the right to turn aside or deflect from the route he was so traveling in going to his home and voluntarily engage in a quarrel or fight with another person, or so join his brother, Mart Griffin, in a voluntary quarrel or fight with another person; and this, although you may believe from the evidence that the defendant was lawfully carrying said pistol up to such time." This charge follows the cases of *Navarro v. State*, 50 Tex. Cr. R. 328, 96 S. W. 932; *Cordova v. State*, 50 Tex. Cr. R. 353, 97 S. W. 87; *Granger v. State*, 50 Tex. Cr. R. 488, 98 S. W. 836; *Irvin v. State*, 51 Tex. Cr. R. 52, 100 S. W. 779; *Quinn v. State*, 50 Tex. Cr. R. 209, 96 S. W. 33; *Brown v. State*, 51 Tex. Cr. R. 423, 102 S. W. 406. We have considered the special charges requested by appellant, and think, so far as proper, they were included in the general charge of the court.

2. Motion was made in the court below to quash the information. From the bill of exceptions it appears that this motion was made for the reason that the same is not based upon any complaint filed in the county court; that the complaint filed, upon which the information is based, shows that it was originally filed in the justice court of precinct No. 6, Nacogdoches county, Tex., and there being nothing in the record showing how the complaint got into the county court of Nacogdoches county, Tex., and there being no authority at law to transfer complaints filed in the justice court as a basis for the information and prosecute same in said last above-named court, and because, further, the complaint shows upon its face that it was not made under the authority and official seal of any officer designated by the statute and being authorized to take complaints for the prosecution in the county court, it appearing as alleged that the complaint shows to have been made before a justice of the peace of Nacogdoches county, and not before him as an ex officio notary public. The complaint, as it appears in the record, was made by B. L. Jopling on the 6th day of May, 1907. It bears the file mark of the county clerk of Nacogdoches county, of date May 7, 1907. The trial was had on the 28th day of January, 1908. As the justice of the peace had no authority, in view of the penalty of imprisonment attached to the offense, to try the case, and inasmuch as the complaint, with the information, was filed in the county court many months before the trial, it is to be assumed that the case was legally filed in the county court, where alone it might be properly tried.

3. The case is essentially one of fact, and the jury by their verdict having affirmed the

judgment on the facts adverse to appellant, we believe that we should not interfere. It is, therefore, ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

GRANT et al. v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

1. LOTTERIES (§ 29*)—EVIDENCE—SUFFICIENCY. Evidence held to sustain a conviction of conducting a lottery, in violation of Pen. Code, art. 373.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 34; Dec. Dig. § 29.*]

2. LOTTERIES (§ 3*)—WHAT CONSTITUTES.

Every drawing, where money or property is offered as prizes to be distributed by chance according to a specified scheme or plan, and a ticket or tickets sold which entitles the holder to money or property, and which is dependent upon chance, is a "lottery."

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4245-4252; vol. 8, pp. 7710, 7711.]

Appeal from Tom Green County Court; Milton Mays, Judge.

Sid Grant and another were convicted of conducting a lottery, and they appeal. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellants were tried together before the court without the intervention of a jury, and the punishment of each defendant assessed at a fine of \$100, for carrying on a lottery.

The evidence in the case is as follows: Sid Grant, one of the defendants, after being duly sworn, testified: "I have lived in San Angelo, Tex., about two months. My partner and I, Sid Terry, have been engaged in the business of custom tailors at San Angelo for about two months. I am one of the defendants in this case. The other defendant is my partner, Sid Terry. We have established a suit club in our tailoring business, which club numbers 52. It is necessary for each member of the club to pay \$1 a week for 26 weeks to become a member of the club. The club has a drawing every seven days, on each Saturday night. In the drawings all of the 52 members are interested. The club runs for 26 weeks, and one suit is disposed of at each drawing. All of the members pay \$1 per week. The member drawing a suit of clothes may remain in and pay his \$1 or he may withdraw from the club, in which event we seek to get another member in his place, and the retiring member is no longer considered a member of the club. If we could not get a new member, the drawings continue with the remaining numbers. We value the suit of clothes which is drawn at \$26, and the suit is worth that amount of money. The right to

participate in the drawing costs \$1, which amount is the week dues of each member. We have had drawings every Saturday night for the past two months, at each of which drawings one of the members drew a suit of clothes. We had a drawing on Saturday, March 7, 1908, at which John Holcomb, one of the members of the club, drew a suit of clothes. He has not yet received the suit of clothes, because there was some delay at the factory. We took his measure, and, after sample being selected by him, sent the order to Meyer & Co., at Chicago, to be made up. The suit of clothes was not present at the time of the drawing. This is the manner in which all suits are made and delivered to the successful party at each drawing. These drawings come off at our place of business. We are also custom tailors, and sell suits to any customer who wants them, by selecting sample, taking measure, and sending them off to be made at some tailoring establishment. We have a room, which is our place of business, in the city of San Angelo, where we take the orders for suits of clothes. The manner and mode of our drawing is as follows: We have checks, numbered from 1 to 52, which are put into a bag and are shaken by some interested party (that is, a member of the club), and one check is drawn from this bag by a disinterested party (that is, a person who is not a member of the club). Each check is identified by the number on it, and when the check is drawn the member having the corresponding number is the successful party. We take the member's application for membership, and at the same time the member pays his \$1 and enters the club we give him a number. We furnish the checks for the drawings, and keep possession of the same from one drawing to another. When the night of the drawing arrives, the members come to our place of business, or at least 6 or 7 of them, when one of the members present either goes and gets the bag containing the checks, or we deliver to him the bag when called upon, and the same is shaken, and the drawing takes place as I have stated before. If a member has remained in the club and paid his \$1 for one week or more, he is entitled to credit for the amount he has paid in. Any member may withdraw at any time he desires, and at the time he withdraws he is entitled to a credit of the amount he has paid in, to be paid to him by us in merchandise; that is, he may buy a suit of clothes, an overcoat, or a pair of pants, for the regular purchase price, and receive a credit for the amount that he has paid in. The suit of clothes that was drawn and disposed of to John Holcomb on Saturday, March 7, 1908, was so disposed of in pursuance to the scheme that I have just told the court. It is not optional with us to discontinue a member at any time without his consent, if he makes his payments. In starting our club, we solicited the members. We had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a piece of foolscap paper with numbers on it from 1 to 52, and when the person would become a member we would write his name on the paper and give him a number; each person joining the club paying \$1. On Saturday night we check up to see whether the members have paid, and when we get that fixed up, and get our books fixed, we take out the membership, and look over that, and see whether the club is filled. We then wait for the members to come in, and wait generally until 6 or 7 come, to see that everything is fair. We put the checks into a bag; but we have nothing to do with the drawing of the number, nor has any one in our employ anything to do with the drawing. The drawing then takes place, as I have before stated. When the number is drawn out, it is shown to us, or one of us. We then refer to the corresponding number, and the party holding the same is entitled to a suit of clothes, to be selected from our samples. We then take his measure, after the party has selected the kind of cloth and style, and mail the same to our tailors to be made up. If upon any Saturday night all of the 52 numbers are not taken, we then take from the bag as many checks as the club is short, and the numbers are taken out to correspond with the numbers not taken, and the drawing then takes place by us putting all the numbers which are taken by the members into a bag, and one of them is drawn by a disinterested party. The party drawing has no means of ascertaining what number he is to draw. We have no way of controlling which number the successful party draws, nor have either of us any interest in which one of the members is successful. We give a suit of clothes at each drawing. If the successful party drawing the suit of clothes is not present, we then notify him that he has drawn a suit, so that he may come in and have his measure taken. He has the right to select from about 400 samples which we have in our place of business. Mr. Holcomb has selected his suit of clothes, and we have taken his measure and sent his order off to be made up. Neither my partner, nor myself, nor any one connected with us, has anything to do with the drawings. We do not take any number, nor participate in any manner in same, except as above testified to. There are no blanks in the drawings. No drawings are determined by means of dice or a wheel. When the 26 drawings have taken place, there have been 26 members drawn a suit of clothes, and when a member has paid in as much as \$26 he is entitled to a suit of clothes, if he has not been successful at a drawing. If new members have been taken into the club before the 26 drawings are completed, and paid in different amounts, they become members of a new club. We keep 52 members in a club. The club is a continuous proposition."

Under this evidence we are thoroughly convinced, and so hold, that the appellants are

both guilty of conducting a lottery within the contemplation of the law of this state, and have clearly violated both the letter and the spirit of the lottery statute. In the case of *Randle v. State*, 42 Tex. 582, the Supreme Court of this state approved the following charge of the trial court: "If the jury believe defendant did, as charged in the indictment, dispose of money or property by lottery, in prizes distributed by chance, according to a specified scheme or plan, then the jury would be authorized to find a verdict of guilty, and assess the punishment by fine not less than \$100, nor more than \$1,000. That each and every drawing, where money or property is offered as prizes to be distributed by chance, according to a specified scheme or plan, and a ticket or tickets sold, which entitle the holder to money or property, and which is dependent upon chance, is an offense. That it made no difference whether every ticket entitled the holder to a certain sum or not, if there is an additional sum dependent upon the distribution by chance over the certain sum, and that it makes no difference by what name it is called, but it is the distribution or offer to distribute the prizes in money by chance, to induce persons to buy tickets therein, and the sale of tickets, and drawing of the numbers, which constitute a lottery, and an offense against the law." This definition clearly covers appellants' offense, and places their acts within the statute which defines a lottery. See article 373, Pen. Code; Cyc. vol. 25, p. 1639, subd. 8; *People v. McPhee*, 139 Mich. 687, 103 N. W. 174, 89 L. R. A. 505; *State v. Randle*, 41 Tex. 292; and *Barry v. State*, 39 Tex. Cr. R. 240, 45 S. W. 571.

We accordingly hold that the judgment of the lower court is correct, and it is therefore in all things affirmed.

HUDSPETH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

1. HUSBAND AND WIFE (§ 137*)—WIFE'S SEPARATE PROPERTY—SALE BY HUSBAND.

A sale by the husband of his wife's personal property is invalid, unless he had express authority from her to sell or unless she ratified the sale.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 520; Dec. Dig. § 137.*]

2. LARCENY (§ 7*)—OWNERSHIP OF PROPERTY.

An unauthorized sale by the husband of his wife's personal property is invalid unless ratified by her, and when not ratified the buyer acquires no title; and a subsequent sale of the same property by the husband with the consent of the wife does not make the husband guilty of stealing the property from the first buyer.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 19; Dec. Dig. § 7.*]

Appeal from District Court, San Augustine County; W. B. Powell, Judge.

Bruce Hudspeth was convicted of cattle

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

theft, and he appeals. Reversed and remanded.

Wm. McDonald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of cattle, and his punishment assessed at two years' confinement in the penitentiary.

The only question we deem necessary to pass upon is the sufficiency of the evidence. The state's evidence shows that appellant sold a cow and calf for some household furniture to the prosecuting witness. The cow and calf, at the time of the sale, were in a field at the home place of appellant. Various other head of cattle were also in the field. The state's evidence further shows that appellant subsequently, with the consent of his wife, sold the cow and calf in question to a third party. Upon this state of facts the state rests its conviction for theft, on the part of appellant, of the cattle. The defense testimony shows that the cattle in question belonged to the wife, and that she never had given her consent for the cattle to be sold to the prosecuting witness Howard. Appellant also swears that he did not sell the animals in question to the prosecuting witness. Appellant admits he bought some furniture from prosecuting witness, for which he still owed him. The wife admits the furniture was brought to her house. So the above is, in substance, the evidence in this record.

We therefore have a case, from the state's standpoint, of a sale by the husband of the wife's personal property without her consent, acquiescence, or knowledge. There must be in law an affirmative, or at least a clear, ratification of an unauthorized sale by the husband on the part of the wife of her property before there could be any valid sale, or there must be an express authority given the husband by the wife to sell the property. The above detailed facts do not show either express authority or ratification. In the case of *Magee v. White*, 23 Tex. 194, in passing upon a similar question, the Supreme Court of this state used the following language: "The husband may be her agent to make a contract that will bind her separate estate, but it is not to be presumed that he is her agent because he is her husband. The agency must be an agency in fact, and not a thing to be presumed because of the relation of husband and wife." This decision has been followed by a long line of decisions of the Supreme Court—among others, *Gossard v. Lea*, 3 Tex. Civ. App. 6, 21 S. W. 703. See, also, *Owen v. New York*, 11 Tex. Civ. App. 292, 32 S. W. 189, *Hamilton v. Brooks*, 51 Tex. 142, and *Kempner v. Comer*, 73 Tex. 200, 11 S. W. 194.

The evidence showing, as above suggested, that the husband had no legal right to sell

the wife's cattle, then no title passed to the prosecuting witness by such supposed sale, even conceding that said sale took place. There being no legal sale to the prosecuting witness of the cattle, in the nature of things appellant could not steal the cattle from the prosecuting witness. It follows, therefore, that the evidence is wholly insufficient to support this conviction.

The judgment is therefore reversed, and the cause is remanded.

MURPHY v. SUMNERS, Co. Atty.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

1. MANDAMUS (§ 72*)—MINISTERIAL AND DISCRETIONARY ACTS.

Since mandamus lies only to compel the performance of a ministerial act, it does not lie to compel a county attorney to institute a criminal prosecution, which involves discretion.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.*]

2. COURTS (§ 247*)—COURT OF CRIMINAL APPEALS—JURISDICTION.

The Court of Criminal Appeals has no jurisdiction of an appeal from an order denying an application for a writ of mandamus to compel a county attorney to institute a prosecution.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 247.*]

Appeal from Dallas County Court, H. F. Lively, Judge.

Mandamus by Joseph Murphy against Hatton W. Sumners, county attorney of Dallas county, to compel the latter to institute a criminal prosecution. From a judgment refusing the writ, plaintiff appeals. Affirmed.

Crawford & Lamar, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. The record in this case discloses, in substance, the following facts: The county attorney had presented to him a valid affidavit and in formation, properly prepared, against certain supposed violations of law in the city of Dallas, and the demand was made that said county attorney should put his official signature to the information and file and prosecute parties who were alleged in the affidavit and information as having violated a misdemeanor law of this state. The county attorney refused to do so. Thereupon a petition was filed by Joseph Murphy, through his attorneys, in the county court of Dallas county, asking the court to grant a mandamus to compel the county attorney to file said prosecution and to prosecute same. Upon the hearing of said petition the writ of mandamus was refused by the county court, and from said refusal an appeal was prosecuted to this court. These are, in substance, the facts upon which this case rests.

We hold, in the first place, this court has no jurisdiction. Furthermore, the writ of

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mandamus would not lie against the county attorney to institute a prosecution.

The function of a writ of mandamus is simply to force a party to perform a purely ministerial act, and the institutions of prosecutions by the county attorney are not purely ministerial acts, since there is a large measure of learning and discretion required and to be exercised in instituting and maintaining prosecutions by said officer, and very clearly it would be beyond the province of this court to grant a mandamus for the purpose of securing the object sought by the petition in this case.

Therefore the writ of mandamus is refused, and the petitioner in this case is ordered to pay all cost in this behalf incurred.

CORNETT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

WITNESSES (§ 396*)—CONTRADICTORY STATEMENTS—EXPLANATION.

Defendant, charged with burglary, claimed that he purchased from F. the razor alleged to have been stolen from the house burglarized. One of defendant's witnesses first denied all knowledge of the transaction, but after consultation with defendant's counsel testified that he saw defendant buy the razor from F. *Held*, that defendant was then entitled to prove by the witness that F.'s cousin had threatened to hurt witness if he testified against F., and that this was the reason for the conflict in his testimony.

[*Ed. Note.*—For other cases, see *Witnesses*, Cent. Dig. §§ 1261, 1262; Dec. Dig. § 396.*]

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Felix Cornett was convicted of burglary, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with burglarizing a house occupied by three named parties. Some silverware and a razor were taken from the house. Appellant was found in possession of the razor, at which time he stated he bought it from Ed Floyd. Ed Floyd was brought in, and the matter came up again, and appellant continued to state that he had gotten the razor from Ed Floyd, and when interrogated with reference to other articles he stated that Floyd had hid them under a log. The parties went to the log on a certain road and failed to find the articles. They then went to another road, Floyd and appellant being with the officers, and near that road appellant found the silverware, or pointed it out, and it was recovered. Floyd was not on trial, but was used by the state as a witness, and proved an alibi, and thus, from his standpoint, was not guilty of the burglary. Appellant introduced evidence that he bought the razor from Floyd, paying him 75 cents

for it, and also evidence to the effect that Floyd's alibi was untrue, placing Floyd in such position that he could have committed the burglary and taken the goods.

Among other witnesses tendered by appellant was Jerry Fisher. When Jerry Fisher was first placed upon the stand, upon direct examination, he stated, in substance, that he knew nothing of appellant having purchased the razor from Ed Floyd, and that he did not remember of meeting Ed Floyd and defendant in the road at the Dunbar place. The bill further recites that this witness was not at that time cross-examined by the state; that after the witness retired from the stand appellant's counsel consulted with him, and placed him back upon the stand as a witness; that he then testified he saw defendant buy the razor from Ed Floyd. Appellant's counsel further asked this witness upon direct examination if anybody had threatened him, and if that was why he did not testify when first placed upon the stand, to which question and answer the state objected, because of its immateriality, in the nature of hearsay, and the state could not be bound or prejudiced by outside parties making threats to witnesses. These objections were sustained by the court and witness was not permitted to answer. If witness had been permitted to answer, he would have replied and stated that a cousin of Ed Floyd had threatened to hurt him if he testified about anything against Ed in the case.

We are of opinion this testimony was admissible. Jerry Fisher, when placed upon the stand, denied any knowledge of the transaction. Appellant's defense was largely hinged upon the fact that he bought the razor from Floyd. He introduced evidence to show that he did. Jerry Fisher, one of his main witnesses, was one of those upon whom he relied to prove that particular fact. When first placed upon the stand he denied any knowledge of the transaction. After consultation with appellant's counsel it was ascertained that he had been threatened, and this constituted his reason for not telling the fact in regard to the purchase from Floyd by appellant of the razor. This was a very important matter in the case. Fisher's testimony was directly in aid of appellant's defense, and it was very important that he should be permitted to explain, if he could, why, when first placed upon the stand, he denied all knowledge of the transaction. We are therefore of the opinion that this was of such importance that the rejection of this testimony should reverse the judgment.

We are of opinion that the other matters complained of are not of such moment as to require a revision.

For the error indicated, the judgment is reversed, and the cause is remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

COLEMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908.)

1. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION ELECTION—PUBLICATION OF RESULT—ENTRY ON MINUTES OF COURT—STATUTORY PROVISIONS.

Under the express provisions of Rev. Civ. St. 1895, art. 3391, an entry by the county judge on the minutes of the commissioners' court, showing the publication of the order of court declaring the result of a local option election and prohibiting the sale of liquors, is prima facie evidence of the fact of publication.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 44; Dec. Dig. § 36.*]

2. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION ELECTION—PUBLICATION OF ORDER DECLARING RESULT—ENTRY ON COURT MINUTES—DUTY OF JUDGE.

The act of the county judge in entering on the minutes of the commissioners' court the fact of publication of the order of the court declaring the result of a local option election is essentially ministerial, he being required by law to make it, in the sense of having the authentic evidence of the publication entered; and whether he himself writes the entry or causes it to be transcribed by another is immaterial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 44; Dec. Dig. § 36.*]

3. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION ELECTION—PUBLICATION OF ORDER DECLARING RESULT—ENTRY ON COURT MINUTES—ACT OF JUDGE.

The entry on the minutes of the commissioners' court showing publication of the order of court declaring the result of a local option election held in 1894, was entirely written by the county clerk on page 131. On page 132 appeared an order, signed by the county judge, stating that the above and foregoing six pages of the minutes had been read over in open court and were correct. *Held*, in view of the great lapse of time and absence of any showing by the then county judge or clerk, the effect of the certificate of the judge was to adopt the entry by the clerk as the official act of the judge, and to evidence the fact that it was made under his direction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 44; Dec. Dig. § 36.*]

4. INTOXICATING LIQUORS (§ 238*)—PROSECUTIONS—VIOLATION OF LOCAL OPTION LAW—EVIDENCE.

The witness to whom it was alleged the illegal sale of liquor was made testified that he asked accused if he had any whisky, and accused said, "No," but that he could order witness some; but, witness stating that he wanted it at once, accused said witness could borrow some until his order came, upon which he gave accused an order and paid for it. Presently T. entered, and upon witness stating that he had ordered whisky and wanted to borrow some, T. told accused to let witness have a quart of T.'s whisky. Witness could not swear that accused heard his talk with T. Accused testified that he did not hear the talk, and did not tell witness that he could borrow of T.; but all he heard was T.'s request for him to give witness a quart of T.'s whisky, and supposed that T. was making a present of it. *Held*, that the evidence raised the issue whether the transaction was a loan, such as to constitute a sale by accused, or whether it was a gift by T.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324, 325, 329; Dec. Dig. § 238.*]

5. CRIMINAL LAW (§ 741*)—TRIAL—NECESSITY FOR INSTRUCTIONS.

It is the court's duty in a criminal case to submit every defense and question of fact raised by any evidence, without reference to the court's opinion, or whether the testimony is cogent or slight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

Appeal from Coleman County Court; F. M. Bowen, Judge.

Dave Coleman was convicted of violating the local option law, and he appeals. Reversed and remanded.

Woodward & Baker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the county court for unlawfully selling intoxicating liquors in violation of the local option law. He was tried thereafter at the April term, 1907, of the county court of said county, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

There are a number of questions raised on the appeal, many of which were considered and decided adversely to appellant in another case pending in this court. There is one matter, however, which we desire to treat at somewhat more length than has heretofore been done. On the trial, in making proof that local option had been legally adopted in precinct No. 7, Coleman county, Tex., the state introduced a certified copy from the minutes of the commissioners' court thereof, certifying that the publication of the result of the local option election theretofore held had been duly made. This certificate is as follows: "The State of Texas, County of Coleman. I hereby certify that the order declaring the result of the local option election held at Santa Anna, Texas, on the 9th day of June, 1894, for justice precinct No. 7, Coleman county, Texas, was published in the Coleman Voice, a newspaper published in the town of Coleman, Coleman county, Texas, for four successive weeks; that is, for five weekly issues of said paper. H. A. Orr, County Judge of Coleman County, Texas." This certificate was duly authenticated by the county clerk of Coleman county, Tex., and evidenced the fact that same was a true and correct copy of a certificate entered by the county judge declaring the publication of the result of such election, as same appears of record in the minutes of the commissioners' court of said county. It was sufficient under the law to evidence due publication of the result of such election, and made out the state's case.

Rev. Civ. St. 1895, art. 3391, provides: "An entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court shall be held sufficient prima facie evidence of such fact of publication." To rebut the case so made by the

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state, appellant introduced one Wood, who testified that he was then county clerk of Coleman county, and custodian of the minutes of the commissioners' court thereof; that he was acquainted with the handwriting of both H. A. Orr and H. D. Walker; that in 1894, at the time the above-quoted order was made, Orr was county judge of Coleman county, Tex., and Walker was county clerk of said county; that the order declaring the result of the election was entirely written by the county clerk, H. D. Walker, and said Orr's name was signed to said order by said Walker; that is, that said order was written by, and said Orr's name was written in the handwriting of, said H. D. Walker, the clerk, and that there was no other order pertaining to this matter in the minutes of the commissioners' court that he had been able to find. It further appears by the testimony of this witness that the order above quoted was written on page 131 of volume E, Minutes of the Commissioners' Court of Coleman County. On page 132 of the same minutes this witness testified that he found the true signature of said Orr at the bottom of the minutes, and attested by H. D. Walker, county clerk, stating that the above and foregoing six pages of the minutes of the commissioners' court are true and correct, and the order introduced herein is included in the minutes of the court which are approved and signed up by H. A. Orr, county judge; such minutes being approved and signed up by Orr in his own handwriting. This order of approval is as follows: "It is ordered by the court that the above and foregoing six and one-half pages of writing, containing all the minutes of the acts of the honorable commissioners' court of Coleman county, Texas, at the August term, 1894, thereof, and this day, August 18, 1894, read over in open court be and the same are hereby approved, and that court adjourned. H. A. Orr, County Judge of Coleman County, Texas. Attest: H. D. Walker, County Clerk of Coleman County, Texas." It further appears that the order above quoted is on another and different page from the original signatures of Orr, the county judge, and Walker, the clerk, and there is other business transacted by the court between these signatures and the said order; that the order above quoted constitutes about one-fourth of a page in the book, and the remaining six pages relates to other business transacted by the court, which had no reference whatever to the local option election in question.

We held in the case of Walker v. State, 106 S. W. 376, that the entry required to be made by the county judge on the minutes of the commissioners' court need not be made by him in person; it being sufficient if he caused the entry to be made while acting in his official capacity. Discussing that question, Judge Brooks says: "The only other question we deem necessary to review is whether or not the county judge could write out the certificate, or dictate same and have the

clerk copy the same upon the minutes of the commissioners' court. We hold that he could. The mere fact that the clerk did the manual labor of transcribing the order upon the minutes either from the copy furnished by the county judge, or wrote the order upon the minutes under dictation of the county judge, there being no question or cavil over the fact that the county judge was directing the entry of the certificate, would not vitiate the certificate. There could be no merit in the insistence that the county judge should, with his own hand, write the certificate upon the minutes, unless the merit lay in the fact that everybody knew the handwriting of the county judge. The plith and point of the whole matter lies in the fact that in the official capacity the certificate is entered or caused to be entered by the man who is acting county judge at the time it is necessary to make the certificate. We have held that any county judge can make the certificate, whether he be the one that presided over the commissioners' court at the time the election was held or not. See Crockett v. State, 40 Tex. Cr. R. 173, 49 S. W. 392. If any judge can enter the order, as held in the above-cited case, then certainly there is no merit in the contention that the county judge has to enter the order with his own hand. We accordingly hold that the certificate was sufficient."

It will be observed in this case that the testimony of County Judge Orr was not produced, nor was the testimony of Walker, who was then county clerk, taken. Whether these parties, or either of them, are now living or dead, we cannot say, nor are we advised. The election took place in 1894, and the result and publication of result appears to have been duly made. The act of the county judge in making the entry on the minutes of the commissioners' court is essentially ministerial. He is required by law to make it in the sense of having the authentic evidence of such publication entered in the minutes of the commissioners' court. Whether he shall himself write such order with his own hand, or cause same to be transcribed, is, as we conceive, wholly immaterial. Now, in this case it appears that the proper entry was made in the right book, at the right time, and in the handwriting of a bonded official occupying the most intimate relations to the judge, and transcribed at length on page 131 of volume E, Minutes of the Commissioners' Court. The certificate introduced in evidence authenticating the minutes of this term of the court declares that the six pages of the minutes of the commissioners' court of Coleman county preceding page 132, on which appears the acknowledged signature of the county judge, had been "read over in open court," and it was declared that the same be approved. This implied, of necessity, if the recital is true, that the county judge had read the minutes of the court which appeared on the pre-

ceding page 131, and the same necessity implied that such entry, appearing on page 131, had been approved and adopted by him as his own act. We think, in view of all the circumstances, the great length of time since the entry was made, the absence of any showing by the county judge or county clerk, Orr and Walker, that in fact such entry was not made by the consent of and under the authority of the county judge, that the legal effect of the final certificate of the county judge is in express terms to legalize, ratify, and adopt the entry made by the clerk as the official act of the county judge which the law requires him to make, and to evidence the fact that same was made under his direction.

We think, however, that this case must be reversed for the following reason: The sale in question was alleged to have been made to one Isaac McHorse. McHorse testified, in substance: That on the 24th day of December, 1906, he approached appellant and asked him if he had any whisky, and he (appellant) said, "No," but that he could order him some, and "I said, 'No; I want it now,' and he said I might borrow some from somebody until mine could come." That he then gave appellant an order for a quart of whisky, and paid him the money. That about this time Bob Taylor came into the house. "I told him I had ordered a quart of whisky through Mr. Coleman, and wanted to borrow a quart until mine came. He told the defendant to let me have a quart of his whisky, which the defendant did. I told said Taylor, when my whisky came, defendant would let him have it." On cross-examination he said that the conversation between himself and Taylor took place near the north side door, and the defendant was behind the counter on the south side of the room; that this room was some 18 or 20 feet wide, and the defendant was near the south side and across the room from where they were; that he could not swear and would not state it to be a fact that the defendant heard the conversation between himself and Taylor. On redirect examination he declared, however, that appellant took part in the conversation, and that he and Taylor were talking loud enough for him to hear them, but he does not know whether he heard all he said or not. Appellant testified in his own behalf as follows: "I never heard any conversation between the witness McHorse and Taylor, and never told the witness that Taylor would loan him the whisky. All that I heard said, Mr. Taylor and Mr. McHorse came up there to the counter where I was. Mr. Taylor said, 'Dave, give McHorse a quart of my whisky,' and I understood from that he was making him a present of it, and I had no knowledge or belief that he was loaning it to him. Mr. Taylor stated in this connection that Mr. McHorse wanted the whisky for his Christmas eggnog, and I supposed from that that he was making him a present of it." This tes-

timony clearly raises the issue between the state and defendant as to whether there was a loan of whisky from Taylor to appellant under such circumstances as to constitute the transaction under our ruling a sale, or whether, as claimed by appellant, the transaction evidenced a gift of the whisky by Taylor to McHorse.

In this state of the record appellant requested, among others, the following special charges: (1) "You are further instructed in this case that, although you may believe that the witness McHorse borrowed the whisky from one Bob Taylor, still you will not be authorized to convict the defendant unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant knew that same was a loan, and aided and abetted or encouraged the said Taylor to loan, if he did, the witness McHorse the whisky in question; and if you have a reasonable doubt as to this matter it will be your duty to acquit the defendant." (2) "You are further instructed in this case, if you believe from the evidence that the witness McHorse intended to borrow the whisky alleged to have been sold in the indictment from one Bob Taylor, but that said Taylor intended the whisky in question as a gift, and not a loan, or if you have a reasonable doubt as to these matters, it will be your duty to acquit the defendant, and say by your verdict 'Not guilty.'" While these special instructions do not with exact correctness apply the law to the testimony, they are nevertheless sufficiently accurate to directly call the attention of the court to the issue entirely omitted in the court's general charge. Indeed, the last requested instruction quite pointedly directs the attention of the court to the issue raised by the evidence, and which appellant was entitled, as a matter of right, to have submitted to the jury. It requires no authority to sustain this proposition, so often laid down, that it is the duty of the court in every case to submit every issue and question of fact to the jury where there is any evidence raising the defense, and this without reference to the court's opinion, and without reference to whether the testimony raising such issue is cogent or slight. The jury are arbiters and triors of all matters of fact. Every appellant in every case has the right under appropriate instructions to have the jury pass on every defense raised by the evidence. The testimony in this case directly raises the issue that the transaction between Taylor and McHorse was a gift, and neither a sale nor a loan. In this condition of the record this issue should have been submitted to the jury. The court submitted only the question of a sale, under the form of a loan. The matter of gift was not mentioned in his general charge, nor, indeed, referred to.

We cannot too strongly urge upon the trial courts the importance in every case of sub-

mitting every issue to the jury. What the jury might have thought about the matter, if submitted to them, we cannot know. We do know that the issue was raised by the evidence, and that same was not submitted. Our Supreme Court, in the recent case of *Harpold v. Moss*, 109 S. W. 928, has thus stated the rule: "It is peculiarly the province of the jury to determine the credibility of witnesses and the weight to be given to the testimony, and for a court to decide that the testimony is entitled to no credit, because overborne by contradictory testimony, or so contrary to circumstances proven as to render it improbable, is to improperly assume the functions of a jury."

There are a number of other questions raised in the record, most of which have been fully discussed by us in other cases decided at the late Austin term of the court, and do not seem to require further treatment at this time.

For the error pointed out, the judgment is reversed, and the cause is remanded.

OWENS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 19, 1908. Rehearing Denied June 13, 1908.)

1. LICENSES—OCCUPATION TAX—DISCRIMINATION.

Acts 29th Leg. p. 217, c. 111, § 1, imposes an annual occupation tax of \$5,000 on persons engaging in the business of purchasing assignments of unearned wages. Section 2 provides that the act shall not apply to persons procuring such assignments to pay for necessities of life for the assignor's family, the purchase of a homestead for him, or for any article necessary for the assignor's pursuit of his employment, etc., where the assignments are made directly to the person from whom the purchases are made, or where the assignments shall not be taken at a discount. *Held*, that the act is discriminatory, because it puts a tax upon a class and exempts other classes amenable to the tax, and hence is violative of Const. art. 8, § 1, requiring taxes to be equal and uniform, and section 2, that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax.

2. CONSTITUTIONAL LAW—OCCUPATION TAXES—CLASS LEGISLATION.

The act is violative of Const. U. S. Amend. 14, in that it is in restraint of the freedom of trade, denies equality before the law, denies the right of the citizen to act, and is class legislation.

Appeal from Bexar County Court; Robt. B. Green, Judge.

M. F. Owens was convicted of engaging in the business of procuring assignments of unearned wages without having paid an occupation tax, and appeals. Reversed, with directions to dismiss.

Onlon & Henry and T. J. Newton, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

BROOKS, J. An information was filed against appellant in the county court of Bexar county, Tex., on the 27th day of January, 1906, charging her with unlawfully engaging in the business and occupation of procuring assignments and transfers of wages not earned and not due and payable at the date of such assignment and transfer, without having first paid to the state of Texas the sum of \$5,000 as an occupation tax. The information alleges that appellant had taken and purchased more than three assignments of unearned wages not due and payable during the month of January, 1906, and further alleges that said purchases and transfers of wages were not for necessities, or for any purpose legalized under the act of April 15, 1905. In the trial of the case a jury was waived and the facts support the allegations in the information.

Appellant's first insistence is that Acts 29th Leg. p. 217, c. 111, which imposes said tax, is unconstitutional, because said act exempts from its provisions any person, firm, or corporation taking, accepting, purchasing, or procuring such assignments or transfers to pay or secure the purchase price for the necessities of life for the family of the assignor, or of the purchase price of a homestead of the assignor, or of improvements or repairs thereon, or for any article necessary for the use of the assignor in the pursuit of his employment, or for the payment of life or accident insurance premiums, dues, or assessments, where such assignments or transfers are made directly to the person, firm, or corporation from whom such purchases are made, or to whom such premiums, dues, or assessments are payable; the exception, as appellant insists, from its said provisions of said persons, firms, or corporations, constituting a privileged class, being grossly discriminative, and not an equal and uniform tax in violation of article 8, §§ 1 and 2, of the Constitution of the state of Texas. Section 1 of said act reads as follows: "Be it enacted by the Legislature of the state of Texas: There is hereby imposed an annual occupation tax of five thousand dollars for state purposes upon every person who, in his own behalf or as agent for another, shall engage in the business of taking, purchasing or procuring assignments or transfers of wages not earned or not due and payable at the date of such assignment or transfer, whether such assignment or transfer is made absolutely, conditionally or as security for each separate county in which such person may engage in such business, either in his own behalf or as agent of another." Section 2 provides that the commissioners' court of each county shall have the right to levy one-half of the state tax above stated and authorizes incorporated cities or towns to also levy one-half of the state tax. Section 3 reads as follows: "Any person shall

be deemed to be engaged in the business referred to in section 1 of this act, who shall take, accept, purchase or procure, directly or indirectly, either in his own behalf or as the agent of another, more than three such assignments or transfers during any calendar month: Provided, that this act shall not apply to or impose a tax upon any person, firm or corporation, taking, accepting, purchasing or procuring such assignments or transfers to pay or secure the purchase price of the necessities of life for the family of the assignor or the purchase price of a homestead of the assignor, or of improvements or repairs thereon, or for any article necessary for the use of the assignor in the pursuit of his employment, or for the payment of life or accident insurance premiums, dues or assessments where such assignments or transfers are made directly to the person, firm or corporation from whom such purchases are made or to whom such premiums, dues or assessments are payable, or where such assignment made for any such purposes shall not be taken or accepted at a discount."

The first ground upon which appellant insists that said act is unconstitutional is that the proviso in same constitutes a privileged class, being grossly discriminative, and not an equal and uniform tax, and in violation of article 8, §§ 1 and 2, of the Constitution of the state of Texas. Section 1, art. 8, of the Constitution reads as follows: "Taxes shall be equal and uniform." Section 2, art. 8, of the Constitution states that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." It will be seen that the proviso of the act above cited exempts from its provisions all dealers in the necessities of life, the seller of a homestead, or dealers in the necessities for the use of the assignor in his employment, all persons making repairs on homesteads, and all life and accident insurance companies. We think appellant's objection to this law is well taken. Suppose, as appellant in his able brief insists, a wage earner's wife is ill. The physician advises an operation as absolutely necessary to save her life. He has no money. His salary is not yet due. The surgeon refuses his services until the money is paid or guaranteed. The wage earner has no property save his own wages, not yet due. When he tries to sell his wages to procure the money to save the wife of his bosom and the mother of his children, the act of April 15, 1905, designed for his protection (?) stares him in the face and says: "Thou shalt not."

However, reverting to the proviso under consideration, the Legislature may classify the subject of taxation, and these classifications may, as they will, be more or less arbitrary; but, where the classification is made, all must be subjected to the payment of the tax imposed who, by the existence of

the facts upon which the classification is based, fall within it, unless exempted under some other constitutional provision. Here we have parties exempted from this tax if they take a transfer of the wages for necessities of life, purchase of a homestead or improvements thereon, for any article necessary for the use of the assignor in the pursuit of his employment, or the payment of life or accident insurance premiums, etc., where such assignment or transfer was made direct to the person, firm, or corporation from whom such purchases are made or to whom such premiums, dues, or assessments are payable. What difference would it make to the wage earner whether he transferred his wages directly or indirectly for these matters? Why should one be forced to pay this tax if he bought the wage earner's right to future pay any more than for any other services or property that he might see fit to transfer his wages for? In fact, the whole act is so unconstitutional it is not necessary to discuss it. It is discriminative, it is unjust, it is unequal, and we so hold. A long line of authorities support the constitutional provision that the taxes must be equal and uniform. Some of them are as follows: *Pullman Pal. Car Co. v. State*, 64 Tex. 274, 53 Am. Rep. 758; *Rainey v. State*, 41 Tex. Cr. R. 254, 53 S. W. 882-889, 96 Am. St. Rep. 786; *Ex parte Overstreet*, 39 Tex. Cr. R. 474, 46 S. W. 425; *Hoefling v. San Antonio*, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; *Ex parte Jones*, 38 Tex. Cr. R. 482, 43 S. W. 513; *Fahey v. State*, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182; *S. A. & A. P. Ry. v. Wilson* (Tex. App.) 19 S. W. 910. We accordingly hold, as stated, that the tax is discriminatory, unjust, and invalid, because it puts a tax upon a class and exempts other classes equally amenable to the tax, and no legal or just reason could be assigned that they were not so amenable.

We furthermore think said act is unconstitutional in that it violates the fourteenth amendment to the Constitution of the United States, in that it is in restraint of the freedom of trade, denies equality before the law, is a denial of the right of a citizen to act, and is class legislation. As aptly said by Judge Snyder in the case of *State v. Goodwill*, 33 W. Va. 183, 10 S. E. 237, 6 L. R. A. 621, 25 Am. St. Rep. 863: "A person living under the protection of this government has the right to adopt and follow any lawful industrious pursuit, not injurious to the community, which he may see fit. And as incident to this is the right to labor or employ labor, to make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, and convey property of every kind." Is not a man's wages or his time "property"? If so, has he not the right under the Constitution to sell and convey such property? If a law

be passed that prohibits the purchase of his "time" or labor, does it not abridge his right of contract? Does it not deprive him of selling what is his? Does it not follow that a prohibitive tax upon parties who would buy his labor deprives the laborer of the right to sell "original foundation of other property"? "The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression." What possible good could flow from a statute of the kind under consideration we are at a loss to know. To say that a man working for wages, whatever the amount of the wages may be, can only sell his time for certain purposes, and if he does sell for those purposes not authorized by the statute the party to whom he sells must pay a \$5,000 tax to the state, is a ruthless invasion of the right of free contract, an abridgment of personal liberty and the right of property, since the laborer's muscle is all the property he has, in many instances, and an invasion of the Constitution of this state and of the United States; and we so hold. Authorities supporting the last proposition, in addition to the one last cited, are *S. A. & A. P. Ry. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315.

In passing upon these questions we wish to express our indebtedness to the able counsel who prepared the brief in this case. It is full of authorities and replete with arguments showing the unconstitutionality of the act in question.

For the reasons suggested, we hold that the act is unconstitutional, and the judgment is reversed, and the prosecution ordered dismissed.

BASS et al. v. TOLBERT.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 17, 1908.)

1. BROKERS (§ 32*)—EMPLOYMENT—PERFORMANCE—AGREEMENT TO SERVE OPPOSITE PARTY—VALIDITY—PUBLIC POLICY.

A broker, who is employed to exercise his abilities on behalf of his principal, cannot, without his principal's knowledge, agree to represent the other party to the transaction; such agreement being contrary to public policy and unenforceable, though the original principal was not injured, the agent intended no wrong, and the other party acted in good faith.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 25; Dec. Dig. § 32.*]

2. BROKERS (§ 32*)—ACTS FOR BOTH PARTIES.

A broker may act as the agent of two or more principals in the same transaction, if his duties to each are not such as to require him to do incompatible things, or if his acts are with full knowledge and consent of both parties.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 25; Dec. Dig. § 32.*]

3. BROKERS (§ 38*)—EMPLOYMENT—VIOLATION OF CONTRACT—PLEADING.

Defendant B., with whom G. had listed land for sale, learning that plaintiff desired to purchase it, requested to be permitted to make the sale, and informed plaintiff that he had G. bound to sell the land \$2.50 per acre cheaper than G. would sell it to plaintiff. Plaintiff authorized B. to offer G. the amount he asked for the land, less \$72 interest on a loan, if it could not be bought for less, B. agreeing not to close the trade with any other party until plaintiff could buy the property at G.'s price. B. informed plaintiff that G. refused to take less than \$2,850 and the \$72 interest, and that the offer at that price would be kept open until the next day, but pending the negotiations B. and the two other defendants purchased the land for themselves, to plaintiff's damage. *Held*, that a petition alleging such facts was not defective as alleging a contract between plaintiff and B. which was invalid as a violation of B.'s duty to G.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 38.*]

4. PARTNERSHIP (§ 54*)—EXISTENCE—EVIDENCE.

Defendant B., a broker for the sale of certain land in H. county for the owner, sold it to himself and defendants M. and S., who were land brokers in E. county. B. listed H. county lands for sale with M. and S.; and, in case they found buyers in E. county, the commission would be divided between them and B., but they had no interest in the sale of H. county lands made by B. to purchasers procured by him. After B. had sold the land in question, in alleged violation of his contract, as broker for the owner, to hold the land for plaintiff, B. stated in the presence of S. that B. and M. and S. were in partnership; that B. furnished the land, and M. and S. furnished the buyers, and the commissions were divided. There was no evidence that S. heard this declaration or that M. was present. *Held* insufficient to establish a partnership between B. and M. and S. so as to charge them with B.'s breach of contract with plaintiff.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 54.*]

5. EVIDENCE (§ 220*)—ADMISSIONS—ACQUIESCENCE.

Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to a voluntary demeanor or conduct of the party sought to be charged; and, whether it is acquiescence in the conduct or language of others, it must appear that such conduct was known, or the language fully understood, by the party sought to be charged before any inference can be drawn from his silence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 771-783; Dec. Dig. § 220.*]

6. EVIDENCE (§ 220*)—ADMISSIONS—SILENCE.

Mere silence of a party, when facts are asserted in his presence, is no ground for presuming his acquiescence, unless the conversation was addressed to him under such circumstances as to call for a reply.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 771-774; Dec. Dig. § 220.*]

7. EVIDENCE (§ 256*)—ACQUIESCENCE—FINDINGS.

Evidence held insufficient to warrant a finding that defendant S. heard the statement of B., made to plaintiff concerning S. and M., and that S. understood and acquiesced therein.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 256.*]

Appeal from Hunt County Court; J. W. Manning, Judge.

Action by R. L. Tolbert against R. S. Bass and others. Judgment for plaintiff, and defendants appeal. Affirmed in part, and in part reversed, and judgment rendered.

G. C. Grace and Pierson & Starnes, for appellants. Thompson & Mead, for appellee.

TALBOT, J. This suit was filed by appellee, R. L. Tolbert, in the county court of Hunt county, on August 20, 1907, against appellants, R. S. Bass, W. A. Malcolm, and T. J. Stroud. The petition alleged, in substance, that one Griffith, on and prior to August 14, 1907, was owner of a tract of land in said Hunt county, and certain mules, farming tools, etc., and an interest in a growing crop upon such land; that on the 14th of August, 1907, appellee learned that said Griffith desired to sell such land, and other property, and made efforts to buy the same; that before such efforts by him (appellee) said Griffith had listed his land with appellant Bass for sale, agreeing to pay Bass a commission therefor; that at this time Bass was engaged in buying and selling lands in Hunt and other counties on commission, and appellees, Malcolm and Stroud, were engaged in a similar business in Ellis county; and that there was some arrangement, the details of which were unknown to plaintiff, by which Malcolm and Stroud became partners in the land business; that Malcolm and Stroud would furnish buyers for lands in Hunt county, listed with Bass, and when a sale was made, the commissions would be divided; and that there was a further arrangement that appellants would, at times, jointly purchase lands, and then sell the same for their own mutual profit; that after appellee had sent word to Griffith that he wished to buy his land, appellant Bass learned that appellee was thinking of buying said land, and advised appellee that said land was listed with him for sale for a commission, and that in case Griffith sold it direct, he would get no commission; and that he asked appellee to make the trade through him, and represented that he could purchase the land through him (Bass) cheaper than he could from Griffith direct, as he (Bass) had Griffith bound up under a contract to sell the land \$2.50 per acre cheaper than Griffith would sell it to appellee; that the land was listed with him at \$47.50 per acre; that Griffith was asking for the land and other property \$2,850, the buyer to pay \$72 interest on a loan on the land; and that Bass told appellee that he would guarantee to buy the land for him at \$2,750 if appellee would let him (Bass) make the trade, and thereby get his commission. It is further alleged, in substance, that, relying on these representations by Bass, appellee agreed not to attempt to buy the land from Griffith, and to allow Bass to buy it for him, authorizing the payment of \$2,850 for the property if it could not be bought for less; that the \$2,850

proposition was submitted to Griffith, who declined the same unless the \$72 interest before mentioned was also paid, and that, pending negotiations in that regard, Bass got in communication with appellants Malcolm and Stroud, with the result that they (Bass, Malcolm and Stroud) themselves, purchased the land and other property from Griffith, and took title to themselves, by which appellee claimed to have been damaged in the sum of \$1,000, for which he sued. By supplementary petition it is alleged that, if appellants were not partners in fact in the transaction mentioned, Bass was acting in the purchase of said land as the agent for the other appellants, by reason whereof they were liable for appellee's damage. The defendants Malcolm and Stroud filed a plea of privilege, which was subsequently overruled, and all of the defendants answered by exceptions, general and special, a general denial, and a denial under oath of partnership, as alleged. The exceptions of defendants, general and special, were overruled, and on a trial before court, plaintiff recovered a judgment against all of the appellants for \$712.50, and, a motion for a new trial having been overruled, an appeal to this court was duly perfected.

The first assignment of error complains that the trial court erred in overruling defendants' general demurrer to plaintiff's petition. The proposition advanced under the assignment, although presented in several different forms, is to the effect that the agreement, as alleged by appellee, Tolbert, in his petition, shows on its face that the same was inconsistent with appellant Bass' duties and obligations to his principal, Griffith, a conspiracy to defraud the said Griffith, and if there was any such agreement, the same was illegal and void as against public policy, and no cause of action could arise thereon in favor of Tolbert for the breach of the same. It is well settled that an agent who is relied upon to exercise, in behalf of his principal, his skill, knowledge, or influence will not be permitted, without his principal's knowledge and consent, to undertake to represent the other party to the transaction. And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the courts will refuse to enforce a contract growing out of such agency or award damages for its breach. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Mech. on Agency*, § 798. A person, however, may act as the agent of two or more principals in the same transaction if his duties to each are not such as to require him to do incompatible things, or if he acts with the full knowledge and consent of both principals. There is some conflict in the decisions upon the last-named exception to the general rule, but it seems that in such cases the weight of authority is in favor of the validity of the

transaction. Mech. on Agency, § 644, and cases cited in note. The decision of the question in the case at bar turns upon the character of the pleading. It was alleged, in substance, that Griffith, the owner of the land which appellee desired to buy, had listed the land with appellant Bass for sale; that Bass, learning of appellee's desire to purchase the land, requested that he (Bass) be allowed to make the trade for appellee; that he (Bass) could buy the land cheaper than appellee could buy it himself, and could also get his commission from Griffith for making the sale, which would amount to \$75; that Bass informed appellee that he had Griffith bound up by contract to sell the land \$2.50 per acre cheaper than Griffith would sell it to appellee; that the price Griffith was asking for the land and other property was \$2,850 and the buyer to pay, in addition thereto, about \$72 interest due on a loan secured by a lien on the land; that appellee then agreed that he would not attempt to buy the land direct from Griffith, but would allow appellant Bass to buy it for him, and that he authorized Bass to offer as much as \$2,850 for the property if it could not be bought for less. It was further alleged that Bass agreed that, if he could not get the land for appellee at the price stated to him, he would submit Griffith's proposition to appellee, and not close the trade with any other party until appellee was given an opportunity to take the property at Griffith's price; that Bass saw Griffith, and informed appellee that Griffith refused to take less than \$2,850 for the property, and the buyer to pay the \$72 interest due on the loan; that at the same time Bass informed appellee that he had an agreement with Griffith by which he could hold the offer open until the next day; that appellee then told Bass that he would pay Griffith the price he asked if they could not get the land cheaper, and that he would let Bass know the next day at 1 o'clock p. m. We think it fairly appears from these allegations that it was neither intended nor contemplated, by either appellee or Bass, that the land should be purchased from Griffith under circumstances of which he was not fully aware, or at a price not fixed by him. It was not alleged that appellee was to pay Bass anything. Griffith had promised to pay him a commission of \$75 to find a buyer for the land, and appellee simply agreed to purchase through Bass instead of going to Griffith in person. It is true Bass urged, as an inducement to this, that he could buy the land for appellee cheaper than appellee could get it from Griffith direct, but in this connection he told appellee, as shown by the pleading, that he had a contract with Griffith which would enable him to do so. If this allegation is true, and it must be so regarded for the purposes of the demurrer, then the price at which Bass proposed to get the land for appellee, if he would buy through him, was not one fixed by Bass against the interest of

Griffith, but one fixed or agreed to by Griffith in his contract with Bass. As has been seen, the allegation is that he (Bass) "had Griffith bound up under contract to sell the land \$2.50 per acre cheaper than Griffith would sell it to plaintiff," which corresponds with the amount Bass said he could procure the land for. The clear inference from the allegations of the petition is that Tolbert and Bass both understood and intended that Griffith should be consulted about the price of the property, and that the same should be agreed to by him before the sale contemplated was consummated. We conclude the demurrer was properly overruled.

Appellants' second assignment of error is to the effect that the trial court erred in rendering judgment against the defendants Malcolm and Stroud, and in refusing to grant them a new trial, because the evidence shows there was no partnership existing between them and the defendant Bass in respect to any contract that may have been entered into between appellee and the said Bass in regard to the purchase of the land in question, and that they had no interest in any such contract. This assignment we believe to be well taken. The strength of the testimony upon this phase of the case is as follows: Appellee testified that Bass told him that he had an arrangement with Malcolm and Stroud by which he (Bass) would list Hunt county land for sale and Malcolm and Stroud find buyers in Ellis county and the commission would be divided among them. Bass testified that he had an agreement with Malcolm and Stroud to divide commissions with them on every sale of land in Hunt county to buyers furnished by them from Ellis county, but that Malcolm and Stroud had no interest in sales of Hunt county land made by him to purchasers found by him; that he only divided commissions with them on sales made to parties that they secured in Ellis county of lands situated in Hunt county. Bass further testified that he never thought of buying the Griffith land until Tolbert had flatly refused to meet Griffith's terms; that Malcolm and Stroud knew nothing about Tolbert, nor had there been any negotiations with him about Griffith's land until after he (Bass) had bought the property, and that, had he sold the land to Tolbert, Malcolm and Stroud would have had no interest in the transaction whatever. Upon being recalled, appellee testified that Bass said, in speaking of Malcolm and Stroud: "We have a partnership. I furnish the land, and they furnish the buyers, and we split the commissions." Stroud testified that he and Malcolm were partners in the real estate business in Ellis county; that they had an arrangement with Bass by which they get buyers in Ellis county to buy lands that Bass had listed in Hunt county, and when Bass made a sale of land in Hunt county to a buyer furnished by them from Ellis county, they would divide the commission on such

sale; that on the night of August 15, 1907, at 7:30 o'clock or later Bass phoned to him, in substance, that the Griffith property was for sale at a bargain, and asked him to go in with him and purchase it, and he authorized Bass to go ahead with the matter on his (Bass') own judgment, and agreed to go up from Waxahachie the next morning, which he did; that Bass had closed the trade before he arrived, and that up to that time he had never seen Tolbert, and did not know him, nor had he had anything to do with the deal. This testimony we regard as wholly insufficient to show that a partnership did exist between Bass and Malcolm and Stroud in the matter of the sale for, or purchase of, the land from Griffith; or that Bass in making the contract with appellee, as alleged, was the agent of the said Malcolm and Stroud, or otherwise so associated with them in the sale or purchase of lands situated in Hunt county as to authorize the judgment rendered against them.

Aside from the statement of appellee that Bass told him, in speaking of Malcolm and Stroud, that, "We have a partnership. I furnish the land, and they furnish the buyers, and we split the commissions"—the evidence seems to conclusively show it was only in the event Malcolm and Stroud furnished a buyer from Ellis county of land held for sale by Bass in Hunt county that they had any interest whatever in the transaction. In that event it was agreed by Bass that they should receive one-half of the commission paid him. But they had no interest whatever in sales made by Bass to purchasers procured by him. Was the declaration of Bass that "we [speaking of himself, Malcolm, and Stroud] have a partnership. I furnish the land, and they furnish the buyers, and we split the commissions"—sufficient to justify the judgment of the court against Malcolm and Stroud? We think not. It does not appear that the statement imputed to Bass, if made in the presence of Stroud, was heard by him. It was shown that a conversation occurred between appellee and Bass in the latter's office, at Greenville, after the sale of the land by Griffith, and that Stroud was in the office at that time, but it does not appear that the statement quoted was heard by Stroud. And it is not pretended that Malcolm was present at that or any other time and heard any such statement. To have authorized a finding that a partnership existed between Bass and Malcolm and Stroud with respect to the alleged contract and Bass' dealing with appellee, upon the statement referred to, it was necessary to show that said statement was heard by Stroud or Malcolm and not denied. Acquiescence, to have the effect of admission of the party to be affected thereby, "must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly ap-

pear that such conduct was fully known, or the language fully understood by the party before any inference can be drawn from his silence." 1 Green. on Ev. § 197. Again Mr. Greenleaf says: "The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation was addressed to him under such circumstances as to call for a reply." Section 197a. "This latter statement of the law seems to be a qualification of a former rule on the subject, which permitted one's silence to be construed as a virtual assent to all that was said in his presence. The reason given for the change is that the former rule was susceptible of great abuse, and called for a course of conduct which prudent and quiet men do not generally adopt." 1 Green. on Ev. § 197a. While there is evidence in this case that appellant Stroud was in Bass' office when the declaration claimed by Tolbert was made by Bass, it clearly appears that the conversation between Bass and Tolbert, in which such declaration was made, was a very animated and angry one, and the only foundation for the belief that Stroud heard it and fully understood its import is his presence during the conversation. Under the rule above announced we think the court was not warranted, under such circumstances, in finding that Stroud not only heard the statement of Bass, but that he fully understood and acquiesced in it, a finding of all which was essential to justify the inference of partnership as declared by Bass. This being true, the evidence was insufficient to establish the finding of the court that Malcolm and Stroud were partners of Bass in the transaction out of which the suit grows, and that the judgment against them must be reversed.

The other assignments of error complain of the insufficiency of the pleadings upon the measure of damages, and the inadmissibility of certain testimony by reason thereof to establish the damages allowed by the court. Also that the evidence was insufficient to warrant the amount of the damages allowed. We shall not enter upon a discussion of these assignments. It is enough to say that they have been considered, with the conclusion reached that they point out no reversible error. The pleading was not, perhaps, as definite as it might have been, but was sufficient in a suit of this character.

The evidence is sufficient to sustain the judgment against appellant Bass, but insufficient to sustain it as to Malcolm and Stroud. The case was tried without a jury, and the facts seem to have been fully developed. It is therefore ordered that the judgment of the court below be affirmed as to Bass, and reversed and here rendered for appellants Malcolm and Stroud.

Affirmed in part and reversed and rendered in part.

BOONE v. HOLDER.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. APPEAL AND ERROR—RECORD—BILL OF EXCEPTIONS—CONTENTS—CERTIFICATE OF BYSTANDERS—EFFECT.

A bill of exceptions, certified by bystanders in accordance with the statute, where the party excepting is not satisfied with the court's correction of his proposed bill, must be taken as representing the true state of the record, in the absence of controverting affidavits.

2. TRIAL—ARGUMENT OF COUNSEL—STATEMENT OF MATTERS NOT IN EVIDENCE.

The statement, in argument of counsel, of material facts not in evidence is reversible error, as evidence cannot be presented in the form of argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 285.]

3. SAME.

In an action for alienation of affections, statements of defendant's counsel in argument that, if plaintiff's wife was permitted by law to testify, she would swear that defendant never had sexual intercourse with her, and that her husband had mistreated her, and neglected her for another woman, being material to the issues and not in evidence, was prejudicial error, where the trial court did not direct the jury to disregard it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 285.]

4. TRIAL—ARGUMENT OF COUNSEL—MATTERS NOT IN EVIDENCE.

Where statements are made, in argument of matters material to the issues, which are not in evidence, the trial court should admonish counsel that the statement is improper, and direct the jury to disregard it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 487.]

Hill, C. J., dissenting.

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by B. E. Boone against Albert Holder. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Carmichael, Brooks & Powers, for appellant.

HART, J. B. E. Boone brought this suit against Albert Holder for alienation of the affections of his wife, Alice Boone. There was a jury trial and a verdict for the defendant, and plaintiff has appealed.

It is unnecessary to abstract the testimony, except to state that it was sufficient to sustain the allegations of the complaint. No objections were made to the instructions of the court. The sole ground relied upon for reversal is on account of alleged improper argument of counsel. In his motion for a new trial the plaintiff, Boone, states that R. J. White, counsel for the defendant, was, over his objections, permitted to argue to the jury "that if the mouth of the plaintiff's wife was not closed by the iron laws, she would swear that Holder, the defendant, never had sexual intercourse with her; that her husband, the plaintiff, had mistreated her; that he had neglected her, and had been too intimate with one of the witnesses for the

plaintiff—Doshy Holder." The presiding judge refused to sign the bill of exceptions prepared in accordance with the language set forth in the motion for a new trial, as above stated, but corrected it so as to read as follows: "Gentlemen, in stating this cause to you I told you that I would prove that the plaintiff was tired of his wife, now that she is old and ugly; that he had mistreated her, and was enamored of a younger and fairer woman—Doshy Holder—one of the witnesses in this case, and that all the suspicious circumstances that the witnesses for the plaintiff would bring into the case would be fully explained to your entire satisfaction, and that, too, consistent with the innocence of the plaintiff's wife of the foul charge of adultery which he makes against her. I have done the best I could to make my statement good in the proof, both by the testimony of witnesses directly given, and by dragging out what of the truth I could by the cross-examination of unfriendly witnesses. If I have failed in any particular to make the proof as strong as I stated it, you must remember, gentlemen, that I was unable to obtain the testimony of the plaintiff's wife in this cause. She is excluded by an iron rule of law, which the court announced. I do not complain at the court or the law. But you must remember that she sits here in this court, an anxious onlooker, while the question of her virtue is being debated and bandied about, the most interested person connected with this case, and must sit dumb in the presence of these base accusations against her and her character, which she holds dearer than life. The interest of the plaintiff and of the defendant, however great, is insignificant in comparison with hers. What she might say if she were permitted to testify is only a matter of conjecture. I want you to weigh the testimony in the cause carefully, and remember that the reputation of a good woman, of a mother, is at stake, and that the law does not permit her to give her testimony, either by way of denial or explanation, but must sit in silence and listen to her defamers in this temple of justice." The plaintiff, not being satisfied with the correction made by the judge, procured the bill as originally prepared by him, and as set forth in his motion for a new trial, to be certified by two bystanders in the manner and form provided by the statutes. No controverting affidavits were filed by the defendant. This court has held, in the case of *Smith v. State*, that a bill of exceptions, as certified by the bystanders in accordance with the statute, in the absence of controverting affidavits, must be taken as representing the true state of the record. The case for some reason was omitted from our printed reports, but the correctness of the decision has never been questioned, and is now the settled law in this state. The case is reported in 16 S. W. 2. In construing a similar statute, the courts of the states of Kentucky

and of Missouri have held that the paper so filed will be treated as containing the correct version of the proceedings, unless its truth be controverted by affidavit filed by the opposite side. *Norton v. Dorsey*, 65 Mo. 376; *Kaelin v. Rufenacht*, 6 Ky. Law Rep. 736. Therefore, as far as this court is concerned, the record stands as if the defendant's attorney had stated to the jury that plaintiff's wife would swear, if permitted to testify before the jury, that the defendant, Holder, had never had sexual intercourse with her; that plaintiff objected to these remarks, and that his objections were overruled. It is a well-established rule that it is error, sufficient to reverse a judgment, for the court to suffer counsel, against objection, to state facts pertinent to the issue and not in evidence. 12 Am. & Eng. Ency. of Pleading & Practice, p. 727; 1 Thompson on Trials, par. 963. Although not expressly decided, the language used by the court in the case of *Little Rock Ry. & Electric Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97, expresses the same view. The reason for the rule is that a party cannot be permitted to present his evidence in the form of the argument of his counsel to the jury, but must confine himself to the legal method of establishing his cause of action or defense thereto. The remarks complained of being a statement of matters material to the issues, the court should have admonished the attorney that the statement was improper, and should have told the jury to disregard it. Having failed to do this, it was prejudicial error to permit counsel to travel out of the record and to base his argument on facts not appearing therein. *Little Rock & Ft. Smith Ry. Co. v. Cavanese*, 48 Ark. 106, 2 S. W. 505; *Fort v. State*, 74 Ark. 210, 85 S. W. 236.

For error in counsel for defendant stating to the jury prejudicial facts which were not in evidence, the judgment must be reversed, and the cause remanded for a new trial.

HILL, C. J. (dissenting). I cannot concur in the construction placed on section 6226, Kirby's Dig., by the majority of the court. The force of *Smith v. State*, which the court follows, is weakened by its omission from the official reports. This can only be done through the approval of the Chief Justice (section 1266, Kirby's Dig.), and he was the writer of that opinion, and evidently did not regard it as affording a precedent. The affidavits of bystanders, when in conflict with each other, or in conflict with the judge's statement, should raise a question of fact to be determined in this court. If a bystander testified that his attention was sharply drawn to the point in issue, and the judge was reading, writing, or conversing, or that he nodded, as judges do sometimes nod, or in some other way indicated that his memory was more likely to be correct than the memory of the judge, then I think that the affidavit of one bystander might well control. But where

the bystanders fail to show, as in this case, any reason for remembering the exact language used, and yet each put it in the identical words used in the motion for new trial, and the attention of the judge is not shown to have been diverted, and the judge says positively that this language attributed to counsel in his argument was not used, then I think the bystanders have failed to overcome the record as made by the judge. That the affidavits of bystanders raise an issue of fact for this court is, I think, the effect of the decision in *Boone v. Goodlett*, 71 Ark. 577, 76 S. W. 1059, and the *Smith Case* was ignored in that opinion, and that, it seems to me, is the only proper construction to place on section 6226. Otherwise irresponsible bystanders can control the records of the court, and that evidently was not the intention of this statute, which was to enable parties to correct a record when the judge was shown to be in error.

ARKANSAS CENT. R. CO. v. WORKMAN. (Supreme Court of Arkansas. Oct. 5, 1908.)

1. MASTER AND SERVANT—INSTRUCTING SERVANT—MASTER'S DUTY—PATENT DANGERS.

An employer must instruct an employé as to patent, as well as latent, dangers, if, because of the employé's youth and inexperience, he does not appreciate them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310-316½.]

2. SAME—RAILROADS.

A railroad company is liable for injury to a young inexperienced brakeman by his alighting from a moving train in an improper way, where he was not instructed as to the proper way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 297-314.]

3. TRIAL—SUBMISSION OF ISSUES—SUPPORT BY EVIDENCE—NECESSITY.

Issues submitted to a jury must be confined to those supported by testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. MASTER AND SERVANT—RAILROADS—DUTY TO ALIGHTING BRAKEMAN—STATION PLATFORMS.

A railway company need not light its station platforms for the benefit of alighting brakemen, in the absence of hidden dangers, though required to provide lights for the convenience and safety of passengers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 212-218.]

5. SAME.

A railway company is not negligent toward alighting brakemen in permitting a space of 14 inches between the edge of a station platform and passing cars.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by Will Workman, by J. B. Branch as next friend, against the Arkansas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Lovick P. Miles, for appellant. T. A. Pettigrew, for appellee.

MCCULLOCH, J. Appellee is a minor under the age of 21 years, and sues appellant railroad company to recover damages for personal injuries received while performing service for the company as brakeman on freight train. He recovered judgment below, and the company appealed.

Appellee was, at the time he took service with the railroad company, 18 years of age, and was entirely inexperienced in that kind of work. He received the injury complained of during his first day's service, or rather during the night succeeding the first day's service. He made a trip from Paris to Ft. Smith during the day, and was injured on the return trip that night. While the train was being slowed down at a station named Ursula for the purpose of discharging freight, and as the engine moved past the platform, he stepped from the tender of the engine, and as he alighted on the platform, he lost his balance and fell backward through the opening between two cars and the space between the cars and edge of platform. His arm was mangled so that it had to be amputated. Negligence of the company is alleged in several particulars, viz.: First, that the headlight on the engine was insufficient to enable the brakeman to see the platform clearly; second, that the platform was not lighted so that the brakeman could see how to alight thereon; third, that the step on the tender of the locomotive, from which the brakeman had to alight, was "old, out of repair, very sleek, and inclined downward," so that it was unsafe for use; fourth, that the platform at Ursula was unsafe by reason of being higher than the step on the tender, and was 14 inches away from the passing cars or tender; fifth, that the train from which appellee alighted was run past the station at a dangerously high speed; sixth, that appellant failed to instruct appellee concerning the safest manner of getting off moving trains, and to warn him of the dangers thereof. All of the acts of negligence are alleged in the complaint to have contributed directly to the injury. The court, by proper instructions, properly took away from consideration by the jury the first and fifth alleged acts of negligence, because there was no evidence to sustain them. It is contended that there was no evidence to sustain any of the charges of negligence, and that the court erred in refusing to take the whole case from the jury. We are of the opinion, however, that there was evidence sufficient to sustain the third and sixth charges. There was testimony tending to show that the step from which appellee had to alight was old and worn sleek, and was inclined downward, so that appellee's foot slipped when he stood on it. It is true that he did not slip from this step, but he testified that just before he was ready to alight, his foot slipped, and he was compelled to grasp the handhold with both hands, which probably caused him to lose his balance when he

alighted on the platform from the moving train. There is testimony to the effect that in attempting to step from a moving train it is necessary to first release the handhold before stepping off; otherwise the person will be jerked back under the train. So the slanting and sleek surface of the step on the tender rendered it such an insecure foot-rest that it may have caused appellee to cling too long to the handhold in order to prevent slipping off the step, thereby hindering him in successfully alighting. It was, of course, negligence to allow the step to get out of repair, and the jury could have concluded that it contributed to appellee's injury in the way just explained.

It is uncontradicted that appellee was, at the time he took service with appellant company, and when he was injured, a youth wholly inexperienced in railroad work, and that no instruction was given him at all about the safest manner of getting off and on moving trains. He was given no warning whatever of the danger of getting off the wrong way. That there is a reasonably safe manner and a dangerous one of getting off moving trains is fully explained in the evidence, and is undisputed. It is true that these differences are obvious when reasoned out according to the laws of motion, and in a sense the danger of getting off a moving train in the wrong manner may be considered a patent one. It is, however, the duty of a master to instruct a servant as to patent, as well as latent, dangers if, by reason of youth and inexperience, the servant does not know of or appreciate such danger. *Ford v. Bodcaw Lumber Co.*, 73 Ark. 40, 83 S. W. 346; *L. & A. Ry. Co. v. Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720. We think there was evidence sufficient to go to the jury and warrant a finding that appellee, by reason of his youth and inexperience, did not properly alight from the moving train, and that this caused him to fall. If these facts are true, appellant is responsible for the injury.

The case should have been submitted to the jury only upon these two charges of negligence. The evidence did not warrant a finding of negligence on either of the other charges, and the court erred in submitting them to the jury. Issues submitted to a trial jury must be confined to those which find some support in the testimony, and it is error to submit abstract ones. *A. & L. Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *McDonough v. Williams*, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. (N. S.) 452; *Railway Co. v. Fain*, 85 Ark. 532, 109 S. W. 514; *Railway Co. v. Cain*, 79 Ark. 225, 95 S. W. 137.

No duty rested upon appellant to keep lights on or about the platform to enable brakemen to see how to alight from trains. There is a duty to provide lights at night for the convenience and safety of passengers (*2 Hutch. on Carriers*, 936), but not to light

up platforms and other places where it may become necessary for brakemen on freight trains to alight from their trains, unless there be some hidden danger at a place where they are liable to be injured.

Nor is any negligence shown in the construction or maintenance of the station platform. A space of about 14 inches was left between the edge of the platform and passing cars, but this did not constitute negligence. There might be something in the charge of negligence if the distance from the step to the edge of the platform had been so great that it was dangerous to alight, but the injury in this case did not occur on account of appellee having to step the distance of 14 inches. He stepped over the space without difficulty, but lost his balance because he did not part from the moving train in the right way so as to retain his equilibrium when he alighted.

Reversed and remanded for new trial.

FORT v. CITY OF BRINKLEY.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. PHYSICIANS AND SURGEONS—LICENSE—REVOCATION—AUTHORITY.

Under Kirby's Dig. § 5590, conferring on mayors of cities the jurisdiction and powers of justices of the peace in criminal cases, and section 5247, authorizing the revocation of the license of a physician convicted of any crime involving moral turpitude, as part of the punishment, the mayor of the city may revoke the license of a physician, convicted of violating a state law creating an offense involving moral turpitude, as part of the penalty therefor.

2. SAME—GROUNDS—"MORAL TURPITUDE."

The illegal sale of intoxicating liquors is not a crime involving moral turpitude within Kirby's Dig. § 5247, authorizing the revocation of a physician's license on his conviction of crime involving moral turpitude, the words "moral turpitude" implying something immoral, regardless of the fact that it is punishable by law, and offenses against the liquor laws, such as illegal sales of liquor, are statutory crimes, and merely mala prohibita.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4580-4581.]

3. STATUTES—CONSTRUCTION—MEANING OF WORDS.

A word which is well known, and has a definite sense at common law, will, when used in a statute, be construed in that sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 266-280.]

4. CRIMINAL LAW—APPEAL—EXCEPTIONS.

Where no declarations of law were asked or given, and accused contended that the judgment was not sustained by the evidence, the exceptions were properly preserved in the record and carried forward in a motion for new trial.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

P. W. Fort was convicted of unlawfully selling intoxicating liquors, and from so much of the judgment as revokes his license to practice medicine, he appeals. Reversed.

P. W. Fort was, on the 21st day of October, 1907, tried and fined by T. H. Jackson, mayor of the city of Brinkley, for the

unlawful sale of intoxicating liquors known as Fort's Tonic, and, in addition to the fine imposed upon the appellant, revoked his license to practice medicine in the state of Arkansas. Fort appealed from that portion of the judgment revoking his license to practice medicine, and the cause was submitted to the Monroe circuit court sitting as a jury, upon the following agreed statement of facts, to wit: "The defendant, P. W. Fort, at the time of his arrest was a practicing physician in the city of Brinkley, and had been for a long time before. And on the 19th day of October, 1907, the city marshal, R. E. Smith, filed an affidavit in the mayor's court of the city of Brinkley, charging the defendant, P. W. Fort, with selling intoxicating liquors known as Fort's Tonic. And thereupon Mayor T. H. Jackson issued a warrant for the arrest of the said P. W. Fort, upon said affidavit so filed with him by the said R. E. Smith, charging him with the unlawful sale of intoxicating liquors known as Fort's Tonic; and on the 21st day of October, 1907, the defendant was brought into court upon said warrant before the mayor, T. H. Jackson, to answer said charge. The city of Brinkley, being represented by C. F. Greenlee, attorney, announced ready for trial, and the defendant announced ready, and pleaded not guilty to the charges made in said warrant. The case was tried, and the mayor, T. H. Jackson, after hearing the evidence of witnesses and the argument of counsel for the city of Brinkley, found the defendant guilty as charged, and assessed the fine at \$100, and all costs of the prosecution, and, in addition to said fine, revoked said defendant's license to practice medicine in the state of Arkansas. The defendant paid his fine and all the costs therein, and appealed from that part of the judgment revoking his license. It is further agreed that the city of Brinkley has no ordinance giving the mayor the right to revoke a physician's license, if he is found guilty of a misdemeanor involving moral turpitude or for any other offense. The question that the circuit court is asked to determine is whether or not the mayor has the right to revoke the defendant's license, and, if he did have the right to revoke his license, if the crime committed by the defendant is one involving moral turpitude in the meaning of the statute." The circuit court sitting as a jury rendered the following judgment upon the foregoing agreed statement of facts, to wit: "Now on this day, this cause coming on to be heard, comes the plaintiff by its attorney, C. F. Greenlee, and comes the defendant by his attorneys, G. Otis Bogle and Thomas & Lee, and both parties announced ready for trial. This cause was submitted to the court upon an agreed statement of facts. It appearing to the court that this is an action to determine if the defendant, P. W. Fort, is guilty of moral turpitude, upon his having been convicted

of selling an intoxicant called Fort's Tonic and assessed a fine and revoked his license as a practicing physician, defendant paid said fine, but appealed from the judgment of the mayor's court in the revoking of his license. The court, after hearing the agreed statement of facts and argument of counsel, doth sustain said judgment rendered by the mayor's court. It is therefore considered, ordered, and adjudged by the court that said judgment revoking defendant's license as a practicing physician be sustained, and the defendant pay all costs of this appeal." On the same day the court rendered the above judgment in said cause the defendant filed his motion for a new trial.

Thomas & Lee (G. Otis Bogle, of counsel), for appellant. C. F. Greenlee, for appellee.

HART, J. (after stating the facts as above). There is nothing in the contention of appellant that the mayor of the city of Brinkley had no authority to revoke his license because the prosecution was had for a violation of the liquor laws of the state, and not for a violation of a city ordinance. The mayor has the same jurisdiction to hear and determine cases within the limits of his jurisdiction, under the criminal laws of the state, as has a justice of the peace. Kirby's Dig. § 5590; *Marianna v. Vincent*, 68 Ark. 244, 58 S. W. 251. Section 5247 of Kirby's Digest provides that: "Whenever any physician and surgeon, or person engaged in the practice of medicine or surgery in this state, shall be convicted of any crime and misdemeanor involving moral turpitude, in addition to the other penalty or penalties imposed upon him, shall be added a revocation of his license to practice medicine and surgery." This section makes the revocation of the license a part of the punishment for the offense, and contemplates that it shall be imposed by the court in which the case is tried.

The second ground relied upon by appellant for reversal is whether or not the sale of intoxicating liquors, contrary to the statute, is a misdemeanor involving moral turpitude, and that is the real question in the case. "Offenses against the liquor laws, such as illegal sales of intoxicants, keeping liquor in possession with the intent to dispose of it unlawfully, illegally transporting liquor from place to place, and the like, are statutory crimes, not being punishable at common law. They are also of the description *mala prohibita*, as there is no inherent immorality in such acts, and their illegality lies only in the fact of their being positively prohibited." *Black on Intoxicating Liquors*, par. 383. "Moral turpitude is defined to be an act of baseness, villeness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general." 20 Am. & Eng. Ency. of Law, 872. See, also, *Ex parte Mason*, 29 Or. 18, 43 Pac. 651, 54 Am.

St. Rep. 772; *In re Kirby*, 10 S. D. 322, 414, 73 N. W. 92, 907, 39 L. R. A. 856. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude. It seems clearly deducible from the above-cited authorities that the words "moral turpitude" had a positive and fixed meaning at common law, and that the illegal sale of intoxicating liquors, not being an offense punishable at common law, does not come within the definition of a crime involving moral turpitude. In a statute using a word, the meaning of which is well known, and which has a definite sense at common law, the word will be restricted to that sense. *Buckner v. Real Estate Bank*, 5 Ark. 536, 41 Am. Dec. 106. Counsel for appellee contends that the judgment should be affirmed because the appellant saved no exceptions to the trial court's conclusion of law. No declarations of law were asked, and none were given by the court. Appellant contends that the judgment of the court is not sustained by the evidence. In such cases no exceptions were necessary, as the exceptions were properly preserved in the record, and carried forward in the motion for a new trial.

For the error in pronouncing a revocation of appellant's license to practice medicine, the judgment is reversed, and the case dismissed.

LIDDELL v. LANDAU et al.

(Supreme Court of Arkansas. Oct. 5, 1908.)

1. JUDGMENT—NUNC PRO TUNC ORDER—JUDICIAL POWER.

A court's authority to amend a record *nunc pro tunc* is to make it speak the truth, and can never be used to make the record speak what it should have spoken, but what it did not in fact speak.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 594, 623.]

2. COURTS—FEDERAL SUPREME COURT—OPINIONS—CONCLUSIVENESS—DUE PROCESS OF LAW.

Decisions of the federal Supreme Court upon questions as to due process of law are conclusive on state courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 329-334.]

3. CONSTITUTIONAL LAW—DEFAULT OF PLAINTIFF—DUE PROCESS OF LAW.

A judgment by default against plaintiffs at a term after the term at which they were dismissed from the case was void as not due process of law; no notice of the proceedings after dismissal having been given them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 929, 930.]

Appeal from Circuit Court, Clay County; Frank Smith, Judge.

Action by Robert Liddell against Louis Landau and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The bond sued on, after the caption, is as follows:

"In consideration of the defendant, Robert Liddell (appellant), dismissing the garnishments in the above-entitled cause, we, Alexander Landau and Louis Landau, partners under the firm name of Landau & Co., as principals, and G. Richter, as surety, hereby agree and undertake that we will pay to the said defendant the amount of the judgment, interest, and costs rendered in the above-entitled cause, upon this express condition: That, should the circuit court of Clay county for the Eastern district, or the Supreme Court upon appeal, refuse to sustain a motion filed for the purpose of correcting an alleged error in said judgment, to the effect that said judgment against said plaintiffs is absolutely void, and refuse to hold that said judgment is void, then we will pay said defendant the amount of said judgment, interest and costs; but, should the said circuit court, or the Supreme Court on appeal, hold that said judgment is void, and the plaintiffs are, therefore, not liable, then this obligation shall be void. [Signed] Louis Landau. Alex. Landau. G. Richter."

F. G. Taylor, for appellant. J. D. Block and F. H. Sullivan, for appellees.

HILL, C. J. (after stating the facts as above). An action was brought in the name of Bodenheimer, Landau & Co., a firm of St. Louis merchants, against Robert Liddell, sheriff of Clay county, before a justice of the peace, to recover possession of certain personal property. The plaintiffs recovered, and the defendant appealed to the circuit court. In the circuit court a question was raised as to the authority of the action being instituted in the name of Bodenheimer, Landau & Co., and it was decided that the action was unauthorized, and they were dismissed from it, and S. D. Hawkins was substituted as plaintiff, and it was ordered that the action proceed in his name. By oversight, this order was not entered of record. At a subsequent term of the Clay circuit court, the case remaining upon the docket, the order of dismissal having been overlooked, judgment by default was rendered against Bodenheimer, Landau & Co. in favor of Robert Liddell, the defendant, for the value of the property in controversy and the costs of the action. Some time thereafter various writs of garnishment were issued upon this judgment. These garnishments brought the first knowledge to Bodenheimer, Landau & Co. that the judgment had been rendered against them, and immediately they filed a petition in the circuit court, setting forth the facts, and asked that the order of dismissal which was omitted from the record be entered nunc pro tunc. An agreement was reached between the parties, by which Bodenheimer, Landau & Co., in consideration of the dismissal of the garnishments, agreed to pay the judgment, inter-

est, and costs in the event that the motion to correct the judgment was not sustained and the judgment should not finally be held void. This bond will be found set out in full in the statement of facts. The court made correction of the record by entering the order of dismissal nunc pro tunc, and also ordered that the judgment in favor of Liddell against Bodenheimer, Landau & Co. be corrected, so as to be against Hawkins, and to show that Bodenheimer, Landau & Co. were not parties thereto. From this judgment Liddell appealed, and this court, on the 7th of April, 1906, affirmed the judgment in so far as it inserted the omitted record, showing a dismissal of Bodenheimer, Landau & Co. from the suit, but reversed it in so far as it corrected the judgment so as to make it against Hawkins, instead of against Bodenheimer, Landau & Co. The court said of the action of the circuit court: "It had no authority to set aside or modify a judgment after the term at which it was rendered had expired, on application for nunc pro tunc order." *Liddell v. Bodenheimer*, 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42. After this decision, Liddell brought suit on the bond, these facts were fully developed in the trial, and the court held that there was no liability upon the bond; and from that judgment Liddell has appealed.

The authority of a court to amend a record by nunc pro tunc order is to make it speak the truth. *Bobo v. State*, 40 Ark. 224. This power can never be used to make the record speak what it should have spoken, but what it did not in fact speak; and such is the effect of the decision in *Liddell v. Bodenheimer*, supra. The only question is whether the judgment by default entered against Bodenheimer, Landau & Co., in favor of Liddell, at a term subsequent to the one in which they had been dismissed from court, is void. The Supreme Court of the United States, whose decisions upon questions as to due process of law are conclusive on the state courts, had this precise question before it, and exhaustively reviewed the authorities upon it, concluding as follows: "To sanction a proceeding, rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction, and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears and condemns only after a party has had an opportunity to present his defense. By the amendment and new judgment, the proceedings are given an effect against the defendant in error which they did not have when he was discharged from them by the judgment of dismissal. By the judgment of dismissal the court lost jurisdiction of the cause and of the person of the defendant. A new judgment in personam could not be rendered against the defendant until by voluntary ap-

pearance or due service of process the court had again acquired jurisdiction over him. As a matter of common right, before such action could be taken, he should have an opportunity to be heard and present objections to the rendition of a new judgment, if such existed." *Wetmore v. Karlick*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745. It necessarily follows that the judgment at a term after *Bodenheimer, Landau & Co.* had been dismissed from court, without further notice, was void as contrary to due process of law. There is no room for indulgence in presumptions of the regularity of the proceedings, for these facts are clearly established by parol and record evidence.

The judgment is affirmed.

KEMPNER v. GANS.

(Supreme Court of Arkansas. July 13, 1908.)

1. SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY.

Evidence in a suit to specifically perform a contract to sell property made by brokers held to show that authority was given the brokers to sell.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 391.]

2 EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY—IDENTITY OF LAND.

Parol evidence to identify property described in a writing is not inadmissible under the rule forbidding parol evidence to explain or modify a writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20 Evidence, §§ 2115-2128.]

On motion for rehearing. Motion denied.

For former opinion, see 111 S. W. 1123.

HILL, C. J. Counsel question the correctness of the statement that "authority to sell the property in controversy was indisputably given by parol." This is the necessary inference to be drawn from the testimony of the whole case. The broker told of the written authority, which he exhibited, and identified the property in controversy as the property which he was authorized to sell, and gave the correct description of it. Then he told of reporting to Gans the sale which he had made of this property to Kempner, and of the negotiations with Gans on the rate of interest on the deferred payments; and it is shown that all matters were acquiesced in but the rate of interest. And he further testifies that, after a conference of the brothers, Sol. Gans told him to tell Kempner that "he had withdrawn it from sale." It is also in evidence that Gans offered the agent his commission for making the sale, and told him to tell Kempner that they had changed their minds, and that Kempner then interviewed Gans on the subject, who told him that they had changed their minds and would not sell the property. All of this is incompatible with the theory that the written authority was all which existed, and that it did not call for the property which the brokers sold to Kempner.

The property intrusted to the brokers to sell was undoubtedly the lot on the south side of Second street, between Louisiana and Center, containing a two-story brick building. The court regards it as indisputably established that the broker had authority to sell this particular property, and the description in the written authority was a mere mistake as to the depth of the lot, and did not limit the dimensions of the lot to be sold. Probably it would be more accurate to state that authority to sell the property was given, and it was indisputably shown that the property to be sold was that in controversy; but, so far as the questions in this case are concerned, it is not important which statement is taken as the more correct summary of the evidence.

The authorities cited, particularly that of *Dorr v. School Dist.*, 40 Ark. 237, show that parol evidence as to the identity of property described in a written instrument is not inadmissible on account of the rule forbidding parol evidence to explain, vary, or modify a written instrument. The property in the written power being identified with the property in the memorandum of sale, and the description being sufficient for the purpose of identifying it, it matters not whether there was parol authority to sell the particular property, or whether the parol testimony only made certain the property intended by the writing to be sold.

The arguments on the other questions have been considered, but the court fails to find any reason for changing its opinion.

The motion is denied.

SPAULDING MFG. CO. v. CHAUDOIN et al. (Supreme Court of Arkansas. Oct. 5, 1908.)

1. INJUNCTION—GROUNDS OF RELIEF—INADEQUACY OF REMEDY AT LAW.

A complaint, averring that defendant was plaintiff's agent, and as such had funds of plaintiff, which he deposited in a bank, also made a defendant, fraudulently claiming to be the owner thereof; that judgment was afterwards, without notice to plaintiff, fraudulently obtained by defendant against the bank for the funds so deposited; that the bank would pay the judgment to defendant; and that defendant was insolvent; and not showing that plaintiff was a party to the suit between defendant and the bank, or that the matters set forth in the complaint were or might have been adjudicated in that suit—was sufficient to entitle plaintiff to an injunction restraining defendant from collecting, and the bank from paying, the judgment.

2. PLEADING—DEMURRER.

A complaint must be tested, on demurrer, by its own allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 535.]

3. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED—IDENTITY OF ISSUES.

A suit by a depositor against a bank for funds he had deposited, and whose payment had been refused, wherein the depositor had judgment, was not res judicata of a subsequent suit by a third person against the depositor and the bank, to restrain enforcement of the judgment, on the ground that the depositor was the

agent of such third person, and as such deposited funds belonging to it with the bank, fraudulently claiming to be the owner thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 1244-1247.]

4. INJUNCTION — EXISTENCE OF REMEDY BY APPEAL.

Failure to appeal from the denial of a motion to be made a party to a suit by a depositor against a bank for funds deposited, on the ground that the depositor was the agent of the one asking to be made a party, and as such had funds belonging to it, which he deposited with the bank, fraudulently claiming to be the owner thereof, does not preclude the one asking to be made a party from proceeding to enjoin the enforcement of the judgment recovered by the depositor against the bank, since, though it might have been a proper party to the suit, it was not a necessary party.

Appeal from Faulkner Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by the Spaulding Manufacturing Company against S. Chaudoin and others. Decree for defendants, and plaintiff appeals. Reversed and remanded.

The complaint (omitting formal parts) sets up substantially that one Chaudoin was, during the year 1906, in the employ of appellant as its agent, and, as such, that he received money belonging to appellant, which he falsely and fraudulently deposited in the Faulkner County Bank in his own name, with the intent to defraud appellant; that afterwards the bank (for certain reasons set forth in the complaint) refused to pay over the money to Chaudoin, whereupon he began a suit at law, and recovered a judgment against the bank for \$40.70; that appellant was not a party to that suit, and had no legal notice thereof; that Chaudoin falsely and fraudulently obtained the judgment, by falsely and fraudulently representing himself to be the owner of the deposit, when in truth and in fact appellant was the owner; that Chaudoin is wholly insolvent; and that appellant has no adequate remedy at law, etc. The prayer of the complaint was as follows: "Wherefore the plaintiff prays that it be decreed to be the true and rightful owner of the said deposit of \$40.70, and the plaintiff prays that the defendant Faulkner County Bank be forever restrained and enjoined from paying said \$40.70 to said S. Chaudoin, his agents or attorneys, upon his check, or otherwise, and that said judgment obtained against said Faulkner County Bank be declared to be null and void, and the defendant S. Chaudoin be forever restrained and enjoined from collecting or enforcing said judgment, by execution or otherwise, against said Faulkner County Bank, and the plaintiff prays that it may have judgment for costs, and for all other proper and equitable relief." The judgment was made an exhibit to the complaint. Chaudoin and the bank were made parties defendant. To this complaint there was an answer and demurrer. The answer, after denying certain allegations of the complaint, alleged the truth to be as follows: "That about the 23d day of December, 1905, defendant S.

Chaudoin opened up an account with the defendant Faulkner County Bank, and deposited his money there from time to time, which money was accepted by the said bank, and placed on their books to the credit of S. Chaudoin; that from time to time he drew his personal checks on said account, and that said checks were honored by the said bank and paid when presented; that about the 1st of March, 1907, there remained to his credit upon the books of Faulkner County Bank a balance of \$40.70, which was money belonging to him that he had deposited with said defendant bank; that about this time the defendant S. Chaudoin presented his check for \$40.70 to said Faulkner County Bank, and that said bank refused to pay same." He further says that on the 11th day of March, 1907, he instituted suit in justice of the peace court in Conway, Faulkner county, Ark., against the Faulkner County Bank for said sum of \$40.70; that 30 days were given to the defendants, that they might have time to take the depositions of each member of the firm of the Spaulding Manufacturing Company, and there was present at the trial of said cause the depositions of two members of the firm of the Spaulding Manufacturing Company, the deposition of the bookkeeper, and also the deposition of the general attorney for said company, taken to prove that the Spaulding Manufacturing Company was the owner of the said \$40.70 involved in this suit; that in said depositions the members of the firm of the Spaulding Manufacturing Company testified that they were protecting the Faulkner County Bank from the loss of a dollar as costs, or attorney fees, or as a judgment in said suit; that defendant S. Chaudoin recovered judgment against the Faulkner County Bank in said justice of the peace court, and that said case was appealed by the Faulkner County Bank to the Faulkner circuit court; that on a trial de novo of said cause in the Faulkner circuit court at the July term, 1907, the same testimony was introduced as above stated on the part of the Faulkner County Bank, and the same depositions were read in evidence; that after the testimony was closed by both the plaintiff and defendants J. C. Clark, attorney for the Faulkner County Bank, and representing said bank in the trial of said cause, and also attorney for the Spaulding Manufacturing Company, filed a motion asking leave for the Spaulding Manufacturing Company to be allowed to interplead and be made parties to said suit, which motion was by the court overruled, and judgment was rendered in favor of the defendant S. Chaudoin for \$40.70; that after said judgment was rendered a motion for a new trial was presented by said J. C. Clark, and was by the court overruled; defendant Faulkner County Bank prayed an appeal to the Supreme Court, which was granted, and 60 days given by the court for the Faulkner County Bank to file its bill of exceptions; that at the time of

the filing of this bill in the Faulkner circuit court the 60 days for filing the bill of exceptions in the Faulkner circuit court had not expired. A certified copy of all said record entries are hereto attached, marked "Exhibit A," and made a part hereof. The appellee Chaudoin prayed that the answer be considered as a demurrer, and further demurred to the complaint for the following reasons: "(1) That plaintiff's complaint does not state facts sufficient to constitute an equitable cause of action; (2) that this court has no jurisdiction of the subject-matter of this action; (3) that at the time of the filing of this suit there was another cause pending in the Faulkner circuit court involving the same subject-matter; (4) that the subject-matter of this suit has already been adjudicated by a court of competent jurisdiction." The decree of the court recites that "this cause is submitted for the court's consideration and judgment, upon the complaint of the plaintiff and answer and demurrer of the defendant S. Chaudoin, heretofore filed. And the court, being well and sufficiently advised as to the issues of the law arising upon said complaint and answer and demurrer, doth order, adjudge, and decree that said demurrer be, and the same is hereby, sustained. Thereupon the plaintiff, refusing to amend the complaint or to plead further, doth elect to stand upon its complaint, and the action is submitted for its final decree, and, the court being well and sufficiently advised in the premises, it is ordered, adjudged, and decreed that the plaintiff take nothing by its complaint, and that its action thereon be, and the same is hereby, dismissed for want of equity. It is further ordered that the injunction and restraining order heretofore made in this cause be, and the same is hereby, dissolved; that the plaintiff, the Spaulding Manufacturing Company, pay all cost of this action, for which execution may issue as upon a judgment at law."

Arthur C. Lyon and J. C. Clark, for appellant. G. W. Bruce, for appellees.

WOOD, J. (after stating the facts as above). The complaint avers that Chaudoin was the agent of appellant, and as such had in his

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hands funds belonging to appellant which he deposited with the Faulkner County Bank, falsely and fraudulently claiming to be the owner thereof; that judgment was afterwards, without notice to appellant, falsely and fraudulently obtained by Chaudoin against the bank for the amount of the funds so deposited; that the bank would pay the judgment to Chaudoin; and that Chaudoin was insolvent. These allegations were sufficient to give appellant a remedy in equity to restrain Chaudoin from collecting, and the bank from paying, the amount of the judgment. The complaint must be tested on demurrer by its own allegations, and these stated a cause of action. See *Himstedt v. German Bank*, 46 Ark. 537. There are no allegations in the complaint showing that appellant was a party to the suit between Chaudoin and the bank, and no allegations showing that the matters set forth in the complaint were, or that they might have been, adjudicated in that suit, so the complaint was good on demurrer. But, even if the answer should be treated as a plea of *res adjudicata*, it is not sufficient. Its allegations do not show that the matters set forth in the complaint were, or should have been, raised in the suit before the justice and circuit courts. Although appellant asked to be made a party to that suit, and to be allowed to interplead, its request was not granted, and the matters in controversy here were not adjudicated. That was not a suit by Chaudoin to recover specific funds from the bank, but simply to recover judgment for the funds he had deposited. As between him and the bank, the relation of creditor and debtor existed. *Himstedt v. German Bank*, supra. Even though appellant might have been a proper party to that suit, it was certainly not a necessary party. Therefore the failure of appellant to appeal from the ruling of the court refusing to allow it to be made a party to that suit does not preclude appellant from proceeding in equity to enjoin the enforcement by Chaudoin of the judgment which he then obtained against the bank.

The court erred in sustaining the demurrer and in dismissing appellant's complaint. Reversed and remanded for further proceedings not inconsistent with the opinion.

**HAZEL GREEN OIL & GAS CO. v.
COLLIER et al.**

(Court of Appeals of Kentucky. Oct. 29, 1908.)

"To be officially reported."

On petition for rehearing and extension of opinion. Petition overruled.

For former report, see, 110 S. W. 343.

NUNN, J. The court, for response to petition for rehearing and extension of opinion, is of the opinion that the rehearing should not be granted, nor should the opinion be extended, for the reason that the question of the appellant's right to remove from the appellees' land the property or fixtures placed thereon by it was not in issue in the action, or passed upon by the court.

Therefore the petition for rehearing and extension is overruled.

MORRISON v. PRICE et al.

(Court of Appeals of Kentucky. Oct. 21, 1908.)

1. JUDGMENT (§ 693*)—PERSONS CONCLUDED—HUSBAND AND WIFE—WIFE'S SEPARATE CONTRACTS—STATUTES.

Under Ky. St. 1903, § 2128, authorizing a married woman to make contracts and to sue and be sued as a single woman, a married woman may rent property; and when she does so she stands as any other tenant, and to dispossess her she must be a defendant to the proceedings, and she is not bound by a judgment in proceedings against her husband to which she is not a party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216; Dec. Dig. § 693.*]

2. JUDGMENT (§ 693*)—HUSBAND AND WIFE—CONTRACTS—EFFECT.

In an action by a married woman for being forcibly put out of a house occupied by her, she testified that she had rented the house from defendant, that he had sued out a warrant against her for forcible detainer on which the verdict was in her favor, that subsequently he sued out a warrant of forcible detainer against her husband and obtained judgment against him, that a writ of possession was issued thereon, and that an officer by direction of defendant dispossessed her. *Held*, to establish a prima facie case, since a judgment against her husband was no authority for dispossessing her.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216; Dec. Dig. § 693.*]

3. LANDLORD AND TENANT (§ 292*)—WRONGFUL DISPOSSESSION OF TENANT—ACTION FOR DAMAGES—PLEADING.

Under the rule that, where an entry is justified under a writ, the writ must be pleaded, one justifying under a writ of possession issued on a judgment in his favor as landlord in forcible detainer proceedings must plead the writ.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 292.*]

4. RECORDS (§ 17*)—SUPPLYING LOST JUDICIAL RECORDS—EFFECT—PROOF.

Where the papers of a case are lost, and a proceeding is instituted to supply the lost record, the proof taken by the commissioner may not be read as substituted record.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25-35; Dec. Dig. § 17.*]

5. RECORDS (§ 17*)—SUPPLYING LOST JUDICIAL RECORDS—EFFECT—JUDGMENT.

Where a lost record has been supplied in a proceeding therefor, the judgment of the court is conclusive that all preliminary steps were properly taken.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25-35; Dec. Dig. § 17.*]

6. EVIDENCE (§ 162*)—BEST AND SECONDARY—LOST JUDICIAL RECORDS—PAROL EVIDENCE.

Where the record of a case is lost, and has not been supplied, the contents thereof may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536-545; Dec. Dig. § 162.*]

7. LANDLORD AND TENANT (§ 292*)—UNLAWFUL DETAINER—WRONGFUL DISPOSSESSION.

Where, after judgment in forcible detainer in favor of a landlord, he was present when, by direction of his attorney, a writ of possession was issued and the officer was directed to obey the order of the court, he in legal contemplation procured the issuance of the writ and the acts necessarily done by the officer in executing it.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 292.*]

8. JUDGMENT (§ 948*)—PLEADING AS ESTOPPEL.

The estoppel by a judgment of a person who defended the action in the name of the defendant must be pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1789; Dec. Dig. § 948.*]

Appeal from Circuit Court, Pulaski County.

"To be officially reported."

Action by Mrs. Joyce Morrison against Henry Price and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Campbell & Williams, for appellant. Edwin P. Morrow and Boyd Morrow, for appellees.

HOBSON, J. Mrs. Joyce Morrison brought this suit against Henry Price and Oliver Blair to recover damages for their forcibly seizing her and putting her and her property out of a house which she occupied as the tenant of Price. The defendants filed answer, in which they traversed the allegations of the petition. It was alleged in the petition that Blair did the acts complained of, but was procured and induced to do them by Price. On the trial of the case before a jury, the plaintiff testified that she had rented the house from Price for a year from August 1, 1906, and paid him the rent until November, 1906, regularly; that in that month he sued out a warrant against her for forcible detainer before the police judge of Ferguson; that the case came on for trial before the police court, and the jury found a verdict in her favor, and Price did not appeal; that after this he sued out a warrant of forcible detainer against her husband, Otho Morrison, who had nothing to do with renting the house, and, having obtained a judgment against him of forcible detainer, had a writ of possession issued on the judgment,

which was delivered to the town marshal, Blair, who was directed in the presence of Price, either by Price, or his attorney, or the police judge, to obey the order of the court. The marshal took the writ, and went to the house, and dispossessed Mrs. Morrison. The police judge, who was introduced as a witness for her, testified in substance to the same facts. The court at the conclusion of the evidence instructed the jury peremptorily to find for the defendants, which was done; and, the plaintiff's petition having been dismissed, she appeals.

The ruling of the circuit court seems to have been based upon the idea that there was no competent evidence introduced as to the proceedings had in the first case, in which the decision was in favor of Mrs. Morrison; but, if we leave out of view entirely the proceedings in that case, the plaintiff showed a right of action. By section 2128, Ky. St. 1903, a married woman may make contracts and sue and be sued as a single woman. She may therefore rent property, and, when she so rents it, she stands just as any other tenant. In order to dispossess her, she must be a defendant to the proceedings. She is not bound by a judgment rendered in an action against her husband to which she is not a party, and a judgment against her husband would be no authority for seizing her property and dispossessing her from a house which she had rented, under a writ against her husband. *Prima facie* the plaintiff made out her case, and it should have been submitted to the jury. *Black v. Black*, 51 S. W. 456, 21 Ky. Law Rep. 408.

There is another reason why the judgment is improper. The defendants simply traversed the petition. There was no plea of authority. The rule is that, where an entry is justified under a writ, the writ must be pleaded. It is thus stated in Stephen on Pleading (Tyler's Ed.) pp. 302, 303: "In general, when a party has occasion to justify under a writ, warrant, or precept, or any other authority whatever, he must set it forth particularly in his pleading. And he ought also to show that he has substantially pursued such authority. * * * So, in all cases where the defendant justifies under judicial process, he must set it forth particularly in his plea; and it is not sufficient to allege generally that he committed the act in question by virtue of a certain writ or warrant directed to him. But on this subject there are some important distinctions as to the degree of particularity which the rules of pleading in different cases require: (1) It is not necessary that any person justifying under judicial process should set forth the cause of action in the original suit in which that process issued. (2) If the justification be by the officer executing the writ, he is required to plead such writ only, and not the judgment on which it was founded; for his duty obliged him to execute the

former, without inquiring about the validity or existence of the latter. But if the justification be by a party to the suit, or by a stranger, except an officer, the judgment, as well as the writ, must be set forth. (3) Where it is an officer who justifies, he must show that the writ was returned, if it was such as it was his duty to return." In *Newman on Pleadings*, § 426f, the rule is thus stated: "Another requisite of a plea in bar, that it be certain, is of more importance, and the ancient rule on this subject must still be observed. The former adjudications are therefore authoritative as to this requisite of a plea or answer. Thus, in an action of trespass, where the defendant justifies under the process of a court, he must set it forth particularly; and it will not be sufficient to allege generally that he did the acts complained of by virtue of certain process to him directed. He must set the process forth specially." On the return of the case, the defendants may have leave to amend their answer.

The plaintiff offered in evidence a deposition taken by a commissioner in a proceeding to supply the lost record; the papers of the proceeding in which judgment was rendered in her favor being lost. The court properly sustained exceptions to this deposition. When the papers of a case are lost, and a proceeding is instituted to supply the lost record, the proof taken by the commissioner may not be read as a substituted record. In *Mayo v. Emery*, 103 Ky. 640, 45 S. W. 1048, the court said: "The statute provides that the evidence which the commissioner takes shall be in writing, and shall be legal evidence, and shall be returned to the clerk of the court and safely kept by him. The statute does not provide that the evidence which the commissioner is required to take shall be used in place of the parts of the record which are lost. The testimony which he takes is simply the evidence upon which the court must act in making a substitution for the lost record. To supply the lost record, it is essential that the court should make an order to that effect, and he sends his commissioner out to get the evidence upon which to act." When the record has been thus supplied by an order of court, the judgment of the court is conclusive that all preliminary steps were properly taken; but, until it is thus supplied, the substituted record cannot be read.

Where the record is lost, and has not been supplied, the contents of the lost record may be shown by parol evidence, just as the contents of any other lost paper may be shown. *Bullock v. Commonwealth*, 96 Ky. 537, 29 S. W. 341. It is common practice to prove by parol evidence the contents of a lost deed, where the record has been destroyed; and there is no reason why the contents of a judicial record may not be proved in the same way until it is supplied. The court, therefore, improperly excluded the testimony

of Mrs. Morrison and the police judge as to the record being lost and as to its contents.

If the defendant Price was present when the writ was issued and given to the officer, and the officer was directed to obey the order of the court, the writ being issued by the direction of his attorney in his presence, he in legal contemplation procured the issuance of the writ, and the acts necessarily done by the officer in executing it.

Where the defense to an action is made by another in the name of the defendant, the person so defending has been held bound by the judgment by estoppel; but an estoppel, if relied on by the defendants, must be pleaded. *Schmidt v. L. C. & L. R. R. Co.*, 99 Ky. 143, 35 S. W. 135, 36 S. W. 168.

Judgment reversed, and cause remanded for a new trial.

ANTONINI v. STRAUBS.

(Court of Appeals of Kentucky. Oct. 21, 1908.)

HUSBAND AND WIFE (§ 71*)—CONVEYANCE OF LAND HELD BY WIFE AS TRUSTEE.

Where a deed to a married woman empowered her as trustee to convey by warranty deed, making her unaccountable for the proceeds of sale if she failed to reinvest them, there being no provision requiring her husband to join in the conveyance, a conveyance by her alone was good; *Ky. St. 1903, § 506*, providing that a conveyance by a married woman may be by joint deed of the husband and wife, not interfering with the right of a married woman to convey, by her sole deed pursuant to a power duly conferred on her, real estate, the title to which she holds as a mere trustee.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 303; Dec. Dig. § 71.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Louis Straubs, trustee, against Eugene Antonini. Judgment for plaintiff, and defendant appeals. Affirmed.

E. L. McDonald, for appellant. Burwell K. Marshall, for appellee.

SETTLE, J. This is an appeal from a judgment specifically enforcing a written contract between appellant and appellee, whereby the former purchased a parcel of real estate in the city of Louisville at an agreed price. Appellee tendered appellant a deed of conveyance to the property which she as trustee had duly signed and acknowledged. The deed accurately expressed the terms of the sale, and contained a covenant of general warranty. Appellant, though able to pay for the property, refused to do so or to accept the deed. Appellee is a married woman, and her husband did not sign or acknowledge the deed, nor was he named therein as a grantor, and for that reason alone appellant rejected the deed and refused to perform the contract. The only question presented by the record is: Did the

deed tendered convey to appellant a marketable title to the property therein described?

It was claimed by appellee, and adjudged by the lower court, that she, although a married woman, could by the deed tendered, without joining her husband, convey the real estate under the power given her by the deed by which she derived title, and which is copied in full in the petition. By that deed Henry Loemker, her father, in consideration of love and affection for his daughter, the appellee, conveyed her the property in trust for her child, and until her youngest child should reach the age of 21 years, for the benefit of the child she then had and any other children she might have, with certain provisions as to remainders in the event of the death of her children. Other clauses of the deed are as follows: "Provided further that the said Amelia Straub shall have the privilege or license of occupying said property as long as she lives, but she shall not have any interest in or to said property, or any part thereof, it being the intention of the grantor that said Amelia Straub shall not by this deed have or acquire any interest whatsoever in said property, or in the rents or income thereof; but shall simply have a license or privilege of living thereon and nothing else. * * *

Provided, further, that said trustee and her successor and successors in office may sell and convey said property herein conveyed by deed of general warranty, and either invest the proceeds of sale in other real estate, title to which shall be held upon the same trusts and subject to the same license and restrictions and with the same powers that the property herein conveyed is held; or said trustee or her successor or successors in office may expend the proceeds of sale for the use and benefit of her said children in such manner, in such amounts and for such purposes as said trustee and her successor and successors in office may deem for the best interest of her said children and having full faith and confidence in the judgment and honesty of my said daughter, Amelia, if she shall expend said proceeds of sale as above set forth, she shall not be held accountable for such proceeds or required to account to her said children or to any of them, or to anybody or to any court for such proceeds, or any part thereof, but any other trustee shall be held accountable; but the purchaser shall not be required to look to the necessity of the sale nor to the investment, nor to the expenditure of the proceeds of sale under any state of case." It will be observed that the above deed gives appellee the privilege of occupying the property conveyed so long as it remains unsold, but excludes her from acquiring in her own right any title to or interest therein, or in the rents or profits thereof. It, however, expressly empowers her as trustee to sell and convey the property by deed of general warranty, makes her unaccountable for the proceeds, if there should be

a failure on her part to reinvest them in other property, and relieves the purchaser of all responsibility for any misappropriation by her of such proceeds. It will further be observed that the deed contains no provision requiring appellee's husband to unite with her in the sale or conveyance of the property; indeed, the deed is silent as to the husband, though he was at the time of its execution alive, and is still living. He and appellee have, however, been separated several years, and she has instituted an action for a divorce, which is yet pending.

It is appellant's contention that, though appellee merely holds as a trustee the title to the property in question, the power given her to convey it cannot be exercised, except in conjunction with her husband, who must unite with her in the deed, as provided by section 506, Ky. St. 1903. This contention seems to be unsupported by authority. As at common law a married woman could not dispose of her real estate without a fine or recovery, she must since the abrogation of the common law by our statute on conveyances in order to do so convey it by the method substituted by the statute; that is, by deed in which the husband joins. But the statute does not interfere with the right of a married woman to convey, in pursuance of a power duly conferred upon her, real estate, the title to which she holds as a mere trustee, without the concurrence or intervention of her husband. As to the last question, all the authorities seem to agree. In 4 Kent's Commentaries (12th Ed.) p. 338, it is said: "Every person capable of disposing of an estate actually vested in himself may exercise a power, or direct a conveyance of the land. The rule goes further, and even allows an infant to execute a power simply collateral, and that only; and a feme covert may execute any kind of power, whether simply collateral, appendant or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband in no case is necessary." • In 2 Washburn on Real Property, § 1685, the same conclusion is expressed: "Any person who is competent to dispose of an estate of his own may execute a power over land. If a power is simply collateral, an infant may execute it. And a feme covert may execute a power, whether collateral, appendant, or in gross; the concurrence of her husband being in no case necessary. She may even execute it in favor of her husband. It makes no difference whether the power was granted to her before or after she became a married woman. The consent of her husband is unnecessary in either case. And the power may be coupled with an interest, as where an interest in land with a power of appointment is given to a married woman to her sole and separate use, or is given so that by statute it is her separate property. But the power must be exercised by her in the mode

appointed by the instrument giving the power. The statutes enabling women to hold their separate estate with full power of disposal do not alter this rule." In this state the case of Tyree v. Williams, 3 Bibb, 367, 6 Am. Dec. 663, the same doctrine is thus stated: "The fourth and last objection we shall notice questions the sufficiency of Jordan's title to one of the lots in Standford. This lot was conveyed to Jordan by Samuel Baird and Mary M. Bell, surviving executor and executrix of William Henderson, deceased. Henderson, being possessed of the legal title to this lot, made his will, by which, after devising all his real estate and personal estate to his wife, he directed all his possessions in the town of Standford to be sold at public auction by his executors at 12 months' credit. The lot in question was advertised and exposed to public sale. A few days before the sale, Jordan by letter informed the executors what price he would give, and, no person having bid as much on the day of sale, the lot was afterward conveyed to him at the price he had offered. It is admitted that Mrs. Henderson, now Mrs. Bell, had intermarried with her present husband before she executed the deed of conveyance to Jordan, and that she was at that time a feme covert. * * * But it is contended in the second place that Mrs. Bell could not legally execute the conveyance without joining with her husband and being privily examined, as the law concerning conveyances directs. There is no doubt that a feme covert may act en autre droit, without her husband. It is said: 'If cestui que use had devised that his wife should sell his land, and made her executrix and died, and she took another husband, that she might sell the land to her husband, for she did it en autre droit, and her husband should be in by the devisor.' Coke, Litt. 112a. Mr. Hargrave in his annotation upon this passage in Coke says: 'It is agreed in the books that a wife may without her husband execute a naked authority, whether given before or after coverture; and the rule (he observes) is the same where both an interest and an authority pass to the wife, if the authority is collateral to, and doth not flow from, the interest, because then the two are as unconnected as if they were vested in different persons.' Note 6, Coke on Litt. 112a. In this case there is no doubt that Mrs. Bell had an interest in the lot conveyed to Jordan; for all the estate, both real and personal, was devised to her. But the interest vested in her individual right, and the authority to sell was given to her in the capacity of executrix. The latter, therefore, did not flow from the former, but was collateral thereto; and consequently they were as unconnected as if they had been vested in different persons. Upon the principles of the common law, then, it is evident Mrs. Bell might, without her husband joining, execute

the conveyance; and it is clear that the statute concerning conveyances can have no effect upon the case, for that statute only enables a feme covert to convey her interest or estate by observing the requisites prescribed in cases where she could not do so before, but does not disable her from executing an authority which she might do according to the principles of the common law." An examination has not enabled us to find a more recent decision than *Tyree v. Williams*, supra, which in any way changes or modifies the doctrine therein expressed. We find, however, that the courts of last resort in many states outside of Kentucky adhere to the same doctrine. *Pullam v. State*, 78 Ala. 31, 56 Am. Rep. 21; *Huls v. Buntin*, 47 Ill. 397; *Armstrong v. Kerns*, 61 Md. 368; *Gridley v. Wynant*, 23 How. 501, 18 L. Ed. 411.

The cases cited by counsel for appellant are not in point. In each of them the wife under a power conferred attempted to convey real estate of which she was the sole owner without having the husband to join in the deed. This, it was held, she could not do. But in the instant case the conveyance by the married woman was made in the execution of an express trust, and the property conveyed an estate in which she owned no interest other than the mere right of occupancy as trustee.

Being of opinion that the deed tendered by appellee to appellant will convey him a good title to the realty therein described, the judgment of the lower court specifically enforcing the contract is hereby affirmed.

COLLINS v. WILLIAMSON et al.

(Court of Appeals of Kentucky. Oct. 27, 1908.)
ESTOPPEL (§ 70*)—EQUITABLE ESTOPPEL—
NEGLECT.

Where a vendor used no diligence to collect an order on third persons directing them to pay vendor a certain sum, which was the price of the land, while such third persons were yet solvent, which was for two or three years, and did not inform the purchaser of failure to collect until several years after such third persons had become insolvent, and then only claimed that they had failed to pay a certain balance, he was estopped from recovering the amount of the order from the purchaser.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 183, 184; Dec. Dig. § 70.*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Martin Collins against James H. Williamson and others for the purchase price of land and to enforce a lien upon the land for its payment. Judgment for defendants, and plaintiff appeals. Affirmed.

Roscoe Vanover, for appellant. W. H. Flanery, for appellees.

NUNN, J. Some time in the month of November, 1895, appellant sold to appellee about

42 acres of land in Pike county, Ky. At that time appellee J. H. Williamson signed and delivered to appellant an order directing Pinson and Reynolds to pay him the sum of \$349.50 as the purchase price of the land. Appellant had no title to the land. He had bought it, however, and paid J. M. Goff for it. On the 28th day of December, 1895, J. M. Goff, in whom the title was, conveyed it to appellee. It was recited in the deed that the consideration was \$349.50, and that James A. Pinson and Thomas Reynolds were to pay that amount to appellant. It was further recited in the deed that a lien was retained upon the property conveyed as surety for unpaid purchase money. This action was instituted by appellant to recover the \$349.50, less a credit of \$48, and to enforce a lien upon the land for its payment. Appellee answered, and denied being responsible for the debt, and averred that no lien was actually retained for the purchase money; that appellant accepted the order on Pinson and Reynolds in full satisfaction of the purchase price; that the deed was written on a blank form, and the words retaining the lien were in print, and by oversight and mistake they were not erased; that appellant accepted the order for the \$349.50, with the full understanding and agreement that he was to look to Pinson and Reynolds for the payment thereof, and that appellee had no knowledge or information for many years thereafter, and until Pinson and Reynolds had become insolvent, that appellant was claiming that the order had not been paid; that at the time appellant received the order, and for a number of years thereafter, Pinson and Reynolds were solvent; that he could have forced collection of the order at any time for three or four years after receiving it; and that, if appellant failed to collect it, it was by reason of his own negligence. He also alleged that appellant had collected the amount of the order from Pinson and Reynolds. These allegations were denied by reply, and upon the hearing of the case the lower court dismissed appellant's petition.

The evidence was very conflicting upon the question whether or not the words in the deed retaining the lien for the purchase money were by mistake not erased from the printed form of it; but we deem it unnecessary to consider this question, for the reason that, conceding there was a lien retained for the purchase price the acceptance by appellant of the order on Pinson and Reynolds, and the failure to collect it, or to use any diligence in collecting the order when Pinson and Reynolds were solvent, estops him from recovering the amount from appellee. The evidence shows that they were solvent some two or three years after appellant accepted the order; and, in addition to this, Pinson and Reynolds and their clerks, by their testimony, show that the amount of the order, or nearly so, was paid to appellant. They were not certain as to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount paid to appellant, for the reason that after they became insolvent their books of accounts were not preserved. It is also shown by the proof that appellee gave appellee no information of his failure to collect the order until several years after Pinson and Reynolds became insolvent, and then only claimed that they had failed to pay a balance of about \$70 on it. Under these facts it would be inequitable to require appellee to again pay the purchase price of this land; for it is certain from the proof that appellee could have collected this money from Pinson and Reynolds before they became insolvent, if appellant had not accepted the order for the \$349.50, which was charged to appellee by Pinson and Reynolds in their settlement.

For these reasons, the judgment of the lower court is affirmed.

HOTFIL v. DEWEESE'S TRUSTEE et al.
(Court of Appeals of Kentucky. Oct. 20, 1908.)

1. **VENDOR AND PURCHASER (§ 267*) — VENDOR'S LIEN—RELEASE—FRAUD.**

Evidence held insufficient to authorize a finding that plaintiff was induced by fraud to release a vendor's lien on certain land, and accept D.'s note in lieu thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 267.*]

2. **ESTOPPEL (§ 71*)—ACTS IN PAIS.**

Where plaintiff released a vendor's lien on certain land, so that infants' money might be invested therein under a judicial decree, he could not, though induced to release such lien by fraud, subject the infants' interest to the payment of the debt formerly secured by the lien.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 173-179; Dec. Dig. § 71.*]

3. **VENDOR AND PURCHASER (§ 266*) — CONTRACT—RESCISSION.**

Where defendant's wife's contract to pay plaintiff \$2,450 was conditioned on his conveying certain land to her, which he never did, but, instead, rescinded the contract, waived the lien reserved thereby, and conveyed the land to defendant's infant children, agreeing to look to defendant individually for money advanced to him, plaintiff could not recover against the wife because defendant deceived him in inducing him to rescind such contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 266.*]

Appeal from Circuit Court, Carroll County.
"Not to be officially reported."

Action by Henry Hotfil against Cornelius and Annette Deweese's trustee and others. Judgment for defendants, and complainant appeals. Affirmed.

Winslow & Howe and J. J. Orr, for appellant. H. G. Botts, W. B. Moody, and Washington Bowle, Jr., for appellees.

BARKER, J. This action was instituted in the Carroll circuit court to enforce the lien of \$2,450 described in the following contract, to wit: "Articles of agreement between Henry Hotfil, party of the first part, and Annie Deweese, party of the second part, witness-

eth: That the party of the first part hereby bargains and sells and agrees to convey to the party of the second part the following described land in Hunter's bottom in Carroll county, Ky., including all the crops thereon and the wheat which has been sold this year, possession of all of which is now given to the party of the second part. [Description of the land omitted.] For the above purchase of said crops and land, the party of the second part agrees to pay to the party of the first part two thousand and four hundred and fifty dollars on the 1st day of March, 1899, and give him her note of this date with J. S. Deweese as her surety for five hundred dollars due March 1st, 1899, and pay John Obertatte forty-two hundred and fifty dollars on the first of March, 1899, when the party of the first part agrees to convey said land to the party of the second part by deed with covenant of general warranty and with a fee simple title free of incumbrance. To secure the said payments a lien is retained on the said land and crops. The party of the second part is to pay the discount on the \$500.00 note until it is due and to pay the interest on a note of the party of the first part to John Obertatte for \$4,250.00 up to March 1st, 1899, from March 1st, 1898, and the party of the second part is to pay the taxes on the land. Witness our hands, August 22nd, 1898. [Signed] Annie A. Deweese. Henry Hotfil." To the petition declaring on this contract the defendants answered, admitting the genuineness of the writing, but alleging, in substance, that the contract between Hotfil and Annie A. Deweese had been rescinded by mutual agreement, and that the property described in the writing had been subsequently sold to the infant children of James S. Deweese for \$7,000; and that Hotfil had waived his lien for \$2,450, and accepted in lieu thereof the individual note of James S. Deweese. In his reply to this answer, the plaintiff makes the following express admission with reference to the acceptance by him of the individual note of James S. Deweese: "Plaintiff admits that said note or obligation was accepted and retained by him at the time in full satisfaction of the \$2,450 sued for in this action, but he says that his acceptance and retention thereof was procured by and through the false and fraudulent representations made by the said trustee and his attorney to plaintiff as herein set out. He then alleges that he is of German nationality, and speaks the English language with difficulty, and is unfamiliar with the ways, customs, and usages of this country in reference to business matters; that James S. Deweese and his attorney, J. A. Donaldson, took advantage of his ignorance, and by their statements made the plaintiff believe Deweese was a man of great wealth and entirely solvent; that he was the owner of a fine

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

farm of about 700 acres, on which he (Deweese) then resided, and that, by reason of these fraudulent and false statements, he was induced to accept the individual note or obligation of James S. Deweese, and waive his lien on the land in question." All of these allegations of fraud were denied by subsequent pleadings, and the issues completed. Upon the trial of the case the chancellor dismissed the petition, and, from this judgment, Hotfil has appealed.

In order to a more thorough understanding of this case, we give a short statement of the facts which led up to the transaction out of which this litigation grew.

James S. Deweese was the trustee of his wife, who owned a large farm in what is known as "Hunter's bottom," in Carroll county, Ky. This farm was managed by the trustee for his wife, and was in the main leased on shares to croppers. In 1895 the chief cropper, one John Obertatte, desired to purchase a neighboring farm, which was also situated in Hunter's Bottom, and which contained 255 acres, owned by James S. Leeds and wife. For this farm Leeds and wife demanded as a selling price \$14,000. Obertatte did not feel willing to assume so large an indebtedness, and, in order to facilitate him in the purchase of so much of the farm as he desired, Deweese agreed that, if Obertatte would buy the whole farm at the price of \$14,000, he would divide it with him, and relieve him of such portion of it as he (Obertatte) did not desire to retain. This seems to have been entirely a friendly act on the part of Deweese. As a result of this agreement, Obertatte purchased the farm from Leeds and wife at the price above mentioned. There was upon the farm at the time of the conveyance to Obertatte a mortgage from Leeds and wife to Margaret B. Collins for the sum of \$8,500, and the payment of this mortgage debt Obertatte assumed as part payment of the purchase price. After the conveyance to him, Obertatte and Deweese agreed upon a division of the farm. Obertatte was to retain 130 acres of it with all the improvements at the agreed sum of \$8,000, and Deweese was to take the remaining 125 acres of unimproved land at the price of \$6,000. Obertatte about this time seems to have left the Deweese farm, and Henry Hotfil, the plaintiff, was installed as chief renter or foreman. Thereafter Hotfil entered into negotiations with Deweese for the purchase of the 125 acres, which the latter had agreed with Obertatte to take. He seems, however, to have been somewhat timid in assuming so large an obligation, and, as a result of his negotiation with Deweese, it was agreed that the possession of the 125 acres should be turned over to him at the agreed price of \$7,200, but no deed was to be made for it, only a bond for title, and he was to have the option at any time within two or three years to decline to take the property. Some time before this Hotfil had been de-

positing with Deweese such sums of money as he made, and for which the latter gave him receipts, and agreed to pay him 5 per cent. interest annually. There is some contrariety in the evidence as to how much of this money was paid before, and how much after the commencement of the negotiations for the sale of the land to Hotfil; but, for the purposes of this case, it may be assumed that the whole sum, amounting to \$2,450, was turned over by Hotfil to Deweese as payments on the land if he subsequently exercise his option to hold it; and this is the most favorable statement of the case possible for appellant. After a year or two from the time the option was given, Hotfil became discouraged with reference to the purchase, and exercised his option by refusing to take the land.

It now becomes necessary to state that James S. Deweese was also the trustee of his two infant children, Cornelius and Annette, who had an estate amounting to about \$18,000 in money; and the trustee, in order to find a market for the 125 acres which Hotfil declined to take as above set forth, conceived the idea of investing a part of the trust fund belonging to his children in its purchase. He thereupon sought permission of the Carroll circuit court to invest \$7,000 of the trust fund in the purchase of the 125 acres of land under discussion. It is almost needless to remark that the court would not permit the investment of this trust fund in property having a prior mortgage upon it. Pending the time required to obtain the consent of the chancellor to an investment of the children's money, and seemingly as a part of the plan leading up to the investment of the children's money, Annie A. Deweese entered into the contract herein sued on, and which is set forth in this opinion. Nothing was ever done under this contract. The land was not conveyed to Mrs. Deweese, nor did she ever pay anything for it; but it was explained to Hotfil that it would be necessary, in order to invest the infants' money in the land, and thus relieve him of any further liability in the premises, for him to waive his lien for the \$2,450 which he had paid over to James S. Deweese, and accept in lieu thereof the individual obligation of the latter for the amount of his claim. This he did, and the trust money was invested in the land, and, with Hotfil's full knowledge and consent, it was conveyed directly from Obertatte and wife to the infants on the 28th day of February, 1899. Six thousand dollars of this money went to Leeds and wife in payment of the purchase price of the farm, and to Mrs. Margaret B. Collins to discharge her mortgage. Subsequently James S. Deweese either was removed or resigned as trustee, both for his wife and his children, and J. A. Donaldson, who seems to have been his attorney in all legal matters, was appointed trustee both for the wife and the children.

In 1906, more than seven years after the transaction above detailed was completed, the trustee, Donaldson, into whose hands the rescinded contract between Hotfil and Mrs. Deweese had been placed, showed it to Hotfil for the purpose of refreshing his recollection as to the amount of the children's money which had been invested in the farm, some dispute about which had arisen between Donaldson and the former trustee, James S. Deweese; and the contract itself was filed in the record in the case of Deweese v. Deweese, then pending in the Carroll circuit court. Thereupon Hotfil employed counsel, obtained a copy of the original contract, and instituted this action. It will be seen that, by the pleadings, the plaintiff reduced his right to recover the amount sued for to the simple question as to whether or not he was defrauded or deceived by James S. Deweese and J. A. Donaldson into a surrender of the contract between himself and Annie A. Deweese and a waiver of his lien on the land by an acceptance of the individual note of James S. Deweese for his debt. He did not consider that he had a contract with Annie A. Deweese. This is shown by himself in his direct testimony. He was asked by his counsel: "What, if any, land, did you ever sell to Jim Deweese's wife, Mrs. Annie A. Deweese? A. I never sold her any. Q. What, if any, talk did you ever have with her in regard to selling her any land? A. Not any." So that it is perfectly plain that the plaintiff did not consider the writing sued on as a contract between him and the wife of James S. Deweese, or that she owed him anything. He had given James S. Deweese \$2,450 of his money, and this was the sum for which he considered he had a lien on the land. The plaintiff shows clearly in his testimony his reason for accepting the note of Deweese in order to facilitate the sale to the children. He was tired of his bargain, and wished to get rid of it. He was asked on cross-examination: "Is it not a fact that you had become dissatisfied with it [the land], and that he took it off your hands as he had agreed to do? A. Yes. I was a little dissatisfied. The times was hard, and I thought I could not pay for it." He also clearly shows that he understood that he was releasing his lien. He was asked this question: "Didn't you know you had no security, and you were allowing him on his own responsibility to hold your money? A. Yes, sir." Again, he was asked: "Is it not a fact that you agreed to look to Mr. Deweese personally for payment of that \$2,500 to you? A. I reckon so. Q. And, when he gave you the receipt for \$2,500, you were thoroughly satisfied that it would be good to you at any time? A. Yes, sir. Q. And after that time I suppose you had no interest in the contract that was made, and paid no attention whatever to it? A. No, sir." Again: "Q. When did it first occur to you that you had a lien on this land for the payment of that money? A. After I

seen that paper. Q. Which? Do you mean the paper with Mrs. Annie A. Deweese's name on it? A. Yes, sir. Q. When did you first see that paper? A. When Judge Donaldson brought it down. Q. About how long ago? A. This spring a year ago. Q. Up to that time you didn't consider that you had any lien on that land? A. No, sir." Of course, this testimony on the part of the plaintiff does not strengthen the defendants' case any more than the pleading which admits the waiver of the lien already referred to.

This brings us to the question whether or not Hotfil was induced to waive his lien by fraud. There is no evidence in this record to show that Donaldson in any wise defrauded the plaintiff. He does not in his testimony claim that the attorney made any statement which tended to deceive him, nor does he claim that the relation of client and attorney existed between him and Donaldson, or that the latter was under any obligation to look out for his interest, or advise him in the transaction he was having in regard to the land. On this subject he was asked: "Did they or not know, or have reason to know, that you were trusting to them to protect you in the arrangement of those matters? A. Deweese ought to have known it. I don't know about the judge. Q. Did or not Judge Donaldson attend to your legal matters prior to that time? A. I never had anything to do with any lawyers before that." The sum total of plaintiff's deception in regard to the solvency of Deweese is shown in the following questions and answers bearing upon that subject, and taken from his testimony: After stating that his money had not been paid to him, he was asked: "What reason, if any, did Jim Deweese give at that time for not paying it to you? A. He just told me he would like to keep it; that he had some bridge stock at Louisville, and that, if I would let him have that money, he could hold that stock. Q. Did he or not give you any paper at that time showing his indebtedness to you? A. Yes; he gave me that note. Q. What note is that? A. That \$2,500 note." Again: "Q. What reports or what statements did he make at that time to you with reference to how much he was worth? A. He told me that he had a lot of life insurance and his place was there, and I thought he was all right—something like that he told me. Q. What place was he living on at that time? A. On his home place there. Q. Who claimed to own it at that time? A. As far as I know, he owned it." It is clear from all this that no fraud was practiced upon the plaintiff; at least, none is shown in his own testimony. No one disputes the truth of the statement that Deweese had a lot of life insurance, or that he owned the bridge stock. The plaintiff does not claim that Deweese told him that he owned the place on which

he lived. On this subject he says that, so far as he knew, Deweese owned it. Undoubtedly the plaintiff thought that Deweese was solvent, or, as he expressed it, "I thought he was a millionaire." He was an active trading man, managed his wife's property, and was connected with the Growers' Tobacco Warehouse in Louisville, Ky., engaged in purchasing the tobacco crops of the farmers in Hunter's Bottom. He seemed to be doing a large business, and no doubt, as said before, the plaintiff thought him abundantly solvent. But the deception from which he suffered was self-deception, and there is not a word of testimony beyond what has been stated in this opinion which tends to show any fraud practiced upon the plaintiff, either by Donaldson, the attorney, or by the trustee, Deweese.

The evidence in this case is entirely too voluminous to state it in anything like detail; but a careful reading of the whole convinces us that the plaintiff's alleged cause of action was completely disproved by his own testimony, as well as that introduced in behalf of the defendants. We have been able to find not one scintilla of evidence which militates against the character or the fair and candid dealing of Donaldson throughout this whole transaction. So far as this record shows, his conduct has been without a shadow of reproach, and there is no basis for the charge of duplicity which has been so insistently urged against him. The testimony as to the fraud of Deweese is in substance what we have stated it, and it in no wise affords a basis for the claim set up by the plaintiff. But, if we assume that Deweese's conduct was fraudulent and deceived the plaintiff, it would be difficult to ascertain how that would entitle him to take the infants' money, which was invested in the land alone upon the condition that he waived whatever lien he had upon it. If he had not waived his lien, the court would not have permitted the investment. Nor would it afford the plaintiff a claim against the wife that the husband had deceived him. The condition upon which the wife agreed to pay him \$2,450 was that he should convey to her the land. This he has never done, and in his testimony says he never agreed to do; and, as the land was not conveyed to the wife, there certainly is no consideration for her agreement to pay plaintiff \$2,450. This leaves out of view his own admission that he rescinded the contract between him and the wife, and agreed to look to the husband individually for the amount of money he had advanced him. As said before, however, the plaintiff did not think he had a contract with the wife, and expressly denied the existence of such contract in his testimony. In conclusion he admits that he agreed to accept the individual note of James S. Deweese for the whole claim herein sued

for, and that for more than seven years after the waiver of the lien he did not consider that he had any other claim for his money than the personal obligation of James S. Deweese.

We agree with the chancellor that the plaintiff wholly failed to make out his case, and therefore his judgment dismissing the petition must be affirmed; and it is so ordered.

CARTER v. CROW'S ADM'R et al.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 375*) —SALE OF REAL ESTATE—PERSONS WHO MAY APPEAL.

A purchaser at a sale made in a suit to settle a decedent's estate has the right to appeal from a judgment confirming the report of sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1538; Dec. Dig. § 375.*]

2. EXECUTORS AND ADMINISTRATORS (§ 375*) —SALE OF REAL ESTATE—VALIDITY—"MATERIAL ALLEGATION."

Under Civ. Code Prac. § 126, providing that material allegations against infants must be proved, though not denied, and section 127, defining a material allegation to be one necessary to support the action, and section 429, requiring a petition in a suit to settle a decedent's estate to state the amount of debts, the nature and value of the property of decedent, and providing that, if the personal property is insufficient to pay debts, so much of the real property as may be necessary may be sold, a sale of an entire tract before the value of the personal property had been ascertained, and before it had been ascertained, at least approximately, what the claims against decedent's estate amounted to, and without any showing that the land was indivisible, was, as to infant heirs, void.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1533; Dec. Dig. § 375.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4404, 4405.]

3. EXECUTORS AND ADMINISTRATORS (§ 339*) —SALE OF REAL ESTATE—VALIDITY.

The report of a commissioner that, in his judgment, certain claims against a decedent's estate had been proved according to law, is not sufficient to support a judgment directing a sale of decedent's real estate to satisfy the same, but, before any such sale is ordered, the validity of the claims should be passed upon by the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1418; Dec. Dig. § 339.*]

4. EXECUTORS AND ADMINISTRATORS (§ 346*) —SALE OF REAL ESTATE—PROVISION FOR INFANT HEIRS.

A judgment directing a sale of the real estate to pay debts must make necessary provision to protect the interest of infant heirs in the proceeds of the sale, over the sum required to pay the debts, otherwise a sale in excess of the amount necessary to pay debts, though the real estate be indivisible, will be void.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 346.*]

Appeal from Circuit Court, Lincoln County.

"To be officially reported."

John M. Carter filed exceptions to the confirmation of a sale to him by the administrator of O. J. Crow, deceased, in the course of the settlement of decedent's estate. Judgment for the administrator confirming the sale, and Carter appeals. Reversed and remanded.

J. B. Paxton, for appellant. M. C. Saufley, for appellees.

LASSING, J. In June, 1906, O. J. Crow died intestate. In July following his administrator filed suit for a settlement of his estate. The petition alleged that decedent left personal property of the value of less than \$3,000; that he owed a mortgage debt of about \$8,000; that he owned a farm of 156¼ acres; and that it was necessary to sell same to pay his debts and settle his estate. Upon the filing of the petition, the clerk referred the case to the commissioner to hear the proof of claims, as authorized by section 430 of the Civil Code of Practice. In his advertisement, the time within which to file claims was limited to August 15th following; but few claims were filed within the time limit, and some of those filed were rejected by the commissioner for various reasons. The case was therefore re-referred, and the claims, as finally proved and allowed by the commissioner, amounted to \$8,818.45. At a special term of the court held on September 6, 1907, judgment was entered directing a sale of the entire tract of land, and the sale was made under this judgment on the 26th of September following. Appellant became the purchaser for \$10,593.77. At the regular November term the sale to appellant was reported, and the administrator asked that it be confirmed. Appellant thereupon filed the following exceptions to the report:

"(1) The judgment rendered by the court at the special term held September 6, 1907, under which the aforesaid sale was made, was premature, in that the issues in this case had not been completed 30 days before the commencement of the term at which said judgment was rendered. Said term began and said judgment was rendered on the 6th day of September, 1907. The report of the guardian ad litem for the infant defendant Mary M. Crow was filed August 30, 1907, and the report of the statutory guardian of the infant defendant Ollie Crow Vanhook was filed September 6, 1907, the same day that judgment was rendered.

"(2) No proof was taken or filed to sustain the allegations of the petition as to the infant defendants.

"(3) The defendants Lizzie Glover and Minnie Hocker are both married women and their husbands are not parties to this action.

"(4) There is no proof on file showing that the land is indivisible, or that it was necessary to sell the whole of same.

"(5) The report of sale does not describe

the property sold. For these reasons, the reported purchaser asks that the exceptions to the report of sale be sustained; that the sale be declared void; that the sale bonds executed by him be canceled."

From the conclusion which we have reached it becomes unnecessary to pass upon the first exception. The third exception is cured by the subsequent pleadings. The fifth exception is abandoned; and it remains necessary to consider only the second and fourth exceptions. To the contention of counsel for appellee that appellant has no right to prosecute this appeal we deem it but necessary to say that in the case of *Sanders v. Wade*, 30 S. W. 656, 17 Ky. Law Rep. 205, it was held that the purchaser at a judicial sale was a necessary party to any appeal that might be prayed from the judgment confirming the report of sale. In *Farmers' Bank of Kentucky v. Peter*, 13 Bush, 591, it was held that the chancellor should refuse to confirm a sale when it was made to appear on exceptions filed before confirmation that there was a defect in title, or some other reason sufficient to set aside the sale. And in *Elliot v. Fowler*, *Guardian*, 112 Ky. 376, 65 S. W. 849, it was held that in a suit to settle an estate the sale of more land than was necessary to pay the debts was void as to infants who had an interest in the land. Hence, if the land in question was divisible, and it was not necessary to sell all of it, the sale of the excess was, as to the infant defendants, void, and this of itself furnished sufficient ground to authorize the chancellor to refuse to confirm the sale; the exceptions having been made in proper time.

The petition shows that two of the heirs of decedent are infants. Section 126 of the Civil Code of Practice provides that all material allegations of pleadings against infants must be proven, even though not denied. Section 127 defines a "material allegation" to be one necessary to support the cause of action, and section 429 sets out at length what facts must be stated in the petition for a sale of a decedent's real estate for the purpose of settling his estate. These "necessary allegations" are the amount of the debts; the nature and value of the property, real and personal, so far as known to the plaintiff; and whether or not the personal estate is sufficient to pay all of the debts. If not, the court may order the real property, or so much thereof as shall be necessary, to be sold to pay the residue of the debts remaining unpaid after the personal estate is exhausted. From the petition it appears that the personal estate was estimated to be of a value not exceeding \$3,000, though no sale had at that time been had of any of the personalty; that the decedent owned three parcels or tracts of land, containing 7 acres, 129 acres, 1 rod, and 4 poles, and about 20 acres; that these three tracts were purchased at different times by the decedent, but were all contiguous, and should all be

sold together as one tract, for the reason that they all constituted and were used by the decedent as one tract or farm; that the decedent was indebted to divers persons in amounts unknown to the plaintiff, but that the aggregate of their claims far exceeded the value of the personal estate of decedent; that the plaintiff held notes against decedent amounting to something over \$8,000, and these notes are set out and described in the petition at length. He prayed for a reference to the master commissioner to hear proof of claims; that his own rights, so far as his claim, which was a mortgage debt, was concerned, be protected; and that the land be sold to satisfy the mortgage and other debts, together with the costs of administration. All of the adult defendants named in the petition were brought before the court. The infant defendant Mary M. Crow was represented by her guardian ad litem, G. D. Florence, a practicing attorney regularly appointed as such, and the infant defendant Ollie Crow Vanhook by her statutory guardian, J. H. Vanhook.

The judgment recites that: "The court is of opinion, and so adjudges, that a sale of all of the land mentioned and described in the petition of which O. J. Crow died possessed is necessary for the payment of his debts." The master commissioner was directed to make said sale to the highest and best bidder on the 25th day of September, 1907. On the same day the master commissioner filed a report of claims, in which several claims were allowed and others rejected. He asked that the case be re-referred, and claimants given an opportunity to amend their proof. In this report he recited that the claim of Matthew Woodson would be allowed on condition that the court extended the time fixed by the order of reference. It appears that this claim was presented after the date fixed by the commissioner for receiving claims, and for this reason was not allowed. At the November term following, on the 6th of November, the commissioner filed his report of sale. His report showed that he sold the land to appellant for \$67.70 per acre, and, accompanying the report of sale, were the report of the appraisers, valuing the land at \$65 per acre, or \$10,140 for the entire tract, and the bonds of the purchaser, due in six and twelve months, one for \$5,296.88 and the other for \$5,296.89. On the 12th day of November the master commissioner filed a report on claims, and on the 13th of November the case was again referred to him for further proof as to debts. At the February term, 1908, of court, the commissioner filed his third and last report on claims. At the time the sale was ordered the claims which had been reported to and allowed by the master commissioner amounted to \$50.60. Several other claims had been presented, but had not been allowed, nor were any other claims allowed by the commissioner until after the sale had been made

and reported back to court, so that at the time the sale was ordered, so far as the record shows, and by that we must be guided, the court had nothing before it bearing upon the indebtedness of decedent's estate further than the general allegation of the petition that the debts of decedent largely exceeded the value of the personal estate, which was fixed at less than \$3,000, coupled with the report of the master that valid claims had been presented and allowed to the extent of \$50.60, and while it has been held that the court may order a sale of land before any report of claims has been made, or even before a reference to the commissioner has been made for proof of claims, in cases where the court is satisfied that it is necessary to sell all of the land (*Harlammert v. Moody's Adm'r*, 26 S. W. 2, 15 Ky. Law Rep. 839, and *Rogers v. Rogers*, 31 S. W. 139, 17 Ky. Law Rep. 358), we are familiar with no authority which authorizes a sale of the decedent's real estate until the necessity therefor has been established by pleading and proof.

The pleadings in this case are too vague and indefinite on the subject of the indebtedness of the decedent to authorize a judgment directing a sale of all his land, and the report of the commissioner did not supply this defect. In fact, both taken together showed that at that time it was not known what the indebtedness was, and as said by this court in the case of *Harlammert v. Moody's Adm'r*, 26 S. W. 2, 15 Ky. Law Rep. 839, above referred to: "Of course, it is necessary for the court to know certainly or approximately the amount of demands against the estate in order to determine whether to sell all of the real estate or part only." The allegations of the petition and the proof before the court at the time the sale was ordered did not furnish the court the information which it should have had as to the indebtedness of the estate before ordering the sale. Even if it is conceded that at that time the court was advised fully as to the exact amount of the indebtedness which was later shown by the commissioner's reports, to wit, \$8,818.45, we are of opinion that the judgment directing a sale of the entire tract was error, for there was no proof that the land was indivisible, and, in the absence of such proof, the judgment should have directed a sale of only so much land as was necessary to pay the debts.

The petition alleged the personal property to be of a value not exceeding \$3,000, and appellee in his brief admits that there was realized out of the sale of this personalty \$1,793.93, so that it was only necessary to sell enough of the real estate to raise the sum of \$6,221.47, and the costs of the litigation. This being true, a sale of the entire tract was error. *Auxier v. Clark*, 82 S. W. 605, 26 Ky. Law Rep. 890. This land had been bought in three tracts. The presumption would be that it was susceptible

of division, and, as the right of infants were involved, the law cast upon plaintiff the burden of affirmatively establishing the fact that it was not susceptible of division before a sale of the entire tract could be ordered. *Talbott v. Campbell*, 67 S. W. 53, 23 Ky. Law Rep. 2198, and *Gill v. Lane*, 80 S. W. 1176, 26 Ky. Law Rep. 267. We are of opinion that the court erred in directing a sale of the real estate before the value of the personal property belonging to decedent had been ascertained, and before it had been ascertained, at least approximately, what the claims against decedent's estate amounted to. This information was necessary in order for him to determine what sum had to be raised by the sale, and, in the absence of a showing that the land was indivisible, he should have directed a sale of only so much of the land as was necessary to pay the debts against the estate remaining unsatisfied after exhausting the personalty, together with the costs of the suit for settlement. The case seems to have been hastily practiced throughout. None of the reports of the commissioner on claims appear to have been confirmed. This was doubtless an oversight, but no judgment should have been given to pay any debt which the court had not found to be a valid claim against the estate. The report of the commissioner reciting the fact that in his judgment certain claims had been proven according to law, and were allowed, is not in our opinion sufficient to authorize or support a judgment directing a sale of the real estate to satisfy same, but, before any such sale is ordered, the validity of these claims should be passed upon by the court.

For the reasons indicated, the judgment is reversed and remanded for further proceedings consistent with this opinion. Upon a return of the case opportunity should be given the plaintiff, if he can, to show that the land is indivisible. If this fact is established to the court's satisfaction, a judgment may be entered directing a sale of the entire tract. If not, then it should direct only so much of the land sold as may be necessary to pay the debts remaining unsatisfied after exhausting the personalty, together with the costs of the suit to settle the estate. If it is shown that the property is indivisible, and it is ordered sold as an entirety, then the court, in its judgment, must make necessary provision for the protection of the interests of the infant defendants in the proceeds of the sale over and above the amount required to pay the debts and costs of the settlement. Otherwise the sale in excess of the amount necessary to pay the debts, even though indivisible, will be void. *Elliott v. Fowler's Guardian*, 112 Ky. 376, 65 S. W. 849; *Zehnder v. Schoenbachler*, 70 S. W. 278, 24 Ky. Law Rep. 947; *Louisville Banking Co. v. Pranger*, 68 S. W. 632, 24 Ky. Law Rep. 408.

CHESTNUT v. OHLER.

(Court of Appeals of Kentucky. Oct. 29, 1908.)

1. SALES (§ 261*)—"WARRANTIES."

Representations made at the time of a sale to induce a purchase are "warranties."

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7402, 7403, 7833.]

2. SALES (§ 434*)—WARRANTIES—ACTION FOR BREACH—PLEADING.

A petition alleging that, at the time of sale to him by defendants of a jack, defendants falsely represented to him that the jack was sound and a good foal getter, and that he made the purchase in reliance thereon, authorizes a recovery for breach of warranty, notwithstanding the addition of allegations of fraud, and failure of proof as to them.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1284-1238; Dec. Dig. § 434.*]

3. PARTNERSHIP (§ 141*)—SALE AND WARRANTY BY PARTNER—LIABILITY OF COPARTNER.

Where one of two partners makes a sale for them with a warranty, the other, knowing of the sale and receiving his part of the proceeds, is bound by the warranty.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 221; Dec. Dig. § 141.*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by D. T. Chestnut against S. W. Ohler and another. Judgment for defendant Ohler. Plaintiff appeals. Reversed, and remanded for new trial.

James M. Hayes, for appellant. H. H. Tye, for appellee.

HOBSON J. D. T. Chestnut brought this suit against S. W. Ohler and W. S. Cochran to recover damages for the sale of a jack by them to him. Cochran did not answer, and as to him the petition was taken for confessed. Ohler answered, denying the allegations of the petition. A trial followed, in which the court, at the conclusion of the evidence for the plaintiff, directed the jury to find for the defendant, and the plaintiff appeals.

It is insisted that the court was right, because the petition stated a cause of action for deceit and there was no proof of fraud. It is alleged in the petition that at the time of the sale of the jack the defendants represented to the plaintiff that the jack was sound and a good foal getter, that plaintiff relied on these representations and was induced thereby to buy the jack, and but for them would not have bought him. Representations made at the time of the sale to induce the purchase are warranties. *Lamme v. Gregg*, 1 Metc. 444, 71 Am. Dec. 489. So, if the petition had stopped here, this part of it, with proper allegations as to damages, would undoubtedly be good as stating a cause of action on a warranty. The fact that other allegations are added, charging the defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ants with fraud, did not affect his right to recover when he proved the warranty, but failed to prove the fraud. When the motion for a peremptory instruction was made, the plaintiff tendered an amended petition, which the court refused to allow to be filed, on the ground that it was a departure from the course of action stated in the petition, which was a suit for damages for fraud, while the amendment sought to recover for a breach of warranty. There was no variance. Every fact necessary to a petition in a suit on a warranty was stated in the petition. The amendment did not change the cause of action, which was to recover damages for the misrepresentations as to the jack. If the plaintiff failed to prove the fraud, that part of his claim went out; but because he was unable to prove his whole claim was no reason for dismissing his case, when what he had proved made out a cause of action.

It is also said the proof showed no misrepresentations by Ohler. The sale was made by Cochron, and he made the representations; but the jack was owned by Cochron and Ohler jointly. The proceeds of the sale were divided between them. Ohler is responsible for the representations of his partner in making the sale, which induced Chestnut to make the purchase. He knew of the sale and accepted part of the proceeds. The sale was made by Cochron for himself and Ohler; Cochron being the mouthpiece of both in making it. Ohler is bound by the warranty that Cochron gave, equally with him.

Judgment reversed, and cause remanded for a new trial.

BURTON v. BURTON.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

DIVORCE (§ 133*)—GROUNDS—ABANDONMENT—EVIDENCE—SUFFICIENCY.

Under Ky. St. 1903, § 2117, plaintiff was entitled to a divorce, where his wife did not appear, and he showed that she left him and moved to another state, that they had lived apart for more than three years, and that he had treated her kindly and provided her with a home, though there was no direct evidence as to why she abandoned him, nor that at the time of abandonment his conduct was above criticism.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-449; Dec. Dig. § 133.*]

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Divorce action by Asher Burton against Susan Burton. From a judgment refusing a divorce, plaintiff appeals. Reversed, with directions.

J. W. Schooler, for appellant.

CARROLL, J. This is a suit brought by the husband against the wife for a divorce upon the ground of abandonment. The petition, which was filed in 1907, set out in apt

terms a good cause of action. The defendant was a nonresident of the state, and resided in Hamilton county, in the state of Ohio. She was brought before the court by a warning order, and the attorney appointed to correspond with her reported that the letter addressed to her was returned by the post-office department marked "Unclaimed." In due time, after notice served upon the corresponding attorney, the depositions of two witnesses were taken. They testified, in substance, that they had known the parties for a number of years; that they were married in October, 1898, and lived together as man and wife until September, 1903, when the defendant left her husband and removed to Cincinnati, Ohio, where she has since lived; that they knew the parties had actually lived apart from each other from the time of the abandonment until the depositions were taken in 1907. The witness McClair, being asked: "Q. Do you know whether the plaintiff gave defendant any cause or reason to leave him?"—answered: "A. No; he did not give his wife, the defendant, any cause to leave him. Q. Did the plaintiff provide for his wife? A. Yes; he did provide well for her support. I know from my own knowledge that he provided a home for her. I have gone home with him, and know he did provide for her a living and support; for I have gone home with him many times and helped him carry his groceries." The witness Scott testified that he knew the plaintiff to be a sober, industrious man; that he had been at their house often while they lived together, and knew that the husband treated his wife kindly and gave her no cause for leaving him. The learned judge of the circuit court refused to grant the divorce upon the ground that the evidence was not sufficient to authorize it.

Only two witnesses testified for the plaintiff, and there was no appearance for or evidence in behalf of the defendant. The statute provides (Ky. St. 1903, § 2117) that: "A divorce may be granted to the party not in fault, if abandoned by the other party for one year." That the parties to this controversy lived separate and apart, one in Kentucky and the other in Ohio, for more than three years before the institution of the action, the evidence leaves no room to doubt. The next inquiry is: Did the defendant leave the plaintiff without his fault? Upon this point the witnesses state from their personal knowledge that the husband treated his wife kindly, provided her with a home, and furnished her with a living. True, there is no direct evidence of the reason that induced the wife to abandon her husband, nor is there any evidence that at the particular time of the abandonment the husband's behavior and conduct were above criticism; but the fact remains that the wife abandoned the husband and they have lived apart for more

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

than three years, and that during this time the husband has continued to reside in Lexington, Ky., where he had lived during his married life and before that time. It is not indispensable that in a suit for abandonment the plaintiff should be able to prove the cause that induced the defendant to abandon him. Indeed, it would be often difficult to do this. It is the duty of the husband, if he is able to do so, to provide a comfortable home for his wife, treat her kindly, and maintain her in a manner suitable to her station in life. When he has done this, he has discharged his duty under the law and the marriage obligations; and if the wife, under circumstances like these, abandons her husband, and they live separate and apart for the statutory period, there is no legal reason why a divorce should be denied the complaining party. As said by this court in *Klien v. Klien*, 96 S. W. 848, 29 Ky. Law Rep. 1042: "It is an important and delicate matter to sever the marital relations, and the courts are reluctant to exercise this power. But the law, whether wisely or not, has provided that abandonment of one by the other for a period of one year, without fault on the part of the one abandoned, is ground for a divorce; and, when the evidence supports the petition seeking a divorce for this reason, it is the duty of the court to grant it."

Wherefore the judgment of the lower court is reversed, with directions to enter a judgment divorcing appellant from the bonds of matrimony with appellee.

WADE v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. EVIDENCE (§ 123*)—RES GESTÆ—DECLARATIONS OF EMPLOYEES—ADMISSIBILITY.

In an action for the death of a passenger, killed while alighting from a train, evidence of statements made by the conductor the day after the accident as to how it occurred is admissible only to contradict the conductor's testimony in the action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 365; Dec. Dig. § 123.*]

2. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS OF PERSON INJURED—ADMISSIBILITY.

In an action for the death of a passenger, killed while alighting from a train, a statement by the passenger, made some hours after the accident, as to how it occurred, is inadmissible in any state of the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 364; Dec. Dig. § 123.*]

3. CARRIERS (§ 318*)—INJURIES TO PASSENGER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a passenger, killed while alighting from a train at a station, evidence held not to show negligence of the carrier, but to show that the accident was caused solely by the passenger's attempt to alight from the train before it had stopped, precluding a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by Nancy Wade, administratrix of George F. Wade, deceased, against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Heavrin & Woodward, for appellant. H. P. Taylor, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

CARROLL, J. This action was brought by appellant, administratrix of George F. Wade, to recover damages for his death, which she alleged was caused by the negligence of the appellee company. Wade was a passenger on one of the company's trains, and received the injuries that resulted in his death while attempting to alight from the train at a station called "Horse Branch," before the train had stopped to permit passengers to get off. At the conclusion of the evidence for appellant, who was the plaintiff below, the court directed the jury to return a verdict for the defendant, now appellee.

The allegations of the petition are that the passenger platform at Horse Branch is built of crushed stone, about equal in height to the lowest step on the passenger cars, and that there is a space between the platform and the steps of about one foot; that, while Wade was a passenger on the train, the conductor announced the approach of the train to Horse Branch, and the engineer stopped the train for the purpose of permitting passengers to get off, and while Wade was in the act of getting off the train was negligently and carelessly started with a violent jerk; that the conductor negligently seized the clothes of Wade while he was attempting to get off, jerking him backwards, and by reason of the negligence in starting the train, and the negligence of the conductor in catching Wade's clothing, he was thrown beneath the moving train, receiving the injuries from which he died. In an amended petition it was averred that when the conductor announced the station the train was running on a downgrade without noise, and had either stopped or was running so noiselessly and slowly that Wade thought it had stopped, when in fact it had not, and that the platform was unlighted and dark, and that one of these allegations is true, but the plaintiff does not know which; that the conductor stood within three feet of Wade and saw him walk off the train while it was in motion, or immediately before it was stopped, as alleged in the original petition, and, with knowledge that the train was moving, failed and refused to warn Wade of the danger, and seized him when he attempted to alight, as stated in the petition. In another amended petition it was averred that the rail farthest from the platform was 5½ inches

higher than the rail nearest the platform, and that the resulting position of the coach and steps, acting in conjunction with the negligence charged in the petition, occasioned the injuries and death of the plaintiff's intestate. The answer was a traverse of the averments of the petition and a plea of contributory negligence. A reply completed the pleadings.

The appellant introduced in her behalf the conductor, who said that he knew Wade, who was a young man in good health, very well, and was talking to him before the train arrived at Horse Branch; that the platform is situated on a curve, the degree of which is not shown. In reference to what took place immediately before and at the time Wade was injured he testified as follows: "Mr. Wade and myself were in the smoking car. I talked with him a good deal of the time until we got down south of Leitchfield. The trade was very light, only one or two passengers on the train. After we left White Run—that is the next regular station—I was sitting in the seat with Mr. Wade, and I got up and said, 'Frank, we are approaching Horse Branch,' and he bade me good-by. I went on through and called out Horse Branch—went over into the ladies' coach and announced it. About that time we were coming into Horse Branch; and I turned around and started out of the ladies' car, and I saw Mr. Wade coming out of the smoker onto the platform. The smoker was the car immediately in front of the ladies' car. That was nothing unusual in a passenger getting to a station. A lot of them go out on the platform. But, when he started down the steps, his general way of going it struck me that he was fixing to get off, and when I ran towards him—he was ahead of me—I halloed, 'Wait! Wait! Wait!' and I saw that he was in the act of getting off, and I reached over and just touched his coat; and, instead of getting off as a passenger usually does, he caught hold of the outside rail, what we call the 'last railing' on the car, that runs opposite the bumper, with his right hand, and turned his face the way the train was going, and stepped down on the platform just as I grabbed, and struck his head against the platform sill and turned around, and he just dropped right in between the platform and the railing; and I lit off before the train stopped running and went back to him, and he got up then and sat on the platform." Asked if he did not tell a Mr. Taylor "that Wade was sober, and that when he called Horse Branch he went out of the coach Wade was in, when Wade said, 'Let me get off first,'" and he said he did not. Asked if he did not say to a brother of Wade "that there was no light at the

station, and when Wade stepped off it looked like the train had stopped," he said he did not. The accident happened in the night. The conductor had a lantern, and the porter of the train also had a lantern, and was standing on the lower step of the ladies' coach when Wade got off on the steps of the front of the ladies' car. The train consisted of only two passenger coaches; the ladies' coach being in the rear. The conductor further testified that the train stopped for the station, and at the usual place, and that when it stopped it did not start again until after the accident; that the train ran about 90 feet after Wade stepped off before it stopped. The conductor was the only witness introduced who attempted to describe how the accident happened. There was no evidence that the train started, after it stopped for the station, until after the accident happened, or that the platform was defective or unsafe.

Over the objection of counsel for the company, Wade's two brothers were permitted to say that the conductor told them the next day, in speaking of how the accident occurred, that "he was talking with Wade about the trial, and he started to get off, and he said that he told him good-by, and Wade said, 'The same to you, Cap.' Wade started to step off, and he said the light shining on the building looked like the train was stopped, and he thought it had stopped, and Wade started to step off; and he seen it hadn't stopped, and he started to grab him, and failed to grab him." This evidence was only admissible for the purpose of contradicting the conductor. A witness was asked what statement Wade made to him at Central City, some hours after the accident, as to how it occurred. Objection was made and sustained to the answer to this question. The record does not disclose any avowal of what the witness would say; but this is not material, because in no state of case could the statement made by the deceased so long after the accident happened have been competent. Nor did the statements made by Wade immediately at the time of the accident throw any light upon the questions at issue.

The foregoing statement of the facts makes it plain that there was no evidence whatever of negligence on the part of any of the persons in charge of the train or in the construction of the platform. The unfortunate accident that resulted in the death of Mr. Wade, who was familiar with the station and had often traveled on the train, was caused solely by his attempt to get off the train before it stopped.

The judgment of the lower court is affirmed.

CHESAPEAKE & O. RY. CO. v. McCOY.
(Court of Appeals of Kentucky. Oct. 23, 1908.)

1. RAILROADS (§ 367*)—INJURIES TO PERSONS NEAR TRACK—SIGNALS AND LOOKOUT.

To back a train, without lookout being maintained and reasonable warning of its movement, at a place where the presence of persons on and about the track was to be anticipated, was negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1258; Dec. Dig. § 367.*]

2. RAILROADS (§ 400*)—INJURIES TO PERSONS NEAR TRACK—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Whether a brakeman on a dinky train, used by contractors to haul material for an overhead railroad crossing, who, after throwing a switch, stepped back and stood on the end of the ties of defendant's railroad to allow his train to pass, and was struck by a train being backed on defendant's railroad, was guilty of contributory negligence, *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1377; Dec. Dig. § 400.*]

Appeal from Circuit Court, Greenup County.
"Not to be officially reported."

Action for personal injuries by James Proctor McCoy against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Wadsworth, for appellant. Osbert E. Irish and Simeon S. Willis, for appellee.

HOBSON, J. In the year 1907 some contractors were putting in an overhead crossing above the Chesapeake & Ohio tracks near Russell, Ky. To do this it was necessary to build an abutment on the north side of the tracks and another on the south side. The contractors were moving the material for the abutment on a dinky train, and James Proctor McCoy was a brakeman on this train. They loaded their train at a shovel and then pulled up the track to a switch, which was thrown. The train was then backed in near the abutment, where the cars were unloaded. On the morning of January 30th, when they had unloaded the cars and were returning with them to the shovel after they pulled out on the track and were backing down to the shovel, McCoy rode down on the cars, so that, when they got down to the switch, he could get off and throw the switch after the train passed in. At the switch the dinky track and the Chesapeake & Ohio tracks were very close together; there being only a space of about three feet between the end of the ties. When McCoy got off to throw the switch, he stepped back to allow his train to pass him, and to get out of the way of the cars of his own train he was standing on the end of the ties of the Chesapeake & Ohio tracks, looking west at his train to see when it cleared the switch. As he was standing there, a Chesapeake & Ohio gravel train backed against him, knocking him down and inflicting serious and painful injuries upon him, to recover for which he brought this action. A judgment was rendered in his

favor for the sum of \$2,200, and the railroad company appeals.

The cars which knocked McCoy down were being backed down by an engine which was behind them. There was no one on the cars to keep a lookout. The engineer was not upon the engine, and the fireman, who was operating the engine, was in such a position that he could not see one at the point where McCoy was. The proof for the plaintiff was to the effect that no signal or warning of the backing of this train was given. Many persons were at work and moving about the tracks at this point. It was a place where the presence of persons on and about the track was to be anticipated, and it was negligent to back the cars as they were backed without lookout being maintained, and without reasonable warning of the movement of the train. There was, therefore, sufficient evidence to take the case to the jury. In cases of this sort the question of contributory negligence is for the jury, and under all the proof we do not see that the verdict of the jury is against the weight of the evidence. McCoy naturally had his attention on his own train. The men in charge of the other train knew the closeness of the tracks and knew of the presence of the men about there, and it was incumbent upon them to take more care in the movement of this backing train than is shown by the evidence. *Shelby's Adm'r v. Cin., etc., R. R. Co.*, 85 Ky. 224, 3 S. W. 157; *Conley's Adm'r v. Same*, 89 Ky. 402, 12 S. W. 764; *L. & N. R. R. Co. v. Lowe*, 118 Ky. 281, 80 S. W. 768, 65 L. R. A. 122; *Ky., etc., Bridge Co. v. Synnor*, 119 Ky. 18, 82 S. W. 989, 68 L. R. A. 183.

The petition as amended shows that McCoy was rightfully at the place where he was injured. If the plaintiff's evidence is true, and adequate warning had been given of the approach of the train, or a lookout had been kept, the injury to him might have been averted. And back of all this is the fact that these tracks were so close together that unusual care should have been taken in backing the other train down after the dinky train had backed in; for it was necessary that the switch be thrown, and the presence of men at the switch and in the vicinity was to be anticipated. Owing to a curve in the track, the duties which were required of McCoy could only be discharged when he was on that side of the track where he was.

Judgment affirmed.

TAYLOR et al. v. ROGERS et al.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. TRUSTS (§ 60*)—CREATION AND EXISTENCE—DURATION.

Persons donated money and property to establish a training school of a designated character, different from a public school. A deed conveying real estate provided that, on failure to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
112 S.W.—70

maintain a school thereon of the described character, the land should be conveyed to trustees, to be used for the purposes for which it was deeded. The school was a failure and could not be conducted. *Held*, that the grantor in the deed conveyed the land in trust for the purposes expressed therein, and the trust failed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 82; Dec. Dig. § 60.*]

2. TRUSTS (§ 61*)—TERMINATION—EFFECT.

An owner conveyed land for a school of a designated character. A building was erected thereon for such purpose with funds donated by others. The trust failed, because the school could not be conducted. *Held*, that the property must be sold and the proceeds given to the heirs of the owner of the land in the proportion that the value of the land at the time of its donation bore to all the sums contributed, including the value of the land, and the interest of the other donors must be in the proportion that the sums contributed by them bear to all the sums contributed, including the value of the land.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 86; Dec. Dig. § 61.*]

3. TRUSTS (§ 61*)—TERMINATION—DISPOSITION OF PROPERTY—PARTIES.

In an action by trustees of property donated for a specified purpose for advice as to the disposition of the property on the termination of the trust, the donors or their heirs should be made parties, or, if they are numerous, some should be permitted to sue or defend for all, and the court should then order the sale of the property and divide the proceeds among the donors or their heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 86; Dec. Dig. § 61.*]

Appeal from Circuit Court, Todd County.

"To be officially reported."

Action by A. F. Rogers and others for the advice of the court as to the disposition to be made of trust property, in which Ross Taylor and others intervened and filed a petition as answer and cross-petition against plaintiffs. From an order sustaining a demurrer to the petition of interveners, they appeal. Reversed and remanded.

S. Walton Forgy, for appellants. Perkins & Trimble, for appellees.

CLAY, C. In the year 1892, certain citizens of the town of Guthrie, Todd county, Ky., conceived the design of organizing a training school for the community. To that end a public meeting was held, and about \$10,000 subscribed for the erection of a school building. At that time the trustees of Bethel College were operating a successful school at Russellville, in the adjoining county of Logan, and it was thought prudent to have the Guthrie school conducted in conjunction with Bethel College and under the supervision of its officers. Upon the adjournment of the public meeting, and in pursuance of the plans then projected, a written contract was made and entered into by a committee of the citizens of Guthrie appointed at that meeting, of the one part, and the trustees of Bethel College, of the other part. This contract is as follows:

"This contract, made and entered into by

and between A. F. Rogers, D. B. Smith, W. M. Ware, T. M. Mimms, and R. Y. Johnson, a committee appointed by a meeting of citizens of Guthrie, Todd county, Ky., on the 10th day of March, 1892, which said meeting was composed of persons who had subscribed money and property for the purpose of establishing a training school at Guthrie, parties of the first part, and the trustees of Bethel College, of Russellville, Ky., parties of the second part, witnesseth:

"That the said parties, representing said subscribers, for and in consideration of the agreement this day and hereby entered into on the part of the second parties to establish and perpetually maintain a training school at Guthrie of the character hereinafter defined, have given, donated, and granted, and by these presents do give, donate, and grant, to the second parties a tract of land lying near the said town of Guthrie, which is to be hereafter conveyed to said Bethel College by the present owner thereof, said tract to consist of about twenty (20) acres, and also money and other property which has already been or may hereafter be subscribed for that purpose. The second parties are to have and hold all of said land, money, and other property in trust for the use and purposes hereinafter stated; that is to say: The trustees of Bethel College hereby bind and obligate themselves and said college to apply the funds so raised and actually paid over to them by said first parties, and to devote the land and other property so received by them from said first parties or from any other sources for that purpose, to the establishment and maintenance of a training school at Guthrie, to be located upon said tract of land. The style, character, and cost of the building or buildings to be erected for the purpose to be determined by the first parties, and the said building or buildings are to be erected by a joint committee, one-half of which is to be appointed by the first and one-half by the second parties; but in no event are said improvements, including furnishing and complete equipment of said building or buildings for school purposes, to cost more than is actually paid to the second parties by the first parties. The second parties obligate themselves and the said college to perpetually maintain the school to be thus established, provided the same can be done by the revenue derived from tuition fees, the common school funds which may be produced for the use thereof, and any endowment which in the future may be secured for it; but in no event is Bethel College to expend any part of its endowment revenues or property in the maintenance or operation of said training school. The curriculum or course of study to be used in said school is to be prescribed by the second parties; but it is agreed that such curriculum or course of study shall be adequate to prepare white pupils of said school for entry into the sophomore class of the col-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

leges in this section of the United States. It is agreed that female pupils are to be admitted to all the privileges of said curriculum.

"The first parties agree to surrender the absolute control of the school to said second parties, and the second parties are to have the right, and it is hereby made their duty, to choose the corps of instructors, and to maintain, keep, or discharge the same at pleasure, without any interference on the part of the first parties. The second parties hereby bind and obligate themselves to put on foot and earnestly prosecute a move to have the Bethel Association raise from within and without its own membership an endowment for said school, and they hereby obligate themselves to devote the whole of such endowment, when procured and received by them, to the maintenance of said training school. If, after the cost of erecting the proposed building or buildings and the cost of equipping them for school use, 10 per cent. of the gross receipts from tuition fees, incidental fees, and income from endowment shall be set apart for the purpose of paying cost of repairs, insurance, and all legal demands against the school, any surplus shall remain, the second parties are to invest such surplus in good interest-bearing securities for the sole benefit of the school. It is further stipulated that, in the event of a failure on the part of Bethel College to maintain a good school at Guthrie of a grade and character herein outlined, its board of trustees are to reconvey to a board of trustees to be selected in the first instance by the donors, or to such party or parties as the donors may designate, all of the real estate and unexpended money on hand, or other property which may be conveyed to the second party under this contract for the building and maintenance of a training school at Guthrie, and to surrender all control over said institution. The board of trustees at Guthrie are empowered to visit the school, to see that the insurance is kept alive and the buildings and grounds kept in repair, and report at least once a year, the 1st of June, to the trustees of Bethel College and the donors.

"In testimony of all, witness the hands and seals of parties hereto, this 14th day of March, A. D., 1892, executed in duplicate.

"A. F. Rogers,

"D. B. Smith,

"W. M. Ware,

"Thos. S. Mimms,

"R. Y. Johnson, Committee.

"Board of Trustees of Bethel College,

"By B. F. Kidd, Pres.

"A. C. Dodgen, Sect."

Thereafter, on April 9, 1892, John F. Taylor executed, acknowledged, and delivered to the trustees of Bethel College a deed, conveying to them a tract of land, consisting of about 20 acres, situated in Todd county, Ky. This deed is as follows:

"This indenture, made and entered into by John F. Taylor, of Todd county, Ky., of the first part, and the trustees of Bethel College,

of Russellville, Logan county, Ky., of the second part, witnesseth:

"That for and in consideration of the desire of the party of the first part to organize and maintain a good school for the education of the white male and female children of Guthrie and vicinity, and any others that may desire to avail themselves of the benefit of said school when organized, and for the further consideration that the party of the second part is to erect buildings, improve the grounds, and furnish a curriculum of studies and teachers, according to contract entered into between the party of the second part and a committee of citizens of Todd Co., Ky., consisting of A. F. Rogers, D. B. Smith, W. M. Ware, T. S. Mimms, and R. Y. Johnson, on March 14, 1892, the party of the first part by these presents hereby conveys and deeds to the party of the second part a tract of land situated in Todd county, Ky., near Guthrie, on the Louisville & Nashville Railroad, and bounded as follows: Beginning at a stone opposite north side of the street in said John F. Taylor's land, west boundary line; thence N. 51° E., 86 poles, to a stake in the field; thence S. 47° E., 27 $\frac{1}{2}$ poles, to a point in the north boundary line of the railroad land; thence S. 44 $\frac{1}{2}$ ° W., 22 $\frac{1}{2}$ poles, with railroad land, to a stake; thence S. 46° E., 3 $\frac{1}{2}$ poles, to a corner of railroad land; thence S. 44 $\frac{1}{2}$ ° W., 39 poles, to a stake, corner to said railroad land; thence S. 43 $\frac{1}{2}$ ° E., 4 poles, to a stake 33 feet from the center of the railroad track; thence S. 50 $\frac{1}{2}$ ° W., 12 poles, to a stake; thence S. 79 $\frac{1}{2}$ ° W., 20 poles, to a stake; thence N. 40° W., 33 $\frac{1}{2}$ poles, to the beginning—containing 20 acres and 10 poles, be the same more or less.

"It is hereby stipulated that the party of the first part makes this deed to the party of the second part with the express understanding that a road is to be forever kept open between said land and the railroad land adjoining throughout its extent. It is also further stipulated that in case of a failure of Bethel College to maintain a good school at Guthrie on said land, of the grade and character outlined in contract referred to as entered into March 14, 1892, the board of trustees of Bethel College are to reconvey said land to the board of trustees of the Guthrie school, to be sacredly used by them for the purpose for which it is hereby deeded,

"Made and entered into this 9th day of April, 1892.

"[Signed] John F. Taylor."

The building was erected upon the land thus conveyed. For three years Bethel College attempted to conduct a school as provided by the terms of the deed. It failed. Bethel College thereafter conveyed the property to certain trustees. After years of faithful effort, they also failed. This action was instituted by A. F. Rogers, Robert Lester, and Frank Walton, as the trustees for the "Guthrie Training School," and A. F. Rogers,

Robert Lester, and Frank Walton, and A. F. Rogers, D. B. Smith, Wm. M. Ware, T. S. Mimms, and R. Y. Johnson, suing for themselves and as trustees and a committee for the citizens of the town of Guthrie, upon ex parte petition, for the purpose of obtaining the direction and advice of the court as to the disposition to be made of the property. After describing the failure on the part of Bethel College to maintain a school of the kind and character defined in the conveyance, the petitioners allege that they have also tried and failed. Upon this point the petition reads as follows: "That at all times since the said three named trustees have held said property, and have made continued and faithful efforts to maintain thereon such a school as was contemplated by the aforesaid deeds and contract, but all their said efforts have been a failure. It is not feasible or possible to maintain a school thereon and with the tuition receipts arising therefrom, without other financial aid, and which has never been provided, and which it is not possible to provide. Many different teachers have been secured and placed in charge of said school, and every possible effort has, by said trustees and by the citizens of Guthrie, been made to operate and maintain thereon such a school as was provided for originally. That for several years last past they have not been able to get any teachers at all to take charge of said school and conduct a school such as was contemplated, and they will never again be able to do so. The free school is patronized almost exclusively and their school is utterly unable to exist. The people of the town and vicinity will no longer contribute to the operation or maintenance of said school, and the same is a failure. The buildings and grounds are out of repair, and the plaintiffs have no means with which to repair them or keep them in such condition, and have no means of procuring such necessary means, and unless something is done the improvements thereon will become greatly damaged and lessened in value. That it will be entirely useless for them to hold said property any longer for the purposes for which it was originally intended."

The petition further states that it is proposed to establish a graded school in the town of Guthrie, to be maintained by taxation, in addition to the funds provided by the state of Kentucky for its support, and the building in question would make an admirable graded school if it could be secured for that purpose, and "to thus establish and maintain a graded school therein and thereon would nearer than anything else fulfill the original project of the promoters of said enterprise." Plaintiffs then state that they doubt their power to sell said property and pass a good and sufficient title thereto; that it is on their hands, and they do not know what to do with it; that they would

be much pleased to carry out the original plan, but such is impossible, and the only thing they can do is to sell it and distribute the proceeds as the court may direct; that for this reason they come to the chancellor and pray for his advice and guidance in the performance of their duties in the premises. They then asked for a sale of the property and that the proceeds, after payment of the expense of said sale, be adjudged to those properly entitled thereto.

Thereafter the appellants, Ross Taylor, John Taylor, and others, intervened in the action and filed their petition, asking that it be taken as an answer and cross-petition against the plaintiffs. They alleged that John F. Taylor, the grantor in the deed to the property in question, had died leaving a last will and testament. By the provisions of said will his estate was devised to the intervening petitioners, the appellants herein. They alleged that John F. Taylor was much interested in the movement to establish a training school at Guthrie, to be under the control and direction of the Baptist Church; that with that end in view he donated the property in question; that Bethel College had attempted to maintain said school for some years, but thereafter conveyed the property upon which the same was located to the petitioners, A. F. Rogers, Robert Lester, and Frank Walton, as trustees of Bethel Training School, of Guthrie, Todd county, Ky., and thereafter surrendered all claim to said property. They further alleged that the present trustees have utterly failed to conduct a school at that point, and that the building and grounds are being permitted to decay and go to waste; that the trustees have no right to sell said property, or convey it for any other purpose than that referred to in the deed from Taylor; that the object and purpose for which said Taylor gave the 20 acres of ground has wholly failed; that by reason of the failure on the part of the petitioners, as trustees, to maintain and establish said school as provided in the contract and deed, said property has been forfeited to the heirs and legatees of John F. Taylor. The petition concludes with a prayer that the property be declared forfeited and that it be turned over to them.

Thereupon the plaintiffs below filed a demurrer to this petition and answer. The demurrer was sustained, and the petition and answer dismissed. From that order the intervening petitioners prosecute this appeal.

Appellees earnestly contend that, even under the limited application of the *cy pres* doctrine in this state, the trustees have the right to convey this property for the purposes of the graded public school. For the purpose of arriving at the intention of the donors of the property, it will be necessary to consider the terms both of the contract and the deed. It is manifest from the provisions of these instruments that the school contemplated by the donors was of a char-

acter entirely different from the schools provided for by our public school law. Among the differences that may be noted are: In the mode of government of the school; in the curriculum or course of study, it being provided that it should be extensive enough to permit graduates to enter the sophomore class of the colleges of that vicinity; in the method of selecting teachers; in the endowment provided for; in that Bethel Association should be made a field within which to secure this endowment; in that 10 per cent. of the tuition fees and the endowment fund should be used to maintain the building and equipment; and in that tuition should be charged each pupil attending the school. These differences make it perfectly plain that it was not the intention of the donors that the requirements of the training school sought to be established should be complied with by the maintenance of an ordinary public school. We do not think, therefore, that the trustees would be authorized, voluntarily and without consideration, to convey the property in question to the trustees of the graded school for the purpose of having a graded school conducted therein. The deed provides that, in case of a failure of Bethel College to maintain a good school at Guthrie on said land of the grade and character outlined in the contract entered into March 14, 1892, the board of trustees of Bethel College are to reconvey the land to the board of trustees of the Guthrie school, "to be sacredly used by them for the purposes for which it is hereby deeded." This language makes it certain that the grantor in that deed conveyed the land in trust for the purposes expressed in the deed, and for no other purposes. As it is admitted that the school is a failure and can no longer be conducted, it follows that the trust itself has failed. That being the case, what are the rights of the donors?

The erection of the training school in question was a joint enterprise. The land conveyed by Taylor was but a small part of the donations made for that purpose. A large and commodious building was erected upon the land; and we may gather from the contract that a considerable sum of money was pledged by others for that purpose. So far as the record shows, the land given and all the sums contributed were mere donations. The parties contributing did so for a common object. They had no other purpose in view, and were moved by no other consideration, than the erection and maintenance of the training school sought to be established. Under these circumstances it would be manifestly unjust and inequitable to hold that the entire property, including the land donated by Taylor and the sums of money donated by others and used in the construction of the building on the land, should revert to appellants herein, as the heirs and devisees of Taylor. As the trust

has failed, we conclude that the present trustees hold the property in question in trust for the use and benefit of appellants and all the other donors. The property may, therefore, be sold in this action by making all the donors, or their heirs, parties, or, if they be numerous, by permitting some to sue or defend for all. The interest of the appellants in the proceeds will be that portion thereof that the value of the land at the time of its donation bears to all the sums contributed, including the value of the land. The interest of the other donors in the proceeds will be in the proportion that the sums contributed by them bear to all the sums contributed, including the value of the land.

For the reasons given, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. SHIRLEY.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. APPEAL AND ERROR (§ 1004*)—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

The weight of evidence is for the jury, and a verdict, though unsatisfactory as to damages awarded, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. APPEAL AND ERROR (§ 1004*)—REVIEW—VERDICT—EXCESSIVENESS.

Where defendant destroyed 12 locust trees, each about a foot in diameter, by cutting them off to within 10 or 12 feet of the ground, the damage being estimated by witness as high as \$1,000 to \$2,000, a verdict of \$500 will not be disturbed as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Mrs. A. M. Shirley against the Cumberland Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh, for appellant. Bingham & Davies, for appellee.

CLAY, C. This suit was instituted in the Jefferson circuit court by Mrs. A. M. Shirley to recover of the Cumberland Telephone & Telegraph Company \$3,000 in damages on account of the destruction of certain trees planted along plaintiff's property located a few miles outside of the city of Louisville. On the first trial of the case plaintiff was awarded damages in the sum of \$1,000. That verdict was set aside and appellant awarded a new trial. On the second trial plaintiff was awarded damages in the sum of \$500, and the defendant appeals.

No complaint is made of errors in the instructions, or the admission or exclusion of evidence. The sole ground relied upon is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the verdict is excessive. According to the testimony for the plaintiff, appellant destroyed 20 black locust trees, each about 12 inches in diameter and 35 feet high, by cutting them off until their height was from 10 to 12 feet only. One of the witnesses for appellee placed the damages at from \$1,500 to \$2,000; the other at \$1,000. While the evidence as to the amount of damages is not altogether satisfactory, it is substantially uncontradicted, and the weight to be given to it was a question for the jury.

That being the case, and one jury having awarded appellee \$1,000 and another having fixed her damages at \$500, we do not feel inclined to disturb the verdict; and the judgment of the lower court is therefore affirmed.

PALMS' ADM'RS v. HOWARD.

(Court of Appeals of Kentucky. Oct. 7, 1908.)

1. ATTORNEY AND CLIENT—DUTIES AND LIABILITIES—FRAUD OF ATTORNEY.

Courts will examine critically transactions between attorney and client, to protect the client's rights and prevent fraud by the attorney; and any disadvantage to the client from the transaction will entitle him to relief, proof of actual fraud being unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 239.]

2. SAME—EFFECT ON CONTRACTS.

An attorney owes his client the utmost good faith in all transactions between them, and equity will avoid any contract made upon any misrepresentation or concealment of material facts by the attorney, or if there is a just suspicion of artifice or undue influence, and will so far as possible restore the parties to their original rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 228, 239-244.]

3. SAME—ACTIONS FOR WRONGFUL ACTS—BURDEN OF PROOF.

One charged with taking advantage, for his own benefit, of confidence placed in him by another, must show that the confidence was not abused; and where a client claims that his attorney, for his own benefit, fraudulently concealed facts material to the client's interest, the burden is on the attorney to prove that he took no advantage of his client.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 248.]

4. SAME—FRAUD—RIGHT TO RECOVER MONEY WRONGFULLY PAID.

Where a client, thinking he owned a tract of land which he had never seen, employed an attorney to inform him of the nature of his holding, protect the land, and sell it if possible, and the attorney, knowing his client had no title and that the land was held adversely, did not inform him of such facts, but led him to believe he owned a valuable piece of land, and did not attempt to sell the land as agreed, the attorney's conduct was such an abuse of confidence as to entitle the client to recover the money paid him as salary under the contract.

5. SAME—TERMINATION OF CONTRACT.

A contract between attorney and client for the protection and sale of the client's land, terminated ipso facto where the client in fact then owned no land, which the attorney knew, and no notice was necessary by the client to terminate the contract, and hence the attorney could not recover for services rendered under the contract.

Appeal from Circuit Court, Magoffin County.

"To be officially reported."

Action by Palms' administrators against Calloway Howard to recover money paid defendant for legal services. From a judgment dismissing the action, and for defendant on his counterclaim, plaintiffs appeal. Reversed, with directions to enter judgment for plaintiffs and to dismiss defendant's counterclaim.

D. D. Sublett and Keena, Lightner & Oxtoby, for appellants. J. J. C. Bach, for appellee.

SETTLE, J. This is the second appeal of this case. The first resulted in a reversal of the judgment of the circuit court because of error committed by that court in prematurely submitting and deciding it. See Palms' Adm'rs v. Howard, 102 S. W. 267, 31 Ky. Law Rep. 316. The issues presented by the pleadings are fully stated in the former opinion, which also sets forth the provisions of the contract out of which the litigation arose. It will therefore be sufficient for the purposes of the present opinion to say that the action was brought by appellants, as administrators of the estate of F. F. Palms, deceased, to recover of appellee, Calloway Howard, moneys paid him by their intestate by way of compensation for services as attorney and agent, which appellee agreed to render and claimed to have rendered, but which the petition alleges were never performed, in protecting the intestate's title to and possession of 19,000 acres of land situated in Magoffin county which the latter supposed he owned. In other words, it is the contention of appellants, as gathered from the averments of the petition, that the intestate, at the cash price of \$60,000, purchased in 1891 from one Webster and received of him a deed to the 19,000 acres of land in question without having seen the land; that the land was covered by what was known as the May-Martin patent, issued in 1872, purporting to embrace 35,000 acres, including, however, certain excepted tracts amounting in the aggregate to 16,000 acres; that the May-Martin patent and deed conveying Palms the land were worthless and passed no title, and in point of fact the 19,000 acres Palms supposed he had purchased were at the time of his purchase, and long prior thereto, in the actual adverse possession of other bona fide purchasers and occupying claimants, whose possession continued after his purchase, and yet continues, and that Palms never had possession of the land himself. The petition further avers that Palms never saw the land, and without knowing of the worthless character of his title he entered into the contract with appellee, set out in the former opinion, whereby the latter undertook to inform him of the nature of his title and holding, protect his possession, keep

off trespassers, see to the payment of taxes thereon, show the land to intending purchasers, and, if possible, effect its sale. Under this contract appellee was to receive for his alleged services \$100 per month, which salary he received down to the year 1895, at which time by agreement between himself and Palms he was thereafter to be paid \$800 per year for his services, and this compensation he received for more than seven years. It is the compensation paid him for and during the time last mentioned that appellants seek to recover. It is further alleged in the petition that appellee knew of the fraudulent character of the May-Martin patent, and that Palms obtained no title by his deed from Webster to the land in question, at the time he entered into the contract with Palms to render the services expected of him, and that he concealed these facts from Palms for the fraudulent purpose of obtaining of the latter the sums that were afterwards paid him under the contract. The averments of the petition were denied by the answer, the statute of limitation pleaded, and a counterclaim set up for \$1,366, to which appellee claimed to be entitled under the contract for services rendered the last 18½ months of the continuance of the contract at the rate of \$800 per year. By the judgment rendered in the circuit court, appellants' action was dismissed, and appellee allowed the full amount of his counterclaim. Appellants complain of that judgment; hence this appeal.

Palms did not discover the alleged fraud practiced upon him by appellee until shortly before his death, which occurred in 1904, and he was preparing to bring suit against appellee on account thereof at the time of his death. The action was later brought by appellants as his administrators, within five years of the discovery of the fraud and within ten years of the date of its perpetration. In an extended opinion in the case, *supra* (see *Palms' Administrators v. Howard*, 102 S. W. 1199, 31 Ky. Law Rep. 814), this court said: "If Palms broke his contract with Howard without cause and without notice, as therein stipulated, Howard may recover such damages as he sustained thereby; the measure of damages to be regulated as in the case of other contracts for personal services. But the contract contemplated that Palms had land for Howard to look after, and when there was no land for him to look after the contract *ipso facto* terminated. When there was no land for Howard to look after, there was no need of notice by Palms to terminate the contract. It was incumbent on Howard to keep his principal informed as to the facts he knew as to the land, so far as they were necessary to protect his interests, and it was also incumbent on him to exercise ordinary care and diligence to keep himself posted as to the matters within the scope of his agency."

Our examination of the entire record in

this case convinces us that Palms never had title to or the possession of this land, and that these facts were unknown to him, but fully known to appellee, at the time he entered into the contract with Palms to render the services therein provided for; that knowledge of these facts was concealed by appellee from Palms; and that the latter, throughout their long connection as client and attorney, never advised Palms of the defective character of his title, or of the fact that the land had been in the actual adverse possession of others for a period of more than 30 years. Indeed, the concealment of these facts is shown by the letters of appellee to Palms, without reference to other evidence in the case. The evident purpose of this correspondence was to keep alive in the breast of Palms the belief that he had in these lands the opportunity for future large profits. Whenever any one struck oil, wherever coal was found or a new railroad talked of being constructed in the vicinity of these lands, information thereof was written by appellee to Palms, and the opinion expressed that it would add to the value of the lands. As late as 1902, when a nephew of Palms visited the land with a prospective purchaser and informed his uncle of the spurious nature of his title and possession, appellee succeeded by correspondence in counteracting in Palms' mind the effect of his nephew's communication, and persuaded him that the latter had misrepresented the facts as to the land, with the intent to ultimately secure it himself at a price less than its true value. Twice, or oftener, appellee, when complaint was received from Palms that he had been informed trespasses were being committed upon the land and timber destroyed, wrote him, in substance, that such trespasses did not result in serious injury to the land; intimated that they were inadvertently committed by owners of some of the tracts included in certain excepted surveys covered by the May-Martin patent and in ignorance of the true location of their lines; and explained that he had not instituted suits against the trespassers, whom he designated "exclusionists," as there might be difficulty in establishing the lines between some of the excepted tracts and these "exclusionists" and the land of Palms covered by the May-Martin patent. It seems apparent from the record that the supposed trespassing Palms complained of was not done by the so-called "exclusionists" at all, but by persons or their vendees in the actual adverse possession and claiming to be the owners of the land covered by the May-Martin patent and deed from Webster to Palms. It seems further apparent that these facts, though known to appellee, were not revealed by him to Palms, notwithstanding his undertaking to keep the latter advised of all that occurred concerning the land.

We are unable to find that appellee ren-

dered any real or valuable service to his employer. He may have done some work in tracing and making an abstract of Palms' supposed paper title; but the report of this work was unaccompanied with any communication of the valid claims or adverse possession of the occupants of the land, which in law and in fact made Palms' title worthless. Nor did he make any effort to induce the occupying claimants to abandon their possession of the land. It is true litigation over the land would have resulted in no benefit to appellee's client; but he should have frankly advised the client of the true situation, instead of concealing it from him. Such information would doubtless have convinced the latter of the worthless character of his title, caused him to abandon his claim to the land, and enabled him to avoid the expense in taxes and salary to appellee to which he was subjected. In any event, if appellee had given such advice, and the client had, in the face thereof, persisted in claiming the land, paying the taxes thereon, and to appellee a salary for such services as the latter rendered under the contract between them, such conduct would have relieved appellee of any responsibility as to results, and estopped Palms or his administrators to demand a return of the sums paid him. It does not appear that any material effort was made by appellee to procure a purchaser for the land, which he agreed to assist in doing and claims to have rendered some service to his client in attempting to accomplish. It is true prospective purchasers occasionally presented themselves, but it does not appear that they were taken by appellee to see the land. Whether this was because inspection of the land would have disclosed to the intending purchaser its actual possession by others, or whether, as intimated in the record, appellee was apprehensive of bodily injury to himself or others, contemplating the purchase of the land, from the persons in possession, we are unable to say; but, whatever the deterrent, it seemed sufficient to keep him off the land.

The law is emphatic in its denunciation of anything amounting to deception or fraud on the part of the attorney toward the client; and it is the policy of the courts, where complaint is made by the client, to examine critically transactions between them, that the rights of the client may be protected against any attempt of the attorney to secure any advantage to himself. In such case proof of actual fraud is not necessary in order for the client to obtain relief. The confidential relation being established, any disadvantage resulting to the client from a transaction with the attorney will be held sufficient to authorize the court to interfere in behalf of the former. The doctrine referred to is thus discussed in Story's Equity Jurisprudence, § 310: "It is obvious that this relation (of client and attorney or solicitor) must give rise to great confidence between the parties and the very strong influence over the actions and rights and in-

terests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client and of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would be held unobjectionable." "A person standing in the relation of attorney must bring everything to the knowledge of his client that he knows pertaining to such position. Cases of undue concealment sometimes arise from the relation of client and attorney. In these cases the law, in order to prevent undue advantages from the unlimited confidence which the relation naturally creates, requires that there must be the utmost degree of good faith in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or a just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the contract void, and as far as possible restore the parties to their original rights." Story, Eq. Jurisprudence, §§ 192-219-311; Weeks on Attys. §§ 253, 259, 262; Burch v. Nicholas, 80 S. W. 1132, 26 Ky. Law Rep. 264. It must not be overlooked that in such transactions as occurred between appellee and the decedent, Palms, the onus of proving that the former took no advantage of his client is upon him; for, as said in 3 Greenleaf, § 253: "The great principle by which courts of equity are governed in cases between attorneys and clients is that he who bargains in the matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." Smith v. Thompson's Heirs, 7 B. Mon. 308.

We are of opinion that appellee, in his dealings with the decedent, Palms, failed to manifest that skill, diligence, and good faith required of an attorney; that his conduct throughout was not such as constituted a fair or reasonable use of the confidence placed in him; and that his concealment of the true state of Palms' title and claim to the land described in the record induced the latter to enter into the contract between them, and caused him the unnecessary outlay and expense complained of, amounting in the aggregate to more than \$10,000. This being true, it was plainly the duty of the lower court to give judgment against him and in behalf of appellants for the amount illegally received by him, from and after May 17, 1895, of the decedent, Palms, as salary; this sum being all that is claimed by appellants.

As appellants are not seriously insisting in this court upon a judgment for the taxes paid by their decedent upon the 19,000 acres of land, and the proof being somewhat indefinite as to the amount thereof, we express no opinion on that subject.

It was, however, error on the part of the circuit court to allow appellee's counterclaim, for no legal services were rendered by him under the contract with Palms for which he is entitled to be compensated. Therefore his counterclaim should have been dismissed. In other words, as said in the extended opinion on the former appeal: "The contract contemplated that Palms had land for Howard to look after, and when there was no land for him to look after the contract ipso facto terminated. When there was no land for Howard to look after, there was no need of notice by Palms to terminate the contract."

For the reasons indicated, the judgment is reversed, with directions to the lower court to set it aside and enter in lieu thereof another in favor of appellant and against appellee, for the amount of salary paid the latter by the decedent, Palms, under the contract between them, from May 17, 1895, down to the date of his (the decedent's) death, with 6 per cent. interest on each payment from the date thereof, and also adjudge the dismissal of appellee's counterclaim.

O'REAR, C. J., not sitting.

SMITH & NIXON CO. v. LEWIS.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

SALES (§ 119*) — CONTRACTS — RESCISSION — GROUNDS.

A seller of musical instruments knew that a buyer wanted a pianola piano, and knew that the instrument delivered was not a pianola. The seller did not inform the buyer of the facts, and the buyer received the instrument on the seller's assurance that it was what she wanted. Held, that the buyer might rescind the contract, whether the seller made a mistake or not, or whether the buyer was injured or not.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by Elizabeth P. Lewis against the Smith & Nixon Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hardin H. Herr, for appellant. Samuel Avritt, for appellee.

BARKER, J. This action was instituted by the appellee, Elizabeth P. Lewis, for the purpose of obtaining a rescission of the contract by which she purchased a piano from the appellant, Smith & Nixon Company, and for the recovery from it of the sum of \$625 which she paid for the instrument. The basis of the action is the alleged fraud of the appellant in delivering to her a make of piano different from that she purchased and for which she paid. The defendant, Smith & Nixon Company, denied all the allegations of the petition; and, the case coming on for trial before the chancellor, he adjudged that

the contract of sale be rescinded, that the appellee recover the amount paid for the piano, and required her to deliver to the appellant the piano upon demand. Of this judgment, Smith & Nixon Company is complaining.

The facts are these: Mrs. Lewis resides in Springfield, Ky. Her daughter, Mrs. Mangate, is a resident of Louisville. The mother, desiring to purchase a pianola piano, which, as we understand it, is a piano containing an attachment within called a pianola, which automatically or mechanically plays such music as is adapted to it, authorized her daughter to locate such an instrument and ascertain its selling price. The daughter, in pursuance of this commission from her mother, went to the Smith & Nixon Company with several relatives and told the salesman who offered to wait upon them that she wanted to purchase a pianola piano. The salesman said in reply, "I have just what you want," and showed her a Kurtzman piano, with a Chase & Baker player contained therein, instead of a pianola, but did not inform her that the "player" was not a "pianola." No purchase was made at this time, but subsequently Mrs. Lewis herself came to Louisville, and with her daughter visited the salesrooms of Smith & Nixon Company, and again opened up negotiations for a pianola piano, and again the agent showed a Kurtzman piano with a Chase & Baker player attachment saying that it was "just what they wanted." Mrs. Lewis was well acquainted with the Kurtzman piano and liked it as a musical instrument; but she was not desirous of purchasing a piano to be performed on by hand. Not being a musician herself, she desired a pianola piano, and this was the sole inducement to the proposed purchase. The pianola attachment is adjustable to several kinds of standard pianos, and it is clear from the evidence that Mrs. Lewis thought the Kurtzman piano exhibited by the salesman had the pianola attachment within. Upon this basis she bought the instrument and paid appellant \$625. The instrument was subsequently packed and shipped to her residence in Springfield, where, after a short while, she discovered that a Chase & Baker player attachment, entirely different from the pianola, had been delivered to her instead of the instrument she desired. Thereupon she notified the appellant and demanded a return of her money and the acceptance by it of the musical instrument delivered.

A careful examination of the evidence in this case convinces us beyond question that Mrs. Lewis asked for a pianola piano, and that when she made the purchase she believed she was getting this make of instrument. It is equally certain that the Smith & Nixon Company did not advise her, or do anything which would make her believe, she was being shown a piano with the Chase & Baker play-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er attachment in it. We are further convinced that she would not have made the purchase, had she known the real facts. She was acquainted with the planola piano. Several of her friends had them. She had heard them perform, and was advised as to the merits of that instrument. She knew nothing of the Chase & Baker player attachment. She had never heard of it before, and at the time of the delivery of the piano to her did not know that there was such an instrument. We do not think the testimony for appellant substantially militates against that of the appellee on this question. It is true, it undertook to establish that the Chase & Baker player is as good as, if not better than, the planola; and this may be true for aught we know. But Mrs. Lewis was entitled to that which she purchased, and not some other instrument. We cannot agree to the position of counsel for appellant that Mrs. Lewis and her daughter were put upon their guard by the statement of the salesman that appellant was no longer agent for the Weber piano; that being one of the makes of piano to which the planola player attachment is adapted. These ladies were not familiar with the different kinds of pianos and their adaptation to the planola attachment. There are at least four standard pianos to which the planola player attachment is adjustable, and the proposed purchaser did not know, or have any reason to believe, that the Kurtzman piano was not adapted to the planola player attachment. The evidence does not show that Mrs. Lewis or her daughter could have seen or known that the player attachment they were buying was the Chase & Baker make, and not the planola. On the contrary, we think a preponderance of the testimony shows that this fact could only have been ascertained by a careful examination. Especially was the fact not readily obvious to novices, although professional players might detect the difference at once. We have no doubt of Mrs. Lewis' sincerity in the premises, or that as soon as she discovered the error which had occurred she notified the defendant (appellant) and demanded a rescission of the contract. The evidence clearly shows there is a marked difference between a planola and the Chase & Baker player. We do not, of course, undertake to adjudge the merits of these respective instruments, or to draw invidious comparisons between them; but that there is a difference is clearly established in the record.

We do not find it necessary to enter into a discussion of the question as to whether or not the Smith & Nixon Company innocently made a mistake in the transaction which took place between it and the appellee. The question before us is not whether the seller made a mistake as to the merits of the instrument it was selling, and therefore there is no room for the application of the principle, contended for by counsel for appellants,

that a rescission of a sale of property will not be had where the representation as to the merits is innocently made, and is therefore without moral turpitude. There is no evidence here that the Chase & Baker player attachment delivered to Mrs. Lewis is in any wise defective. On the contrary, we are impressed with the fact that it was all that the Chase & Baker make of instrument should be; but it was not what Mrs. Lewis purchased. She paid her money for a planola piano, and was entitled to that, or a return of her money. The evidence shows that Smith & Nixon Company had lost the agency for the planola player, and that it was at the time of the purchase alone controlled by another firm. It had the agency for the Chase & Baker player attachment, and was doubtless honestly of the belief (and this belief may be well founded) that the Chase & Baker player attachment is as good as, or better than, the planola; but, as said before, the evidence shows that Mrs. Lewis desired a planola player, and not a Chase & Baker, and that she made the purchase of the Kurtzman piano upon the assurance of the appellant's agent, that it was "just what she wanted." As she had asked for a planola player, she assumed that the Kurtzman piano contained that instrument, as that was what she wanted.

We do not feel that it is necessary to a proper decision of this case to follow counsel for appellant in the discussion of the question as to whether or not appellee was injured by the delivery to her of the Chase & Baker attachment, instead of the planola. A consideration of that principle would be applicable if the question before us was whether or not the article purchased was in quality as represented. If that were the question, of course, if the purchaser was not injured she would have no cause of action, either for a rescission or damages. The question for adjudication here is quite different from that suggested by counsel. Here the question is whether the purchaser has received what she purchased. It may be illustrated by the supposition that one sent his servant with money to his grocer for the purchase of Mocha coffee, and the grocer should deliver to him Rio or Java, or, to use another illustration, if one sent to a dealer for a saddle horse, and should have delivered to him an animal suited only for harness purposes. In neither of the supposed cases could it be urged that the purchaser would be bound to show, in order to have rescission of the contract and the return of his money, that he had been really injured by the substitution of one brand of coffee for another, or of the harness horse for the saddle horse; nor would the court in such a case inquire whether the substitution was fraudulent or the purchaser injured. The appellant knew that the appellee wanted a planola player, and it knew that the instrument it was de-

livering was a Chase & Baker player. The court will not stop to inquire whether it honestly supposed the Chase & Baker was as good as the pianola, or whether or not appellee has been injured. In the selection of musical instruments, taste and sentiment enter largely as ingredients; and where, as in a case like this, that which was purchased has not been delivered, the court will remedy the wrong.

Judgment affirmed.

NEALE v. WRIGHT.

(Court of Appeals of Kentucky. Oct. 29, 1908.)

CORPORATIONS (§ 117*)—SALE OF STOCK—RESCISSI—MUTUAL MISTAKE.

Where the parties to a sale of stock acted on the supposition that the published statements of the affairs of the corporation were true, in which case the stock would be worth par, whereas under the true state of affairs, the statement as to amount of merchandise on hand being grossly false, the stock was worthless, the purchaser has a right to rescission for mutual mistake.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

Appeal from Circuit Court, Graves County.

"To be officially reported."

Action by R. F. Wright against H. C. Neale. Judgment for plaintiff. Defendant appeals. Affirmed.

W. J. Webb, Speight & Deane, and Webb & Seay, for appellant. Robbins & Thomas, for appellee.

HOBSON, J. On January 16, 1907, R. F. Wright conveyed to H. C. Neale a tobacco barn and the lot on which it stood, worth \$2,000, for 20 shares of the common stock of the May Pants Company, of the par value of \$100 each. On September 2, 1907, Wright brought this action against Neale to cancel the deed on the ground that the stock of the May Pants Company, which Neale represented to him to be worth at least par, was then of no value, and that Neale knew the condition of the company and had perpetrated a fraud on him. It was also alleged that Neale was vice president and a director in the corporation, and that he had knowingly caused to be published false statements of its condition, when, if the truth had been published, the statements would have shown that the stock was worth nothing. Neale filed an answer, denying the allegations of the petition. Proof was taken, and on final hearing the court adjudged Wright the relief sought. Neale appeals.

The May Pants Company was incorporated in the year 1890, with a capital stock of \$35,000, paid in. It was managed by seven directors, a president and vice president, general manager, secretary, and treasurer. The affairs of the company were in fact managed by the general manager, C. A. McDonald.

McDonald made reports to the directors, which showed that during the first three years of its business the corporation had accumulated a surplus amounting to \$35,000, and it then doubled its capital stock and issued to its stockholders stock amounting to \$35,000, in lieu of the accumulated surplus standing to their credit. After this things went on as before, McDonald's statements showing that the company was making large profits. In November, 1906, by his report, he showed that the company had a net capital at that time which made the stock worth book value \$161 to the share. They then issued to each stockholder as much stock as he had, or doubled the stock of the company a second time, each stockholder paying in 39 cents to the dollar; the 39 cents to the dollar so paid in and the 61 cents of accumulated profits making the face value of the new stock. After this had been done, McDonald, in November, 1906, resigned as general manager and was followed by E. G. Minton. In January following the trade was made between Neale and Wright, and in the following April Minton took an invoice, which showed that, instead of the company's having on hand \$194,826.13 of merchandise in November, it in fact had on hand only \$47,437.18; the difference being \$147,388.95. Minton communicated his discovery to the president and the vice president, Neale; but they concluded to say nothing about it, in the hope that the company could work out, and a statement was then issued which showed the company in even better condition than McDonald's statement had showed it in November. Thus things went along until the following August, when some of the directors, learning of the condition of things promulgated it. Wright at once appealed to Neale to deed him back his property, which he refused to do, and this suit followed.

There is little or no conflict in the evidence as to the material facts of the case. The company, instead of having a surplus in November, had lost money, and the company's common stock was worth nothing. Neale and Wright were both directors in the company, and neither knew its real condition, although Neale did know that McDonald's statement was padded to the extent of 10 per cent. This he did not disclose to Wright, supposing, as he says, that the company would soon make that up. The directors in a company are its managing agents. It is their duty to publish true statements of the affairs of the corporation. The published statements of the affairs of this corporation were so manifestly untrue that if Neale had transferred the stock to a stranger, who had bought it upon the faith of the statements published by the directors, clearly he would not be allowed to say that he did not know the condition of the corporation, and to keep the purchaser's money, who had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bought the stock relying upon the truth of the statements. But it is insisted that as Neale and Wright were both directors in the company, one is as much to be charged with knowing the truth as the other, and that, if Neale had bad stock and sold it to Wright, the latter cannot complain. There is much force in this. But there is another ground upon which the judgment may be rested. Conceding that Neale and Wright were both equally ignorant of the true condition of the corporation, and that they were equally innocent as to the false statements which had been published, still we have the fact that both of them acted upon the supposition that the statements which had been published as to the condition of the corporation were true. When Neale delivered this stock to Wright, he supposed that the corporation had \$194,826.13 of merchandise in November, and so did Wright. If Wright had known that it had only \$47,437.18 worth of merchandise, he would not have taken the stock for his barn. They both traded upon the supposition that the corporation had \$147,380.95 worth of merchandise, which it did not have. This difference rendered the common stock worthless. Wright was not proposing to sell his barn for worthless stock, and Neale was not proposing to buy his barn with such stock. They both acted upon the supposition that the company had the goods which had been reported to them.

What, then, are the rights of the parties? In *Bell v. Truit*, 9 Bush, 237, a deed was executed in consequence of the mutual mistake of the lessor and lessee as to the existence of oil on the land. It turned out that there was no oil on the land, and it was held that the lease should be rescinded, following the rule laid down in *Liggett's Adm'r v. Ashley*, 5 Litt. 178, where the court said: "A mistake which was thus common to both parties, and which was caused by the fault of neither, ought, most indisputably, to be relieved against in a court of equity." In *Ruffner v. Ridley*, 81 Ky. 165, it was held that where, in the sale of land, there is an innocent and mutual misapprehension as to the quantity conveyed, where the contract has been executed, if the deficiency is so great as to amount to a failure of consideration for the purchase, the court will direct a rescission. In *Rowland v. Cox*, 121 Ky. 341, 89 S. W. 215, the person who was boring a well reported that the drill had struck a crevice, and when it went down again became fastened, and after this they found oil had run in. An examination showed oil in the well, and there were several sales and purchases of an interest in the well, made by persons who innocently believed that oil had been struck. The seller and the purchaser were both deceived; the fact being that the person who was boring the well had simply poured oil in it. It was held

that the conveyances should be rescinded on the ground of mutual mistake and a total failure of consideration. In that case the court distinguished such transactions from those where parties have knowingly entered into a speculative contract in which they intentionally speculated as to the result, on the ground that these transactions were had on the idea that oil had been struck, when in fact and in truth simply a fraud had been perpetrated. Persons who deal in the stock of corporations necessarily enter into speculative contracts, and they will not be ordinarily released simply because the stock turns out to be worth less than it was supposed to be worth. But here the stock which Neale transferred to Wright for the land was of no value. As the fact proved, he received no consideration for his land. The parties were dealing upon the supposition that the corporation had about four times as much merchandise as it in fact had. Their trade was made upon the supposed condition of the corporation. There was a mutual mistake, induced by the statements of the condition of the corporation which had been promulgated. They were both deceived; but when the truth appears, and it is shown that there is a total failure of consideration for the deed, it will be canceled in equity.

Judgment affirmed.

DOTSON v. CARTER.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. PLEADING (§ 245*)—AMENDMENT—PETITION.

Plaintiff held under execution sale land which defendant, the original owner, brought suit to redeem, in which he recovered judgment against plaintiff for money paid to redeem, the court holding that there had been no agreement for redemption; but on appeal it was held that there was a right to redeem, and defendant was entitled to the land upon payment of an additional sum. Plaintiff sued to vacate the judgment and a conveyance from him to defendant of part of the land, alleging that before appeal the parties had compromised; plaintiff making the conveyance and repaying to defendant the sum found to have been paid by him, the rest of the land to be plaintiff's, and no appeal to be taken. *Held*, that an amendment of the petition, after issues joined, by setting up plaintiff's title to portions of the land through another than the purchaser on execution, was properly refused, where the evidence to support the claim was unsatisfactory and not sufficient to sustain a judgment on the question.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 653-659; Dec. Dig. § 245.*]

2. COMPROMISE AND SETTLEMENT (§ 23*)—EVIDENCE.

Evidence held to support a finding that no compromise and settlement of a suit was made.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 23.*]

3. JUDGMENT (§ 464*)—EQUITABLE RELIEF—RELIEF AWARDED.

Where plaintiff had paid defendant money upon rendition of a judgment in a previous litigation between them, in the belief that the case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was settled and that no appeal would be taken, but defendant appealed and obtained a more favorable judgment, plaintiff's suit to set aside the judgment because of the supposed compromise should not be dismissed, upon a finding that there was no compromise, without giving him judgment for the money mistakenly paid.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 464.*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by G. W. Dotson against H. S. Carter to vacate a judgment, set aside a conveyance, etc. Judgment of dismissal, and plaintiff appeals. Reversed and remanded with directions.

J. M. Roberson, Hazelrigg, Chenault & Hazelrigg, and J. F. Butler, for appellant. W. S. Pryor, for appellee.

LASSING, J. The history of the transactions out of which the litigation involved in this appeal grows is fully set out in the case of Carter v. Dotson, 92 S. W. 600, 29 Ky. Law Rep. 155. It appears that Carter had failed in business, and a homestead was assigned to him out of certain lands which he owned, and the balance of his land was sold under an execution to pay his debts. One Campbell became the purchaser thereof. He later assigned his bid and purchase to G. W. Dotson, and it was the contention of Carter that Dotson took this assignment with the understanding and agreement that he was to hold it for Carter until he had paid to him (Dotson) the purchase money, when the land was to be transferred to Carter. Carter claimed he had paid to Dotson the full amount of the purchase price and demanded the land. Dotson denied the agreement to redeem, though admitting that Carter had paid to him the sum of \$525. This, however, he said was in satisfaction of an old logging debt, due him on a logging contract, and was not a payment on the land. On the trial in the circuit court a judgment was entered to the effect that there was no agreement between Carter and Dotson by which Carter had a right to redeem the land; but the court further found that Dotson had received from Carter \$525 for the purpose of redeeming this land, and not in satisfaction of an old debt, and he gave Carter a judgment and lien on the land in question for this amount. Thereafter Carter prayed an appeal from that judgment, and upon consideration here the judgment of the circuit court was reversed—it being held that there was an agreement between Carter and Dotson by the terms of which Carter was to have the land back upon the payment by him to Dotson of the purchase price, to wit, \$802.88; that all of said sum had been paid by Carter, except \$47 and interest; that Dotson had a lien upon the land to secure him in this amount; and that when it was paid the land belonged to Carter.

When the mandate from this court was filed in the Pike circuit court, Dotson brought a suit in equity, in which he prayed that the order and judgment in the case of Carter v. Dotson be vacated and set aside, and held for naught, and that the deed conveying the land to Carter be canceled, because he and Carter had, at the time of the rendition of the judgment in the Pike circuit court appealed from, settled and compromised all of their differences by his paying to Carter the \$525, with interest to that date, amounting to \$627.37, and the costs of the action, amounting to something like \$100, and surrendering to the use of Carter a certain house and lot and barn and lot, to be held by him during life; the remainder of the land in litigation to be the property of Dotson, and no appeal to be taken. He alleged that this compromise was entered into in good faith, and that, believing that the litigation had been settled, he paid to Carter and his attorneys, by check, the \$627.37 aforesaid and the costs of the litigation. He asked that their compromise and agreement be enforced, but, if this could not be done, then that Carter be required to return to him the money which he had thus obtained in the settlement and compromise, with interest from the date of its payment. Carter answered, denying the compromise in toto, admitted the payment of the money, but claimed that it was due him for reasonable rent of the land in question during the time that Dotson had held it. Issue was joined on these questions, and later Dotson offered to file an amended pleading, in which he set up and claimed title to certain portions of the land in question through a source other than Campbell, the purchaser at the Carter sale. The court refused to permit this pleading to be filed, and upon final hearing dismissed the petition of plaintiff, Dotson, with judgment for costs. From this finding and judgment of the court, Dotson prosecutes this appeal.

The first question of which we will dispose is the ruling of the court in refusing to permit the amended pleading to be filed. An examination of the evidence offered by Dotson in support of his claim to title through a source other than the Campbell purchase shows that it was very hazy and not at all satisfactory; and under the circumstances, and coming at the time it did, we are of opinion that the court did not err in refusing to permit this pleading to be filed. Still, even if he had permitted it to be filed, the proof offered, upon this point would not have supported a judgment in favor of Dotson upon this question.

As to whether or not the compromise was made, as alleged by Dotson, much proof has been taken. He and his witnesses testified that the proposition to compromise was made

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to Carter through his attorney, Vanover, and that they understood through him that it was accepted, and that with that understanding the money was paid by check to Carter's attorneys, and was indorsed by them, and by him as well, and the money drawn thereon. Carter emphatically denies that the compromise was made at all, or that he authorized or consented that any one might compromise his claim for him. All admit that he was not present when the compromise was first discussed with Vanover, and, while some of the witnesses say that after Vanover had talked with him in regard to the matter and returned, and just before receiving the money, Carter said it was all right, and they understood that he assented to a compromise. Still, on the other hand, their evidence does not go far enough to show that he was consenting that the case be settled and compromised upon the terms indicated, or at all. There are certain portions of the judgment, which was entered at that time, which look as though the parties themselves understood that the case was adjusted, while, on the other hand, Carter is positive that it was not compromised, and his lawyer, Vanover, says that he took the money, hoping to succeed in getting his client to agree that the matter might end there, but not that there was any compromise as alleged, or at all. The fact that an appeal was prosecuted by Carter rather lends color to his contention that he had never agreed to the compromise.

Of course, if these parties had agreed upon the terms by which the litigation between them was to be settled and stopped, and Dotson paid his money in furtherance of such agreement, Carter should be made to live up to it; but, under the circumstances, we are of opinion that the proof does not support the contention that the compromise was made. The record shows that Carter was an old man, then past 81 years of age. He was not at all satisfied with the judgment as rendered by the circuit court, and the most that can be made out of the testimony of his lawyer is that he accepted the amount of the judgment which the circuit court gave his client and endeavored to get his client to take that sum and stop the litigation. This, however, falls short of establishing an agreement on the part of Carter to do so. The witnesses in the country, who testified that Carter told them, shortly after the term of court at which this case was tried, that the case was settled by Dotson getting the land and him getting the money, added no weight to the claim of Dotson that it was compromised; for, in making the statements that he did, Carter was but telling his inquiring friends what the judgment of the court was, for that is exactly what the judgment provided—that he should have the money and Dotson the land—and this view of the testimony is strengthened, especially

by one witness, who asked him if he was satisfied, and his response was that he had to be. On this branch of the litigation the chancellor correctly found that no compromise and settlement of the litigation between appellant and appellee was had, though the pleadings showed that appellant had paid to appellee \$627.37 on the 6th of May, 1904, under the mistaken idea and belief that he was settling the differences between Carter and himself and getting the land in question.

Since the evidence does not support the contention that the litigation was compromised and adjusted, Carter should not be permitted to retain appellant's money, and the court erred in dismissing his petition without giving him a judgment for the money, which he had thus paid through a mistake to Carter for the land. The effort of Carter to claim this money as due him for rent is not tenable. The use of the place to Dotson while in his possession was not worth more than the value of the improvements which he put upon it, and, besides, had there been anything coming to him in the way of rent, his claim should have been set up and proven in the other case, where all matters in dispute between them relative to the land in question were or should have been litigated.

For the reason indicated, the judgment is reversed, and the case is remanded, with instructions to the trial court to enter a judgment in favor of appellant, Dotson, against appellee, Carter, for the sum of \$627.37, with interest thereon from May 6, 1904, until paid, and if same is not paid within 60 days after the filing to direct a sale of the land described in the pleadings to satisfy same, together with the \$47 and interest which was ordered to be paid by the former judgment, if same has not been paid, and for further proceedings consistent with this opinion.

LEAVELL et al. v. CARTER.

(Court of Appeals of Kentucky. Oct. 29, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 152*) —LIEN FOR PURCHASE MONEY—TITLE OF PURCHASERS.

Where executors purchase land with funds belonging to decedent's widow and minor children, and take a deed to them, charging the land with a lien for part of the purchase money, the grantees hold the land subject to the lien.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 152.*]

2. TENANCY IN COMMON (§ 46*)—RIGHTS AS TO THIRD PERSONS—LIENS—RIGHTS OF MINORS.

Where land is conveyed to a woman and her infant children, she may create a lien thereon affecting her interest, but not the interests of the minors.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

3. INFANTS (§ 111*)—ACTIONS—VACATION OF JUDGMENT—STATUTORY PROVISIONS.

While an infant may, by petition within a year after attaining majority, show cause against a judgment, with certain exceptions, under Civ. Code Prac. § 391, and the court may

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

modify the judgment within that time, under section 518, subd. 8, where the error in the proceedings does not appear therein, and may, within a year after attaining majority, appeal from the judgment, under section 745, to correct an error on the face of the record, no such right is given to persons of age, and an infant loses the right unless exercised within a year after becoming of age.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 817; Dec. Dig. § 111.*]

4. JUDICIAL SALES (§ 39*)—POLICY OF LAW.

It is the policy of the law to sustain judicial sales, and a sale of land for \$3,600 after the panic of 1893, which had been bought for \$4,900 before such date, will be upheld.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 77; Dec. Dig. § 39.*]

Appeal from Circuit Court, Garrard County.
"Not to be officially reported."

Petition by Susie K. Leavell and others against J. B. Carter to vacate a judgment and sale of land to satisfy a purchase money lien. Judgment sustaining demurrer, and plaintiffs appeal. Affirmed.

R. H. Tomlinson and Smith & Smith, for appellants. Herndon & Swinbrod and Wm. Herndon, for appellee.

HOBSON, J. The facts of this controversy are stated in the opinion delivered on the former appeal. See *Leavell v. Carter*, 96 S. W. 597, 29 Ky. Law Rep. 920. After that decision was rendered a petition was filed in the circuit court by the infants, asking a vacation of the judgment and sale of the land. The circuit court sustained a demurrer to the petition, and they appeal.

The circuit court properly held that, under the will of B. F. Leavell, the land, which was bought by his executors, belonged to the widow and children equally. It may have been unwise in the executors to buy land in excess of the funds in their hands, so that there was a balance of the purchase money due on the land; but this was a matter of judgment only. It did not affect the validity of the transaction, and the executors having bought more land than they could pay for, and having accepted a deed which charged the land conveyed with a lien for the balance of the purchase money, the grantees held the land subject to the lien, and they cannot complain that this lien for the purchase money was enforced. Mrs. Leavell was without authority to create any lien on the land beyond her interest in it; but she could create a lien on her interest in the land, not affecting the interest of the infant children. The circuit court so held, and protected the rights of the infant children, so that they have nothing to complain of in the judgment directing a sale of the land. The proceeds of the sale coming to them was reinvested in another tract, which the infants now hold.

While an infant may, by petition within 12 months after attaining the age of 21 years,

show cause against a judgment, under sections 391 and 518, subd. 8, of the Civil Code of Practice, where the error in the proceedings does not appear therein, or he may, under section 745, within a year after the removal of his disability, appeal from the judgment to correct any error shown on the face of the record, no such right to open a judgment is given to persons who are of age, and the infant loses the right unless exercised within a year after he becomes of age. In this case, upon a careful examination of the whole record, we find nothing to the prejudice of the substantial rights of the infants. It is true that the land was originally bought for \$4,900, and, when sold at the judicial sale, brought only something over \$3,600; but it is well known that between the purchase of the land and its sale under the order of the court the panic of 1893 occurred, and land values had shrunk very much. The infants had had the use of the land from the time of its purchase until it was sold again. The sale was fairly made, and Carter, on the facts shown, is as much entitled to the benefits of his purchase as a stranger would have been if he had purchased the land at a judicial sale. It is the policy of the law to sustain judicial sales, and to encourage bidding by all persons, so that property may not be sacrificed.

Judgment affirmed.

MERSHMAN et al. v. ROBERT FIELD CO. (Court of Appeals of Kentucky. Oct. 22, 1908.)

1. PRINCIPAL AND SURETY (§ 145*)—ACTION AGAINST PRINCIPAL—RES JUDICATA—ISSUES.

Where a judgment was affirmed on appeal, the court holding that it was not void because rendered against a corporation instead of against certain individuals as a partnership, such decision was *res judicata* in an action on the supersedeas bond given on such appeal.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§. 397-401; Dec. Dig. § 145.*]

2. APPEAL AND ERROR (§ 1241*)—SUPERSEDEAS BONDS.

Where a corporation was the only defendant against whom judgment was rendered, and an appeal was prosecuted from that judgment, no objection could be made, in an action on a bond executed to supersede it, that the bond was only given to secure the liability of certain individual appellants.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1241.*]

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by the Robert Field Company, against J. H. Mershman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Martin M. Durrett and Strickler & Johnson, for appellants. B. F. Graziani, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CLAY, C. In the action of Robert Field's Sales Agency v. Ignatius Droege et al., 104 S. W. 1007, the plaintiff obtained a judgment against the I. Droege & Sons Foundry Company, a corporation organized under the laws of the state of Kentucky. On appeal to this court by the I. Droege & Sons Foundry Company the case was affirmed as a delay case. Thereafter the appellant moved to set aside the judgment affirming. In passing upon this motion the court said: "As seen, the judgment is against the defendant, not as a copartnership, but in the correct corporate name. It being admitted that the appellant, who was one of the defendants sued, is a corporation, the judgment rendered against it would not be reversed on appeal because the petition did not say that the appellant was a corporation. The judgment is not void on that account, nor is the failure of the petition to sufficiently state the plaintiff's case in this respect such a substantial error, or so prejudicial to the substantial rights of the appellant, as would entitle it to a reversal of the judgment. Section 756, Civ. Code." Droege & Sons Foundry Co. v. Robert Field Sales Agency, 104 S. W. 1007, 31 Ky. Law Rep. 1247. The supersedeas bond in the former appeal was signed by appellants, J. H. Mersham and John C. Droege. Upon the return of the case the appellee, Robert Field Company, instituted this action upon the supersedeas bond. Appellants defended on the ground that the former action, instituted by the Robert Field Sales Agency, and in which the supersedeas bond was executed, was not instituted against the I. Droege & Sons Foundry Company; that no judgment was rendered against that company, and, even if the judgment was rendered, it was void. Appellants also defended on the ground that the bond was given in the former suit to answer for any judgment rendered against the defendants in that suit, to wit, Ignatius Droege, John C. Droege, and Fred Droege, partners doing business as I. Droege & Sons Foundry Company. A demurrer was sustained to appellants' answer, pleading the above facts. Judgment was then entered in favor of appellee. From that judgment this appeal is prosecuted.

While the appellants herein contend that the judgment entered in the former case was void, an examination of the foregoing opinion will show that this court expressly affirmed the judgment against the I. Droege & Sons Foundry Company, and furthermore held that the judgment was not void. That being the case, the issues herein raised, as to whether or not a judgment was rendered, and whether or not that judgment was void, are res adjudicata.

Nor is there anything in appellants' contention that the bond was not executed to supersede a judgment against the I. Droege & Sons Foundry Company. It was the only defendant against whom a judgment was rendered.

The appeal prosecuted by the appellants in that case was from that judgment. The bond was therefore executed to supersede that judgment, and no other.

For the reasons given, the judgment is affirmed.

WILSON v. SULLIVAN et al.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. JUDGMENT (§ 949*)—PLEAS IN BAR—BASED ON JUDGMENT OR ORDER.

A plea in bar of former adjudication must be based upon a judgment or order of court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1796; Dec. Dig. § 949.*]

2. DISMISSAL AND NONSUIT (§ 6*)—DISMISSAL WITHOUT PREJUDICE—STATUTORY PROVISIONS.

Under Civ. Code Prac. § 371, providing that an action may be dismissed by plaintiff without prejudice to a future action before the final submission of the case to the jury, etc., the court, after sustaining a motion for a peremptory instruction to find for defendants, and before the case is finally submitted to the jury, may dismiss the action without prejudice on plaintiff's motion.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 14-16; Dec. Dig. § 6.*]

3. COSTS (§ 137*)—DISMISSAL GROUNDS—FAILURE TO PAY COSTS IN FORMER ACTION.

The court cannot arbitrarily dismiss a case for plaintiff's failure to pay the cost of a former action against the same defendants which he had had dismissed without prejudice.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 537-548; Dec. Dig. § 137.*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Action by Samuel Wilson against A. J. Sullivan and others for damages on an injunction bond. Judgment of dismissal, and plaintiff appeals. Reversed with directions.

R. S. Rose and R. L. Pope, for appellant. H. H. Tye, for appellees.

CARROLL, J. In October, 1906, the appellant, Samuel Wilson, brought suit against the appellees to recover damages on an injunction bond executed by them. Issues were made by the pleadings, and the case went to trial before a jury. Upon the conclusion of the evidence for the plaintiff, the defendants moved the court to instruct the jury to return a verdict for them. This motion was sustained by the court; but, before the jury returned a verdict, the plaintiff moved to dismiss the action without prejudice. To this motion the defendants objected, but the court overruled their objection, and dismissed the action before a verdict was returned. Afterwards Wilson brought this suit against the appellees on the same bond to recover damages for its breach. In other words, his cause of action was the same as that involved in the litigation in which his petition was dismissed without prejudice.

The appellees, defendants below, in the second paragraph of their answer pleaded in bar of the right of the plaintiff to maintain this action that, after the court had sustained the motion for a peremptory instruction, it had no power to dismiss the action without prejudice before the case was finally submitted to the jury. We may here remark that the orders of court in the action dismissed without prejudice are not in the record, and the statements relative to the action of the court are taken from the answer. There is no judgment or order of court pleaded in bar, as the only order shown by the answer to have been made was the one sustaining the motion of the plaintiff to dismiss the action without prejudice, and for this reason the answer did not present a defense. It is necessary that a plea in bar of former adjudication should be based upon a judgment or order of the court.

But, passing this point, and accepting as true the statements of the answer as to the ruling of the lower court at the time the petition was dismissed without prejudice, the court had the right after the motion for a peremptory instruction was made and sustained and before the case was finally submitted to the jury to entertain the motion of the plaintiff to dismiss the action without prejudice and to so order. Civ. Code Prac. § 371. This question of practice was settled in *Vertrees' Adm'r v. Newport News & Miss. V. R. Co.*, 95 Ky. 314, 25 S. W. 1. In that case the orders of court showed that "the defendant moved the court to instruct the jury peremptorily to find for defendant, which motion was fully heard by the court and sustained, to which the plaintiff excepted, and then moved the court to allow plaintiff to dismiss his cause of action without prejudice to a future trial, which motion was overruled, and the jury was instructed to find for the defendant, to which the plaintiff objected and excepted." From the judgment upon this verdict, an appeal was prosecuted, and this court said: "The bill of exceptions which we have quoted shows that, although the court had sustained plaintiff's motion for the peremptory instruction, there had not been any submission of the case finally or otherwise to the jury before plaintiff moved to dismiss the case, for it is stated that the jury was not actually instructed to find for defendant until after the motion of plaintiff to dismiss was made. Strictly and properly speaking, there can be no final submission of a case to a jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case have been actually delivered to the jury, and they are authorized without further interposition or control of the court to proceed to a judicial examination of the issue of fact submitted to them. In our opinion plaintiff had the right to dismiss his action without prejudice at the time he made the motion, and the court erred in overruling it."

The plaintiff entered a general demurrer to the second paragraph of the answer, but, before the demurrer was disposed of, the appellees, who were defendants below, "moved the court to stay proceedings herein until the plaintiff pay or secure the costs of the former action dismissed without prejudice, and in which a judgment was entered against Wilson for costs." The order containing this motion recites that "the court, after due consideration thereof, sustained the same, and gave the plaintiff until 1 o'clock p. m. of the day upon which the motion was made and the order entered to pay or secure the costs of the former action." Thereafter, on the same day, the following order was made and entered: "It appearing to the satisfaction of the court that it is now past the hour of 1 o'clock p. m., and that the plaintiff has failed to pay or secure the costs in the former action instituted by him against the defendants to recover damages for breach of same bond upon which this action was instituted, and it further appearing that the plaintiff has shown no cause why he should not pay or secure such costs, it is now, therefore, ordered and adjudged that this action and the petition of plaintiff be and the same is each now hereby dismissed, and that the plaintiff take nothing by reason thereof, and it is further ordered and adjudged by the court that the defendants recover of the plaintiff, Wilson, their costs herein expended, and that this action be and the same is now hereby stricken from the docket in this court, to all of which the plaintiff prays an appeal to the Court of Appeals, which is granted." The court did not have the right to dismiss the plaintiff's action because he failed to pay the costs in the action dismissed without prejudice. In *Hobbs v. L., H. & St. L. R. Co.*, 102 S. W. 818, 31 Ky. Law Rep. 452, the court said: "We do not mean to hold that trial courts in the exercise of a reasonable discretion over parties and proceedings, to the end that justice may be promoted, will not under any state of case be permitted to require the plaintiff to pay the costs of an action unnecessarily dismissed with the apparent design of subjecting his adversary to unreasonable trouble and expense, or to lay down any rule that will prevent the court, in the exercise of a sound discretion, upon a proper showing, from requiring a party, as a condition precedent to maintaining a second action, to pay the costs of the former one between the same parties. But it is certainly not the purpose of our laws, and has never been the practice in this state, to impose upon its citizens burdens that would prohibit them from appealing to the courts to protect their rights, or redress their wrongs." The record does not disclose any reason whatever why the court should have arbitrarily dismissed the plaintiff's action upon his failure to pay the costs of the former action within a few hours after the motion against him was made.

The judgment is reversed, with directions to reinstate the case upon the docket, and sustain a demurrer to the second paragraph of the answer.

**CONTINENTAL CASUALTY CO. v.
SEMPLÉ.**

(Court of Appeals of Kentucky. Oct. 21, 1908.)

1. CONTINUANCE (§ 22*)—GROUNDS.

In an action on an accident policy, payable if the death of insured was necessarily and solely from injury, the answer alleged that death resulted from disease. Defendant asked a continuance because of the absence of a physician, who with seven other physicians was present at an autopsy, and who would have testified that insured was diseased before he was injured. The affidavit for continuance, which plaintiff consented might be read as the deposition of the absent witness, disclosed with minuteness all the facts proposed to be proven by the witness. The other seven physicians testified, and the jury also heard read the affidavit. *Held*, that the court did not abuse its discretion in denying the motion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 62; Dec. Dig. § 22.*]

2. PLEADING (§ 261*)—ANSWER—AMENDMENTS—NEW DEFENSE AT TRIAL.

Where insured's proof of death under an accident policy showed all his accident insurance, and actions were brought against defendant and all the other insurers at the same time and in the same court, defendant's application to file a trial amendment, alleging that it had just discovered that insured had more accident insurance than his application disclosed, was properly refused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 794; Dec. Dig. § 261.*]

3. TRIAL (§ 304*)—DISCHARGE OF JURY—MISCONDUCT OF JUROR—EVIDENCE.

Where defendant's attorneys made affidavits that a juror was asleep part of the time during the trial, but plaintiff's attorneys made affidavits that he was not asleep, and the juror swore that he was not asleep at any time during the trial, that he had a habit of closing his eyes when listening to others, and that he heard all that was said by both witnesses and lawyers, the court properly refused to discharge the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 304.*]

4. INSURANCE (§ 668*)—ACCIDENT INSURANCE—ACTIONS—SUBMISSION TO JURY.

In an action on an accident policy, wherein defendant alleged that insured's death was from disease and not accident, the refusal of a peremptory instruction for defendant *held* proper under the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1763; Dec. Dig. § 668.*]

5. INSURANCE (§ 669*)—ACCIDENT INSURANCE—ACTIONS—INSTRUCTIONS.

In an action on an accident policy, defendant alleged that insured died of disease. The court instructed, in effect, that if by reason of extraordinary exertion to control his horse, or by the movements of the horse and independent of all other causes, a blood vessel in insured's brain was ruptured, and that the injury necessarily and solely caused his death, they should find for plaintiff, though the blood vessel had been weakened or hardened by prior disease, and called the jury's attention to the fact that if the disease, if any he had, had no part in causing the rupture, and the death of insured, it was not a defense. By another instruction the court

called attention to the fact that if insured was suffering from disease which tended to weaken or harden the blood vessels in the brain, and that such disease caused or actively co-operated with any accidental injury to insured's brain, and that his death resulted from such co-operating, the law was for defendant. *Held*, that the instructions were not conflicting.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division. "Not to be officially reported."

Action by Lillian Semple against the Continental Casualty Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Charles H. Sheld and Manton Maverick, for appellant. P. B. Muir, Muir Weissinger, J. T. O'Neal, Kohn, Baird, Sloss & Kohn, and D. W. Baird, for appellee.

NUNN, J. This appeal is from a judgment for \$5,000, obtained on an accident policy which was issued by appellant to Alex L. Semple and made payable to appellee. It provided that appellant would pay to the insured, or to his beneficiary, his wife, indemnity as scheduled in the policy in the event that the insured, while the policy was in force, should receive personal bodily injury effected directly and independently of all other causes through external, violent, and purely accidental means, and in case of death of insured would pay to the beneficiary \$5,000, if the death resulted necessarily and solely from injury. By appellee's petition it was alleged that Alex L. Semple received accidental injury through external and violent means which resulted in his death, and his death resulted necessarily and solely therefrom. Appellant, by answer, controverted the allegations of the petition, and by an amended answer alleged that the death of Alex L. Semple resulted from disease, which by agreement was controverted of record. A trial was had before a jury, which resulted in a verdict in favor of appellee for the amount mentioned in the policy, \$5,000. Appellant asks a reversal of the judgment for several reasons: First, the court erred in refusing to grant it a continuance because of the absence of a physician, an important witness for it; second, because the court erred in refusing to allow it to file an amended answer setting forth a new cause of defense; third, because the court erred in refusing to discharge the jury for the reason that one of them had been asleep during a part of the trial; fourth, because the verdict of the jury was against the evidence; fifth, because the court erred in its instructions to the jury.

That the first ground for reversal may be understood, it is necessary to state a few of the facts proven as appear in the record. On the 18th day of July, 1906, Alex L. Semple received the alleged accidental injury

which produced his death on the 18th day of August, 1906. He received his injury in Jefferson county, Ky., but died in Atlantic City, N. J., from where his body was returned to Kentucky and buried, and 17 days thereafter, at the instance of appellant and other insurance companies, an autopsy was demanded and held upon his body. At that autopsy there were present eight physicians, one of whom was Dr. Carl Weidner, on account of whose absence the continuance was asked. The affidavit for the continuance disclosed the fact that this physician examined the tissues of the brain as by the use of a knife they were exposed. He was the man who declared the discoveries as they were made, and was the active person in ascertaining and determining what the brain tissues in fact disclosed, and would have testified, if present before the jury, that Semple was diseased before he received the accidental injury; that the blood vessels of the brain would not and could not have bursted by reason of the exercise and exertion employed by Semple at the time of his injury, unless they were already weakened and hardened by disease. This affidavit disclosed with minuteness all the facts proposed to be proven by Dr. Weidner, and, further, that the force and effect of his testimony could not be obtained, except by his personal attendance before the jury. Appellee consented that this affidavit might be read as the deposition of Dr. Weidner, and the court overruled the motion for a continuance. The motion for a continuance addressed itself to the sound discretion of the court, and we cannot say that the court abused it. As disclosed by the affidavit, there were eight physicians present at the autopsy, seven of whom were present and testified before the jury, and the jury also heard read the affidavit, which was admitted as the deposition of Dr. Weidner, and it is certain that the jury understood every material fact disclosed by the autopsy.

As to the second ground presented by appellant for reversal, to wit, the court erred in refusing to allow an amended answer to be filed, the facts are about as follows: On the third day after the trial had commenced appellant offered the amended answer, in which it was alleged: That it had just discovered that Alex Semple had more accident insurance than he disclosed when he made application to it for the policy sued on. That he stated in his application: "I am not now a policy holder in this company, and except as hereinafter stated I have no other accident insurance (give name of company and amount): \$5,000.00, F. & C.; \$5,000.00, Ocean." That it had just discovered that he had another \$5,000 policy in the F. & C., and that if it had known this fact it would not have issued the policy sued on. Appellee claims that the defense attempted to be set up by this amendment was not material; that the principle governing fire insurance

and the ordinary life insurance does not apply to accident insurance when death ensues. In life and fire insurance companies the inquiry as to the amount of insurance sometimes becomes material and important as a protection against suicide and the burning of property, for they are always intentional, and an accident in the nature of the case can never be intentional. It is always, and must be, unlooked for, an unexpected something which happens casually, and always against the will and wish of the person injured; hence it matters not how much accident insurance is upon the life of the person. The authorities presented from other jurisdictions sustain this contention; but it is unnecessary for us to pass upon this question. Immediately after the death of Semple the necessary proof was made out and presented to appellant. In this proof the exact number of policies was stated, and appellant had information of every fact contained in the amendment at the time of the filing of the original and first amended answer. At the same time this suit was brought actions were also brought upon the other policies named and in the same court. If appellant did not know of the additional policies when it filed its original and first amended answer, it was because of its own carelessness in the examination of the records before it. In allowing amendments the court has a very wide discretion, and may only allow them when it seems that the ends of justice require it. Section 134, Civ. Code Prac.; C., N. O. & T. P. R. R. Co. v. Crabtree, 100 S. W. 318, 30 Ky. Law Rep. 1002; Burkholder v. Farmers' Bank of Kentucky, 67 S. W. 832, 23 Ky. Law Rep. 2449; Mattingly v. Bank of Commerce of Owensboro, 53 S. W. 1043, 21 Ky. Law Rep. 1029. In the case of Mattingly v. Bank of Commerce of Owensboro, supra, the court said: "The power of the trial court to allow amendments of pleadings in furtherance of justice is, under the Code, very broad. It is a judicial discretion, and not to be exercised arbitrarily; but, being a matter peculiarly within the discretion of the trial court, on appeal his ruling will never be reversed, unless there has been an abuse of discretion by which injustice has been done." Under the facts and this authority we are unwilling to say that the lower court abused its discretion in refusing the amendment.

The attorneys for appellant made affidavits that one of the jurors was asleep a portion of the time during the trial, and the lawyers for appellee made affidavits that he was not asleep; and the juror himself swore that he was not asleep at any time during the trial, that he had a habit of closing his eyes when listening to others, and that he heard all that was said by both witnesses and lawyers. The lower court, under this evidence, did not err in refusing to discharge the jury from the trial of the case.

The fourth objection is that the facts prov-

en did not authorize the verdict, and it necessitates our stating the substance of the facts proven. Appellee's contention is that Semple received his injury which produced his death while riding a horse for exercise in a field of Mrs. McKay. The witnesses for appellee testified, and were not contradicted, that up to the moment Mr. Semple mounted his horse for this ride that he was a stout, healthy, active man, and very energetic, was fond of exercise and took a great deal, before and after his hours of employment as purchasing agent for a wholesale house in Louisville; that after ceasing his labor on the afternoon of July 18, 1906, he went to the home of Mrs. McKay, with whom he and his family were boarding for the summer, had his hostler saddle his large, spirited, gray horse, and as soon as he could remove his business suit and don his riding suit he mounted his horse and rode into a large grass field for his ride.

The hostler, William Brown, testified in part as follows: "Q. Can you tell what you saw him do after he had gotten on the horse? A. After he had gotten on the horse I went and opened the gate for him to go out into the back field. He went on out in the back field, and after he was out in the field, over in the field was a kind of hill, and he was right out in the field where the hill was, and it looked like the horse was trying to get away, and I think he was prancing around, and as he went over the hill it looked like he (Semple) was leaning, and then I never seen him any more. Q. Did you notice whether he ran under or near anything? A. He ran up on top of the hill, and there was a row of trees right straight across the field like, and it looked like he ran under the trees, and as he ran up to the trees he went over the hill, and that was the last I saw of him until he came back to the stable. Q. Did you see him when he got off his horse? A. Yes, sir. Q. Tell the jury what you saw. A. When he came back the horse was full of foam and sweat, wringing with it, wringing with sweat, and the foam was coming out of his mouth, and his mouth was bleeding, and Mr. Semple was wet all over, his collar was all wet, and all coming down on his leggings and everywhere. When he got in his hat was dented down like that; but I didn't pay much attention to his hat, but paid more attention to him. He came on in the stable, and there was a chair at the door, and he sat down, and I looked at him, and the horse was full of sweat, and foam was coming out of his mouth, and the curb was under his lip, where he had been seesawing on him, trying to hold him, and the curb was a chain, and his lip was cut where he was trying to hold him. I took him (the horse), and he said, 'William, take me back (to the house) in the back way.' Then, after he told me that, I wiped the horse's mouth off and pulled out his tongue. Q. What was it he told you? A. I pulled out his tongue and looked at it, and he had a hole clean through his tongue, and

I never said nothing to him, and he said: 'William, put the horse back in the stable. He gave me a terrible knock'—and he put his hand up to his head. He said: 'He gave me a terrible known [knock] up in my—something hot—felt like something broke loose, something hot ran down.' And he went on, and it looked like he was dragging his left side, kind of helpless; but I didn't pay much attention then, and he walked on, and the last time I saw him he was dragging his left side and his foot, and his arm was down that way (describing). That was the last time I saw him." Dr. Thompson, his family physician, testified that he was called to see him, and Semple told him that he had a struggle with the horse, and the horse hurt him, and he felt something give away in his head; and other witnesses testified to the same effect. All the physicians testified that a blood vessel was ruptured in Semple's brain. Appellee's witnesses testified that this caused his death, and they also testified that the struggle which he had with the horse could have produced the injury.

All of appellant's witnesses, except about two, testified that they did not know Mr. Semple, and all they knew about his condition was obtained at the autopsy. They testified that in their opinion Semple died of a "disease" technically called "arterio-sclerosis," or hardening of the arteries of the brain, or rather of hemorrhages of the brain caused by the rupture of the blood vessel, resulting from the hardening or diseased condition of the arteries. It was also their opinion that the struggle Semple had with his horse could not have broken the arteries if they had not been diseased. They stated that they did not examine his arteries at the time of the autopsy to ascertain whether or not they were diseased, but stated that they could have ascertained this fact if they had made the investigation. They contented themselves with the statement of their opinions that a sound artery could not have been ruptured by the struggle with the horse. The two witnesses above excepted were physicians who attended Semple in Atlantic City after his arrival there. They stated that there were indications at that time that his arteries were diseased. Appellee's witnesses testified that this condition of the arteries might have been expected at that time as the result of the rupture and hemorrhage. Appellee's witnesses, who were physicians and attended Mr. Semple after his injury up to the time he left for Atlantic City, also stated that they examined his arteries, but found them sound and healthy, and that his struggle with the horse could have resulted and did result in the rupture of a sound blood vessel, and the hemorrhage from it caused his death. In view of these facts, we are of the opinion that the court did not err in refusing a peremptory instruction in behalf of appellant.

The only other question presented for reversal is the alleged error of the court in its instructions to the jury. The instructions are as follows:

"(1) The court instructs the jury that, if they shall believe from the evidence that within one year from May 3, 1906, to wit, on or about July 18, 1906, Alex L. Semple did sustain personal bodily injury which was effected, directly and independently of all other causes, through external, violent, and purely accidental means, and which resulted at once in total and continuous disability to engage in any labor or occupation, and if the jury shall further believe from the evidence that the death of said Alex Semple resulted necessarily and solely from said injury, within 90 days thereafter, to wit, on or about August 18, 1906, then the law is for the plaintiff, and the jury should so find.

"(2) But unless the jury should believe from the evidence that within one year from May 3, 1906, to wit, on or about July 18, 1906, Alex L. Semple did sustain personal bodily injury which was effected directly and independently of all other causes, through external, violent, and purely accidental means, and which resulted at once in total and continuous disability to engage in any labor or occupation, and unless the jury shall further believe from the evidence that the death of said Alex L. Semple resulted necessarily and solely from said injury within 90 days thereafter, to wit, on or about August 18, 1906, the law is for the defendant, and the jury should so find; or if the jury shall believe from the evidence that the decedent, Alex L. Semple, came to his death from any other cause not proximately brought about by personal injuries received from purely accidental causes, or if they shall believe from the evidence that any other cause, coupled or conjoined with accidental personal injuries received, if any, caused his death, and that the accidental injury, if any, received by him was not the sole cause of his death, independent of all other causes, if any, then the law is for the defendant, and the jury should so find.

"(3) If the jury shall believe from the evidence that the plaintiff's decedent, Alex L. Semple, while riding a horse on the 18th day of July, 1906, was because of the restiveness or behavior of said horse, and to avoid being thrown by him, compelled to make extraordinary exertion to control him, and that by reason of such exertion so compelled, or of the movements of the horse, and independent of all other causes, if any, a blood vessel in the brain of said Alex L. Semple was ruptured, and that the injury so inflicted necessarily and solely caused his death within 90 days thereafter, the law is for the plaintiff, and the jury should so find, although the jury may believe from the evidence that the blood vessel in the brain of

Alex L. Semple had been weakened by prior disease.

"(4) But if the jury shall believe from the evidence that said Alex L. Semple was, on July 18, 1906, suffering from disease which tended to harden or weaken the blood vessels in his brain, and that such disease, if any, caused or actively or efficiently co-operated with any accidental injury to said Semple in causing a rupture in a blood vessel or vessels in his brain, and that his death resulted from such co-operating causes, the law is for the defendant, and the jury should so find.

"(5) If the jury shall find for the plaintiff, their verdict shall be for the sum of \$5,000, with interest at the rate of 6 per cent. per annum from the 2d day of January, 1907.

"(6) If the jury shall find for the defendant, they will simply say so, and no more."

Appellant's counsel in their brief concede that instructions Nos. 1, 2, 5, and 6 were correct, but claim that instructions 3 and 4 are contradictory, the one with the other, and confused the jury. Appellee sued upon a breach of the terms of the policy, and, as stated, appellant answered, controverting the allegations of the petition, and afterwards filed an amended answer, and averred that the insured died of disease, and the court gave instructions 3 and 4 upon this special issue. By No. 3 the court told the jury, in substance, that if by reason of extraordinary exertion to control the horse, or by the movements of the horse, and independent of all other causes, if any, a blood vessel in the brain of Semple was ruptured, and that the injury inflicted necessarily and solely caused his death, etc., they should find for appellee, although the blood vessel in the brain of Semple had been weakened or hardened by prior disease. By the last phrase of the instruction the court called the attention of the jury to the fact that if the disease, if any he had, had no part in causing the rupture and the death of Semple, it was not a defense for the appellant. By the fourth instruction the court called the attention of the jury to the fact that if Semple was suffering from disease which tended to weaken or harden the blood vessels in the brain, and that such a disease, if any, caused or actively or efficiently co-operated with any accidental injury to his brain, and that his death resulted from such co-operating, the law was for the defendant. The instructions are not conflicting, but are in accord. The one in effect told the jury that, even though they might believe from the evidence that Semple was diseased at the time of the accidental injury, yet they could not find for appellant if the disease of Semple did not operate to the extent of causing his injury and death; and the other told them that if they did they should find for appellant.

For these reasons, the judgment of the lower court is affirmed.

HOLLERBACH & MAY CONTRACT CO. v. WILKINS.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. CONTRACTS (§ 32*)—COMPLETION—REDUCTION TO WRITING.

Where all the terms of a contract, by which plaintiff agreed to furnish defendant a specified quantity of broken stone at a certain price per cubic yard, were agreed to, and the contract was dictated to defendant's stenographer with instructions to write out duplicates, and send them by mail to plaintiff, who was to sign both and return one to defendant, the contract was complete and enforceable, though not reduced to writing and delivered before defendant's breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 32.*]

2. CONTRACTS (§ 278*)—CONDITIONS—FAILURE TO COMPLY.

Where defendant, sued for breach of contract, did not deny that, if there was a contract, it did not allow time for the execution by plaintiff of a bond to secure performance before defendant broke the contract, plaintiff's failure to furnish a bond was no defense.

[Ed. Note.—For other Cases, see Contracts, Dec. Dig. § 278.*]

3. DAMAGES (§ 62*)—CONTRACT—BREACH—DUTY TO REDUCE DAMAGES.

Plaintiff, a quarryman, contracted to furnish defendant a certain quantity of broken stone at a specified price per cubic yard. Held that, on defendant's breach of such contract, plaintiff was entitled to recover profits he would have made by furnishing the stone, and was not required to sell the stone in the market and recover the difference between the contract price and market value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 129; Dec. Dig. § 62.*]

4. CONTRACTS (§ 303*)—BREACH—JUSTIFICATION.

Where plaintiff and defendant's manager had agreed on terms of a contract by which plaintiff was to furnish broken stone to defendant, and, after dictating the contract to defendant's stenographer, defendant's manager visited plaintiff's quarries and promised that the written contract should be forwarded at once, he was not justified in refusing to comply therewith by the stenographer's subsequent statement to him that plaintiff had previously said he would not sign the contract unless a certain modification was inserted in it.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMED FACTS.

An instruction that if the jury believed that plaintiff and defendant made a contract as pleaded in the petition, and defendant broke it, while plaintiff was ready and willing to execute it, then plaintiff was entitled to damages, was not objectionable as assuming the existence of the contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 423; Dec. Dig. § 191.*]

6. DAMAGES (§ 62*)—DUTY TO MINIMIZE.

Those complaining of violations of contract are generally required to minimize their damages as much as the exercise of reasonable diligence will accomplish without sacrificing a substantial right.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 129; Dec. Dig. § 62.*]

7. CONTRACTS (§ 279*)—BREACH—OFFER OF PERFORMANCE.

Where defendant informed plaintiff of its election not to take stone contracted for, plaintiff, under the rule that the law does not require the doing of a useless act, was not required to make an express tender of performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1235; Dec. Dig. § 279.*]

Appeal from Circuit Court, Warren County.
"To be officially reported."

Action by J. Arch Wilkins against the Hollerbach & May Contract Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright & Logan and Ora E. Hazelp, for appellant. T. W. Thomas, Wilkins & Milliken, and John M. Logan, for appellee.

BARKER, J. This is an action for the breach of an alleged contract between appellee and appellant for the sale and delivery by the former to the latter of 4,000 cubic yards of broken rock to be used in constructing lock and dam No. 6 in Green river. Appellee alleged in his petition that appellant, a corporation, had secured the contract from the United States government to construct the lock and dam in question, and that in the construction of this work is needed about 4,000 cubic yards of broken stone of dimensions not less than one-half cubic foot nor larger than what a man could handle; that he entered into a contract with appellant by which he undertook to furnish it with the stone, and it agreed to pay him therefor 60 cents per cubic yard delivered on barges in Green river; that, after making this contract with him, the appellant willfully and arbitrarily broke it, and refused to permit him to go on with it. The damages were laid in the petition at \$1,250, and were said therein to consist of \$250 expended in opening up the quarry in order to get out the stone, and \$1,000 which the appellee could have made in profit had he been allowed to execute his contract as made with appellant. The appellant in its answer denied the existence of the contract, and this was the real issue between the parties, although there are several questions discussed in the briefs. A trial of the case resulted in a verdict in favor of appellee for \$500 and from the judgment based upon that verdict this appeal is prosecuted. The evidence shows without question that the appellant agreed with the appellee for the purchase by it of the 4,000 cubic yards of broken stone at the agreed price of 60 cents per cubic yard. This contract was not only agreed to in all its terms, but was dictated to the stenographer of appellant, with instructions to him to write it out in duplicate and send by mail to appellee, who was to sign both and return one copy to appellant. Several days after this was done, A. Hollerbach, who seems to have been the active manager of appellant company, went up to appellee's quarries from which the rock was to be taken, and

inspected them with appellee. While there, appellee asked Hollerbach why the written contracts had not been sent down as agreed upon, whereupon Hollerbach expressed surprise that he had not received them, and said: "You will get them by Tuesday" (it being then Sunday). Hollerbach left the quarries, and went on to his place of business, and appellee heard nothing further for several days, whereupon he wrote to appellant, inquiring why the contracts had not been sent down, and received a letter in reply that appellant had made other arrangements to get the stone it needed. Appellee then instituted this action.

The mere fact that the oral contract was to be afterwards reduced to writing does not render it unenforceable. *Bell v. Offutt*, 10 Bush, 632; *Mattingly v. Springfield F. & M. Ins. Co.*, 120 Ky. 768, 83 S. W. 577. If the minds of the parties had met, and nothing else was to be agreed upon, the mere fact that the parties were to reduce their understanding to writing does not militate against the right of either to sue for a breach of the oral agreement. The testimony introduced by plaintiff (appellee) fully sustains his contention, and this is in no substantial respect disputed or contradicted by the appellant, or its witnesses, except that it alleged and undertook to prove that, after the contract was agreed on between appellee and Hollerbach, appellee said to the stenographer that he wished a different clause inserted as to the dimensions of the stone, and that, if this was not done, he would not sign it. This was denied by appellee, and that question was submitted to the jury in the instructions of the court, and found adversely to appellant.

Nor do we think the court erred in not submitting to the jury the question as to whether or not appellee had prepared and tendered a bond with surety conditioned for the faithful performance of the contract. Appellant's evidence tended to show that a bond was to be given, and, while appellee denied that there was such an agreement, he admitted that he sometimes gave bond for the prompt performance of his contracts, and would have had no objection to giving bond for the performance of the contract under consideration. Appellant did not deny that it agreed upon the terms of the contract as alleged by appellee, or that these terms were dictated to the stenographer and taken down by him in shorthand; but it insists that there never was a contract, or, if there was one, it was rescinded by the demand of the appellee for the modification thereof. It does not deny that it made arrangements for the obtention of the desired amount of broken stone from another party, and that after that it was impossible for it to carry out its contract with appellee. In other words, it does not dispute that, if there was a contract between it and appellee, it broke it. Assuming this to be true, it was entirely immaterial whether there was a bond executed. Appellant did not allow the time for the ex-

ecution of the bond to arrive, because, before that time, it made a contract with another party for the stone, and so notified the appellee.

We think the court correctly held that the question between the parties was whether or not there was a contract as claimed by appellee; and, if so, the amount of damages appellee sustained by reason of the breach. Hollerbach's own testimony established appellee's contention of the existence of the contract, and his only excuse for the breach was that his stenographer had told him when he came back from the quarries that appellee had said to him (the stenographer) that, unless there was a modifying clause inserted in the contract, he would not sign it. Being told this, he says he immediately, without notifying the appellee, made a contract with a different party for supplying the stone that appellant needed. Hollerbach's position in this matter is not a very enviable one. He knew that what his stenographer told him was not correct, because he had been at the quarries with appellee since the supposed conversation between the stenographer and appellee had taken place, and he knew that appellee was preparing to go on with the contract, and had there asked him why the written contract had not been sent to him, and he knew that he had promised appellee that the writing should go to him at least by the following Tuesday, and yet, knowing that appellee considered that he had a contract with appellant, and was going on at some outlay to prepare to execute it, he, without any notice to appellee, made a contract, as said before, with another party, and, as he states, at a higher price.

We do not think the first instruction of the court assumes that there was a contract between appellant and appellee. If this were true, it would be erroneous, because the existence of the contract was the real issue between the parties. Instead of assuming the existence of the disputed contract, the court expressly told the jury that if they believed from the evidence that the appellee and appellant made a contract as set out in the petition, and appellant broke it, and that the appellee was ready and willing at all times to execute it, then he was entitled to damages from the appellant.

The court did not err in not instructing the jury that it was the duty of the appellee, even if there was a breach of the contract, to use reasonable diligence to sell the stone contracted for to other parties. The principle for which counsel for appellant contend has no application to a contract like the one under discussion. It is true, where there is a contract for personal services, and there is a breach, the party whose services are to be engaged may not sit down and supinely permit the amount of his damages to grow. It is his duty to seek employment elsewhere, and the other party is only liable

to the extent of the injury after the exercise of ordinary diligence by the complainant to obtain other employment still leaves him a sufferer by reason of the breach. In the case in hand the appellee had a rock quarry, and, although it might be true that he could have sold 4,000 cubic yards of rock to another party, that would not have diminished his damages in not being allowed to carry out his contract with appellant, because he was entitled, if he could, to sell all the rock in his quarry; and it in no wise minimized the damages he may have sustained by the breach of appellant's contract that he might, perchance, have sold 4,000 yards of broken rock to some one else. This is quite different from a contract for personal services. There the contract cannot be performed for two different parties, and, when the employer refuses to carry out his contract for the personal services of the servant, the latter must look for another employer, and thus reduce the damages, arising from the breach, as much as possible. We do not mean to be understood as limiting the application of the principle of avoidance of damages to breaches of contracts for personal service; on the contrary, the rule is of much broader application, and it would, perhaps, not be going too far to say that the duty of those complaining of violations of contracts to minimize their damages as much as the exercise of reasonable diligence will accomplish is the general rule appertaining to the right to recover damages therefor. The complainant should reduce his damages whenever the principle can be applied without sacrificing any substantial right. A fair illustration of the general application of the rule may be found in the supposition that the breach of the contract under discussion had been by appellee's refusing to deliver to appellant the stone contracted for. It would in the supposed case have been the duty of appellant to go out into the market and buy the stone, and it could only hold appellee liable for the difference between the contract price and what it had to pay for the stone on the market. This, from the very nature of the case, would cover all the damage it sustained by the breach of the contract. But the same principle is not applicable to the breach of contract complained of in this record. Appellee was entitled to enjoy the benefit of the profits of his contract with appellant, and, if he could have made as beneficial a contract with another, he was entitled to the benefits of that also. In other words, he was entitled to carry forward as many such contracts as he could make, and, if he succeeded in making more than one, he was entitled to both profits. Receiving the profits of one such contract would not tend to recoup his loss by reason of the breach of another. Sedgwick on Damages (8th Ed.) § 608. It was not necessary

for the appellee to expressly offer to go on with the contract after the breach. He was informed by the appellant that it had contracted for the stone from another party, and it was therefore useless for him to make a formal tender of the stone to it. The law does not require the doing of a useless act.

Upon the whole case no substantial error was committed against appellant, and the judgment is therefore affirmed.

COMMONWEALTH ex rel. ALBRITTON, Revenue Agent, v. SINKING FUND COM'RS OF LEBANON WATERWORKS CO.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

TAXATION (§ 217*)—PROPERTY SUBJECT—MUNICIPAL SINKING FUND.

A sinking fund created to liquidate the bonded debt incurred by a city in the purchase of a waterworks system is but so much taxes collected to liquidate a debt, incurred for a public purpose, notwithstanding it is invested in interest-bearing stocks and bonds, and is exempt from taxation under Const. § 170, providing that public property used for public purposes shall not be taxed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 356; Dec. Dig. § 217.*]

O'Rear, C. J., and Nunn and Carroll, JJ., dissenting.

Appeal from Circuit Court, Marion County.
"To be officially reported."

Suit in the county court by the commonwealth, on the relation of T. G. Albritton, revenue agent, against the sinking fund commissioners of the Lebanon Waterworks Company to assess certain dividend-paying stocks, bonds, and cash. There was a judgment for the revenue agent in the county court, and an appeal was taken to the circuit court, where judgment was rendered for the commissioners, and the revenue agent appeals. Affirmed.

W. W. Spalding, for appellant. H. S. McElroy and J. P. Thompson, for appellees.

LASSING, J. This suit was instituted in the Marion circuit court by T. G. Albritton, revenue agent, for the purpose of assessing certain dividend-paying stocks, bonds, and cash held by the sinking fund commissioners of Lebanon, Ky. In 1884 a charter was granted by the state Legislature to J. M. Cardwell and others as incorporators of the Lebanon Waterworks Company. The capital stock of this company was fixed at \$100,000. The company was organized under this charter to supply the town of Lebanon with water. In 1886 the charter of the Lebanon Waterworks Company was amended so as to authorize the city of Lebanon to purchase its stock up to an amount not exceeding 750 shares of a par value of \$100 each, and, for the purpose of making this purchase, the city was authorized to issue

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its bonds, which were to mature at a stated time. The act further provided that for the purpose of paying the bonds, which the city should thus issue, a sinking fund should be created, and that the city should annually pay into said fund a sum sufficient to liquidate the bonds at maturity. For the purpose of managing this fund a commission of three was appointed. It appears from the record that \$55,000 of the stock of the water company were at that time delivered to the city and a like amount of city bonds were issued to the water company, and by it sold upon the market. At the time of the institution of this suit there had been paid into the sinking fund each year a sum approximating \$1,600, and the aggregate amount then in the hands of the commissioners was about \$26,000. The case was submitted to the county court upon the pleadings, there being no disagreement as to the amount of funds on hand. The county judge decided that the property of the sinking fund was liable for state and county taxes, and directed it to be assessed accordingly. An appeal was taken from this judgment to the circuit court, where, in due course of time, a judgment was rendered, in which it was held that all of the property in the hands of the sinking fund commissioners was, under section 170 of the Constitution, exempt from taxation. The petition of the revenue agent was accordingly dismissed, and, from that judgment, this appeal is prosecuted.

For the state it is urged that the city holds these stocks and bonds and this cash in a private or proprietary capacity, and not in its governmental or public capacity, and that, therefore, it is subject to taxation; whereas, the sinking fund commissioners contend that it is held for a purely governmental or public purpose, and is exempt from taxation. The debt which this sinking fund was created to liquidate was originally incurred by the city by legislative authority in the erection and installation of a waterworks system for the city. The same act which authorized the city to incur this indebtedness required that a fund be created for the purpose of liquidating this indebtedness at its maturity. The city owns all of the stock of the waterworks company, and the waterworks company, in addition to supplying the city with water, is held and operated for the purpose of extinguishing fires, sprinkling streets, flushing gutters and sewers, thereby ministering, not only to the comforts and necessities of the citizens of said town, but promoting and subserving the public health and conveniences of the city. The sinking fund was created for the sole purpose of liquidating the bonded debt incurred by the city in the purchase of the waterworks. It appears that the income from the sale of water has never been equal to, or at least exceeded, the expense of maintaining the plant.

The city is an arm or branch of the state government, and in the administration of

its public affairs it acts as an agent of the state, and no property held by it for a purely public or governmental purpose is subject to taxation any more than the public property of the state itself is subject to taxation. In the case of the City of Louisville v. Commonwealth, 1 Duvall, 295, 85 Am. Dec. 624, Judge Robertson, speaking for the court, held that a courthouse, prison, and such property as was necessary or useful to the administration of municipal affairs, and devoted to such uses, were exempt from taxation, but, when such property was used by the city in its private capacity, such as market houses, fire engines, etc., it was subject to taxation. Since the date of this decision the trend of legislative enactment, and judicial interpretation as well, has been to extend and enlarge the exemption from taxation of the different classes of property held by cities in their governmental capacity, and contributing to the health, comfort, and convenience of its citizens, and the rule announced by Judge Robertson has been materially modified and extended. In the more recent case of the City of Owensboro v. Commonwealth, 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202, it was held that property used by a city in connection with its fire department, and even public parks, was exempt from taxation. In the case of the Board of Councilmen of Frankfort v. Commonwealth, 94 S. W. 648, 29 Ky. Law Rep. 699, it was held that: "The Legislature authorizes municipalities to levy and collect taxes for the purpose of building and maintaining waterworks and lighting plants. They are acquired for public purposes and maintained for public purposes. They are paid for with money that arises from the levy and collection of taxes, which can only be levied and collected for public purposes. Water is essential to the comfort, health, and safety of the citizens of the municipalities. * * * Therefore the Legislature has recognized waterworks and lighting plants as public necessities. The right of municipalities to tax their inhabitants for the purpose of raising money to build and maintain these plants is not even questioned, and this court has repeatedly recognized that it can be done." In the case of the City of Covington v. District of Highlands, 110 S. W. 338, decided May 13, 1908, the principle announced in the case of the Board of Councilmen of Frankfort v. Commonwealth, 94 S. W. 648, is recognized and approved. The waterworks being acquired and maintained for a public purpose, paid for with money raised by pledging the city's credit, under special legislative authority, granted only upon condition that there should be created by the city a sinking fund for the purpose of redeeming the bonds at their maturity, it could hardly be said that this fund, which the city was required to create to redeem its bonds, should be subject to taxation. The debt was created for a governmental purpose, and must be

paid off and satisfied by taxation. It is too great a burden to be borne by the municipality in any one year, and hence the Legislature wisely provided that the burden of its payment should be distributed over a number of years. This annual tax, when collected and set aside for the purpose of redeeming these bonds, is no more subject to taxation than would a balance in the hands of the city treasurer be subject to taxation if there remained a balance at the end of the fiscal year. It is not held by the city for the purpose of making any profit out of it, but only for the purpose designated in the act of the Legislature which authorized and directed its creation. But it is urged for the commonwealth that it is invested in interest-bearing stocks and bonds, and therefore the city derives a profit from its use. This is true, but the profit derived from its investment in such stocks and bonds is added to the principal fund from time to time, and this will continue to be done until the amount on hand in the sinking fund is sufficient to satisfy and pay off the bonds. When this period has been reached, the citizens of the municipality will then be relieved of any further burden on this account, and this tax, which has been collected through a number of years, will then be applied to the purpose for which it was collected.

Considered in its true light, the sinking fund in the hands of the commissioners is but so much taxes collected by the city for the purpose of liquidating an indebtedness created for a purely public purpose, and hence is not subject to taxation, and, the circuit judge having so held, the judgment is affirmed.

O'REAR, C. J., and NUNN and CARROLL, JJ., dissent.

LOUISVILLE RY. CO. v. GAAR.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. STREET RAILROADS (§ 118*)—OPERATION—ACTION FOR INJURIES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for injuries by being struck by defendant's street car, an instruction that unless defendant's agents, or one of them in charge of the car, failed to have it under reasonable control or to keep a reasonable lookout or exercise reasonable care, the jury should find for defendant, was erroneous, where defendant had two agents on the car, the conductor and the motorman, and it was not the conductor's duty to keep a lookout, since the jury might have found for plaintiff because the conductor failed to keep a lookout.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

2. STREET RAILROADS (§ 118*)—OPERATION—ACTION FOR INJURIES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction that if defendant's street car was running at a reasonable speed and under reasonable control, and plaintiff went upon the track so close to the car that the motorman

could not by ordinary care prevent a collision, the jury shall find for defendant, was erroneous, since it would permit a recovery, even if a collision could not have been avoided had the car been running at a reasonable rate of speed and under control.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

3. STREET RAILROADS (§ 102*)—OPERATION—INJURIES TO PERSONS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Though a street car was running too fast and was not under reasonable control, the company would not be liable for injuries to plaintiff if he came upon the track in front of the car so close to it that a collision could not have been avoided, even if the car had been running at a reasonable rate of speed and had been under control.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 200; Dec. Dig. § 102.*]

4. STREET RAILROADS (§ 118*)—CHILD ON TRACK—INJURY—INSTRUCTIONS.

In an action for injury to a child on defendant's street railway track, instructions to be given on new trial determined.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

5. STREET RAILROADS (§ 100*)—OPERATION—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In an action against a street railroad for injury to a 4½ year old child, plaintiff was too young to be charged with contributory negligence, and no instruction upon that subject should be given.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 217; Dec. Dig. § 100.*]

6. TRIAL (§ 61*)—RECEPTION OF EVIDENCE—EXAMINATION IN CHIEF.

In an action for injuries by being struck by a street car, plaintiff should introduce as evidence in chief testimony as to the distance in which the car could have been stopped before striking him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 146; Dec. Dig. § 61.*]

7. APPEAL AND ERROR (§ 547*)—BILL OF EXCEPTIONS—NECESSITY—MISCONDUCT OF COUNSEL.

Misconduct of counsel on trial, which is not shown by bill of exceptions, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2431; Dec. Dig. § 547.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Samuel Gaar, by his next friend, against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for a new trial.

Fairleigh, Straus & Fairleigh and Robert G. Gordon, for appellant. Popham & Webster and Morton K. Yonts, for appellee.

HOBSON, J. Samuel Gaar, a little boy 4½ years old, was struck by a north-bound street car on Fourth street, between L and M streets, in Louisville, and severely injured. This action was brought to recover for his injuries. A trial was had, which resulted in a verdict and judgment in favor of the plain-

tiff in the sum of \$3,190. The defendant appeals.

There are two tracks along Fourth street; the east track being used for north-bound cars, and the west track for those south-bound. The little boy was standing on the curb on the east side, about 20 feet from the north-bound track. According to the proof for the plaintiff, he started across the street, and, when he got between the two tracks, a south-bound car was approaching, and he stepped back on the north-bound track to let it pass him, and, while standing there, was struck by a north-bound car to which he had his back turned. The proof for the plaintiff was to the effect that he could be seen by the motorman of the north-bound car for 200 feet; that it was running very rapidly, and no effort was made to stop the car, and no signal was given of its approach until about the time he was struck. The proof for the defendant was to the effect that the child was on the curb until the car got in about 20 feet of him; that he then came suddenly upon the track, and too close to the car for the motorman to avoid striking him; that the collision occurred about the center of the square; that the car was running on its schedule time; and that proper signals of the approach of the car to the street crossing at M street had been given. The court instructed the jury, in substance, that if they believed from the evidence that the defendant's agents or any of them in charge of the car failed to have the car under reasonable control, or failed to exercise ordinary care to avoid a collision with persons in the street, and by reason of this the collision occurred, they should find for the plaintiff, and that unless they believed from the evidence that the defendant's agents or one of them in charge of the car failed to have the car under a reasonable control, or failed to keep a reasonable lookout, or failed to exercise ordinary care to prevent a collision, they should find for the defendant. The defendant had two agents on the car—the conductor and the motorman. The motorman had charge of the operation of the car. The conductor took up fares, and looked after the passengers in getting on and off the car. He had general charge of the car, but it was not a part of his duty to keep a lookout, and the jury, under the instructions of the court, might have found for the plaintiff on the ground that the conductor was not keeping a lookout. It was incumbent on the defendant to keep a lookout, but it was not required to have its conductor and its motorman both to keep a lookout.

The court also instructed the jury that if they believed from the evidence that the car was running at a reasonable rate of speed and under reasonable control, and that while it was so running the plaintiff went upon the track so close to the car that the motorman could not by ordinary care with the appliances under his control prevent the col-

lision, they should find for the defendant. Under this instruction, the jury could not find for the defendant if the car was running at an unreasonable rate of speed, and was not under reasonable control no matter how close to the car the boy came upon the track. But, although the car was running too fast and was not under reasonable control, still the defendant would not be responsible if the child came upon the track in front of the car so close to it that a collision with him could not have been avoided, if the car had been running at a reasonable rate of speed, and had been under reasonable control. *Lexington Railway Co. v. Van Loden's Adm'r*, 107 S. W. 740, 32 Ky. Law Rep. 1047. On another trial of the case, in lieu of the instructions referred to, the court will instruct the jury as follows:

"(1) It was the duty of the defendant's motorman in charge of the car to keep a lookout ahead for persons or vehicles upon the street, and to run the car at such speed and to have it under such control as ordinary care for their safety demanded and to exercise ordinary care to avoid a collision with them; and, if the jury believe from the evidence that the motorman in charge of the car referred to in the evidence failed to keep a lookout ahead for persons or vehicles upon the street, or failed to run the car at such speed or to have it under such control as ordinary care for their safety demanded, or failed to exercise ordinary care to avoid a collision with the plaintiff, and by reason thereof the collision occurred, they should find for the plaintiff.

"(2) Unless the jury believe from the evidence that the motorman in charge of the car failed to keep a lookout ahead for persons or vehicles upon the street, or failed to run the car at such speed or to have the car under such control as ordinary care for their safety demanded, or failed to exercise ordinary care to avoid a collision with plaintiff, and that by reason thereof plaintiff was injured, the jury should find for the defendant.

"(3) If the jury believe from the evidence that the plaintiff went out in the street so close to the car that, if the car was running at a reasonable rate of speed as defined in No. 1, the motorman could not by the exercise of ordinary care have perceived his danger, and stopped the car so as to avoid injury to him, the jury should find for the defendant."

These instructions and those given by the court defining ordinary care, the measure of damages, and the form of their verdict contain the whole law of the case. The child was too young to be charged with contributory negligence, and therefore no instruction on contributory negligence should be given. On another trial the plaintiff will introduce in chief his evidence as to the distance in which the car could be stopped. Some complaint is made as to misconduct of counsel; but this cannot be considered, as it is not

shown by the bill of exceptions. The only way in which matters occurring on the trial in the circuit court may be brought up for review in this court is by bill of exceptions. *Paducah Light Co. v. Bell*, 85 S. W. 216, 27 Ky. Law Rep. 428; *Geo. T. Stagg Co. v. Brightwell*, 92 S. W. 8, 28 Ky. Law Rep. 1220.

Judgment reversed, and cause remanded for a new trial.

DARBY v. FRENCH.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. GARNISHMENT (§ 163*)—ACTION AGAINST GARNISHEE—PLEADING.

A petition against a garnishee, alleging that he was legally indebted to plaintiff's debtor in a sum largely in excess of plaintiff's claim, and that such debtor had an action pending to recover the amount, was insufficient to entitle plaintiff to a personal judgment against the garnishee, under the rule that plaintiff must state the cause of action in favor of his debtor with the same particularity that the debtor would be required to do had he sued.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 88; Dec. Dig. § 163.*]

2. APPEAL AND ERROR (§ 82*)—APPEALABLE ORDERS—ORDER SETTING ASIDE JUDGMENT.

An order setting aside a judgment against a garnishee and permitting him to answer is not a final order, from which an appeal will lie.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 379; Dec. Dig. § 82.*]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by John W. Darby against B. F. French, garnishee. From a judgment setting aside a judgment against the garnishee and permitting him to answer, plaintiff appeals. Dismissed.

R. S. Crawford, for appellant. J. R. Allen and J. M. Stevenson, for appellee.

NUNN, J. This is an appeal from a judgment of the Fayette circuit court, setting aside a judgment and permitting appellee, French, to answer. It appears that appellant recovered a judgment against Will A. Young for something over \$200, and caused an execution to be issued upon it, which was returned, "No property found to satisfy same." Afterwards he instituted this action against Young and this appellee, and sought to collect his judgment from appellee as debtor of Young. The allegations of the petition with reference to appellee are as follows: "The plaintiff says that the defendant B. F. French is justly and legally indebted to his codefendant, Will Young, in a sum largely in excess of the plaintiff's debt, interest, and costs, and the costs of this action, and the said Young now has an action pending in the Clark circuit court to recover said amount. Wherefore the plaintiff makes him a defendant herein, and asks that he be required to answer this petition, and in his answer disclose under oath the amount of

his indebtedness to said Young, and that he be required to pay said sum of money into this court, to be applied to the payment of the plaintiff's claim herein." The summons was served on appellee in Clark county, Ky., the place of his residence, and after 30 days had expired from the date of service the court rendered a default judgment against appellee in favor of appellant for the amount of his judgment, interest, and cost that he had against Will A. Young. In two days after the judgment was rendered, appellee appeared and tendered an answer, the allegations in which, if true, constituted a complete defense. The lower court at first refused to set aside the judgment, but upon further consideration set aside the order and sustained appellee's motion, and vacated the judgment against him, and permitted him to file the answer; and it is from this order that this appeal is prosecuted.

It is a well-established rule, when a personal judgment is sought against a garnishee, that the plaintiff must state the cause of action in favor of his debtor with the same particularity as that the debtor would be required to do if he had sued. We are of the opinion that the judgment against appellee for the debt of Young was erroneous. We are also of the opinion that the order setting aside the judgment against appellee is not a final order, nor such an order from which appellant can appeal. The case was not finally disposed of. Appellant may yet prosecute his action to judgment, and recover of French the amount of the judgment which he had against Young.

For these reasons, the appeal is dismissed.

EVERSOLE et al. v. COMBS et al.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. PARTITION (§ 12*)—RIGHT TO PARTITION—STATUTORY PROVISIONS.

Civ. Code Prac. § 490a, providing for the division of land held under a deed or will vesting a life estate in two or more persons, with remainder as to each share to the life tenant's children, does not apply where one owns a nine-tenths interest for life and others own the remainder in the nine-tenths interest, not under the life tenant, but by conveyance from the testator's children.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 47, 48; Dec. Dig. § 12.*]

2. PARTITION (§ 12*)—RIGHT TO PARTITION—LIFE TENANTS OF LAND HELD JOINTLY.

Life tenants may enforce a partition of land held jointly.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 47; Dec. Dig. § 12.*]

3. PARTITION (§ 12*)—LIFE TENANTS OF LAND HELD JOINTLY.

If one owns a nine-tenths interest in land for her life, and another owns a one-tenth interest for the life of the same person, and also the same interest in remainder, they might have a partition as between themselves, but could obtain no relief against the other remain-

dermen, and, at the death of the cestui que vie, the whole tract would have to be redivided.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 47-60; Dec. Dig. § 12.*]

Appeal from Circuit Court, Perry County.
"To be officially reported."

Action by W. C. Eversole and others against D. Y. Combs, Polly Ann Combs, and others. Judgment of dismissal, and plaintiffs appeal. Affirmed as to all defendants except Polly Ann Combs. Reversed and remanded as to her.

Eversole & Eversole, for appellants. Miller & Ward, P. T. Wheeler, and F. J. Eversole, for appellees.

HOBSON, J. J. H. Combs died some years ago a resident of Perry county, leaving a widow, Polly Ann Combs, to whom was allotted as dower in his estate a tract of land containing 391 acres. On October 10, 1907, she conveyed by deed to W. C. Eversole and others an undivided one-fifth interest in this tract of land. J. H. Combs left five children who conveyed their remainder interest in the land to different persons; W. C. Eversole and his associates becoming the owners of a one-tenth interest in the remainder. They brought this suit against Polly Ann Combs and the other persons who owned the balance of the remainder outside of the one-tenth which they owned themselves, asking that the land be divided and that their one-tenth be set apart to them. They also alleged in their petition that the deed which Polly Ann Combs made to them by mistake conveyed an undivided one-fifth of the dower, when they only bought an undivided one-tenth, and that, by mistake of the draughtsman, the deed called for one-fifth, when it should have called for one-tenth. They prayed that the deed be reformed to conform to the intention of the parties. The circuit court sustained a general demurrer to the petition, and, they declining to plead further, the action was dismissed, and they appeal.

Section 499a of the Civil Code of Practice provides for the division of land where it is held under a deed or will vesting a life estate in two or more persons, with the remainder as to each share to the life tenant's children; but this section has no application to the case before us. Polly Ann Combs owns nine-tenths of the land for life under the allegations of the petition, and the other defendants own the remainder in this nine-tenths. They do not hold under her, but under the children of J. H. Combs. Since the statute of Henry VIII life tenants have been allowed to maintain an action to enforce a partition of land held jointly. 21 Am. & Eng. Cyc. of Law, 1153; Freeman on Partition, § 439. If appellants own one-tenth of the tract of land for the life of Polly Ann Combs and she owns nine-tenths of it for her life, they may have the tract divided as between her

and them. They are entitled to no relief against the other remaindermen, and, at the death of Polly Ann Combs, the whole body of land will have to be divided again. But the appellants may have their one-tenth set apart to them now, so that they can hold and use it during her life. If the dowress should sell one-half of her land to one person and one-half to another, one might not be able to get the full benefit of his purchase if he could not require a division, and he who owns one-tenth is as much entitled to a division as the one who owns five-tenths. When the land is thus divided, appellants will be under the obligation to care for it and use it as other tenants for life. The division will be made only between them and Polly Ann Combs. It will affect no one else's rights, and will confer upon them no rights beyond the life of Polly Ann Combs. If a mistake was made in the deed from Polly Ann Combs to them, it may be corrected in this suit before the division is made.

The judgment is affirmed as to all of the defendants, except Polly Ann Combs. As to her it is reversed, and the cause is remanded for further proceedings consistent herewith.

SYMPSON v. BELL.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

Where, in an action on a note given for a policy premium, the answer did not allege that plaintiff represented to defendant that there would be any stipulations in the policy that were not contained in it, especially one that she would receive 7 per cent. per annum interest on premiums paid, an instruction that, if plaintiff represented to defendant that the policy would contain such stipulation which defendant believed to be true, and by reason thereof was induced to execute the note, they should find for defendant, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 691; Dec. Dig. § 251.*]

2. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

Defendant successfully resisted payment of a premium note on a plea of alleged misrepresentations by plaintiff. Plaintiff applied for a new trial for newly discovered evidence of a letter written by defendant more than a month after the note was executed and two days after it fell due, long after she knew all the facts on which her defense rested, in which she stated to plaintiff that she could not meet the payments, and requested cancellation of the policy. Plaintiff was unable to discover this letter at the trial, but finally found it in the possession of the insurance company. There was other newly discovered parol evidence throwing light on the letter, and materially strengthening plaintiff's testimony. Held, that the court erred in denying a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 228, 227; Dec. Dig. § 108.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.
"Not to be officially reported."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Frank W. Sympson against Della D. Bell. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

John S. Kelly, for appellant. Augustus E. Willson and Arthur E. Hopkins, for appellee.

HOBSON, J. On December 12, 1906, Della D. Bell executed to Frank W. Sympson her note for \$204.90, payable on January 15, 1907. She failed to pay the note, and Sympson brought this suit to recover judgment upon it. By her answer she alleged that Sympson offered to sell her a certain insurance policy on her life in the National Life Insurance Company, and represented to her that, by paying the annual premiums of \$204.90 for a period of 10 years, she would receive annually the return of at least 7 per cent. per annum on the sum so paid, and that, after the 10 annual premiums were paid, the principal of the sum so paid would be returned to her at the expiration of the said 10 years with a paid-up policy of life insurance on her life in the sum of \$2,000; that, when the insurance policy was delivered to her, she was required by Sympson to sign a paper which he said was another application, and that, believing this statement to be true, she signed the paper without reading it or knowing its contents; and that this paper was the note sued on, and was obtained from her by fraud. The plaintiff by his reply controverted the allegations of the answer. A trial was had which resulted in a verdict for the defendant. The court entered judgment upon the verdict, and overruled the plaintiff's motion for a new trial. He appeals.

The court by its instructions told the jury that if the plaintiff represented to the defendant that the insurance policy which would be delivered to her would be an investment contract upon which she would receive 7 per cent. per annum interest upon the money which she would invest and that she would receive that money annually, and that such a stipulation would be written in the policy, and she believed these statements of the plaintiff to be true, and by reason thereof was induced to execute the note, they should find for the defendant. There was no proof on the trial tending to show that the defendant executed the note not understanding that it was a note, and so this part of the defense was properly left out of the instructions. But by the answer it was not alleged that Sympson represented to her that a stipulation would be written in the policy to the effect that she would receive annually 7 per cent. per annum

interest upon the money which she would invest. The instruction is not predicated upon the representations alleged by the answer as the basis of the defense. The plaintiff had a right to prepare his case upon the defense that was made in the pleadings. The purpose of pleading is to apprise the adverse party of the claim or defense which is asserted against him. The plaintiff was not apprised that it would be claimed that he had represented to the defendant that there would be any stipulations in the policy that were not contained in it. In preparing his defense he would not naturally prepare to meet a charge of this sort. The instructions should be based upon the defense set out in the answer, and, if the evidence substantially varies from the pleading, the pleading should be amended. The representation set out in the instruction is not substantially the representation set out in the pleading.

After the trial was over the plaintiff filed affidavits as to newly discovered evidence, and, among other things, filed a letter written by her to the plaintiff on January 17, 1907, which he thought was lost at the time, but after the trial had found it in the possession of the insurance company. This letter is as follows: "921-7th, Louisville, Ky. Mr. F. W. Sympson, Dear Sir: I just do not see how I can possibly meet the payments upon that insurance. I am necessarily at considerable expense, so I again ask that you cancel that policy in the National Insurance Company. This is an embarrassing favor to ask, but I trust you will pardon it on the part of a friend. You will recall I was opposed to taking out the policy, and also said that I would let you know when I was ready to insure. Thanking you for the consideration of a reply, I am, Respectfully, Della D. Bell. Address me at #921-7th." This letter is radically different from the testimony of the defendant on the trial, and is new evidence of such a potent character that, under all the circumstances and the other newly discovered testimony, a new trial should be granted. It was written more than a month after the execution of the note and two days after the note fell due—long after she had received the policy and knew all the facts upon which the defense rests. There was other parol evidence newly discovered throwing light upon the letter and materially strengthening the plaintiff's testimony.

Judgment reversed, and cause remanded for a new trial.

MEMORANDUM DECISIONS.

LYNCH v. COMMONWEALTH. (Court of Appeals of Kentucky. Sept. 23, 1908.) Appeal from Circuit Court, Pulaski County. "Not to be officially reported." Cleveland Lynch was convicted of crime, and he appeals. Affirmed. Campbell & Williams, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

O'REAR, C. J. Appellant was convicted of the statutory offense of breaking into a railroad car with intent to steal therefrom. Section 1163, Ky. St. 1903. He complains of the trial on the sole ground that there was no evidence of his guilt. The trial court thought there was, the jury thought so, and we think so. Judgment affirmed.

DUNBAR v. RUSHING. (Supreme Court of Arkansas. March 30, 1908.) Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

PER CURIAM. Settled, and appeal dismissed.

MISSOURI & N. A. RY. CO. v. WILSON. (Supreme Court of Arkansas. March 23, 1908.) Appeal from Circuit Court, Boone County; Brice B. Hudgins, Judge.

PER CURIAM. Dismissed on appellant's motion.

NASHVILLE LUMBER CO. v. CORBELL. (Supreme Court of Arkansas. April 6, 1908.)

Appeal from Howard Chancery Court; James D. Shaver, Chancellor.

PER CURIAM. Settled, and appeal dismissed.

ST. LOUIS, I. M. & S. RY. CO. v. BROWN. (Supreme Court of Arkansas. March 16, 1908.) Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

PER CURIAM. Settled, and appeal dismissed.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. WALLS. (Supreme Court of Arkansas. April 6, 1908.) Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

PER CURIAM. Settled, and appeal dismissed.

HOWELL v. STATE. (Court of Criminal Appeals of Texas. Oct. 14, 1908.) Appeal from Brown County Court; A. M. Brumfield, Judge. John Howell was convicted, and appeals. Reversed and remanded. Harrison & Wayman, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$75 and 50 days' confinement in the county jail. This is a companion case to the case of *Howell v. State*, 110 S. W. 914, decided at the recent Austin term; and, for the reasons therein assigned, the judgment herein is reversed, and the cause remanded.

END OF CASES IN VOL. 112.

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One may abandon his right to property by evidencing his intention by an act legally sufficient to divest ownership.—Huggins v. Reynolds (Tex. Civ. App.) 116.

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Under Rev. St. 1899, §§ 856, 857 (Ann. St. 1906, pp. 805, 806), *held*, a revivor on appeal in case of death of one of appellants was unnecessary.—Reed v. Colp (Mo.) 255.

*Under Rev. St. 1895, art. 973, an action for personal injuries does not abate by the death of plaintiff after judgment in his favor and after defendant has filed his petition for writ of error and bond.—Binyon v. Smith (Tex. Civ. App.) 138.

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*Certificate of acknowledgment; if defective, held cured by Act March 20, 1903 (Laws 1903, p. 151; Kirby's Dig. § 780).—Sledge & Norfleet Co. v. Craig (Ark.) 892.

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§ 1. Nature and form.

*Under Kirby's Dig. §§ 1282, 5991, a complaint in equity, which states no equitable cause of action, should be transferred to the circuit court on being challenged by a demurrer providing it states a cause at law, though in the absence of statutory provisions a demurrer

*Point annotated. See syllabus.

should be sustained.—Rowe v. Allison (Ark.) 395.

A certain complaint in chancery *held* to state a cause of action at law but not a cause in equity.—Rowe v. Allison (Ark.) 395.

A defense that an administrator of an estate was a stockholder and the cashier of a bank which purchased land belonging to the estate *held* not interposable as a defense to an action at law by the bank for the possession of the land.—Crawford County Bank v. Bolton (Ark.) 398.

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§ 2. Joinder, splitting, consolidation, and severance.

*Under Civ. Code Prac. § 73, providing in what counties actions may be brought against a carrier for breach of contract of carriage or for injuries to person or property, and section 83, permitting causes of action to be united where they may be brought in the same county, etc., plaintiff could not unite a cause of action for personal injuries with one for breach of contract of carriage, where they could not be brought in the same county.—Wilson v. Louisville & N. R. Co. (Ky.) 585.

Defendant could not delay trial by asking a consolidation with another case; plaintiff being entitled to trial when the case was ready.—Adams v. Mineral Development Co. (Ky.) 624.

*In an action against a carrier for failure to deliver a shipment, *held*, that plaintiff could join in different counts of the petition a breach of the common-law duty of the carrier to deliver, a conversion of the property, and a breach of contract to deliver in a reasonable time.—Moseley v. Missouri Pac. Ry. Co. (Mo. App.) 1010.

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*Actual adverse possession for 12 years *held* a complete investiture of title.—Doniphan Lumber Co. v. Case (Ark.) 208.

Evidence in ejectment *held* to warrant a finding that defendant was in possession under a bona fide claim of title.—Allen v. Phillips (Ark.) 403.

*Where a grantor in adverse possession conveyed the land to his daughters for life, remainder to their heirs, the continuing possession of the daughters and their grantees inured to the benefit of the heirs as remaindermen.—Charles v. Pickens (Mo.) 551.

*Facts *held* to show acquisition of title to county land by limitations.—Hardin County v. Nona Mills Co. (Tex. Civ. App.) 822.

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*An order refusing to permit the filing of an amended petition is not final, and is not appealable.—*Poor v. New South Brewery & Ice Co.* (Ky.) 618.

A suit by creditors to subject transferred property to their claims held to involve \$1,000, as affecting a transferee's right to appeal.—*Singleary v. Boerner-Morris Candy Co.* (Ky.) 637.

The amount in controversy in drainage proceedings as shown by the record held but \$150, and insufficient to sustain an appeal.—*Hill v. Pettitt* (Ky.) 646.

Ordinarily no order is final which may not be enforced by rule or execution.—*Bennett v. Knott* (Ky.) 849.

*An order setting aside a judgment against a garnishee and permitting him to answer is not a final order, and appealable.—*Darby v. French* (Ky.) 1132.

§ 2. Right of review.

In an action against a trustee on his bond, the setting aside of a former judgment against the administrators of one of the sureties on the bond could not be questioned on appeal by the trustee.—*Bogard v. Planters' Bank & Trust Co.* (Ky.) 872.

§ 3. Presentation and reservation in lower court of grounds of review.

*Error cannot be predicated on the refusal of the court to permit witnesses to answer as to particular matter, where no offer was made to show what the witnesses would answer.—*St. Louis Southwestern Ry. Co. v. Myzell* (Ark.) 203.

*Under Cr. Code Prac. § 11, the court, in the absence of a motion and grounds for a new trial in a penal as well as in a civil action, can only determine whether the pleadings are sufficient to support the judgment.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

*Objections to jurisdiction and joinder of parties held not reviewable on appeal in a suit by creditors to subject transferred stock to their claims.—*Singleary v. Boerner-Morris Candy Co.* (Ky.) 637.

*In an action against a railroad for the destruction of property by fire, plaintiff's recovery held properly limited to the theory on which the case was tried.—*W. W. Taylor & Sons Brick Co. v. Kansas City Southern Ry. Co.* (Mo.) 59.

*Objections to evidence not made when it was offered will not be considered on appeal.—*Moseley v. Missouri Pac. Ry. Co.* (Mo. App.) 1010.

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§ 4. Parties.

Under Rev. St. 1895, arts. 973, 1240, 1399, a defendant suing out a writ of error to review a judgment for plaintiff in a personal injury

*Point annotated. See syllabus.

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*An abstract on appeal *held* to fail of compliance with rule 9 so as to require affirmance.—Kempner v. Broyles (Ark.) 219.

Records of probate court read at trial but not made part of the record by bill of exceptions *held* not to be considered on appeal.—Brown v. Nelms (Ark.) 373.

Oral testimony in a chancery suit *held* not sufficiently preserved for consideration on appeal unless treated as depositions and filed and identified as such, notwithstanding authentication by stenographer's certificate.—Rowe v. Allison (Ark.) 395.

Under Supreme Court rule 25 (56 S. W. v) a transcript can be cured by amendment only when it affirmatively appears that the amended matter was in the record in the trial court.—Chatfield v. Iowa & A. Land Co. (Ark.) 875.

*Pleadings being part of the record proper, and hence not required to appear by bill of exceptions, no bill is essential to a review of a ruling sustaining a demurrer to the complaint.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

A bill of exceptions, as certified by bystanders under the statute, where the party excepting is not satisfied with the court's correction of his proposed bill, must be taken as representing the true state of the record, in the absence of controverting affidavits.—Boone v. Holder (Ark.) 1081.

*Statement of what is necessary to make instructions part of the record.—Latham v. Lindsay (Ky.) 584.

Upon the record the Court of Appeals *held* unable to revise the trial court's refusal to consolidate the case with another action.—Adams v. Mineral Development Co. (Ky.) 624.

*In the absence of motion for new trial, separate findings of law and fact, and a bill of exceptions, *held*, the only question open for review is whether the pleadings justify the judgment.—Burrow v. Maxon (Ky.) 661.

*Misconduct of counsel on trial, not shown by bill of exceptions, cannot be considered on appeal.—Louisville Ry. Co. v. Gaar (Ky.) 1130.

On an appeal to the Supreme Court from a circuit court after an appeal thereto from the county court, *held*, that the appeal would not be stayed to allow mandamus proceedings to compel a correction of the record in the county court.—Sidwell v. Jett (Mo.) 56.

Proceedings for amendment of bill of exceptions *held* to receive no additional validity from leave granted by the Court of Appeals, in which the appeal, of which it had no jurisdiction, was pending.—Reed v. Colp (Mo.) 255.

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tions is unnecessary to an appeal.—Fall v. Hornbeck (Mo. App.) 41.

The rule that, in the absence of a statement of facts, the court will not consider errors in the admission or rejection of evidence, *held* inapplicable where the evidence was material and relevant under any probable state of the testimony.—Ivy v. Ivy (Tex. Civ. App.) 110.

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Where the statement of facts contained in the record does not appear to have been filed by the district clerk, the appellate court will decline to consider it.—Thomas v. Matthews (Tex. Civ. App.) 120.

*A rule excluding testimony is not reviewable where the bill of exceptions taken fails to state the grounds of objections to the testimony.—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

*Where the failure to file a statement of facts in time was due solely to the act of the trial judge, who was under a misapprehension of the date on which the time limit expired, the court on appeal will consider the statement.—Texas & G. Ry. Co. v. First Nat. Bank of Carthage (Tex. Civ. App.) 589.

*Without a statement of facts in the record, findings of fact are conclusive on appeal.—Kruegel v. Johnson (Tex. Civ. App.) 774.

*Assignments of error, *held* not sustainable where unsupported by a statement of facts or bills of exceptions.—Kruegel v. Johnson (Tex. Civ. App.) 774.

§ 8. Assignment of errors.

In the absence of a proper assignment of error to the direction of a verdict, court will presume that the evidence warranted such action.—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

A statement, in support of an assignment of error to the direction of a verdict that, the testimony being conflicting and strongly in support of plaintiff's case, it was error for the court to invade the jury's province, *held* insufficient under rule 31 (67 S. W. xvi).—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

A statement in support of an assignment that the court erred in directing a verdict for defendants, referring only to one of several defenses, *held* insufficient to authorize a review of the rulings on appeal.—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

*Where there were several grounds for a motion for a new trial, an assignment that the court erred in overruling the motion was too general to be considered on appeal.—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

Under Court of Civil Appeals, rule 31 (67 S. W. xvi), an assignment of error to the overruling of a motion for continuance, which does not show the grounds of the motion, or set it out, but only refers to a bill of exceptions in the record, will not be considered.—Texas & N. O. R. Co. v. Powell (Tex. Civ. App.) 697.

*An assignment presenting two distinct questions is insufficient, and propositions following the assignment, and intended to explain each of the points presented, cannot supply the place of a valid assignment.—Kaack v. Stanton (Tex. Civ. App.) 702.

Where the giving or refusal of an instruction, which undertakes to apply the law to the facts,

*Point annotated. See syllabus.

is complained of, enough of the evidence must, under court rule 31 (67 S. W. xvi), be given in appellant's brief.—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

Facts in a personal injury action *held* to require a presumption by the Court of Civil Appeals on defendant's appeal that plaintiff was entitled to recover.—Dallas Consol. Electric St. Ry. Co. v. Motwiler (Tex. Civ. App.) 794.

§ 9. Briefs.

The application of appellant for leave to file briefs denied on the showing made.—Chicago, R. I. & G. Ry. Co. v. Crenshaw (Tex. Civ. App.) 117.

*Propositions under grouped assignments of error not copied in the brief will not be considered.—Kruegel v. Johnson (Tex. Civ. App.) 774.

Court rule 31 (67 S. W. xvi), governing the preparation of briefs, is made to facilitate the work of appellate courts, and must not be disregarded.—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

Where complaint is made of the admission or rejection of evidence, enough of the evidence bearing on the proposition sufficient to explain and support it, must, under court rule 31 (67 S. W. xvi), be given in appellant's brief.—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

A reference in appellant's brief, simply to the pages of the record is not a compliance with court rule 31 (67 S. W. xvi).—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

§ 10. Dismissal, withdrawal, or abandonment.

A motion by appellee to dismiss an appeal for want of prosecution will be dismissed where an inspection of the record discloses fundamental error in the want of jurisdiction of the lower court over the amount in controversy.—Chicago, R. I. & G. Ry. Co. v. Crenshaw (Tex. Civ. App.) 117.

§ 11. Hearing and rehearing.

*Where laches were pleaded in the answer of defendant and argued in his brief on appeal, the claim that one of plaintiffs was a minor and unaffected by laches, raised for the first time on rehearing after the reversal of the judgment for plaintiffs, will not be considered.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, Id.

*The losing party on appeal cannot, on petition for rehearing present a point not raised on the original hearing.—Kansas City Southern Ry. Co. v. Henrie (Ark.) 967.

§ 12. Review—Scope and extent in general.

*The only question presented for review on appeal from a default judgment is: Were the allegations of the complaint sufficient to authorize the judgment?—Neimeyer v. Claiborne (Ark.) 387.

Where the failure of a complaint to state an equitable cause of action is waived by failure to demur or move for transfer, the court on appeal will consider the case as if tried in the proper forum, notwithstanding Kirby's Dig. §§ 1282, 5991, relating to transfer to the proper forum.—Rowe v. Allison (Ark.) 395.

Where sufficient undisputed evidence sustained the amount of the recovery for the failure of a carrier to furnish cars, the fact that other damages not recoverable were claimed was unimportant.—St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.) 744.

A particular branch of a suit by creditors against a common debtor and his transferees *held* not presented on appeal by one of the transferees.—Singletary v. Boerner-Morris Candy Co. (Ky.) 637.

*A case will be reviewed by the appellate court on the theory adopted by the parties at the trial.—W. W. Taylor & Sons Brick Co. v. Kansas City Southern Ry. Co. (Mo.) 59.

*Where motion for new trial was sustainable on any of the grounds alleged, it was immaterial on appeal that it was not sustainable on the ground on which it was based by the trial judge.—Chlanda v. St. Louis Transit Co. (Mo.) 249.

On appeal from a judgment of a circuit court in a proceeding contesting an election to determine whether a county should subscribe to the stock of a railway company, the question whether the commissioners and the county court had the right to go behind the poll lists and returns and examine the ballots *held* immaterial.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

*The question whether a suit for an injunction was maintainable on the grounds alleged in the petition *held* immaterial in view of the trial of the cause on the issues raised by a cross-action and by an amended petition.—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

Where the report of the master formed no part of the evidence on which the court based its judgment, the court on appeal will not consider assignments of error attacking the judgment because of the refusal to sustain exceptions to the report.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 13. — Parties entitled to allege error.

*Parties requesting an instruction containing the same defect as another instruction given cannot complain.—Pettus & Buford v. Kerr (Ark.) 886.

*A statement by defendant's counsel on which the court erroneously sustained an objection to certain testimony *held* not to make the error an invited one.—Chlanda v. St. Louis Transit Co. (Mo.) 249.

*A party cannot predicate error on the action of the court in giving an instruction asked by himself.—Brown v. Globe Printing Co. (Mo.) 462.

*Where the court gave an instruction requested by a party, and refused another requested instruction, the party could not urge that the instruction given should have been refused or the other requested instruction given, because they contained a similar statement of the law.—Brown v. Globe Printing Co. (Mo.) 462.

§ 14. — Presumptions.

*Where a default judgment is taken, it will be presumed that whatever proofs were necessary to support it were introduced.—Neimeyer v. Claiborne (Ark.) 387.

*Oral evidence not preserved in the record will be conclusively presumed to sustain a decree which is within the issues.—Rowe v. Allison (Ark.) 395.

*A decree not responsive to the issues is void, and if outside the issues, or if the complaint does not state a cause of action, the presumption that evidence not preserved in the record is sufficient to sustain the judgment cannot avail.—Rowe v. Allison (Ark.) 395.

*Where the evidence in an equity suit is not preserved in the record on appeal, the case must be determined on the face of the record.—Rowe v. Allison (Ark.) 395.

*Where a chancery cause was heard on testimony preserved in the record, and on oral testimony of various witnesses not preserved, the presumption is that the oral testimony sustains the decree.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, Id.

*The court will not explore the transcript for evidence omitted from the abstract in vio-

*Point annotated. See syllabus.

lation of court rule 9, but will presume that the judgment is correct.—*Baker v. Cazort* (Ark.) 890.

*Where a peremptory instruction was based on an instrument not set out in the abstract, the court on appeal will presume that the instruction was correct, and will not examine the transcript for such instrument.—*Baker v. Cazort* (Ark.) 890.

*The court on appeal from a judgment for defendant in a penal action for a violation of Ky. St. 1903, § 2209, regulating the sale of illuminating oil, *held* required to presume that the proof offered by defendant sustained its valid affirmative defense.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

*Judicial notice cannot be taken by the court on appeal of the width of a lot in support of an instruction not based on any certain evidence thereof.—*Gessner v. Metropolitan St. Ry. Co.* (Mo. App.) 30.

Under the facts, *held*, the Court of Civil Appeals would presume that there was no pleading authorizing plaintiff to recover interest as part of his demand.—*Morris v. Smith* (Tex. Civ. App.) 180.

In absence of statement of facts, it will be assumed on appeal that the evidence authorized the findings of fact.—*Goode v. Pierce* (Tex. Civ. App.) 688.

Even if there was no finding that an agent acted under a power of attorney in executing a conveyance to defendants' ancestor, it will be presumed in support of the judgment for defendants that the court so found.—*Neill v. Kleiber* (Tex. Civ. App.) 694.

§ 15. — Discretion of lower court.

*Appellate courts are slow to disturb the chancellor's exercise of discretion in the award of costs.—*Mt. Nebo Anthracite Coal Co. v. Martin* (Ark.) 882.

*The granting of a new trial for newly discovered evidence is largely within the trial judge's discretion; and, unless that discretion is abused, an appellate court will not revise his action.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

*The trial court, in trespass to try title, *held* not to have abused its discretion in refusing defendants a new trial for newly discovered evidence.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

§ 16. — Questions of fact, verdicts, and findings.

*The verdict of a jury on conflicting evidence will not be reversed on appeal, notwithstanding it appears to be against the preponderance of the evidence.—*McDonough v. Williams* (Ark.) 164.

*The sufficiency of evidence to sustain the verdict is the sole question in the Supreme Court, and it has nothing to do with the weight thereof.—*Tebbs v. Wiseman* (Ark.) 196.

*A finding will not be disturbed on appeal where the evidence is conflicting.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.* (Ark.) 205; *Robertson v. Robinson* (Ark.) 883; *Ward v. Hall* (Ky.) 600; *Arndell v. Malusky* (Ky.) 640; *Same v. Depoyster, Id.*; *Wilson v. Hardman* (Ky.) 672.

*The Supreme Court cannot pass upon the weight of evidence.—*St. Louis, I. M. & S. Ry. Co. v. Richardson* (Ark.) 212.

*In testing the sufficiency of the evidence as a whole to sustain a verdict, the court must view it in the strongest light favorable to the findings of the jury.—*St. Louis, I. M. & S. Ry. Co. v. Brabbsen* (Ark.) 222.

*Findings of the chancellor against the clear weight of the evidence will be set aside on appeal.—*Westbrook v. Potter's Sons' Trustee* (Ky.) 635.

*Under Civ. Code Prac. § 341, providing that not more than two trials shall be granted upon the ground that the verdict is not sustained by the evidence, a third verdict will not be disturbed on appeal on that ground.—*Mobile & O. R. Co. v. Morrow's Adm'r* (Ky.) 639.

*Where trial by jury is waived, and the facts are decided by the court, its judgment will be given on appeal the weight that would be given the verdict of a properly instructed jury.—*Arndell v. Malusky* (Ky.) 640; *Same v. Depoyster, Id.*

*Facts *held* to require affirmance of a judgment against a railway company for killing one lying on the track.—*St. Louis, I. M. & S. Ry. Co. v. Coalson* (Ky.) 739.

*A verdict will not be disturbed, as being against the weight of the evidence, where the testimony of several witnesses on each side conflicts.—*Louisville & N. R. Co. v. Veach's Adm'r* (Ky.) 869.

*The weight of evidence is for the jury.—*Cumberland Telephone & Telegraph Co. v. Shirley* (Ky.) 1109.

*Where defendant destroyed trees, the damage being estimated by witness as high as \$1,000 to \$2,000, a verdict of \$500 *held* not to be disturbed as excessive.—*Cumberland Telephone & Telegraph Co. v. Shirley* (Ky.) 1109.

*Where a jury is waived, and the issues are submitted to the court, all presumptions are in favor of the correctness of its findings on the questions of fact involved.—*Donaldson Bond & Stock Co. v. Houck* (Mo.) 242.

*A verdict on conflicting evidence is final.—*Sparks v. Jasper County* (Mo.) 265; *Landrum v. St. Louis & S. F. R. Co.* (Mo. App.) 1000; *Missouri, K. & T. Ry. Co. of Texas v. James* (Tex. Civ. App.) 774.

*Findings of trial court are conclusive on appeal.—*Charles v. Pickens* (Mo.) 551.

*Where the trial court approves the amount of a verdict, the appellate court will not disturb it if not grossly disproportionate to the injury.—*Gerhart v. Metropolitan St. Ry. Co.* (Mo. App.) 12.

*A verdict in a case fairly tried will not be disturbed on appeal.—*Sires v. Clark* (Mo. App.) 526.

*The court *held* authorized to set aside a verdict in a personal injury action as excessive, on it appearing that the verdict is excessive, after giving plaintiff's evidence its full probative force.—*Barree v. City of Cape Girardeau* (Mo. App.) 724.

*In interpreting the testimony of a witness as to its sufficiency to make out a case, it should be looked at in the light of all that has been said and the surrounding circumstances, and not merely considered by itself.—*Landrum v. St. Louis & S. F. R. Co.* (Mo. App.) 1000.

*Issues of fact, as well as of law in an equity case, are reviewable on appeal.—*Jolly v. Huebler* (Mo. App.) 1013.

*A finding of the jury which there is evidence to support is conclusive.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

§ 17. — Harmless error in general.

*Where the record does not show what the answer to excluded questions would have been, the ruling on the questions was not shown to be prejudicial.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

*The overruling of an objection for misjoinder of two defendants in one action *held* not prejudicial, since the two actions might have been consolidated under Act May 11, 1905, p. 798, No. 339.—*Western Union Telegraph Co. v. Shofner* (Ark.) 751.

*Point annotated. See syllabus.

Treating an affidavit in support of motion to set aside judicial sale as an exception to the sale *held* not substantial error.—*Mitchell v. Odewalt's Ex'r* (Ky.) 612.

*A party cannot complain of an error operating in his own favor.—*Brown v. Globe Printing Co.* (Mo.) 462.

*In an action for injuries through negligence defendant *held* not entitled to complain of certain instructions.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

*A defeated party cannot complain because the court directed a verdict against him for a smaller sum than the successful party was entitled to.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

*Error in charging on the effect of a waiver of its rules by defendant railroad, where there was no evidence to show their violation by plaintiff, being prejudicial only to plaintiff, defendant cannot complain on appeal.—*Texas & N. O. R. Co. v. Powell* (Tex. Civ. App.) 697.

*Where the evidence is sharply conflicting, the admission of improper testimony upon a material issue is deemed prejudicial on appeal, unless the contrary appears.—*Fieldier v. St. Louis, B. & M. Ry. Co.* (Tex. Civ. App.) 699.

§ 18. — Harmless error in pleading.

*Any error in refusing to allow defendant to amend by pleading one year limitation *held* harmless in view of an instruction given.—*Kentucky Distilleries & Warehouse Co. v. Barrett* (Ky.) 643.

*The sustaining of a demurrer to certain paragraphs of the answer was without prejudice, where on the whole answer defendants had no defense.—*Perry v. Dance* (Ky.) 911.

The overruling of plaintiff's special exceptions to defendant's amended answer, pleading special exceptions to the petition, was without prejudice, where defendant's exceptions were all overruled.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 19. — Harmless error in admission of evidence.

*Admission of evidence on a will contest by testator's daughter *held* improper, but not prejudicial error.—*Taylor v. McClintock* (Ark.) 405.

*In a will contest it was harmless error to allow contestant to show that one from whom testator acquired a large estate had 3,000 bales of cotton burned in 1863.—*Taylor v. McClintock* (Ark.) 405.

*Where a witness who sent a telegram testified fully as to its contents without contradiction, the refusal to allow a copy of the telegram to be read in evidence was not erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Taylor* (Ark.) 745.

*Admission of evidence *held* harmless.—*Cunningham v. Clay's Adm'r* (Ky.) 852.

*In an action for injuries to a passenger in an elevator through the falling thereof the error if any in the admission of certain evidence *held* harmless.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

*Error in admission of evidence was harmless, where the witness for the objecting party testified to substantially the same state of facts.—*Atchison, T. & S. F. Ry. Co. v. Harrington* (Tex. Civ. App.) 100.

*Error in admitting testimony over objection is cured where another witness is allowed to give the same testimony without objection.—*Missouri, K. & T. Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 339.

*A party has a right to have only legal evidence submitted to the jury, and irrelevant evidence, admitted over objection, requires a reversal if it may have been prejudicial.—*Fieldier*

v. St. Louis, B. & M. Ry. Co. (Tex. Civ. App.) 699.

Error in admitting testimony is harmless, where the witness testified to substantially the same matter without objection.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

Admission of evidence in a personal injury action respecting plaintiff's injury *held* not error prejudicial to defendant.—*Dallas Consol. Electric St. Ry. Co. v. Motwiller* (Tex. Civ. App.) 794.

§ 20. — Harmless error in exclusion of evidence.

*The exclusion of certain evidence in an action by a seller against a buyer *held* not prejudicial.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

Rejection of certain evidence *held* prejudicial, notwithstanding other evidence to the same effect.—*McDonough v. Williams* (Ark.) 164.

*The exclusion of evidence was harmless error, where the information sought had already been substantially elicited on cross-examination.—*Taylor v. McClintock* (Ark.) 405.

*Any error in excluding an expert opinion *held* harmless.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*In an action for the death of one struck by a train while crossing a track, refusal to allow the engineer to testify to the speed required by the schedule at the point of the accident *held* harmless error.—*Illinois Cent. R. Co. v. France's Adm'r* (Ky.) 929.

*Where defendant was not liable on the cause of action alleged, the exclusion of evidence with reference to plaintiff's damages was without prejudice.—*Donaldson Bond & Stock Co. v. Houck* (Mo.) 242.

In an action for personal injuries, the erroneous exclusion of evidence of plaintiff's physician indicating that plaintiff could walk without artificial aid *held* prejudicial.—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

Where a present agreement to marry, followed by cohabitation, was clearly shown, the exclusion of subsequent declarations made by the husband, tending to negative the fact of marriage, if error, was harmless.—*Davis v. Stouffer* (Mo. App.) 282.

*Erroneous exclusion of evidence of an offer intended to minimize plaintiff's damages *held* cured by the subsequent admission thereof.—*Vencill v. Quincy, O. & K. C. R. Co.* (Mo. App.) 1030.

*Error, if any, in excluding a letter written by witness, which letter states a fact testified to by the witness, is harmless.—*Slaughter v. Western Union Tel. Co.* (Tex. Civ. App.) 688.

§ 21. — Harmless error in instructions.

*Error in an instruction on the measure of damages in an action for permitting filth to accumulate on premises near plaintiff's residence *held* harmless in view of the verdict.—*Kentucky Distilleries & Warehouse Co. v. Barrett* (Ky.) 643.

*Defendant *held* not prejudiced by the court's failure to limit the jury in assessing damages to such damages as the evidence showed plaintiff had sustained.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

A technical error, in an instruction in an action for injuries to an employé, *held* not to authorize the reversal of the judgment.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*A judgment will not be reversed for errors in the instructions, unless they are prejudicial to the substantial rights of the party complaining.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*Point annotated. See syllabus.

*Errors in instructions *held* not ground for reversal in view of the verdict.—Mangelsdorf Bros. Co. v. Harnden Seed Co. (Mo. App.) 15.

*An instruction assuming as a fact a matter not in controversy is harmless error.—Smith v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 32.

*An instruction, in an action against a railway company for injury to a child struck by detached cars, *held* not prejudicial error.—Gulf, C. & S. F. Ry. Co. v. Coleman (Tex. Civ. App.) 690.

*An instruction, which, as given, was misleading, is reversible error.—Houston & T. C. R. Co. v. Keeling (Tex. Civ. App.) 808.

§ 22. — Error waived in appellate court.

Objections to a petition will be considered waived on appeal unless brought forward in appellant's brief.—McLean v. Stith (Tex. Civ. App.) 355.

§ 23. — Subsequent appeals.

*A decision on a former appeal *held* conclusive on the question of sufficiency of evidence.—McDonough v. Williams (Ark.) 164.

*Where judgment for plaintiff is reversed for error in admission of evidence, and the evidence was not insufficient to sustain the verdict, and on second trial in accordance with the ruling of the Supreme Court verdict is rendered for plaintiff on same evidence, it will be affirmed on appeal.—St. Louis, I. M. & S. Ry. Co. v. Inman (Ark.) 179.

*The decision on appeal that the circuit court has jurisdiction of a controversy is conclusive as to all objections that might have been interposed.—Breckinridge County v. Rhodes (Ky.) 624.

*Decision on former appeal *held* to preclude the right to have certain question again adjudicated on second appeal.—Chesapeake & O. Ry. Co. v. Morgan (Ky.) 839.

*On a subsequent appeal, the opinion on the former appeal is the law of the case.—Sinclair's Adm'r v. Illinois Cent. R. Co. (Ky.) 910.

§ 24. Determination and disposition of cause.

*The Supreme Court, reversing a judgment for plaintiff for erroneous ruling on evidence, will, on the evidence being insufficient to sustain a verdict, so declare.—St. Louis, I. M. & S. Ry. Co. v. Inman (Ark.) 179.

A court of equity *held* to have no jurisdiction where a complaint attacked by demurrer does not state an equitable cause of action, so that a decree for plaintiff will be reversed notwithstanding the complaint states a cause of action at law.—Rowe v. Allison (Ark.) 395.

To determine whether a cause brought in the wrong forum should be remanded after reversed, the court on appeal must consider the sufficiency of the complaint as if in the proper forum.—Rowe v. Allison (Ark.) 395.

Where a demurrer to an equitable defense in an action at law is not sustained, and the decree is for defendants, on reversal the cause will be remanded for transfer to the proper forum.—Crawford County Bank v. Bolton (Ark.) 398.

*Where the clerk of the Supreme Court, in writing up a judgment of affirmance, by mistake directed a recovery of all costs in the lower court, as well as on appeal, the judgment will be corrected to conform to the opinion.—Mt. Nebo Anthracite Coal Co. v. Martin (Ark.) 882.

The indorsement of the record by appellee, required by Civ. Code Prac. § 759, not having been made, *held*, motion to affirm the judgment

as a delay case will be overruled.—Latham v. Lindsay (Ky.) 584.

*In an action on an accident policy, the transfer of the cause to the equity side of the docket, and the refusal to permit the jury to try all questions raised by the pleadings, *held* not prejudicial under Civ. Code Prac. §§ 134, 756.—Claypool v. Continental Casualty Co. (Ky.) 835.

*Where a cause was remanded with directions, all the lower court could do was to obey them.—Ætna Ins. Co. of Hartford v. Missouri Pac. Ry. Co. (Mo. App.) 31.

*The opinion of the Court of Appeals on a prior appeal is the law of the case on retrial.—Young v. Ruhweddel (Mo. App.) 993.

The trial court's conclusions of law being erroneous, the Court of Civil Appeals must render such judgment as the trial court should have rendered.—First Nat. Bank v. McElroy (Tex. Civ. App.) 801.

*Where the facts were fully developed on the trial, the court on appeal will render such judgment as should have been rendered in the court below.—McClary v. Trezevant & Cochran (Tex. Civ. App.) 954.

§ 25. Liabilities on bonds and undertakings.

*That a guardian could have appealed from a judgment against him without giving a supersedeas bond *held* no defense to liability thereon.—Hands v. Haughland (Ark.) 184.

Facts *held* to show no defense to liability on a bond given by a guardian to supersede a probate judgment against him.—Hands v. Haughland (Ark.) 184.

*A supersedeas bond, given on an appeal from a judgment against a corporation alone, *held* not objectionable as given to secure the liability of individual appellants.—Mershman v. Robert Field Co. (Ky.) 1119.

APPEARANCE.

*Defendant's appeal from an adverse judgment of the circuit court *held* to bring him before the circuit court on the return of the case as though he then entered his appearance.—Pendleton v. Pendleton (Ky.) 674.

APPLIANCES.

Liability of employer for defects, see Master and Servant, § 4.

APPLICATION.

For sale of property of decedent, see Executors and Administrators, § 4.

Of assets of partnership, see Partnership, § 2.

Of payment, see Payment, § 1.

APPOINTMENT.

Of executor or administrator, see Executors and Administrators, § 1.

Of receiver, see Receivers, § 2.

APPROPRIATION.

For payment of municipal debts, see Municipal Corporations, § 11.

APPROVAL.

Of verdict by trial court, effect on right to review facts, see Appeal and Error, § 16.

*Point annotated. See syllabus.

ARBITRATION AND AWARD.

See Submission of Controversy.

ARGUMENT OF COUNSEL.

In civil actions, see Trial, § 4.

In criminal prosecutions, see Criminal Law, §§ 10, 19.

Presentation of objection to, in appeal record, for purpose of review, see Appeal and Error, § 7.

ARREST.

See Bail.

ARREST OF JUDGMENT.

In civil actions, see Judgment, § 3.

ASSAULT AND BATTERY.

Applicability of instructions to case, see Trial, § 9.

Assault to rape, see Rape, § 1.

Elements of damages in general, see Damages, § 1.

Liability of carrier for assault on passenger, see Carriers, § 8.

Province of court and jury in general, see Trial, § 6.

Reception of evidence, see Trial, § 3.

§ 1. Civil liability.

*In assault and battery, evidence of the bad reputation of defendant *held* inadmissible.—*Stewart v. Watson* (Mo. App.) 762.

Under a general allegation of assault and battery, plaintiff may recover such damages as naturally result from the act complained of.—*Stewart v. Watson* (Mo. App.) 762.

*In actions for assault and battery, the jury may consider, not only the mental distress, which is a part of the bodily pain, but also that other condition of mind caused by the insult of the blows received.—*Stewart v. Watson* (Mo. App.) 762.

*In an action for assault and battery, humiliation, bodily pain, and mental anguish *held* elements of general damages.—*Stewart v. Watson* (Mo. App.) 762.

ASSESSMENT.

Of damages, see Damages, § 5.

Of expenses of public improvements, see Drains, § 2; Municipal Corporations, §§ 7, 8.

ASSETS.

Of partnership, see Partnership, § 2.

ASSIGNMENT OF ERRORS.

See Appeal and Error, § 8.

ASSIGNMENTS.

For benefit of creditors, see Assignments for Benefit of Creditors.

Fraud as to creditors, see Fraudulent Conveyances.

Imposition of occupation tax on purchasers of assignments of wages, see Licenses, § 1.

In bankruptcy, see Bankruptcy, § 1.

Transfers of particular species of property, rights, or instruments.

See Judgment, § 12; Mechanics' Liens, § 2.

Contract for sale of standing timber, see Logs and Logging.

Corporate shares, see Corporations, § 1.

§ 1. Rights and liabilities of parties.

Loss due to payment of order issued by a county bridge contractor on the county to a subcontractor, before completion of the bridges, *held* to fall on the county and not on the contractor.—*Sparks v. Jasper County* (Mo.) 265.

§ 2. Actions.

*Under the Code (Rev. St. 1899, §§ 539, 540 [Ann. St. 1906, pp. 574, 575]), an assignee of a chose in action may sue thereon in his own name.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, § 1; Insolvency, § 1.

§ 1. Administration of assigned estate.

In an action to charge defendants as trustees for the portion of the assets received by them as assignees for creditors, evidence *held* to support the finding of the chancellor that there was an agreement between plaintiff and defendants whereby plaintiff's claim was to be excluded until the other debts of the insolvent had been paid.—*Brewer v. Johnson* (Ark.) 364.

ASSOCIATIONS.

See Building and Loan Associations.

Distinguished from partnership, see Partnership, § 1.

Fraternal insurance associations, see Insurance, § 10.

ASSUMPSIT, ACTION OF.

See Use and Occupation; Work and Labor.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 7, 10, 11.

ATTACHMENT.

See Execution; Garnishment; Sequestration. Exemptions, see Exemptions; Homestead.

§ 1. Proceedings to procure.

Under the attachment statute and Rev. St. 1895, art. 3268, *held*, that the affidavit that attachment was not sued out to injure or harass "defendants" need not add the words "or either of them."—*Doty v. Moore* (Tex.) 1038

ATTENDANCE.

Of juror, see Jury, § 2.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see Trial, § 4.

Arguments and conduct of counsel at trial in criminal prosecutions, see Criminal Law, § 10.

Attorneys as public officers, see Attorney General.

Attorneys in fact, see Principal and Agent.

Confidential communications, see Witnesses, § 1.

Counsel for accused, see Criminal Law, § 8.

Presentation of issues as to argument of counsel in lower court for purpose of review, see Criminal Law, § 17.

Presentation of objections to argument of counsel in appeal record for purpose of review, see Appeal and Error, § 7; Criminal Law, § 19.

§ 1. The office of attorney.

Ky. St. 1903, § 104, *held* not to prevent proceedings in the name of the commonwealth for

*Point annotated. See syllabus.

the disbarment of an attorney for his wrongful refusal to pay over to his client money collected.—*Commonwealth v. Roe* (Ky.) 683.

*An attorney *held* guilty of misconduct warranting his disbarment.—*Commonwealth v. Roe* (Ky.) 683.

Ky. St. 1903, § 97, construed, and *held*, to point out only two of the numerous causes that warrant the disbarment of an attorney.—*Commonwealth v. Roe* (Ky.) 683.

*The power inherent in courts to disbar attorneys for cause should be exercised with moderation and judgment.—*Commonwealth v. Roe* (Ky.) 683.

*Courts independent of statute *held* authorized to disbar an attorney for personal or professional misconduct.—*Commonwealth v. Roe* (Ky.) 683.

*An attorney, after being admitted to practice, becomes an officer of court, exercising a privilege or franchise.—*Harkins v. Murphy & Bolanz* (Tex. Civ. App.) 136.

§ 2. Retainer and authority.

A contract between attorney and client for the protection and sale of land by the former, *held* to terminate ipso facto where the client in fact owned no land, which the attorney knew, and hence the latter could not recover for services rendered under the contract.—*Palms' Adm'rs v. Howard* (Ky.) 1110.

If a client unreasonably refuses to make advances to pay expenses and apply on account in reasonable amounts during the progress of extended litigation, it may furnish sufficient cause to justify an attorney in withdrawing his services.—*Young v. Lanznar* (Mo. App.) 17.

*An attorney employed generally to conduct legal proceedings enters into an entire contract to conduct them to their termination, and cannot abandon the services of his client without justifiable cause, and only on reasonable notice.—*Young v. Lanznar* (Mo. App.) 17.

Under Rev. St. 1895, art. 1209, the right of any one other than a party to a suit, or an attorney of the court, *held* excluded by implication from prosecuting or defending a suit.—*Harkins v. Murphy & Bolanz* (Tex. Civ. App.) 136.

A party to an action in a court of record *held* not entitled to prosecute or defend a suit or a writ of error in the Court of Civil Appeals, by an agent or attorney in fact who is not an attorney at law.—*Harkins v. Murphy & Bolanz* (Tex. Civ. App.) 136.

§ 3. Duties and liabilities of attorney to client.

*Where a client claims his attorney fraudulently concealed facts material to client's interest for his own benefit, the burden is on the attorney to prove that he took no advantage of his client.—*Palms' Adm'rs v. Howard* (Ky.) 1110.

*An attorney owes his client the utmost good faith, and equity will avoid any contract made upon any misrepresentation or concealment of material facts by the attorney, or if there is a just suspicion of artifice or undue influence.—*Palms' Adm'rs v. Howard* (Ky.) 1110.

*Courts will examine critically transactions between attorney and client, to protect the client's rights and prevent fraud by the attorney; and any disadvantage to the client from the transaction will entitle him to relief, proof of actual fraud being unnecessary.—*Palms' Adm'rs v. Howard* (Ky.) 1110.

*An attorney in dealing with his clients must act with the utmost fairness, and in perfect good faith.—*Hames v. Stroud* (Tex. Civ. App.) 775.

*Evidence *held* to show that an attorney dealt fairly with his clients.—*Hames v. Stroud* (Tex. Civ. App.) 775.

§ 4. Compensation and lien of attorney.

A judgment creditor's attorney cannot prosecute an appeal from an order sustaining objections to the title to land under the judgment against the client's consent and at the latter's expense because of the attorney's lien on the judgment for fees.—*Nixon v. Ossenbeck* (Ky.) 645.

Concealment by an attorney of facts material to the client's interest *held* to be such an abuse of confidence as to entitle the client to recover money paid him as salary for the protection and sale of land, etc.—*Palms' Adm'rs v. Howard* (Ky.) 1110.

If the value of services is not agreed on, or if it is agreed that the attorney is to be reasonably paid from time to time as requested, he may require advances from time to time to pay expenses and apply on account.—*Young v. Lanznar* (Mo. App.) 17.

*If an attorney's compensation is stipulated, and he without just cause abandons his client before the proceeding for which he was employed has been conducted to a termination, he forfeits his right to compensation for services rendered.—*Young v. Lanznar* (Mo. App.) 17.

A judgment for \$1,315 for the services of an attorney in the course of extended litigation in behalf of his client prior to withdrawing his services *held* not excessive.—*Young v. Lanznar* (Mo. App.) 17.

Evidence in an action by an attorney for services considered, and *held* sufficient to sustain a finding that he had reasonable cause for severing his connection with his client's cases.—*Young v. Lanznar* (Mo. App.) 17.

Evidence in an action by an attorney for services *held* to justify an instruction based on an express agreement as to compensation.—*Young v. Lanznar* (Mo. App.) 17.

Whether there was reasonable cause for the withdrawal of an attorney from a client's service *held* a proper question for the jury in an action for services rendered.—*Young v. Lanznar* (Mo. App.) 17.

*An attorney is not bound to defend persons charged with a crime, and may fix the terms on which he will serve.—*Hames v. Stroud* (Tex. Civ. App.) 775.

ATTORNEY GENERAL.

*The word "assistance," as used in Ky. St. 1903, § 114, *held* to mean "assistants."—*Ray v. James* (Ky.) 641.

Effect of Ky. St. 1903, § 114, authorizing employment of special assistance to the Attorney General, stated.—*Ray v. James* (Ky.) 641.

AUTHORITY.

Of agent, see Principal and Agent, § 2.
Of attorney, see Attorney and Client, § 2.

BAIL.

§ 1. In criminal prosecutions.

That one under bail was prevented from attending court because of being accidentally shot, though while out of the state, *held* ground for relief from forfeiture.—*Hargis v. Begley* (Ky.) 602.

BAILMENT.

Embezzlement or larceny by bailee, see Embezzlement.

*Point annotated. See syllabus.

Particular species of bailments, and bailments incident to particular occupations.

See Carriers, § 2; Depositaries; Livery Stable Keepers; Pledges.

*A deposit of \$1,000, made by plaintiff with his brother, placed in an envelope marked as plaintiff's property and put in a safe is a gratuitous bailment, entailing no liability except for gross negligence.—*Stevens v. Stevens* (Mo. App.) 35.

*There is no conversion of property bailed in the absence of a demand for its return and a refusal.—*Stevens v. Stevens* (Mo. App.) 35.

BALLOTS.

See Elections, § 1.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Insolvency.

Right of trustee in, to appeal from judgment in justice court, see Justices of the Peace, § 2.

§ 1. Assignment, administration, and distribution of bankrupt's estate.

*A trustee in bankruptcy holds the title to the bankrupt's property in trust for those beneficially entitled to it.—*Brown v. Frenken* (Ark.) 207.

§ 2. Rights, remedies, and discharge of bankrupt.

*Under Bankr. Act July 1, 1898, c. 541, §§ 7, 17, 30 Stat. 548, 550 (U. S. Comp. St. 1901, pp. 3425, 3428), discharge held not to release bankrupt from liability on notes which he had listed as a liability to another than the known creditor.—*Fible v. Crabb* (Ky.) 576.

*A discharge in bankruptcy not pleaded as a defense in a suit involving liabilities cut off by the discharge held not a defense to the execution sale under a judgment rendered in such suit.—*Stone v. Schneider-Davis Co.* (Tex. Civ. App.) 133.

BANKS AND BANKING.

See Depositaries.

Alteration of check, see Alteration of Instruments.

Conclusiveness of judgment against bank, see Judgment, § 10.

Equitable defenses in action at law by bank, see Action, § 1.

BAR.

Of action by former adjudication, see Judgment, § 9.

Of action by limitation, see Limitation of Actions, § 3.

Of dower, see Dower, § 1.

BASTARDS.

§ 1. Illegitimacy in general.

*The law presumes one's legitimacy.—*Dunn v. Garnett* (Ky.) 841.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see Building and Loan Associations.

BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, § 1.

Acceptance of, as ground of ratification, see Principal and Agent, § 2.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

In civil actions, see Evidence, § 4.

In criminal prosecutions, see Criminal Law, § 6.

BIAS.

Of juror, see Jury, § 3.

Of witness, see Witnesses, § 2.

BIDS.

On public works, see Municipal Corporations, § 6.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, § 2.

BILL OF REVIEW.

Limitations applicable, see Limitation of Actions, § 1.

BILLS AND NOTES.

Alteration of check, see Alteration of Instruments.

Competency of witness in action on note, see Witnesses, § 1.

Estoppel to claim note, see Estoppel, § 1.

Parol evidence to vary check, see Evidence, § 8.

Wrongful conversion of note, see Trover and Conversion, § 2.

§ 1. Requisites and validity.

The validity of a note given to a university held not destroyed by reason of the consolidation of the university with the college and the removal of the seat of the university to the seat of the college in another town.—*Miller v. Central University* (Ky.) 669; *Central University v. Miller*, Id.

The consideration of a note given to a university held not to fail by reason of the consolidation of the university with a college.—*Miller v. Central University* (Ky.) 669; *Central University v. Miller*, Id.

§ 2. Modification, renewal, and rescission.

Where an agent represented that he owned a note held for collection, and the debtor gave to him new notes in part payment, afterwards accepted by his principal, false representation did not affect their validity.—*Billingsley v. Benefield* (Ark.) 188.

§ 3. Rights and liabilities on indorsement or transfer.

The rights of one becoming an owner of a note before maturity for value and without

*Point annotated. See syllabus.

notice cannot be defeated because of the fraud of the payee.—*Hames v. Stroud* (Tex. Civ. App.) 775.

§ 4. Presentment, demand, notice, and protest.

*An owner of a note has placed the same with another for collection *held* not bound either to personally notify the indorser of dishonor, or to make inquiries as to where the indorser received his mail.—*Vogel v. Starr* (Mo. App.) 27.

*Personal service on an indorser of notice of dishonor is not required, but constructive service will suffice where reasonable diligence is exercised to make it in the manner best adapted to convey actual notice.—*Vogel v. Starr* (Mo. App.) 27.

*Diligence exercised to give notice of dishonor to an indorser *held* insufficient.—*Vogel v. Starr* (Mo. App.) 27.

§ 5. Payment and discharge.

*Payment of a note may be made without the payee indorsing it.—*Jolly v. Huebler* (Mo. App.) 1013.

§ 6. Actions.

*Evidence *held* to show that a note was paid by the execution of a renewal note and its payment.—*Westbrook v. Potter's Sons' Trustee* (Ky.) 635.

In a suit to have a note declared paid, evidence *held* to show that the transaction by which defendant acquired the note was a purchase, and not a payment thereof.—*Prather v. Hairgrove* (Mo.) 552.

Whether a notary exercised reasonable diligence in giving notice of dishonor to an indorser *held* a question of law, not of fact, where there is no controversy over material facts.—*Vogel v. Starr* (Mo. App.) 27.

*Mere possession of an unindorsed negotiable note made payable to order by a person other than the payee is not *prima facie* evidence of ownership.—*Jolly v. Huebler* (Mo. App.) 1013.

BOA FIDE PURCHASERS.

Of bill of exchange or promissory note, see Bills and Notes, § 3.

Of lands, see Vendor and Purchaser, § 4.

BONDS.

Forthcoming bonds, see Execution, § 2.

Of insurance agents, see Insurance, § 1.

Of insurance company to state, see Insurance, § 9.

Person entitled to review in action on, see Appeal and Error, § 2.

Sureties on bonds, see Principal and Surety.

Bonds for performance of duties of trust or office.

See Depositaries; Sheriffs and Constables, § 1; Trusts, § 5.

Bonds in judicial proceedings.

See Appeal and Error, §§ 6, 25; Bail; Costs, § 2; Injunction, § 4; Partition, § 2.

Appeal in justice court, see Justices of the Peace, § 2.

To keep the peace, see Breach of the Peace.

BOUNDARIES.

Effect of change of boundaries after call of local option election, see Intoxicating Liquors, § 1.

Of county, see Counties, § 1.

Of municipal corporation, see Municipal Corporations, § 1.

§ 1. Description.

*Where the parties are mistaken as to where the lines and corners of surveys referred to in a deed are, and the proof is conflicting, the jury must locate the lines of the land conveyed.—*Sullivan v. Hill* (Ky.) 564.

*One call of a deed is entitled to as much respect as another; and uncertainty may often be avoided by reversing calls from the beginning point.—*Sullivan v. Hill* (Ky.) 564.

*Course and distance must give way to marked lines and corners found on the ground or to established monuments called for in the deed.—*Sullivan v. Hill* (Ky.) 564.

*Courses and distances called for in deeds must give way to natural objects called for, when there is a conflict between them.—*Hightower v. Borden* (Ky.) 675.

§ 2. Evidence, ascertainment, and establishment.

*Estoppel *held* not to be invoked against an owner as to boundary line because of a conversation between him and an adjoining owner.—*Tebbs v. Wiseman* (Ark.) 196.

Where parties are mistaken as to where the lines and corners of surveys referred to in a deed are, and the proof is conflicting, the jury must locate the lines of the land conveyed.—*Sullivan v. Hill* (Ky.) 564.

The court *held* required to submit to the jury the issue whether land recovered by a third person from a grantee was covered by the deed of the grantor.—*Sullivan v. Hill* (Ky.) 564.

*Evidence *held* to show that a line was a boundary line.—*Williams v. Murphy* (Ky.) 610.

*In an action involving title to two parcels of land, evidence *held* sufficient to sustain a finding as to the location of the boundary line.—*Arndell v. Malusky* (Ky.) 640; *Same v. Depoyster, Id.*

BREACH.

Of condition, see Insurance, §§ 4, 5.

Of contract, see Contracts, § 3; Sales, § 3; Vendor and Purchaser, § 3.

Of covenant, see Insurance, § 5.

Of warranty, see Insurance, §§ 4, 5; Sales, §§ 4, 6.

BREACH OF THE PEACE.

Appealability of order requiring bond to keep the peace, see Criminal Law, § 16.

Summary trial of accused, see Criminal Law, § 4.

*Bonds to keep the peace *held* properly required under the circumstances.—*Lowe v. Commonwealth* (Ky.) 647.

BRIBERY.

Evidence of similar facts, see Criminal Law, § 6.

Evidence competent in prosecution for bribery *held* also competent in prosecution for being accessory to bribery.—*State v. Dulaney* (Ark.) 158.

BRIEFS.

On appeal or writ of error, see Appeal and Error, § 9.

Publication of parts of briefs as not privileged, see Libel and Slander, § 2.

BROKERS.

See Principal and Agent.

Insurance brokers, see Insurance, § 1.

*Point annotated. See syllabus.

§ 1. Duties and liabilities to principal.

*A broker's agreement to serve both parties, without the knowledge and consent of his original principal, is contrary to public policy and unenforceable.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

*A broker may act for both parties if his acts are not incompatible, or are performed with the knowledge and consent of both.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

*In an action against a broker and two others who purchased certain property, the broker had agreed to procure for plaintiff a petition. *Held* not to charge an invalid contract between plaintiff and the broker.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

§ 2. Compensation and lien.

*Where plaintiff was not the procuring cause of a sale of defendant's system of railway to a syndicate, plaintiff was not entitled to commissions on such sale.—*Donaldson Bond & Stock Co. v. Houck* (Mo.) 242.

§ 3. Actions for compensation.

*In an action for broker's commissions in procuring a purchaser for the stock and bonds of a projected railroad company, evidence *held* to show that the contract was with the railroad company and not with defendant.—*Donaldson Bond & Stock Co. v. Houck* (Mo.) 242.

*In an action for brokers' commissions, evidence *held* sufficient to go to the jury.—*Burns v. Moore* (Mo. App.) 1002.

BUILDING AND LOAN ASSOCIATIONS.

Ky. St. 1903, § 567, when construed with sections 573 and 870 and Const. § 192, and the charter of a building and loan association, as originally granted, *held* not to limit the right of the association to acquire and hold real estate without limitation as to time.—*Home Savings Fund Co. Bldg. Ass'n v. Driver* (Ky.) 864.

Purchase of certain real estate *held* not an unreasonable exercise of building and loan association's power to purchase real estate necessary to its business.—*Home Savings Fund Co. Bldg. Ass'n v. Driver* (Ky.) 864.

The power of a building and loan association to acquire real estate necessary to its business *held* to include the right to pay therefor from accumulated moneys.—*Home Savings Fund Co. Bldg. Ass'n v. Driver* (Ky.) 864.

The acquisition of a place or home by a building and loan association for the conduct of its business *held* a necessary expense within Ky. St. 1903, § 863.—*Home Savings Fund Co. Bldg. Ass'n v. Driver* (Ky.) 864.

Building and loan association, in erecting building of more than sufficient capacity to accommodate its then business, and leasing the excess, *held* not to engage in a business other than that authorized by its charter, in violation of Const. § 192, and Ky. St. 1903, § 567.—*Home Savings Fund Co. Bldg. Ass'n v. Driver* (Ky.) 864.

BURGLARY.

Right to kill burglar, see Homicide, § 4.

§ 1. Offenses and responsibility therefor.

Ky. St. 1903, § 1163, *held* to require proof of an entry into a railroad car with intent to steal property to justify conviction.—*Price v. Commonwealth* (Ky.) 855.

BUSINESS HOMESTEAD.

See Homestead, § 1.

BY-LAWS.

Of municipal corporation, see Municipal Corporations, § 2.

CALENDARS.

Computation of time, see Time.

CALLS.

In deeds, see Boundaries, § 1.

CANCELLATION OF INSTRUMENTS.

See Quieting Title; Reformation of Instruments.

Cancellation of deed giving life estate, see Life Estates.

Rescission of contracts for sale of land, see Vendor and Purchaser, § 2.

Rescission of contracts for sale of goods, see Sales, § 2.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, § 3.

§ 1. Right of action and defenses.

That plaintiff bought the land with money his wife had at their marriage *held* no defense to plaintiff's suit to cancel his deed to defendants.—*Cook v. Newby* (Mo.) 272.

*In an action to recover property fraudulently obtained, etc., necessity for tendering a release of rights acquired from defendants, stated.—*Witliff v. Spreen* (Tex. Civ. App.) 98.

§ 2. Proceedings and relief.

*In a suit by a widow to set aside a deed conveying her homestead and dower rights, evidence *held* not to show that it was obtained by fraud, undue influence, or coercion.—*Smith v. Lamb* (Ark.) 884.

CANVASS OF VOTES.

See Elections, § 2.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

Applicability of instructions to case in action for injuries to live stock shipment, see Trial, § 9.

Applicability of instructions to case in action for injuries to passenger, see Trial, § 9.

Assessment of damages in action for injuries to live stock shipment, see Damages, § 5.

Assessment of damages in action for injuries to passenger, see Damages, § 5.

Competency of evidence in general in action for failure to deliver shipment, see Evidence, § 3.

Construction of instructions in action for failure to furnish cars, see Trial, § 12.

Harmless error in action for injuries to passenger, see Appeal and Error, § 19.

Impeachment of witness in action for injuries to live stock shipment, see Witnesses, § 3.

Joinder of causes of action for failure to deliver shipment, see Action, § 2.

Jurisdiction of inferior courts in action for injuries to shipment of live stock, see Courts, § 3.

Mitigation of damages in action for injuries to live stock, see Damages, § 1.

Offense by carrier against liquor law, see Intoxicating Liquors, §§ 3, 4.

Opinion evidence in action for injuries to live stock shipment, see Evidence, § 9.

Opinion evidence in action for wrongful ejection of passenger, see Evidence, § 9.

*Point annotated. See syllabus.

Pleading damages in action for injuries to passenger, see Damages, § 5.
 Punitive damages in action for wrongful ejection, see Damages, § 2.
 Reception of evidence in action for injuries to live stock shipment, see Trial, § 3.
 Requests for instructions in action for injuries to passenger, see Trial, § 10.
 Res gestæ in action for injuries to passenger, see Evidence, § 3.
 Scope and extent of review in action for failure to furnish cars, see Appeal and Error, § 12.
 Venue of action on contract of carriage, see Venue, § 1.

§ 1. Control and regulation of common carriers.

Whether a railroad station was a "regular," or a "flag" station within Kirby's Dig. § 6612, held a question of fact.—Clark v. Jonesboro, L. C. & E. R. Co. (Ark.) 961.

Agents of a carrier held required to exercise the same kind of judgment in doing the carrier's business as if he were doing business for himself.—Adams Express Co. v. Commonwealth (Ky.) 577.

§ 2. Carriage of goods.

A warehouseman held the agent of a carrier to take up order bills of lading under which cotton delivered to the warehouseman was shipped and to issue warehouse receipts therefor.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

*It is not within the scope of the authority of the agents of a carrier to issue bills of lading for goods not actually received.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

A bill of lading is both a receipt and a contract, and as a receipt is merely prima facie evidence of the facts recited therein and is impeachable for mistake, error, or false statements.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

*A due bill issued by a carrier for the excess between an incoming and outgoing bill of lading for cotton could not be regarded as a bill of lading.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

A carrier's agent having issued a duebill for cotton without authority, the carrier held not estopped to deny that it never received the cotton represented by such duebill.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

A carrier held not liable on a duebill issued by its agent without authority for cotton never delivered to the carrier.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

Under the express provisions of Kirby's Dig. §§ 524, 532, neither a carrier nor a warehouseman can issue any receipt for goods unless the goods shall have been actually received into the possession of such carrier or warehouseman.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

Kirby's Dig. § 530, providing that bills of lading shall be transferable by indorsement, makes the bill representative, so far as delivery is concerned, of the commodity itself.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

A carrier having cotton in its possession shipped under order bills of lading held liable to complainant bank for certain bales wrongfully shipped out without surrender of the bills of lading, held by plaintiff bank and not exchanged for warehouse receipts.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

*Where goods are delivered to a carrier not for immediate transportation, the carrier's li-

bility is measured by the principles governing a depositary or bailee.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

*A contract between a railroad company and a shipper, limiting liability to loss or injury on its own line, is binding, if based on a valid consideration.—Chicago, R. I. & P. Ry. Co. v. Cotton (Ark.) 742.

In the absence of a stipulation restricting liability, the acceptance of goods by a carrier implies an undertaking to be responsible for loss or injury occurring on the line of a connecting carrier.—Chicago, R. I. & P. Ry. Co. v. Cotton (Ark.) 742.

A shipper suing for the failure of a carrier to furnish cars for the shipment of hay held not limited to a recovery of nominal damages.—St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.) 744.

Measure of damages for the failure of a carrier to furnish cars for the shipment of hay determined.—St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.) 744.

The mere fact that a commodity intended to be shipped is not on the platform of the carrier is not an excuse for the carrier's failure to furnish cars, when the commodity is under the control of the shipper, and ready for shipment in the usual way.—St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.) 744.

In an action for the failure of a carrier to furnish cars, the fact that plaintiff and the carrier, after the damages accrued, contracted for the shipment of the freight, held not to affect the right to recover the damages sustained.—St. Louis, I. M. & S. Ry. Co. v. Taylor (Ark.) 745.

Under Civ. Code Prac. § 73, the M. county circuit court held to have jurisdiction of an action for breach of a contract of carriage of goods to be delivered in that county.—Wilson v. Louisville & N. R. Co. (Ky.) 585.

*In an action against a carrier for damage to goods by flood, the evidence held to show that the cars had been delivered to plaintiff in good condition before the flood, so that its liability had ceased when the goods were damaged.—Kingman St. Louis Implement Co. v. Southern Ry. Co. (Mo. App.) 721.

In an action against a carrier for failure to protect goods from injury by flood, plaintiff must show that the goods were in defendant's possession either as carrier or warehouseman.—Kingman St. Louis Implement Co. v. Southern Ry. Co. (Mo. App.) 721.

A carrier held to have received cars of freight from the consignee after delivery thereof as bailee, and not as a common carrier.—Kingman St. Louis Implement Co. v. Southern Ry. Co. (Mo. App.) 721.

A delivery of cars of freight to a consignee subject to inspection held to release the carrier from liability, unless the consignee on inspection rejected the freight, and notified the carrier thereof.—Kingman St. Louis Implement Co. v. Southern Ry. Co. (Mo. App.) 721.

*In an action against a carrier for failure to deliver 93 bales of cotton in accordance with a bill of lading, evidence held to sustain a finding that the 93 bales were delivered to a third person, authorizing a judgment against the carrier therefor.—Texas & G. Ry. Co. v. First Nat. Bank of Carthage (Tex. Civ. App.) 589.

*A carrier held liable for failing to deliver cotton in accordance with the bill of lading.—Texas & G. Ry. Co. v. First Nat. Bank of Carthage (Tex. Civ. App.) 589.

§ 3. Carriage of live stock.

*A shipper of cattle held not bound under the evidence by a contract restricting defendant

*Point annotated. See syllabus.

railroad's liability to injuries on its own line.—Chicago, R. I. & P. Ry. Co. v. Cotton (Ark.) 742.

In an action for the failure of a carrier to furnish cars, certain evidence *held* competent under the issues.—St. Louis, I. M. & S. Ry. Co. v. Taylor (Ark.) 745.

In an action for the failure of a carrier to furnish cars for the shipment of live stock, the court properly confined the damages to those growing out of the failure of the carrier to furnish transportation in accordance with an agreement made by its station agent.—St. Louis, I. M. & S. R. Co. v. Taylor (Ark.) 745.

In an action against a carrier for the death of a hog, evidence that on the night the hog died witness heard a hog squealing *held* inadmissible, unless the hog that squealed was identified as the hog in question.—Weisinger v. Southern Ry. Co. in Kentucky (Ky.) 660.

*In an action for death of plaintiffs' hog, the court should have charged that if the hog would have died, notwithstanding defendant's agent required his removal from a car he was loaded in for transportation, etc., plaintiffs could not recover.—Weisinger v. Southern Ry. Co. in Kentucky (Ky.) 660.

*Where a shipper of hogs is directed by a carrier's agent to load them in the wrong car, the carrier is responsible for damages naturally resulting from removing the hogs, if required by the carrier; but, if no car was designated, the removal was at the shipper's risk.—Weisinger v. Southern Ry. Co. in Kentucky (Ky.) 660.

A carrier's duty to designate the car in which an owner of hogs shall load them for shipment is not sufficiently performed by exercise of ordinary care.—Weisinger v. Southern Ry. Co. in Kentucky (Ky.) 660.

*Evidence *held* to support a finding that one of plaintiff's horses died, and the other two were depreciated in value, because of diseases contracted through a carrier's failure to properly care for them during a delay in transportation.—Gilbert v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1002.

*Circumstances, slightly tending to show a carrier's negligence in the origin of an unusual delay, *held* sufficient to support an inference of negligence.—Gilbert v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1002.

*The burden of proof is on a shipper, under a contract exempting the carrier from liability for delay, to prove that the delay was unreasonable and the result of the carrier's negligence.—Gilbert v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1002.

*A carrier's delay, in the transportation of plaintiff's horses, for more than 24 hours *held* negligent.—Gilbert v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1002.

*A carrier's agent, for an additional compensation having contracted to furnish plaintiff's horses food and water during a delay in transportation, the carrier was responsible for failure to do so.—Gilbert v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1002.

*Evidence of a carrier's unnecessary delay in transporting plaintiff's cattle *held* to require submission of such issue to the jury.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*Original carrier *held* responsible for a delay of a stockyard's company in transporting plaintiff's cattle from such original carrier's terminal station to the cattle chutes at the stockyards where they were to be delivered.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*A letter written by a carrier's general freight agent *held* to indicate an intent to waive immediate notice of injuries to cattle shipped un-

der a special contract.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*Facts *held* a reasonable compliance with a provision in a cattle transportation contract requiring notice of injury within 10 days after delivery.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*A carrier *held* responsible for delay in transporting plaintiff's cattle caused by the defectiveness of an engine.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*A carrier was not liable for injuries to cattle by delay in transportation caused by a snow-storm obstructing the tracks.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

*The difference in the market value of live stock in an injured and uninjured condition is the owner's measure of recovery against carriers for injuring them in transporting them.—Missouri, K. & T. Ry. Co. of Texas v. Rich. (Tex. Civ. App.) 114.

That the jury in an action against a carrier for injuries to live stock could not determine from the evidence what amount of damages occurred on the respective lines did not warrant a finding for the carriers.—Missouri, K. & T. Ry. Co. of Texas v. Rich. (Tex. Civ. App.) 114.

In an action against carriers for injury to a live stock shipment, the petition *held* not insufficient for failing to separately allege items of damage.—Missouri, K. & T. Ry. Co. of Texas v. Rich. (Tex. Civ. App.) 114.

That animals contributed to injuries received in transportation by their inherent vice, etc., *held* not to prevent the owner from recovering for injuries caused by the carriers' negligence.—Missouri, K. & T. Ry. Co. of Texas v. Rich. (Tex. Civ. App.) 114.

§ 4. Carriage of passengers—Relation between carrier and passenger.

A railway company *held* liable for expelling through passengers from a waiting room at a junction point.—St. Louis Southwestern Ry. Co. of Texas v. Foster (Tex. Civ. App.) 797.

Rule as to duration of relation of carrier and passenger stated.—St. Louis Southwestern Ry. Co. of Texas v. Foster (Tex. Civ. App.) 797.

§ 5. — Fares, tickets, and special contracts.

*A railroad station *held* a flag station, and not a regular station, within Kirby's Dig. § 6612.—Clark v. Jonesboro, L. C. & E. R. Co. (Ark.) 961.

Under Kirby's Dig. § 6611, railroad companies *held* entitled to charge the same fare for a fraction of a mile that can be charged for a whole mile.—Jonesboro, L. C. & E. R. Co. v. Brookfield (Ark.) 977.

§ 6. — Performance of contract of transportation.

*Measure of damages for failure by initial carrier to return to a passenger that part of his ticket entitling him to transportation over line of connecting carrier, declared.—St. Louis, I. M. & S. Ry. Co. v. Cates (Ark.) 202.

Duty of railway companies, respecting station accommodations, stated.—St. Louis Southwestern Ry. Co. of Texas v. Foster (Tex. Civ. App.) 797.

Carrier's duty to permit through passengers to use its waiting room at junction point *held* not affected by the proximity of hotels, etc., to depot.—St. Louis Southwestern Ry. Co. of Texas v. Foster (Tex. Civ. App.) 797.

§ 7. — Personal injuries.

*Where a carrier undertakes the carriage of passengers on freight trains, it owes them the same high degree of care as if they were on passenger trains; its duty being modified only by the nature of the train and necessary differ-

*Point annotated. See syllabus.

ence in its mode of operation.—*St. Louis, I. M. & S. Ry. Co. v. Brabbszon* (Ark.) 222.

Defendant railroad *held* not liable for injuries to a passenger through falling through an open vestibule door on the rear platform of a car.—*Chicago, R. I. & P. Ry. Co. v. Simpson* (Ark.) 875.

Railroad passengers may assume that vestibuled coaches are safe for the purposes intended and are prudently managed.—*Chicago, R. I. & P. Ry. Co. v. Simpson* (Ark.) 875.

*Where a passenger is injured by a breakdown of one of the cars, the burden *held* to be on the carrier to show the defect could not have been discovered, either by it or the builders, by the utmost human skill.—*Chesapeake & O. Ry. Co. v. Morgan* (Ky.) 859.

*Carriers' duty towards passengers on freight trains stated.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

A conductor *held* required to see that a passenger is offered an opportunity to alight from the car in safety.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

A passenger *held* entitled to rely on the promise of the conductor that he will let him off at a designated place.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

*One going to a depot merely to say good-by to a passenger *held* not there on implied invitation of the carrier, but as a licensee, to whom it owes no duty as to safety of waiting room.—*Galveston, H. & S. A. Ry. Co. v. Matzdorf* (Tex.) 1086.

Facts *held* to show ejection of passengers from a railway waiting room.—*St. Louis Southwestern Ry. Co. of Texas v. Foster* (Tex. Civ. App.) 797.

*An instruction requiring of a carrier the "utmost care" *held* erroneous.—*Houston & T. C. R. Co. v. Keeling* (Tex. Civ. App.) 808.

§ 8. — Actions for injuries.

*A verdict of \$500 for compensatory damages in an action for injuries to passenger *held* not excessive.—*St. Louis Southwestern Ry. Co. v. Myzell* (Ark.) 203.

*In an action against a railroad for an assault by the train auditor, evidence *held* to show that the misconduct of the train auditor fell short of the elements of wantonness or willfulness from which malice is inferred as the basis of an action for exemplary damages.—*St. Louis Southwestern Ry. Co. v. Myzell* (Ark.) 203.

*In an action for injury to a passenger caused by a jerking of a caboose whether she was injured by a jerk of great and unnecessary violence *held* a jury question.—*St. Louis, I. M. & S. Ry. Co. v. Richardson* (Ark.) 212.

*In an action for personal injuries received by plaintiff while a passenger on defendant's local freight train, evidence of defendant's negligence *held* sufficient to go to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Brabbszon* (Ark.) 222.

*Evidence in an action for personal injuries to a passenger on a local freight train while standing, preparatory to alighting, from a sudden and violent jerk of the train, examined, and *held* sufficient to sustain a verdict for plaintiff.—*St. Louis, I. M. & S. Ry. Co. v. Brabbszon* (Ark.) 222.

*Where a passenger fell and was injured while entering a train by the moving of the train, the presumption is that the injury was due to the negligence of the carrier.—*St. Louis, I. M. & S. Ry. Co. v. Stell* (Ark.) 876.

Under Civ. Code Prac. § 73, relating to the county in which actions may be brought against a carrier for personal injuries to a passenger or

another, the M. county circuit court *held* not to have jurisdiction of an action by a passenger for personal injuries sustained in another state; neither plaintiff nor defendant residing in that county.—*Wilson v. Louisville & N. R. Co.* (Ky.) 585.

*Evidence, in an action against a carrier for injuries to a passenger, *held* to warrant a verdict for the passenger.—*Chesapeake & O. Ry. Co. v. Morgan* (Ky.) 859.

Plaintiff, in an action against a carrier for personal injuries, *held* not precluded from relying on certain negligence, on the ground that her amended petition did not enumerate such negligence.—*Chesapeake & O. Ry. Co. v. Morgan* (Ky.) 859.

*In an action for the death of a passenger, killed while alighting from a train, evidence *held* not to establish actionable negligence.—*Wade v. Illinois Cent. R. Co.* (Ky.) 1103.

*Where a passenger alleged that she was injured and suffered damages through the negligence of the servant of both defendant railway companies, the burden was on her to prove such charge.—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

*In an action for injuries to a passenger in a collision between two street railroads, plaintiff *held* entitled to the application of the doctrine *res ipsa loquitur*.—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

In an action for injuries to a passenger in an elevator through the falling thereof, an instruction that the burden of proving the specific facts causing the injury rested throughout the case on plaintiff *held* properly refused.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

In an action for injuries to a passenger in an elevator through the falling thereof, certain evidence *held* admissible.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

*In an action for injuries to a passenger in an elevator through the falling thereof, evidence *held* to make out a prima facie case entitling plaintiff to go to the jury.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

**Res ipsa loquitur* doctrine *held* to apply to injury received by passenger on a freight train.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

That the jerk given a train on a coupling of cars was extraordinary and unusual tends to prove negligence in operating the train.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

Facts in an action for injury to a passenger on a freight train *held* to warrant a finding that the company was negligent in coupling cars.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

A petition in an action for injuries to a passenger *held* to charge every negligent act on the part of the conductor as to stopping and starting the car.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

Whether a carrier was negligent in failing to maintain a guard rail at the end of a passenger platform *held* for the jury.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

Where the evidence was conflicting as to whether plaintiff passenger was intoxicated when injured, he testifying that he had not been drunk for two years prior thereto, testimony was admissible that he had been intoxicated many times previous to the injury.—*Lewis v. Houston Electric Co.* (Tex. Civ. App.) 593.

In an action by a passenger for assault by the company's servants, an isolated instance of intoxication some three months before the

*Point annotated. See syllabus.

assault was not admissible to show that plaintiff's damages were due to alcoholism and not the assault.—*Fielder v. St. Louis, B. & M. Ry. Co.* (Tex. Civ. App.) 699.

In an action by a passenger for assault by the company's employes, defendant claiming plaintiff's damages were due to alcoholism, certain questions as to a witness' conversation with plaintiff about drinking some time prior thereto held prejudicial error.—*Fielder v. St. Louis, B. & M. Ry. Co.* (Tex. Civ. App.) 699.

*If plaintiff was assaulted by the company's employes while a passenger, he was entitled to at least nominal damages, even though the damages alleged resulted from other causes; and hence it was error to instruct for defendant, if the damages did not result from the assault.—*Fielder v. St. Louis, B. & M. Ry. Co.* (Tex. Civ. App.) 699.

Five hundred dollars held not excessive recovery against a railway company for wrongfully ejecting plaintiff and his wife from a waiting room.—*St. Louis Southwestern Ry. Co. of Texas v. Foster* (Tex. Civ. App.) 797.

*Evidence in an action against a carrier for injury to plaintiff's wife held to support the finding that the carrier was negligent in causing the injury.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

An instruction in an action against a carrier for injuries to plaintiff's wife held not erroneous because of the use of the word "unusual" in describing violence of a company.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

Jury held not to have been misled by direction as to form of their verdict.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

Allegations in petition against carrier for injuries to plaintiff's wife as to injuries sustained held to authorize evidence, in the absence of proper exceptions.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

Allegations in petition against a carrier for injury to plaintiff's wife held sufficient to permit of a recovery for the diseased condition of her shoulder from the injury.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

The expression "a high degree of care," in an instruction defining the care due one standing in the position of a passenger, held not to correctly express the rule.—*Houston & T. C. R. Co. v. Keeling* (Tex. Civ. App.) 808.

§ 9. — Contributory negligence of person injured.

*In an action for injury to a passenger caused by a jerking of a caboose, whether she was guilty of contributory negligence in going out on the back platform held for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Richardson* (Ark.) 212.

*In an action for personal injuries to plaintiff while a passenger on defendant's local freight train, held, that plaintiff's contributory negligence was a question for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Brabbzson* (Ark.) 222.

In an action for injury to a freight train passenger, an instruction failing to correctly state the law respecting contributory negligence held properly modified.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*Whether it was negligent for a passenger on a freight train to sit on a trunk near an open side door of caboose held under the evidence a jury question.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

A passenger on a freight train could assume that a coupling of cars of the train would be made without negligence.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*A railway passenger need not exercise more than ordinary care for his own safety.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*Though negligent toward a passenger, a railway company is not liable for resulting injury if his failure to use ordinary care contributed to the injury.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*Whether a boy 12 years old was guilty of contributory negligence while alighting from a moving car held for the jury.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

That a passenger was asleep when thrown from her seat held not to raise an issue of contributory negligence.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

§ 10. — Ejection of passengers and intruders.

In an action for the wrongful ejection of a passenger, accompanied by insulting language of the conductor, certain evidence held admissible.—*White v. Metropolitan St. Ry. Co.* (Mo. App.) 278.

*Evidence held to warrant the submission to the jury of the question whether defendant street railroad's conductor in ejecting a passenger was insulting and abusive.—*White v. Metropolitan St. Ry. Co.* (Mo. App.) 278.

CARRYING WEAPONS.

See Weapons.

CASE ON APPEAL.

Making and settlement, see Appeal and Error, § 7.

Necessity for purpose of review, see Appeal and Error, § 7.

CAUSE OF ACTION.

See Action.

CEMETERIES.

Computation of limitations affecting land dedicated for cemetery, see Limitation of Actions, § 2.

Dedication of, see Dedication, § 2.

CENSUS.

Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), relating to the census of the city, held not complied with by a city taking a census, and the affidavits of the enumerators were not prima facie evidence of its correctness.—*Flowers v. Smith* (Mo.) 499.

CERTIFICATE.

Certified copies, see Evidence, § 7.

For public land, see Public Lands, § 2.

Mutual benefit insurance certificate, see Insurance, § 10.

Of acknowledgment of written instrument, see Acknowledgment, § 2.

Of corporate stock, see Corporations, § 1.

CERTIORARI.

Review in contempt proceedings, see Contempt, § 2.

CHALLENGE.

To juror, see Jury, § 8.

*Point annotated. See syllabus.

CHAMPERTY AND MAINTENANCE.

*A possession, sufficient under the statute of limitations, may not be sufficient under the champerty statute.—*Sullivan v. Hill* (Ky.) 564.

CHANCERY.

See Equity.

CHANGE OF VENUE.

Of criminal prosecutions, see Criminal Law, § 2.

CHARACTER.

Of accused in criminal prosecutions, see Criminal Law, § 6.

Of witness, see Witnesses, § 3.

CHARGE.

By carrier for carriage of passengers, see Carriers, § 5.

To jury in civil actions, see Trial, §§ 6-12.

To jury, in criminal prosecutions, see Criminal Law, § 12.

CHARITIES.**§ 1. Creation, existence, and validity.**

Effect of a transaction between a community and a lodge respecting the construction and use of a building on the lodge's land, stated.—*Rhodes v. Maret* (Tex. Civ. App.) 433.

CHARTER.

Of municipality, see Municipal Corporations, §§ 2, 5-8.

CHattel MORTGAGES.

See Pledges.

§ 1. Filing, recording, and registration.

*The failure for five days to record a chattel mortgage held a failure to use proper diligence to record it within a reasonable time as required by statute.—*Brunswick-Balke-Collender Co. v. Kraus* (Mo. App.) 20.

Notwithstanding Rev. St. 1895, art. 789, held, that the Legislature can provide for the registration of deeds to and mortgages of realty and personalty in unorganized counties, etc.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

Rev. St. 1895, art. 4641, relating to the recording of deeds, etc., to land in unorganized counties, held not to apply to chattel mortgages.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

Acts 1876, p. 242, c. 144, § 6, held to attach an unorganized county to its parent county for all county government purposes, including the registration of instruments affecting realty and personalty.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

That a chattel mortgagor residing in an unorganized county was qualified for jury service in the county to which that county was attached for judicial purposes held not to make registration of the mortgage in the organized county proper.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

Acts 1876, p. 242, c. 144, § 6, relating to an unorganized county, held not repealed so far as concerns the registration of instruments affecting property in the unorganized county by Acts 1881, p. 12, c. 18, Acts 1883, p. 40, c. 52; Id., p. 63, c. 67; Acts 1887, p. 80, c. 98; Acts

1891, p. 36, c. 34; Acts 1893, p. 166, c. 110; Acts 1897, p. 85, c. 71; Acts 1901, p. 54, c. 39; or Acts 1903, p. 92, c. 67.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

§ 2. Construction and operation.

*Under Rev. St. 1899, § 3404 (Ann. St. 1906, p. 1936), a chattel mortgage which is recorded before prior creditors obtain a lien on the mortgaged chattels or change their position in relation thereto held valid as to them.—*Brunswick-Balke-Collender Co. v. Kraus* (Mo. App.) 20.

*A lessor held not, by reason of an agreement, to obtain a lien for rent on certain chattels as against a mortgagee in a chattel mortgage not recorded at the time.—*Brunswick-Balke-Collender Co. v. Kraus* (Mo. App.) 20.

Registration of a chattel mortgage covering property in an unorganized county in the county in which that county was attached for judicial purposes held not constructive notice to subsequent purchasers and mortgagees.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

*Under Rev. St. 1895, art. 3328, in the absence of transfer of possession, a chattel mortgage must be registered to be valid against subsequent purchasers, creditors, and lienholders in good faith.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

Priorities of chattel mortgages as affected by a mortgagee taking possession stated.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

§ 3. Rights and liabilities of parties.

*In replevin by a chattel mortgagee, held, that judgment should have been rendered for the property or the balance due on the mortgage, as expressly provided by Kirby's Dig. § 6869.—*Shafstall v. Downey* (Ark.) 176.

§ 4. Foreclosure.

In an action on a contract for the sale of a stock of goods, the complaint held to state a good cause of action as against a demurrer.—*Jones' Adm'r v. Jones' Adm'r* (Ky.) 650.

CHATELS.

See Property.

CHEAT.

See Fraud.

CHECKS.

See Bills and Notes.

Alteration of, see Alteration of Instruments. Parol evidence to vary, see Evidence, § 8.

CHILDREN.

See Bastards; Guardian and Ward; Infants. Contributory negligence of, see Negligence, §§ 3, 4.

Employment of, see Master and Servant, § 11. Injuries to by operation of street railroad, see Street Railroads, § 2.

CHOSE IN ACTION.

Assignment, see Assignments.

CITIES.

See Municipal Corporations.

CITIZENS.

Equal protection of laws, see Constitutional Law, § 4.

Privileges and immunities, see Constitutional Law, § 3.

*Point annotated. See syllabus.

CIVIL RIGHTS.

See Constitutional Law, §§ 3, 4.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against county, see Counties, § 5.

Against estate of decedent, see Executors and Administrators, § 3.

Against estate of insolvent, see Insolvency, § 1.

CLOUD ON TITLE.

See Quieting Title.

Jurisdiction of equity to restrain sale as, see Injunction, § 2.

CODICIL.

To will, effect as revocation, see Wills, § 3.

COLLATERAL AGREEMENT.

Parol evidence, see Evidence, § 8.

COLLATERAL ATTACK.

On acknowledgment of deed, see Acknowledgment, § 1.

On execution sale, see Execution, § 4.

On judgment, see Judgment, § 7.

COLLATERAL SECURITY.

See Pledges.

COLLECTION.

Of estate of decedent, see Executors and Administrators, § 2.

Of taxes, see Taxation, § 2.

COLLEGES AND UNIVERSITIES.

Validity of note to, see Bills and Notes, § 1.

COLOR OF TITLE.

To sustain adverse possession, see Adverse Possession.

COMBINATIONS.

See Conspiracy.

COMITY.

Between courts, see Courts, § 5.

COMMERCE.

Carriage of goods and passengers, see Carriers. Inspection of merchandise, see Inspection.

§ 1. Subjects of regulation.

Where the original packages containing dairy products consisting of interstate shipments are broken, and the products are sold in different packages from those in which they were shipped into the state, the transactions are changed from interstate to intrastate commerce, and become subject to state laws.—City of St. Louis v. Wortman (Mo.) 520.

Sales of dairy products, consisting of interstate shipments sold in the original unbroken packages, are governed by the acts of Congress and not by state laws, and hence are not subject to a city ordinance prohibiting the use in such products of formaldehyde or other foreign substance or preservative.—City of St. Louis v. Wortman (Mo.) 520.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

Railroad commission, see Railroads, §§ 4, 5. To take testimony, see Depositions.

COMMISSIONERS.

Highway commissioners, see Highways, § 1. Mandamus to commissioner of general land office, see Mandamus, § 3.

COMMISSIONS.

Of broker, see Brokers, § 2.

Of executor or administrator, see Executors and Administrators, § 6.

Of receiver, see Receivers, § 4.

COMMITMENT.

On conviction of crime, see Criminal Law, § 45.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

Dedication, see Dedication, § 1.

Indictment under, see Indictment and Information, § 1.

Limitations affecting common law actions, see Limitation of Actions, § 1.

Right of action for death, see Death, § 1.

*The courts of this country are under no obligation to follow the mutations of decisions or new views announced by the English courts as to what was the law of that country prior to the independence of the colonies.—Davis v. Stouffer (Mo. App.) 282.

COMMON SCHOOLS.

See Schools and School Districts, § 1.

COMMUNITY PROPERTY.

See Husband and Wife, § 6.

COMPENSATION.

Of particular classes of officers or other persons.

See Brokers, § 2; Executors and Administrators, § 6; Physicians and Surgeons; Receivers, § 4.

Attorney, see Attorney and Client, § 4.

Servant, see Master and Servant, § 2.

COMPETENCY.

Of evidence in civil actions, see Evidence, § 3.

Of evidence in criminal prosecutions, see Criminal Law, § 6.

*Point annotated. See syllabus.

Of experts as witnesses, see Evidence, § 9.
 Of fellow servant, see Master and Servant, § 6.
 Of juror, see Jury, § 8.
 Of witnesses in general, see Witnesses, § 1.

COMPLAINT.

In civil actions, see Pleading, § 2.
 In criminal prosecutions, see Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Payment.

Evidence of admission, see Evidence, § 5.

A stipulation for the settlement of certain consolidated actions by a widow to recover dower *held* not to confer on her a fee-simple title to the lands awarded to her, but only a life estate.—*Perry v. Dance* (Ky.) 911.

*Evidence *held* to support a finding that no compromise and settlement of a suit was made.—*Dotson v. Carter* (Ky.) 1116.

COMPUTATION.

Of period of limitation, see Limitation of Actions, § 2.
 Of time, see Time.

CONCEALED WEAPONS.

See Weapons.

CONCLUSION.

Of witness, see Evidence, § 9.

CONCLUSIVENESS.

Of former judgment in action against surety, see Principal and Surety, § 3.

CONCURRENT JURISDICTION.

Of courts, see Courts, § 5.

CONCURRING NEGLIGENCE.

Of master and servant, see Master and Servant, § 6.

CONDITIONAL SALES.

See Sales, § 7.

CONDITIONS.

In insurance policies, see Insurance, §§ 4-6.

CONDONATION.

Of grounds for divorce, see Divorce, § 2.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see Witnesses, § 1.

Of parties to contract or conveyance, see Fraudulent Conveyances, § 1.

CONFIRMATION.

Of sale of decedents' land, see Executors and Administrators, § 4.

CONFLICT OF LAWS.

As to pledges, see Pledges.

Conflicting jurisdiction of courts, see Courts, § 5.

CONNECTING CARRIERS.

See Carriers, §§ 2, 3.

CONSIDERATION.

Of contract in general, see Contracts, § 1.

Of bill of exchange or promissory note, see Bills and Notes, § 1.

CONSOLIDATION.

Of actions, see Action, § 2.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see Criminal Law, § 6.
 To commit homicide, see Homicide, § 6.

§ 1. Civil liability.

Evidence *held* admissible under allegations that defendants conspired with others to defraud and deceive the general public and plaintiff in particular.—*Witliff v. Spreen* (Tex. Civ. App.) 98.

§ 2. Criminal responsibility.

*The existence of a conspiracy composed of only two persons cannot be established by evidence of the acts or declarations of one in the absence of the other.—*Cumnock v. State* (Ark.) 147.

In a prosecution for conspiracy, the conviction of both conspirators *held* necessary to sustain the indictment.—*Cumnock v. State* (Ark.) 147.

In a prosecution for conspiracy, an instruction as to the effect of statements and acts of co-conspirators *held* erroneous both in its original and modified form.—*Cumnock v. State* (Ark.) 147.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See Building and Loan Associations; Courts, § 3; Drains, § 2; Executors and Administrators, § 3; Food; Homestead, §§ 1, 3; Judges, § 2; Jury, § 1; Licenses, § 1; Municipal Corporations, §§ 6, 11; States, § 1.

Enactment and validity of statutes, see Statutes, § 1.

Subjects and titles of statutes, see Statutes, § 2.

§ 1. Construction, operation, and enforcement of constitutional provisions.

*Where a Constitution re-enacts in the same words provisions which it supersedes, it is presumed that no change of law was intended.—*Pittman v. Byars* (Tex. Civ. App.) 102.

*Where a statute or Constitution, after having been construed, is re-enacted without mate-

*Point annotated. See syllabus.

rial change, such construction becomes a part thereof.—*Pittman v. Byars* (Tex. Civ. App.) 102.

*Where language similar to that in a present Constitution is found in former Constitutions, it is presumed that it was intended to use such language in the sense previously given to it by the courts.—*Pittman v. Byars* (Tex. Civ. App.) 102.

§ 2. Distribution of governmental powers and functions.

The Legislature may determine benefits or assessments to be placed on lands in districts which it forms for public improvement, or it may delegate that duty to an inferior tribunal, and when that duty is performed by the inferior tribunal it is an agency carrying out the legislative will.—*Caton v. Western Clay Drainage Dist.* (Ark.) 145.

§ 3. Privileges or immunities, and class legislation.

Acts 20th Leg. p. 217, c. 111, imposing an occupation tax on those purchasing assignments of unearned wages, *held* violative of Const. U. S. Amend. 14, as a restraint of trade and as denying equality before the law.—*Owens v. State* (Tex. Cr. App.) 1075.

§ 4. Equal protection of laws.

The classification made by Act May 1, 1905, providing for the protection of mechanics constructing and repairing railroad equipment, *held* not violative of the constitutional provision guaranteeing to all the equal protection of the laws.—*St. Louis, I. M. & S. Ry. Co. v. State* (Ark.) 150.

§ 5. Due process of law.

*Act May 23, 1907 (Acts 1907, pp. 890-910), relating to drainage assessments in certain portions of Clay county, *held* to comply with the due process of law requirement of the Constitution.—*Caton v. Western Clay Drainage Dist.* (Ark.) 145.

*A judgment by default against plaintiffs at a term after the term at which they were dismissed from the case *held* void.—*Liddell v. Landau* (Ark.) 1085.

A city order for the original construction of a city improvement at the cost of abutting owners *held* not to deprive such owners of their property without due process of law.—*Guilfoyle's Ex'r v. City of Maysville* (Ky.) 666.

A judgment, compelling a water company to construct necessary pipes to supply water to consumers, *held* not objectionable, as the taking of its property without due process of law.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

CONSTRUCTIVE TRUSTS.

See Trusts, § 1.

CONTEMPT.

§ 1. Acts or conduct constituting contempt of court.

Filing of a motion suggesting the disqualification of a judge to try a case *held* not a contempt.—*Johnson v. State* (Ark.) 143.

Filing and presenting motions thought to be made to vex or delay *held* not contemptuous.—*Johnson v. State* (Ark.) 143.

§ 2. Power to punish and proceedings therefor.

On certiorari to review a conviction for contempt committed in a chancellor's presence, it will be conclusively presumed that the chancellor

recited in his judgment all the facts constituting the alleged contempt.—*Johnson v. State* (Ark.) 143.

CONTEST.

Of election, see Elections, § 3.

CONTINGENT REMAINDERS.

Creation, see Wills, § 5.

CONTINUANCE.

Assignment of errors to rulings on motion for, see Appeal and Error, § 8.

In criminal prosecution, see Criminal Law, § 7.

*Refusal of continuance to take plaintiff's deposition, which he had refused to give, *held* error (Civ. Code Prac. § 537).—*Western Union Tel. Co. v. Williams* (Ky.) 651.

*A trial court's discretion as to granting continuances is judicial, and not arbitrary.—*Sun Ins. Office v. Stegar* (Ky.) 922.

*In an action on an accident policy, the court *held* not to have abused its discretion in denying defendant's motion for a continuance for the absence of a witness.—*Continental Casualty Co. v. Semple* (Ky.) 1122.

The court may, on the application of a defendant for a continuance after the allowance of an amendment to the petition, call on defendant to show that he is not prepared to meet the new issues tendered, which showing may be made either by affidavit or oral testimony.—*Mangelsdorf Bros. Co. v. Harnden Seed Co.* (Mo. App.) 15.

A continuance should not be granted to a party because of the allowance of an amendment to the pleading of the adverse party where the party has prepared himself to meet the new issues.—*Mangelsdorf Bros. Co. v. Harnden Seed Co.* (Mo. App.) 15.

*A continuance to obtain testimony of absent witnesses is properly denied, where it does not appear with reasonable certainty that they would testify to any fact material to any issue.—*Hyman v. Grant* (Tex.) 1042.

*A continuance *held* properly refused, because the proposed testimony would have shown no defense.—*Hyman v. Grant* (Tex.) 1042.

*A continuance to obtain testimony of an absent witness to explain a lease will not be granted, where the lease is not in evidence, since the testimony would not be admissible.—*Hyman v. Grant* (Tex.) 1042.

*Refusal of a continuance to defendants on account of absent testimony *held* error.—*Witliff v. Spreen* (Tex. Civ. App.) 98.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

Cancellation, see Cancellation of Instruments.

Conclusiveness of judgment, see Judgment, § 10.

Mandamus to compel performance, see Mandamus, § 3.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of customs or usages, see Customs and Usages.

Parol or extrinsic evidence, see Evidence, § 8.

Reformation, see Reformation of Instruments.

Specific performance, see Specific Performance.

Subrogation to rights or remedies of creditors, see Subrogation.

*Point annotated. See syllabus.

Contracts of particular classes of persons.

See Attorney and Client, § 2; Carriers, §§ 2, 5, 6; Corporations, § 4; Counties, § 3; Infants, § 3; Master and Servant; Municipal Corporations, §§ 3, 6; Schools and School Districts, § 1.

Married women, see Husband and Wife, § 3.

Contracts relating to particular subjects.

See Intoxicating Liquors, § 5; Marriage; Mines and Minerals, § 1.

Carriage of live stock, see Carriers, § 3.

Construction of railroad, see Railroads, § 3.

Employment of insurance agents, see Insurance, § 1.

Employment of teachers, see Schools and School Districts, § 1.

Ground for mechanics' liens, see Mechanics' Liens, § 1.

Standing timber, see Logs and Logging.

Transportation of goods, see Carriers, § 2.

Transportation of passengers, see Carriers, §§ 5, 6.

Particular classes of express contracts.

See Bailment; Bills and Notes; Covenants; Depositaries; Indemnity; Insurance; Partnership; Sales.

Agency, see Principal and Agent.

Bills of lading, see Carriers, § 2.

Employment, see Master and Servant.

Leases, see Landlord and Tenant.

Marriage settlements, see Husband and Wife, § 2.

Sales of realty, see Vendor and Purchaser.

Stipulations in actions, see Stipulations.

Suretyships, see Principal and Surety.

Particular classes of implied contracts.

See Contribution; Use and Occupation; Work and Labor.

Particular modes of discharging contracts.

See Compromise and Settlement; Payment.

§ 1. Requisites and validity.

*A compromise of a doubtful claim is a good consideration to uphold a contract.—Reinecke v. Bailey (Ky.) 569.

*Where an oral contract for the sale of stone was completed, except that it was not reduced to writing as contemplated, it was enforceable, though not reduced to writing and delivered before breach.—Hollerbach & May Contract Co. v. Wilkins (Ky.) 1126.

Under a written agreement between plaintiff and a railroad company with reference to the sale of bonds, *held*, the original contract for plaintiff's services was not a mere order for bonds which defendant had agreed to deliver under former negotiations.—Donaldson Bond & Stock Co. v. Houck (Mo.) 242.

§ 2. Construction and operation.

*A contract must be construed as a whole.—Irwin v. Nichols, Dean & Gregg (Ark.) 209.

Words omitted by inadvertence from a written contract may be supplied by construction, if the context shows what words are omitted.—Irwin v. Nichols, Dean & Gregg (Ark.) 209.

In a letter relied on as a contract of employment, *held*, that the omission of the word "not" was a plain inadvertence or clerical mispension.—Irwin v. Nichols, Dean & Gregg (Ark.) 209.

The intention of the parties to a contract must be arrived at from a consideration of the nature and purpose of the contract, as shown by the language used.—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

*Where there is a conflict between the written and printed portions of a contract, the former controls.—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

A contract for railroad construction work construed, and *held*, that the contractor could not demand more bonds and stocks of the railroad company than the railroad commission authorized.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 3. Performance or breach.

*Defendant having broken a contract sued on before the time arrived for plaintiff to execute a bond to secure performance, plaintiff was excused from tendering the bond.—Hollerbach & May Contract Co. v. Wilkins (Ky.) 1126.

*Defendant having notified plaintiff of his election not to accept performance of a contract, plaintiff was not bound to offer performance.—Hollerbach & May Contract Co. v. Wilkins (Ky.) 1126.

*Defendant *held* not justified in breaking a contract with plaintiff by a statement of its stenographer to its manager that plaintiff demanded the insertion of a modifying clause.—Hollerbach & May Contract Co. v. Wilkins (Ky.) 1126.

*One prevented from performing a contract by refusal of another to have it performed *held* entitled to recover.—Walker v. Lundstrum (Mo. App.) 1.

*Nonperformance of contract to cultivate land *held* not excused by impossibility of performance because of excessive rain.—Gunter v. Robinson (Tex. Civ. App.) 134.

§ 4. Actions for breach.

In an action on a contract for services, a declaration of plaintiff's right to recover, providing the suit was not brought before the work was to have been completed, *held* appropriate and not applicable merely to a case on quantum meruit.—Walker v. Lundstrum (Mo. App.) 1.

CONTRADICTION.

Of record, see Appeal and Error, § 7.

Of witness, see Witnesses, § 3.

CONTRIBUTION.

*The rule that there is no right of contribution between tort-feasors does not apply between a municipal corporation and another, where a sidewalk is rendered unsafe by their joint wrongdoing.—City of Bowling Green v. Bowling Green Gaslight Co. (Ky.) 917.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 3.

Of passenger, see Carriers, § 9.

Of person injured by operation of street railroad, see Street Railroads, § 2.

Of person killed by operation of railroad, see Railroads, § 9.

Of servant, see Master and Servant, §§ 8, 11.

CONVERSION.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

Contracts to convey, see Vendor and Purchaser, § 3.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, § 1.

Conveyances by or to particular classes of persons.

See Guardian and Ward, § 1; Receivers, § 3.

Married women, see Husband and Wife, § 3.

*Point annotated. See syllabus.

Conveyances of particular species of, or estates or interests in, property.

See Easements, § 1; Homestead, § 2.

Particular classes of conveyances.

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Mortgages.

Partition deeds, see Partition, § 1.

CORONERS.

Proceedings at inquest as evidence on trial for homicide, see Homicide, § 8.

CORPORATIONS.

Action for fraud inducing purchase of corporate stock, see Fraud, § 2.

Mandamus to, see Mandamus, § 2.

Plea to jurisdiction of prosecution against corporation, see Criminal Law, § 5.

Taxation of foreign corporations, see Taxation, § 1.

Venue of offense by corporation, see Criminal Law, § 2.

Venue of penal action against, see Venue, § 1.

Particular classes of corporations.

See Building and Loan Associations; Municipal Corporations; Railroads; Street Railroads.

Insurance companies, see Insurance.

Surety companies, see Principal and Surety, § 1.

Telegraph and telephone companies, see Telegraphs and Telephones.

Water companies, see Waters and Water Courses, § 3.

§ 1. Capital, stock, and dividends.

*Under the facts the purchaser *held* entitled to rescission for mutual mistake.—Neale v. Wright (Ky.) 1115.

The cancellation of a certificate of stock issued to a subscriber, who had paid only 5 per cent. of the par value of the stock and the issuance in lieu thereof of a certificate for full paid-up stock for the amount that had been paid, *held* in fraud of the creditors of the corporation.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

One subscribing for corporate stock *held* not entitled to rely upon certain representations made by the corporation's representatives.—Gough Mill & Gin Co. v. Looney (Tex. Civ. App.) 782.

§ 2. Members and stockholders.

*An action to recover corporate property must be brought in the name of the corporation, and cannot be maintained by stockholders, unless the corporation or its directors decline to sue.—Reinecke v. Bailey (Ky.) 569.

While the shareholders are in a sense separate from the corporation, equity will regard them in many transactions for practical purposes as being the same.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 3. Officers and agents.

*The president of a corporation *held* subject to the statutory liability for debts imposed by Kirby's Dig. § 859, where no annual statement required by such section had been filed during several years of the corporation's existence.—

Mississippi Valley Const. Co. v. Chas. T. Abeles & Co. (Ark.) 894.

*The officers of a corporation hold its funds as trustees for the stockholders and creditors, and it is a breach of the trust for a trustee to pay his own debt out of the trust fund and leave other debts unpaid.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

§ 4. Corporate powers and liabilities.

*If a lumber company acted under a contract made by its president and manager in his own name, it is liable, he being also bound.—Bryant Lumber Co. v. Crist (Ark.) 965.

*A stockholder of a corporation *held* without power to settle with the manager thereof for the latter's embezzlement of corporate funds.—Reinecke v. Bailey (Ky.) 569.

Under Cr. Code Prac. § 11, and Ky. St. 1903, § 4028, a penal action *held* to lie for the penalty imposed on a corporation by section 4087 for failing to make required reports.—Commonwealth v. Morrell Refrigerator Car Co. (Ky.) 860.

*A corporation's contract of guaranty, ultra vires under Rev. St. 1889, § 2508, *held* without consideration, and so unenforceable.—Ellet-Kendall Shoe Co. v. Western Stores Co. (Mo. App.) 4.

§ 5. Insolvency and receivers.

Where a creditor of an insolvent has received a preference, upon repayment thereof the creditor will be remitted to the notes and securities formerly held for the debt.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

In an action to recover a preference by an insolvent corporation, *held* not material that the preferred creditor had no notice of the corporation's intent to prefer him.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

A payment by an insolvent corporation *held* to be an illegal preference.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

In an action to recover a preference by an insolvent corporation to a creditor bank, the corporation and the bank *held* the only necessary defendants.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

Where a suit is brought in time against an insolvent corporation and a creditor to recover a preference, it will not be defeated if it afterward appears that others have an interest in the transfer which would make them proper defendants.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

A shareholder by whose dereliction the assets of an insolvent corporation have been depleted *held* not entitled in equity to share as a creditor equally with other creditors of the corporation.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 6. Foreign corporations.

*Act May 13, 1907, p. 744, *held* to require foreign corporations to pay fees based on the authorized and subscribed capital stock, though the stock has not been paid for.—London & Lancashire Fire Ins. Co. v. Ludwig (Ark.) 197.

A complaint, in an action by a foreign corporation against the Secretary of State for fees paid under protest under Act May 13, 1907, p. 744, *held* bad on demurrer in view of Kirby's Dig. §§ 3447-3449.—London & Lancashire Fire Ins. Co. v. Ludwig (Ark.) 197.

*The allegation in the petition in replevin by a former corporation that it exists under the laws of Illinois, while the chattel mortgage under which it claims title shows that it exists under the laws of Ohio, does not defeat the action.—Brunswick-Balke-Collender Co. v. Kraus (Mo. App.) 20.

*Point annotated. See syllabus.

CORPUS DELICTI.

Instructions as to, see Criminal Law, § 12.

CORRECTION.

Of bill of exceptions, see Exceptions, Bill of, § 2.
Of record on appeal or writ of error, see Appeal and Error, § 7.

CORROBORATION.

Of witness in general, see Witnesses, § 3.

COSTS.

In proceeding to establish drain, see Drains, § 1.

§ 1. Nature, grounds, and extent of right in general.

*Where a plaintiff obtains a substantial recovery by the suit, she is entitled to costs.—*Brown v. Nelms* (Ark.) 373.

Under Rev. St. 1899, § 10,116 (Ann. St. 1906, p. 408), providing for the allowance of a stenographer's fee in cases tried, and section 690 (page 700), defining what constitutes a trial, *held*, that the entry of a judgment on a stipulation was not a trial.—*Barber Asphalt Pav. Co. v. Field* (Mo. App.) 3.

§ 2. Security for payment.

*The court cannot arbitrarily dismiss a case for plaintiff's failure to pay the cost of a former action against the same defendants dismissed without prejudice.—*Wilson v. Sullivan* (Ky.) 1120.

§ 3. On appeal or error, and on new trial or motion therefor.

A justice's docket *held* to show a valid tender so that on plaintiff's failure to recover more than the sum tendered on an appeal to the circuit court costs should have been taxed against him.—*Shafstall v. Downey* (Ark.) 176.

CO-TENANCY.

See Tenancy in Common.

COUNCIL.

See Municipal Corporations, § 2.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Municipal Corporations.

Adverse possession of county lands, see Adverse Possession, § 1.

County courts, see Courts, § 3.

Judicial notice of places in, see Evidence, § 1.
Laws regulating selection of juries in certain counties, see Jury, § 2.

Liability of county judge for failure to require guardian to make settlement, see Judges, § 1.
Presumptions as to county warrants, see Deeds, § 2.

Recitals in deed to county lands, see Deeds, § 3.

§ 1. Creation, alteration, existence, and political functions.

The Legislature can attach an unorganized county to several organized counties for different purposes, as convenience may suggest.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

§ 2. Government and officers.

Acts of county court, though irregular, *held* binding on the county, if acquiesced in, as completely as if regular.—*Sparks v. Jasper County* (Mo.) 265.

The courts are slow to imply powers not expressly given by statute, and no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created.—*Blades v. Hawkins* (Mo. App.) 979.

While the law is strict in limiting the authority of the county courts, they may exercise certain incidental powers germane to the powers expressly delegated and indispensable to their performance.—*Blades v. Hawkins* (Mo. App.) 979.

§ 3. Property, contracts, and liabilities.

Under Ky. St. 1903, §§ 127, 1834, 1840, the fiscal court of a county *held* authorized to maintain forcible detainer for the recovery of a room in the courthouse, notwithstanding section 3948.—*Owen County v. Greene* (Ky.) 854.

The letting of a county bridge contract, which it had been advertised would be let at the site of the proposed bridge a half a mile therefrom, *held* not a compliance with the statute.—*Sparks v. Jasper County* (Mo.) 285.

Where a county court in contracting complied with Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), and written acceptance of the employment was filed, *held*, that the contract was properly executed, though duplicate copies were not executed nor a copy filed as required by section 6760 (Ann. St. 1906, p. 3328).—*Blades v. Hawkins* (Mo. App.) 979.

There is no statutory authority given to county courts to employ an expert to audit and examine the books of the county and its officers.—*Blades v. Hawkins* (Mo. App.) 979.

A county court under the power and duty imposed upon it by Rev. St. 1899, § 6781, c. 97 (Ann. St. 1906, p. 3334), relating to counties, *held* to have implied power to employ an expert to examine the accounts of county officers.—*Blades v. Hawkins* (Mo. App.) 979.

Under Rev. St. 1895, art. 794, requiring county lands to be sold at public auction, a sale made in any other manner does not pass title.—*Hardin County v. Nona Mills Co.* (Tex. Civ. App.) 822.

Under Rev. St. 1895, art. 794, a deed to county land *held* to pass the beneficial ownership or equitable title, though defectively acknowledged.—*Hardin County v. Nona Mills Co.* (Tex. Civ. App.) 822.

§ 4. Fiscal management, public debt, securities, and taxation.

Under Kirby's Dig. §§ 7627, 7628, relating to school directors' warrants, *held*, that the county treasurer was not compelled to pay a judgment based upon a warrant of the school directors, where no warrant had been drawn for its payment.—*Ferrell v. Laughinghouse* (Ark.) 894.

Order calling in county warrants for cancellation and reissue *held* not invalid because the sheriff's return did not show that a copy of the order had been posted at the election precincts in each township of the county.—*Chicago, R. I. & P. Ry. Co. v. Perry County* (Ark.) 977.

Order calling in county warrants for reissue *held* not invalid because not showing that a similar order had not been made within a year.—*Chicago, R. I. & P. Ry. Co. v. Perry County* (Ark.) 977.

Rev. St. 1899, § 1778 (Ann. St. 1906, p. 1246), providing that the county court or some judge thereof, upon settlement of county officers with the county, shall ascertain by actual examination and count the amount in the hands of such

*Point annotated. See syllabus.

officers, *held* to relate to the examination when they settle with the county court, and has no application to the examination at other times of accounts of such officials.—*Blades v. Hawkins* (Mo. App.) 979.

§ 5. Claims against county.

County *held* not entitled to recover amount paid for bridges on the ground that contracts were illegally let without a return of the bridges.—*Sparks v. Jasper County* (Mo.) 265.

§ 6. Actions.

Evidence in an action against a county on bridge contracts *held* to support a finding that the bridge commissioner and bidders who accompanied him to a point a half a mile from the site of the proposed bridge where the contract was let, if at all, did not know that there were any other bidders at the site of the proposed bridge at which it had been advertised the contract would be let.—*Sparks v. Jasper County* (Mo.) 265.

COUNTY BOARD.

See Counties, § 2.

COURSES AND DISTANCES.

See Boundaries, § 1.

COURTS.

Contempt of court, see Contempt.

Judges, see Judges.

Justices' courts, see Justices of the Peace.

Mandamus to inferior courts, see Mandamus, § 2.

Prohibition to police judge, see Prohibition, § 1.

Province of court and jury, see Trial, § 6.

Removal of action from state court to United States court, see Removal of Causes.

Review of decisions, see Appeal and Error.

Right to trial by jury, see Jury, § 1.

Secondary evidence of proceedings in probate court, see Evidence, § 4.

Jurisdiction of particular actions or proceedings.

Election contest, see Elections, § 3.

For loss of or injury to shipment, see Carriers, § 2.

To sell decedent's land, see Executors and Administrators, § 4.

Special jurisdictions and particular classes of courts.

See Criminal Law, § 1.

§ 1. Nature, extent, and exercise of jurisdiction in general.

*Justices' proceedings must show the facts bringing a case within their jurisdiction, or the whole proceeding is void.—*Little Rock Brick Works v. Hoyt* (Ark.) 880.

*Circuit courts being courts of general jurisdiction, it will be presumed, in the absence of a showing to the contrary, that they have jurisdiction of defendant.—*Richardson v. Louisville & N. R. Co.* (Ky.) 582.

§ 2. Establishment, organization, and procedure in general.

*Decisions of the federal Supreme Court upon questions as to due process of law are conclusive on state courts.—*Liddell v. Landau* (Ark.) 1085.

The fact that the instructions given in one case were approved on appeal does not justify the conclusion that they are applicable to another case.—*Illinois Cent. R. Co. v. France's Adm'r* (Ky.) 929.

*Where a decision turns on the construction of the common law of a sister state, the court

will follow its own precedents.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*The Court of Civil Appeals will follow a decision of the Supreme Court directly in point, though the soundness of the decision is questionable.—*Williams v. Keith* (Tex. Civ. App.) 948.

§ 3. Courts of limited or inferior jurisdiction.

Const. §§ 109, 135, 143, repeal so much of a charter of a district as provides for a police court thereof.—*Morris v. Randall* (Ky.) 856.

Under Rev. St. 1899, §§ 1788, 4060 (Ann. St. 1906, pp. 1248, 2208), the circuit court has no jurisdiction of an appeal from the county court not taken within 10 days from rendition of judgment.—*Sidwell v. Jett* (Mo.) 56.

The allegation in an amended petition in an action against a carrier for damages to a shipment of cattle, filed in the county court on appeal from a justice's court *held* to oust the jurisdiction of the county court.—*Chicago, R. I. & G. Ry. Co. v. Crenshaw* (Tex. Civ. App.) 117.

§ 4. Courts of appellate jurisdiction.

The Court of Appeals *held* without jurisdiction of an appeal from a judgment for \$55.—*Otter Creek Lumber Co. v. Marritt* (Ky.) 855.

*The Supreme Court *held* to have jurisdiction of writ of error in garnishment proceedings ancillary to judgment of the district court though the amount involved was within the jurisdiction of the county court.—*Simmang v. Pennsylvania Fire Ins. Co.* (Tex.) 1044.

*The Court of Criminal Appeals has no jurisdiction of an appeal from denial of mandamus to compel a county attorney to institute a prosecution.—*Murphy v. Summers* (Tex. Cr. App.) 1070.

§ 5. Concurrent and conflicting jurisdiction, and comity.

Scope of review by Court of Appeals in action for killing stock, based on violation of Rev. St. 1899, §§ 1105, 1106 (Ann. St. 1906, pp. 945, 959), after the cause has been remanded from the Supreme Court, to which it was sent as involving a constitutional question, considered.—*Shell v. Missouri Pac. Ry. Co.* (Mo. App.) 39.

COVENANTS.

In insurance policies, see Insurance, § 5.

§ 1. Actions for breach.

*In an action by a grantee for breach of warranty, occasioned by third person recovering land claimed by the grantee under a deed of the grantor, the court *held* required to confine the evidence of the value of the land lost to the time of the making of the deed.—*Sullivan v. Hill* (Ky.) 564.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

Of witness, see Witnesses, § 3.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Insolvency.

Remedies against surety, see Principal and Surety, § 3.

Subrogation to rights of creditor, see Subrogation.

*Point annotated. See syllabus.

CREDITORS' SUIT.

Conformity of judgment to pleading and proof, see Judgment, § 3.
Decisions reviewable, see Appeal and Error, § 1.
Remedies in cases of fraudulent conveyances, see Fraudulent Conveyances, § 3.

CRIMINAL LAW.

Bail, see Bail, § 1.
Competency of witnesses, see Witnesses, § 1.
Construction of criminal statutes, see Statutes, § 4.
Conviction of offense included in that charged, see Indictment and Information, § 4.
Grand jury, see Grand Jury.
Indictment, information, or complaint, see Indictment and Information.
Mandamus to compel institution of criminal prosecution, see Mandamus, § 2.
Penalties, see Penalties.

Particular offenses.

See Breach of the Peace; Bribery; Burglary; Conspiracy, § 2; Contempt; Embezzlement; Homicide; Larceny; Lotteries, § 2; Nuisance, § 2; Perjury; Rape; Robbery; Suicide; Trespass, § 3.
Against food laws, see Food.
Against liquor laws, see Intoxicating Liquors, §§ 3, 4.
Carrying weapons, see Weapons.

§ 1. Jurisdiction.

Under Cr. Code Prac. § 230, requiring the court to take the proceedings directed by sections 166 and 167 when it appears an offense was committed without the court's jurisdiction, and sections 166 and 167, requiring the proceedings, etc., to be transferred to the jurisdiction where the offense was committed, if a demurrer is sustained to the indictment because the offense was committed in another jurisdiction, or that fact appears upon trial, section 230 *held* applicable to prosecutions for misdemeanors in such cases, as well as to felonies, though section 166 was limited only to felonies.—*Gearhart v. Commonwealth* (Ky.) 572.

Where defendant was indicted in C. county for illegally selling liquors in that county, and, it appearing on the trial that the offense was committed in E. county, the cause was transferred to that circuit for trial, it was error to try defendant there upon the indictment found in C. county, and he should have been held to answer to an indictment in that county.—*Gearhart v. Commonwealth* (Ky.) 572.

§ 2. Venue.

In a prosecution for violating Ky. St. 1903, § 576, requiring all corporations to use the word "incorporated" after the corporate name, the circuit court of the county where defendant had its place of business *held* to have jurisdiction of the offense.—*Paracamph Co. v. Commonwealth* (Ky.) 587.

The clerk of the court to which the venue of a murder case was changed *held* properly directed to place his file mark on the indictment and transcript nunc pro tunc.—*Rice v. State* (Tex. Cr. App.) 299.

*Under a statute attaching an unorganized county to an organized county for "judicial purposes," the grand jury of the organized county has jurisdiction to indict for offenses committed in the unorganized county.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

§ 3. Former jeopardy.

*Where accused was acquitted of murder and convicted of manslaughter and the judgment reversed, he was not entitled, on a subsequent trial, to an instruction to acquit of man-

slaughter if the evidence showed the offense to have been murder.—*Burnett v. State* (Tex. Cr. App.) 74.

*Where a person is acquitted of a higher grade of an offense, such acquittal only bars a subsequent conviction for the degree of the offense for which he was acquitted or any higher grade.—*Burnett v. State* (Tex. Cr. App.) 74.

§ 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Exceptions, based on the insufficiency of the evidence to sustain a judgment of conviction, *held* properly preserved in the record and carried forward in a motion for new trial.—*Fort v. City of Brinkley* (Ark.) 1084.

Accused *held* entitled to show on trial *de novo* in the circuit court that a plea of guilty in justice court was obtained through duress.—*Holtman v. Commonwealth* (Ky.) 851.

A plea of guilty in justice court of disturbing the peace did not prevent accused from appealing to the circuit court, nor deprive her of the right to a trial *de novo* expressly under Cr. Code Prac. §§ 174, 366.—*Holtman v. Commonwealth* (Ky.) 851.

One appealing to the circuit court from a conviction of disturbing the peace on a plea of guilty *held* to have the right to introduce evidence to mitigate the punishment.—*Holtman v. Commonwealth* (Ky.) 851.

§ 5. Arraignment and pleas, and nolle prosequi or discontinuance.

The trial court's jurisdiction of a prosecution against a corporation for failure to indicate its corporate character in an advertisement, as required by statute, could not be raised by special demurrer, the record not showing defendant's place of business, but only by answer in the nature of a plea to the jurisdiction; but, when defendant's place of business thereafter appeared from the pleadings, the prosecution should have been dismissed.—*Paracamph Co. v. Commonwealth* (Ky.) 587.

*Under Code Cr. Proc. arts. 707-709, one accused of homicide cannot complain of the act of the county attorney in entering nol. pros. as to other persons indicted for the same homicide, on the ground that the nol. pros. left them without a guaranty of immunity from further prosecution, and that therefore he was deprived of the benefit of their untrammelled testimony.—*Hobbs v. State* (Tex. Cr. App.) 308.

§ 6. Evidence.

*Acts or declarations done or made by one conspirator after a conspiracy is formed, in furtherance or aid thereof, are admissible against the conspirators.—*Cummock v. State* (Ark.) 147.

*Evidence of acts or declarations of conspirators should not be admitted against accused until the fact of conspiracy is shown, or a prima facie case against all the conspirators made.—*Cummock v. State* (Ark.) 147.

In prosecution for being accessory to bribery, certain evidence as to similar acts *held* admissible to show that the crime charged was within the general scheme in which the similar acts testified to were included.—*State v. Dulaney* (Ark.) 158.

Principle that evidence of offenses or acts similar to the one charged in an indictment is competent for the purpose of showing knowledge, intent, or design *held* not an exception to nor in violation of the general rule that evidence of other crimes or offenses is inadmissible against a defendant charged with a particular crime.—*State v. Dulaney* (Ark.) 158.

On a trial for homicide, evidence of what accused stated to a physician over the telephone

*Point annotated. See syllabus.

held admissible.—*Chapman v. Commonwealth* (Ky.) 567.

Evidence of a conversation between accused and a witness while confined in separate cells *held* admissible against accused.—*Clark v. Commonwealth* (Ky.) 571.

The pardon of one convicted of crime is the best evidence, and oral testimony of its existence is properly excluded.—*Parson v. Commonwealth* (Ky.) 617.

*A safe rule is to limit as far as practicable the evidence to the very matter in hand, and to exclude admissions and testimony of extraneous offenses and controversies.—*Brown v. State* (Tex. Cr. App.) 80.

*In a trial for uxoricide by poisoning, the state *held* entitled to show declarations made by decedent in accused's absence.—*Rice v. State* (Tex. Cr. App.) 299.

*In a murder trial nonprofessional witnesses for the state were properly permitted to testify concerning decedent's sanity where defendant offered testimony tending to show that decedent was insane.—*Rice v. State* (Tex. Cr. App.) 299.

How a fountain syringe is ordinarily used by one accustomed to its use is not a proper subject for expert testimony.—*Rice v. State* (Tex. Cr. App.) 299.

*A physician *held* qualified to testify whether decedent died of strychnine poisoning.—*Rice v. State* (Tex. Cr. App.) 299.

*The rule as to the admissibility of a transcript of evidence given on a preliminary examination or former trial of one accused of crime is the same whether the witness giving the testimony is dead or is beyond the jurisdiction of the court.—*Hobbs v. State* (Tex. Cr. App.) 308.

*A question asked a witness in a homicide case *held* objectionable as calling for the opinion of the witness.—*Marsh v. State* (Tex. Cr. App.) 320.

*The fact that declarations of a conspirator in the absence of a co-conspirator were received in evidence before the evidence proving the conspiracy *held* immaterial.—*Proctor v. State* (Tex. Cr. App.) 770.

*Testimony of a person, who had measured tracks leading to the place where a deceased infant's body was found, that they corresponded with a pair of shoes found at the home of the person charged with the infant's death, *held* admissible, though the stick with which the tracks were measured was not produced.—*Cordes v. State* (Tex. Cr. App.) 943.

On trial of a woman for infanticide, where she consented to a physical examination during her incarceration after being advised by the physician that he would not examine her without her consent, the physician's testimony of her condition was admissible.—*Cordes v. State* (Tex. Cr. App.) 943.

*In an infanticide case, a portion of a blanket alleged to have been found wrapped around the deceased infant, and which a witness testified was similar to another portion found at accused's home, *held* admissible in evidence, though it had been washed and was white in color, while it was dirty and bloody when found.—*Cordes v. State* (Tex. Cr. App.) 943.

Statements made by a person accused of infanticide to a sheriff on investigating the case, but before she was arrested, *held* admissible.—*Cordes v. State* (Tex. Cr. App.) 943.

*In an infanticide case, witnesses were properly allowed to state the apparent pregnancy of accused shortly after the child's body was found, and their testimony did not constitute mere conclusions.—*Cordes v. State* (Tex. Cr. App.) 943.

*In a homicide case, it is permissible to ask medical experts hypothetical questions embracing practically all the evidence on the question.—*Cordes v. State* (Tex. Cr. App.) 943.

*In a manslaughter trial, *held* proper to allow a court reporter to state parts of accused's testimony at a former trial.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 7. Time of trial and continuance.

*Refusal to grant a continuance because of illness of one of the counsel of accused *held* not erroneous on the showing made.—*Howerton v. Commonwealth* (Ky.) 606.

*Where the prosecution admitted, to avoid a continuance, that an absent witness would, if present, testify to the facts as averred in the affidavit for a continuance, the prosecution might contradict the affidavit by other testimony and show its falsity.—*Howerton v. Commonwealth* (Ky.) 606.

*A continuance for absence of witness *held* properly denied where it appeared that the testimony desired was only cumulative.—*Burnett v. State* (Tex. Cr. App.) 74.

§ 8. Trial—Course and conduct of trial in general.

*Under Code Cr. Proc. art. 633, requiring defendant's presence in felony prosecutions and certain misdemeanor prosecutions, the temporary absence of accused from the courtroom during argument *held* not to violate the statute and not ground for reversal.—*Killman v. State* (Tex. Cr. App.) 92.

*The word "counsel," as used in Const. art. 1, § 10, authorizing an accused to be heard by himself or by counsel, or both, *held* to mean an advocate, etc., and not one not admitted to practice law.—*Harkins v. Murphy & Bolanz* (Tex. Civ. App.) 136.

§ 9. — Reception of evidence.

*The state need not put on the stand all the witnesses cognizant of the facts.—*Sanders v. State* (Tex. Cr. App.) 938.

§ 10. — Arguments and conduct of counsel.

*The argument of prosecuting attorney that testimony proved a fact against accused *held* not erroneous notwithstanding the charge of the court.—*Chapman v. Commonwealth* (Ky.) 567.

Prosecuting attorneys should see that justice is fairly meted out, and it is not a part of their duty to abuse accused in the hearing of the jury.—*Howerton v. Commonwealth* (Ky.) 606.

The argument of prosecuting attorney in a criminal case *held* reversible error.—*Howerton v. Commonwealth* (Ky.) 606.

*The refusal to discharge the jury because of the misconduct of the prosecuting attorney in his argument *held* not erroneous.—*Parson v. Commonwealth* (Ky.) 617.

*Certain argument of the prosecuting attorney *held* not prejudicial to accused.—*Parson v. Commonwealth* (Ky.) 617.

*In a criminal prosecution, remarks of counsel as to the effect of negro dives and the leniency of white juries in causing mobs *held* objectionable and prejudicial.—*State v. Cook* (Mo. App.) 710.

A statement by the district attorney to the court in the presence of the jury, *held* not objectionable as an allusion to defendant's former conviction.—*Burnett v. State* (Tex. Cr. App.) 74.

*In an infanticide case, *held* not error for the court to refuse to permit counsel to read to the jury a decision from a law report.—*Cordes v. State* (Tex. Cr. App.) 943.

*Point annotated. See syllabus.

*Improper argument of the prosecutor in an infanticide case *held* not reversible error, where the jury was admonished to disregard it and a special charge was given to the same effect.—*Cordes v. State* (Tex. Cr. App.) 943.

§ 11. — Province of court and jury in general.

*In a rape prosecution, a charge *held* not on the weight of the evidence.—*Sanders v. State* (Tex. Cr. App.) 988.

*An instruction in an infanticide case *held* properly refused as upon the weight of the evidence.—*Cordes v. State* (Tex. Cr. App.) 943.

*It is the court's duty in a criminal case to submit every defense and question of fact raised by any evidence, without reference to the court's opinion, or whether the testimony is cogent or slight.—*Coleman v. State* (Tex. Cr. App.) 1072.

§ 12. — Necessity, requisites, and sufficiency of instructions.

*An instruction as to the weight to be given to the confession of accused, made out of court, should follow Cr. Code Prac. § 240.—*Chapman v. Commonwealth* (Ky.) 567.

Where the corpus delicti is sufficiently established, an instruction in the language of Cr. Code Prac. § 240, as to the weight to be given to the confession of accused, should not be given.—*Chapman v. Commonwealth* (Ky.) 567.

*It is sufficient to instruct the jury that an argument of the prosecuting attorney is improper, and to direct the jury not to consider it.—*Parson v. Commonwealth* (Ky.) 617.

*Where accused was charged with killing decedent by cutting him, and the proof showed that the cutting was done by her son, instructions based on the idea that she did the cutting should not be given.—*Steely v. Commonwealth* (Ky.) 655.

*Instructions should present the law as warranted by the facts proved.—*Steely v. Commonwealth* (Ky.) 655.

*The court on the trial on an indictment charging that the act of killing was committed by defendant, who was aided and abetted by codefendant, need not designate either of them as principal or aider and abettor.—*Combs v. Commonwealth* (Ky.) 658.

A charge in a murder case *held* erroneous as shifting the burden of proof.—*Huddleston v. State* (Tex. Cr. App.) 64.

In a murder case, where the question of self-defense was involved, uncommunicated threats of decedent against accused were admissible to show whether or not decedent began the attack that ended in the homicide, and a charge limiting their effect to an ascertainment of the condition of decedent's mind at the time of the homicide was erroneous.—*Huddleston v. State* (Tex. Cr. App.) 64.

Where dying declarations were received in evidence, the court *held* required to charge that the jury should not consider them unless they were made voluntarily while decedent was sane and conscious of approaching death.—*Brown v. State* (Tex. Cr. App.) 80.

*Rule respecting the necessity for limiting the purposes for which evidence may be considered stated.—*Rice v. State* (Tex. Cr. App.) 299.

*A charge must be read as a whole, when passing on a criticism based on its failure to fully state the law.—*Proctor v. State* (Tex. Cr. App.) 770.

*On a trial for homicide, an instruction on the evidence in the case *held* not erroneous for using the phrase "will consider" it, instead of the phrase "may consider" it.—*Proctor v. State* (Tex. Cr. App.) 770.

*The refusal to charge on circumstantial evidence *held* not erroneous under the evidence.—*High v. State* (Tex. Cr. App.) 939.

*A requested charge in an infanticide case *held* properly refused as singling out testimony.—*Cordes v. State* (Tex. Cr. App.) 943.

*In passing upon an instruction, it should be considered together with the whole charge.—*Cordes v. State* (Tex. Cr. App.) 943.

§ 13. — Requests for instructions.

*Instructions covered by those given are properly refused.—*Rice v. State* (Tex. Cr. App.) 299; *Cornelius v. State* (Tex. Cr. App.) 1050.

*Special instructions, covered by the court's main charge, are properly refused.—*Cordes v. State* (Tex. Cr. App.) 943.

§ 14. — Custody, conduct, and deliberations of jury.

Under Code Cr. Proc. art. 735, requiring the recall of a witness and the restatement of his testimony, if the jury disagree thereon, a witness *held* to have been recalled by the jury as to the testimony which he was asked to restate, and that his testimony on recall was the same as his original testimony on direct examination.—*Killman v. State* (Tex. Cr. App.) 92.

§ 15. Judgment, sentence, and final commitment.

Evidence *held* insufficient to show that accused was insane at the time of his conviction of larceny.—*Smith v. Commonwealth* (Ky.) 615.

An opinion as to accused's insanity is entitled to little weight, where the witnesses are not experts, and do not testify to acts showing insanity.—*Smith v. Commonwealth* (Ky.) 615.

§ 16. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

Provisions of Kirby's Dig. §§ 2602-2604, relative to appeals by the state in criminal prosecutions, stated.—*State v. Dulaney* (Ark.) 158.

Under Cr. Code Prac. § 281, the action of the court in impaneling a special grand jury to investigate accused, which jury returned the indictment under which he was tried, *held* not reviewable.—*Ehrlick v. Commonwealth* (Ky.) 565.

An order requiring a bond to keep the peace *held* not appealable; Cr. Code Prac. § 347, being inapplicable.—*Lowe v. Commonwealth* (Ky.) 647.

§ 17. — Presentation and reservation in lower court of grounds of review.

*The court on appeal will not reverse a conviction for the improper argument of the prosecuting attorney not objected to in the trial.—*Chapman v. Commonwealth* (Ky.) 567.

§ 18. — Proceedings for transfer of cause, and effect thereof.

A justice of the peace had no jurisdiction to issue a commitment, where an appeal had been taken and a sufficient bond given.—*Ray v. Dodd* (Mo. App.) 2.

§ 19. — Record and proceedings not in record.

*Errors based on the improper argument of the prosecuting attorney must be shown by bill of exceptions.—*Bibb v. Commonwealth* (Ky.) 401.

*Errors of the court on the trial must be shown in the bill of exceptions.—*Bibb v. Commonwealth* (Ky.) 401.

*The trial court's action in refusing to permit a witness to answer questions is not reviewable, unless the record shows what the

*Point annotated. See syllabus.

testimony would have been.—*Leach v. Commonwealth* (Ky.) 595.

*Objectionable remarks of the prosecuting attorney in argument cannot be considered on appeal, where the record does not show the ruling of the trial court on the objection thereto.—*State v. Cook* (Mo. App.) 710.

*Questions as to the introduction of evidence and the state's failure to place certain witnesses on the stand cannot be considered on a criminal appeal, in the absence of a bill of exceptions in the record.—*Sanders v. State* (Tex. Cr. App.) 938.

Alleged error in the state's refusal to place on the stand as witnesses the father and mother of the prosecutrix in a rape prosecution, to corroborate her testimony, cannot be considered on appeal, in absence of a bill of exceptions.—*Sanders v. State* (Tex. Cr. App.) 938.

Alleged error in recalling the jury after retirement in a rape prosecution and altering the charge, stated as ground for a motion for a new trial, cannot be considered on appeal, where such ground is in no wise verified.—*Sanders v. State* (Tex. Cr. App.) 938.

*The overruling of a motion to quash a venire held not reviewable on the record.—*High v. State* (Tex. Cr. App.) 939.

*A bill of exceptions to a refusal to exclude testimony because it does not tend to support the charge is insufficient, where it does not state the testimony nor refer to the part of the record where it can be found.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*An objection that a witness is not an expert is insufficient to establish that fact in the appellate court.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 20. — Review.

*Where there is any evidence tending to show the guilt of accused, the case should go to the jury, and their finding of guilt will not be disturbed in the absence of prejudicial error of law.—*Foster v. Commonwealth* (Ky.) 563.

*Where there is any evidence of the guilt of accused, the weight thereof, together with the punishment within the limits as given in the court's instructions, are solely for the jury.—*Ehrlick v. Commonwealth* (Ky.) 565.

*The language of the trial court during the examination of a witness held not prejudicial to accused.—*Ehrlick v. Commonwealth* (Ky.) 565.

*On a trial for homicide, the introduction of evidence in rebuttal instead of in chief held not substantial error.—*Chapman v. Commonwealth* (Ky.) 567.

Under the Code, the court on appeal has no right to reverse a criminal case where there is any evidence tending to show the guilt of accused.—*Miller v. Commonwealth* (Ky.) 598.

*The exclusion of testimony that a witness for accused, impeached by proof of his conviction of a felony, had been pardoned by the Governor, held not prejudicial.—*Parson v. Commonwealth* (Ky.) 617.

*Under Cr. Code Prac. §§ 385-387, persons accused on a magistrate's warrant of threats to do violence held not entitled to complain because taken before the circuit judge.—*Lowe v. Commonwealth* (Ky.) 647.

The court, on review of the denial of a motion to quash an indictment, will presume, in the absence of any showing in the record, that the grand jury returning the indictment was composed of 12 men.—*State v. Vaughn* (Mo. App.) 728.

The court on review of the denial of a motion to quash an indictment on the ground

of the failure to appoint a foreman of the grand jury will presume, in the absence of any showing in the record, that the court appointed a foreman, and that the clerk omitted to record the appointment.—*State v. Vaughn* (Mo. App.) 728.

Under Code Cr. Proc. art. 785, providing that a witness may be recalled and required to re-state his testimony if the jury disagree upon the testimony, on the recall of a witness, if his testimony was different from his original testimony, the bill of exceptions should show the difference, if any, as it is presumed that the court acted correctly in admitting it, and that the restated testimony was the same as the original testimony.—*Killman v. State* (Tex. Cr. App.) 92.

The state's peremptory challenge of a juror held to render any irregularity in his summoning harmless.—*Rice v. State* (Tex. Cr. App.) 299.

*Under facts, held not prejudicial error to overrule a challenge to a juror for cause.—*Rice v. State* (Tex. Cr. App.) 299.

*In a murder trial any error in receiving particular testimony held harmless.—*Rice v. State* (Tex. Cr. App.) 299.

A judgment of conviction will be reversed where evidence erroneously admitted by the court may, when viewed in one light, prejudice the minds of the jury, though, considered in another light, it is harmless.—*Hobbs v. State* (Tex. Cr. App.) 308.

*The refusal to permit a witness called by accused to testify at whose instance he was first subpoenaed held harmless, in view of his subsequent testimony.—*Proctor v. State* (Tex. Cr. App.) 770.

*A finding of the jury on the testimony of an impeached witness cannot be disturbed on appeal.—*Cordes v. State* (Tex. Cr. App.) 943.

*In a manslaughter trial, held not prejudicial error to allow a physician to testify as to the course of the fatal bullet.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*On appeal from a conviction, held, that it would be assumed that the filing of the case in the court below, where alone it might be properly tried, was legal.—*Griffin v. State* (Tex. Cr. App.) 1066.

§ 21. — Determination and disposition of cause.

A criminal case should not be reversed for trivial or harmless errors.—*Blanton v. Commonwealth* (Ky.) 594.

Where defendant was convicted in two cases in the county court for selling liquor in violation of the local option law, but the clerk in entering judgment below failed to make the imprisonment assessed cumulative, held, that judgment could not be amended in the Court of Criminal Appeals so as to make the imprisonment cumulative.—*Killman v. State* (Tex. Cr. App.) 90.

*The Court of Criminal Appeals cannot refer to a statement of facts to supplement a bill of exceptions, unless the bill refers to it.—*Cornelius v. State* (Tex. Cr. App.) 1050.

CROPS.

Injuries to by flowage, see *Waters and Water Courses*, § 2.

Right of tenant to harvest after term, see *Landlord and Tenant*, § 3.

CROSS-EXAMINATION.

See *Witnesses*, § 2.

*Point annotated. See syllabus.

CURTESY.

See Dower.

*A husband has curtesy of trust as well as of legal estates and of an equity of redemption in mortgaged premises.—*Jackson v. Becktold Printing and Book Mfg. Co. (Ark.)* 161.

CUSTODY.

Of child, see Divorce, § 5.

Of jury, see Criminal Law, § 14; Trial, § 13.

CUSTOMS AND USAGES.

Customary law, see Common Law.

*Custom *held* admissible to add an incident not expressly embraced in a contract.—*Bowles v. Driver (Tex. Civ. App.)* 440.

DAMAGES.*Damages for particular injuries.*

See Assault and Battery, § 1; Death, § 1;

Libel and Slander, § 3; Nuisance, §§ 1, 2.

Breach by buyer of contract for sale of goods, see Sales, § 5.

Breach of contract for carriage of passenger, see Carriers, § 6.

Discharge from employment, see Master and Servant, § 1.

Failure of carrier to furnish cars, see Carriers, § 2.

Injuries to passenger, see Carriers, § 8.

Negligent transmission of telegram, see Telegraphs and Telephones, § 1.

Recovery in particular actions or proceedings. See Trover and Conversion, § 2.

§ 1. Grounds and subjects of compensatory damages.

*A cause of action *held* not to lie in favor of a woman for suffering resulting from fright, from an assault on a third person who occupied a room in the woman's house.—*Reed v. Ford (Ky.)* 600.

*No recovery can be had for injuries resulting from mere fright caused by the negligence of another.—*Reed v. Ford (Ky.)* 600.

*In an action for breach of contract to furnish stone to defendant, plaintiff *held* entitled to recover the profit he would have made had he been permitted to carry out the contract.—*Hollerbach & May Contract Co. v. Wilkins (Ky.)* 1126.

*Damages from breach of contract must be minimized so far as may be without sacrifice of a substantial right.—*Hollerbach & May Contract Co. v. Wilkins (Ky.)* 1126.

*When damages for mental suffering unconnected with a physical injury may be recovered stated.—*Carter v. Oster (Mo. App.)* 995.

*The rule that mental suffering cannot be taken into consideration in an action for tortious injury to property or for breach of contract *held* subject to exceptions.—*Carter v. Oster (Mo. App.)* 995.

*In an action sounding in tort, the jury *held* authorized to award damages for mental suffering.—*Carter v. Oster (Mo. App.)* 995.

*In a suit for damages to cattle by delay, evidence that defendant's agent offered to permit plaintiff to unload the cattle and wait for transportation until the next day *held* admissible.—*Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.)* 1030.

§ 2. Exemplary damages.

*The element of willfulness or conscious indifference to consequences from which malice

may be inferred is necessary to sustain an action for punitive damages.—*St. Louis Southwestern Ry. Co. v. Myzell (Ark.)* 203.

*In an action for wrongful ejection of a passenger from a car, accompanied by abusive conduct on the part of the conductor, a verdict of \$250 punitive damages *held* not excessive.—*White v. Metropolitan St. Ry. Co. (Mo. App.)* 278.

§ 3. Measure of damages.

*Recovery can be had for impairment of earning capacity resulting from negligent personal injury.—*Dallas Consol. Electric St. Ry. Co. v. Motwiller (Tex. Civ. App.)* 794.

§ 4. Inadequate and excessive damages.

*A verdict in personal injury action *held* not excessive.—*Chicago, R. I. & P. Ry. Co. v. Lannon (Ark.)* 177; *Barree v. City of Cape Girardeau (Mo. App.)* 724; *Robinson v. St. Louis & S. F. R. Co. (Mo. App.)* 730.

*A verdict for more than \$1,000, in an action for personal injuries, *held* excessive.—*St. Louis, I. M. & S. Ry. Co. v. Brabbzson (Ark.)* 222.

*A verdict for plaintiff for \$18,000 in an action for injuries to a passenger *held* excessive.—*Chlanda v. St. Louis Transit Co. (Mo.)* 249.

§ 5. Pleading, evidence, and assessment.

An instruction as to damages as to injuries to a passenger *held* not objectionable in so far as it related to compensatory damages, but erroneous in respect to exemplary damages.—*St. Louis Southwestern Ry. Co. v. Myzell (Ark.)* 203.

*In an action for personal injuries, the jury *held* properly permitted to determine from their own general knowledge what the medical services would cost plaintiff.—*St. Louis, I. M. & S. Ry. Co. v. Stell (Ark.)* 876.

Statement of evidence admissible on the matter of mental anguish.—*Western Union Telegraph Co. v. Williams (Ky.)* 651.

Instructions as to parts injured *held* justified in an action by a passenger against carrier.—*Gerhart v. Metropolitan St. Ry. Co. (Mo. App.)* 12.

*The compensation to be awarded in a personal injury action is peculiarly within the province of the jury.—*Barree v. City of Cape Girardeau (Mo. App.)* 724.

*Where the evidence on the issue of the extent of a personal injury is conflicting, the question of its extent is for the jury.—*Barree v. City of Cape Girardeau (Mo. App.)* 724.

The law infers bodily pain and suffering, injury to the feelings, and mental anguish from personal injury.—*Stewart v. Watson (Mo. App.)* 762.

In an action by a nonunion man against union men for his discharge from various employments because of their wrongful acts, the question whether the acts of defendant were malicious *held* for the jury.—*Carter v. Oster (Mo. App.)* 995.

In an action against carriers for injury to a live stock shipment, *held* error to direct the jury to return a verdict not exceeding a specified sum on finding for plaintiff.—*Missouri, & T. Ry. Co. of Texas v. Rich (Tex. Civ. App.)* 114.

Evidence, in a personal injury action, *held* to authorize the jury to consider mental and physical pain suffered by plaintiff.—*Gulf, C. & S. F. Ry. Co. v. Coleman (Tex. Civ. App.)* 690.

In an action by a passenger for assault by the company's employes, the company, under a general denial, could show that the alleged damages were not caused by the assault, but re-

*Point annotated. See syllabus.

sulted from chronic alcoholism.—*Fielder v. St. Louis, B. & M. Ry. Co.* (Tex. Civ. App.) 699.

In a personal injury action, *held* not prejudicial error to authorize the jury to consider plaintiff's impaired ability to "earn money."—*Dallas Consol. Electric St. Ry. Co. v. Motwiller* (Tex. Civ. App.) 794.

Rule respecting right of one to recover for impaired ability to earn money arising from personal injury stated.—*Dallas Consol. Electric St. Ry. Co. v. Motwiller* (Tex. Civ. App.) 794.

*Evidence *held* to show impairment of a woman's earning capacity from a personal injury.—*Dallas Consol. Electric St. Ry. Co. v. Motwiller* (Tex. Civ. App.) 794.

DEATH.

Applicability of instructions to case in action for, see Trial, § 9.

Construction of instructions in action for, see Trial, § 12.

Harmless error in action for, see Appeal and Error, § 20.

Liability for death caused by operation of railroad, see Railroads, §§ 7, 9.

Liability of master for death of servant, see Master and Servant, §§ 3, 6, 8, 10, 11.

Of party to action ground for abatement, see Abatement and Revival, § 1.

Res gestæ in action for, see Evidence, § 3.

Review of questions of fact in action for, see Appeal and Error, § 16.

§ 1. Actions for causing death.

*At common law no right of action existed for the death of a human being.—*Earnest v. St. Louis, M. & S. E. R. Co.* (Ark.) 141.

*A death action accruing in Missouri brought in Arkansas under Missouri Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), but barred in Missouri because not brought within a year, as expressly required by section 2868 (page 1652), *held* not maintainable in Arkansas.—*Earnest v. St. Louis, M. & S. E. R. Co.* (Ark.) 141.

*Decedent's widow's and children's pecuniary loss through his death is the probable aggregate amount of his contributions to them, reduced to present value.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*Thirty-two thousand five hundred dollars recovery for a railway conductor's death *held* excessive by \$7,500.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*Under Kirby's Dig. § 6290, all decedent's heirs at law *held* required to join in an action for his negligent death, where there is no personal representative.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*An instruction, in an action for negligent death, on measure of damages, *held* not erroneous.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

Plaintiff's testimony, in an action for negligent death, *held* to sufficiently negative the existence of other heirs, etc., within Kirby's Dig. § 6290.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

A verdict of \$4,000 for death of a healthy young man 24 years old *held* reasonable.—*Gould Const. Co. v. Childers' Adm'r* (Ky.) 622.

*In a death action, plaintiff is not bound to produce eyewitnesses, but it is sufficient to prove circumstances which indicate that it might be ascribed with reasonable probability to the causes alleged.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

*Evidence *held* to warrant a verdict finding that decedent was killed by the fall of a counter-balance weight attached to a dummy elevator.—

Winkle v. George B. Peck Dry Goods Co. (Mo. App.) 1026.

*Measure of damages for the death of a child determined.—*Galveston, H. & N. Ry. Co. v. Olds* (Tex. Civ. App.) 787.

In an action for the negligent death of a child, the refusal to give a certain charge on the measure of damages *held* reversible error.—*Galveston, H. & N. Ry. Co. v. Olds* (Tex. Civ. App.) 787.

*In an action by parents for the death of a child, a verdict *held* not excessive.—*Galveston, H. & N. Ry. Co. v. Olds* (Tex. Civ. App.) 787.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Insolvency.

DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators.

Testimony as to transactions with persons since deceased, see Witnesses, § 1.

DECEIT.

See Fraud.

DECLARATION.

In pleading, see Pleading, § 2.

DECLARATIONS.

As evidence in criminal prosecutions, see Criminal Law, § 6.

As evidence of marriage relation, see Marriage. Dying declarations, see Homicide, § 7.

DEDICATION.

§ 1. Nature and requisites.

*Land may be dedicated to the public for a cemetery, and a common-law dedication is sufficient, which upon acceptance precludes the owner from his former rights over the land.—*Tracy v. Bittle* (Mo.) 45.

Facts *held* to show a common-law dedication of land as a public burying ground and its acceptance and use by the public.—*Tracy v. Bittle* (Mo.) 45.

*Rule as to liability of municipalities for condition of dedicated streets stated.—*Atkinson v. City of Nevada* (Mo. App.) 1022.

§ 2. Operation and effect.

A person having near relatives buried in a graveyard dedicated to the public for burial purposes has a peculiar right in its maintenance for the public use and in preventing an obstruction to the public use and may maintain a suit to enjoin an unwarranted interference with it.—*Tracy v. Bittle* (Mo.) 45.

*A cemetery was not abandoned, where most of the bodies buried there had not been removed, and it was still known as a burying ground, though no further interments were made and the place had been allowed to remain uncared for.—*Tracy v. Bittle* (Mo.) 45.

*Where land has been dedicated to the public for cemetery purposes, if there be an abandonment of the graveyard, the right of the public, which is in the nature of an easement, ceases, and the land reverts to the original owner or his grantees.—*Tracy v. Bittle* (Mo.) 45.

*Point annotated. See syllabus.

DEEDS.

Acknowledgment of execution, see Acknowledgment.

Cancellation, see Cancellation of Instruments.
Cancellation of deed giving life estate, see Life Estates.

Covenants in deeds, see Covenants.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, § 1.

Parol or extrinsic evidence, see Evidence, § 8.
Priority between deed and mortgage, see Mortgages, § 1.

Reformation, see Reformation of Instruments.

Deeds by or to particular classes of persons.

See Counties, § 3; Guardian and Ward, § 1.

Deeds of particular species of, or estates or interest in, property.

See Easements, § 1; Homestead, § 2.

Particular classes of deeds.

Partition deeds, see Partition, § 1.

Tax deeds, see Taxation, § 4.

Trust deeds, see Mortgages.

§ 1. Requisites and validity.

*A grantee of one without title or interest in the land conveyed acquires no interest therein.—Frank Kendall Lumber Co. v. Smith (Ark.) 888.

*It is not necessary that a grantee in a deed be mentioned by name, and, where the designation is sufficient to identify the person intended, the deed is effectual.—Clark v. Northern Coal & Coke Co. (Ky.) 629.

A deed *held* delivered, vesting a fee subject to the grantor's life estate, where he gave it to a third person to record on his death.—Cook v. Newby (Mo.) 272.

One who has been induced by fraud to execute an unacknowledged deed of a railroad right of way cannot recover the value of the land and the damages caused thereby without first obtaining the cancellation of the deed.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

The deed *held* not void for uncertainty in describing the land.—Hardin County v. Nona Mills Co. (Tex. Civ. App.) 822.

§ 2. Recording and registration.

Plaintiff not being injured thereby *held* not entitled to complain of the recording of a deed, in breach of trust, vesting title in the grantee subject to the grantor's life estate.—Cook v. Newby (Mo.) 272.

§ 3. Construction and operation.

*A deed construed, and *held* to vest no part of the property conveyed in the wife of the grantee.—Clark v. Northern Coal & Coke Co. (Ky.) 629.

*A deed must be construed to effectuate the intention of the parties, and the proper construction of a deed depends on all its provisions.—Clark v. Northern Coal & Coke Co. (Ky.) 629.

The common-law rule as to conveyances of a life estate to another, with remainder to the heirs of the grantor, *held* not affected by Ky. St. 1903, § 2345.—Mayes v. Kuykendall (Ky.) 673.

A conveyance by a husband to his wife *held* to vest a life estate in the wife, with reversion in the husband.—Mayes v. Kuykendall (Ky.) 673.

*Rule respecting construction of deeds stated.—Williams v. Grimm (Ky.) 839.

*Point annotated. See syllabus.

*A deed construed to convey a life estate to the grantor's daughter, with vested remainder to her children.—Williams v. Grimm (Ky.) 839.

*Where a grantor conveyed land to his five daughters by name, and the heirs of their body forever, the daughters took a life estate by virtue of the statute abolishing fee tails, with a remainder over to their respective children.—Charles v. White (Mo.) 545; Same v. Neill, Id.

The recital of the consideration for a deed *held* not to include a special deposit with the grantor.—Stevens v. Stevens (Mo. App.) 35.

A deed construed, and *held* not to pass interest of the grantor in certain standing timber.—Thompson v. Cline (Tex. Civ. App.) 101.

Authority of one to convey county land as agent for the county, as recited in the deed, will be presumed, where the county records have been destroyed, and where the deed was executed 38 years ago.—Hardin County v. Nona Mills Co. (Tex. Civ. App.) 822.

Evidence *held* to identify land in suit as that intended to be conveyed by a certain deed.—Hardin County v. Nona Mills Co. (Tex. Civ. App.) 822.

Where a deed contains an accurate, but general, description of land, extrinsic evidence is admissible to identify it.—Hardin County v. Nona Mills Co. (Tex. Civ. App.) 822.

§ 4. Pleading and evidence.

*Evidence in an action to recover land *held* to disprove plaintiffs' claim that their grandmother executed a deed, under which they claim.—Reaves v. Baker (Ky.) 609.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Judgment by, see Judgment, § 2.

DELAY.

In delivery of shipment of live stock, see Carriers, § 3.

In transmission of telegram, see Telegraphs and Telephones, § 1.

Laches, see Equity, § 2.

DELEGATION.

Of duties of master, see Master and Servant, § 4.

DELIVERY.

Of deed, see Deeds, § 1.

Of goods by carrier, see Carriers, § 2.

Of goods sold, see Sales, §§ 1, 3.

Of goods to carrier, see Carriers, § 2.

DEMAND.

For payment of bill or note, see Bills and Notes, § 4.

DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see Criminal Law, § 6.

DEMURRER.

In pleading, see Pleading, § 4.

DENIALS.

In pleading, see Pleading, § 3.

DE NOVO.

Trial de novo on appeal from justice court, see Justices of the Peace, § 2.

DEPOSITARIES.

Under Ky. St. 1903, § 4602, in the absence of an agreement fixing the termination of a bank's relation as state depository, it continues during the mutual will of state treasurer and the bank.—State Nat. Bank v. Commonwealth (Ky.) 678.

An agreement appointing a bank state depository *held* terminable only on notice of election to withdraw by the state treasurer, or by a similar notice and tender of the deposit by the bank.—State Nat. Bank v. Commonwealth (Ky.) 678.

A renewal bond of state depository, under Ky. St. 1903, § 4603, does not relieve the obligors in a former bond from full liability.—State Nat. Bank v. Commonwealth (Ky.) 678.

A state depository under valid bond to pay the state interest on deposits *held* not relieved from such obligation because of its refusal to renew its existing bond during a contest for the office of State Treasurer.—State Nat. Bank v. Commonwealth (Ky.) 678.

DEPOSITIONS.

See Witnesses.

Evidence affecting credibility of, see Witnesses, § 3.

Grant of continuance to take, see Continuance. Reception at trial, see Trial, § 3.

*It is within the discretion of the trial court to permit the reading of a deposition, as against the objection that some of the interrogatories are leading.—St. Louis, I. M. & S. Ry. Co. v. Stell (Ark.) 876.

The exclusion of the deposition of a party taken at the instance of the adverse party *held* erroneous, though the testimony in the deposition related to a transaction between the party and a deceased person under whom the adverse party claimed.—Ivy v. Ivy (Tex. Civ. App.) 110.

An error in excluding the deposition of a party taken at the instance of the adverse party *held* not cured.—Ivy v. Ivy (Tex. Civ. App.) 110.

*An objection that the answers of a witness testifying by deposition were not responsive to the questions, not made before trial on notice to the adverse party was not available on the trial.—Kaack v. Stanton (Tex. Civ. App.) 702.

DESCENT AND DISTRIBUTION.

See Curtesy; Dower; Executors and Administrators; Homestead, § 8; Wills.

Estoppel against infant to claim inheritance, see Infants, § 2.

§ 1. Nature and course in general.

A citizen of Virginia who entered the military service of Texas in her war for independence, and who died in her service, was at the time of his death, a citizen of Texas, and his estate descended in accordance with the laws of Texas.—Waterman v. Charlton (Tex. Civ. App.) 779.

*Point annotated. See syllabus.

§ 2. Persons entitled and their respective shares.

*Under Kirby's Dig. § 8020, the rights of a pretermitted child or its issue *held* not affected by a sale under the will.—Rowe v. Allison (Ark.) 395.

*Kirby's Dig. § 8020, *held* intended to give a pretermitted child such share as he would have received had there been no will.—Rowe v. Allison (Ark.) 395.

A common-law wife is entitled, on the death of the husband, to all the property rights accorded a widow who had been married by ceremony.—Davis v. Stouffer (Mo. App.) 282.

Under Rev. St. 1895, art. 1689, the right acquired by a judgment for plaintiff suing for a personal injury *held* to pass on his death intestate to his wife and children.—Binyon v. Smith (Tex. Civ. App.) 138.

§ 3. Rights and liabilities of heirs and distributees.

The remedy of a pretermitted child by scire facias provided by Kirby's Dig. § 8021, *held* not exclusive.—Rowe v. Allison (Ark.) 395.

DESCRIPTION.

Of devisees or legatees in will, see Wills, § 5.

Of land conveyed, see Deeds, § 1.

Of property conveyed, see Boundaries, § 1; Deeds, § 3.

DETINUE.

See Replevin.

For pledged property, see Pledges.

DEVISES.

See Wills.

DILATORY PLEAS.

See Pleading, § 3.

DIRECTING VERDICT.

In civil actions, see Trial, § 5.

DISABILITIES.

Contributory negligence of persons under disability, see Negligence, § 3.

Effect on limitation, see Limitation of Action—§ 2.

Particular classes of persons.

See Infants, § 1.

Attorneys, see Attorney and Client, § 1.

Married women, see Husband and Wife, § 3

DISBARMENT.

Of attorney, see Attorney and Client, § 1.

DISCHARGE.

From employment, see Master and Servant, §§ 1, 13.

Of jury, see Trial, § 13.

From indebtedness, obligation, or liability.

See Bankruptcy, § 2; Compromise and Settlement.

Liability as surety, see Principal and Surety, § 2

DISCLAIMER.

As estoppel, see Estoppel, § 1.

DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, § 1.

DISCOVERY.**§ 1. Under statutory provisions.**

Under Civ. Code Prac. § 606, subsec. 8, *held*, defendant had a right to take plaintiff's deposition.—*Western Union Telegraph Co. v. Williams* (Ky.) 651.

DISCRETION OF COURT.

Admission in prosecution for homicide of transcript of testimony at coroner's inquest, see Homicide, § 8.

Admission of deposition, see Depositions.

Allowance of alimony, see Divorce, § 4.

Competency of experts, see Evidence, § 9.

Dismissal of appeal from justice court, see Justices of the Peace, § 2.

Grant or refusal of continuance, see Continuance.

Reception of evidence, see Trial, § 3.

Review in civil actions, see Appeal and Error, § 15.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see Appeal and Error, § 10.

Dismissal of suit to vacate judgment, see Judgment, § 6.

§ 1. Voluntary.

*Under Civ. Code Prac. § 371, the court, after sustaining a motion to find for defendants, and before the case is finally submitted, may dismiss without prejudice on plaintiff's motion.—*Wilson v. Sullivan* (Ky.) 1120.

DISORDERLY CONDUCT.

See Breach of the Peace.

DISQUALIFICATION.

Of judge, see Judges, § 2.

DISSOLUTION.

Of partnership, see Partnership, § 3.

DISTRIBUTION.

Of assets of partnership on dissolution, see Partnership, § 3.

Of estate of decedent, see Descent and Distribution.

Of estate of insolvent, see Insolvency, § 1.

Of proceeds of property fraudulently conveyed, see Fraudulent Conveyances, § 3.

DISTRICT AND PROSECUTING ATTORNEYS.

Mandamus to compel county attorney to institute criminal prosecution, see Mandamus, § 2.

DITCHES.

See Drains.

DIVORCE.

Appointment of receiver, see Receivers, § 2.

As affecting homestead rights, see Homestead, § 4.

Lien of judgment for alimony, see Judgment, § 11.

§ 1. Grounds.

*A husband *held* entitled to a divorce on the ground of the unchastity of the wife.—*Kerby v. Kerby* (Ky.) 927.

§ 2. Defenses.

A wife *held* to have condoned the offense of mistreatment.—*Shirey v. Shirey* (Ark.) 369.

Continued cohabitation will condone acts of cruelty as well as any other ground for divorce, except where the life or health of the innocent party is involved or where cohabitation is continued without separation in the hope of better treatment.—*Shirey v. Shirey* (Ark.) 369.

*A voluntary resumption of cohabitation by the innocent spouse after separation on account of cruel conduct constituting grounds for divorce operates to condone the cruelty.—*Shirey v. Shirey* (Ark.) 369.

*A husband, who, with knowledge of his wife's adultery, induced her to dismiss a suit by her for divorce by promising to take her back again as his wife, condoned the wrong.—*Shirey v. Shirey* (Ark.) 369.

§ 3. Jurisdiction, proceedings, and relief.

Reversal of a decree in a divorce suit sets aside a provision therein inserted by consent of parties.—*Strickland v. Strickland* (Ark.) 197.

*Under Ky. St. 1903, § 2117, plaintiff *held* entitled to a divorce on the ground of abandonment.—*Burton v. Burton* (Ky.) 1102.

Where plaintiff in divorce alleged he was a resident of B. county, on proof that he was a resident of J. county, the suit was properly dismissed.—*Lagerholm v. Lagerholm* (Mo. App.) 720.

The invalidity of a portion of a judgment in an action for divorce *held* not to affect the validity of another portion thereof.—*Sykes v. Speer* (Tex. Civ. App.) 422.

§ 4. Alimony, allowances, and disposition of property.

*The allowance of attorneys' fees in a suit by a wife for divorce is within the discretion of the court in view of all the circumstances.—*Shirey v. Shirey* (Ark.) 369.

An independent suit for alimony may be maintained, and where a decree for divorce is denied because of condonation alimony may be awarded to the wife for her maintenance where the husband refuses to support her.—*Shirey v. Shirey* (Ark.) 369.

The amount of alimony awarded a wife who is denied a divorce is within the discretion of the court after considering the husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing on the cause of separation.—*Shirey v. Shirey* (Ark.) 369.

Where alimony is awarded to a wife who is denied a divorce, the allowance should be a continuing one for periodical payments.—*Shirey v. Shirey* (Ark.) 369.

Defendant purchasing with his own money a note which had been assumed by plaintiff and her husband, without any agreement between himself and plaintiff's husband, *held* not a trustee for the husband.—*Prather v. Hairgrove* (Mo.) 552.

In an action to have a deed to defendant, executed by plaintiff's husband, set aside as made to deprive plaintiff of her interest in the land, evidence *held* not sufficient to justify setting it aside.—*Prather v. Hairgrove* (Mo.) 552.

The fact that a petition for a receiver may show upon its face that defendant has an interest in the real property involved in the suit, and that he has been enjoined from disposing of sufficient of it to protect plaintiff, *held* not to defeat plaintiff's right to have a receiver to

*Point annotated. See syllabus.

take charge of the personal property.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

The rights given in divorce cases by statute to sequester the property and to an injunction to restrain defendant from disposing of the property *held* not exclusive and to preclude the appointment of a receiver.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

Under Rev. St. 1895, art. 1465, relating to appointment of receivers, and article 2985, giving the court power to make necessary orders respecting property and parties pending divorce, *held*, that a wife in an action for a divorce and to establish her separate interest in property held by her husband was entitled to a receiver of the property.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

§ 5. Custody and support of children.

A judgment of divorce awarding to the wife the custody of the children *held* a mere judicial determination that she shall have the preference legal right to their custody.—*Sykes v. Speer* (Tex. Civ. App.) 422.

DOCUMENTS.

As evidence in civil actions, see Evidence, § 7.

DOWER.

See Curtesy.

Cancellation of deed conveying dower rights, see Cancellation of Instruments, § 2.

§ 1. Inchoate interest.

*A bill of sale executed by a husband *held* in fraud of his wife's dower rights, and void as to her.—*Smith v. Lamb* (Ark.) 884.

DRAINS.

Decisions reviewable in drainage proceedings, see Appeal and Error, § 1.
In cities, see Municipal Corporations, § 10.
Laws relating to as delegation of legislative power, see Constitutional Law, § 2.

§ 1. Establishment and maintenance.

In proceedings to establish a drainage ditch, the refusal of the county court to permit two of the three reviewers to file a report *held* not to affect the substantial rights of the parties.—*Bennett v. Knott* (Ky.) 849.

Under Ky. St. 1903, § 448, a report by two of three reviewers, in proceedings for the establishment of a drainage ditch, is valid.—*Bennett v. Knott* (Ky.) 849.

Motions in proceedings in the circuit court to establish a drainage ditch *held* made too late.—*Bennett v. Knott* (Ky.) 849.

Whether a proposed drainage ditch will be a public utility and a benefit to the lands assessed for the construction thereof is for the jury.—*Bennett v. Knott* (Ky.) 849.

In proceedings to establish a drainage ditch, it is not error to refuse to charge the jury to consider in reaching their verdict the fact that the parties liable for the costs of the construction would have to be at the expense of keeping the ditch open.—*Bennett v. Knott* (Ky.) 849.

A provision in a judgment establishing a drainage ditch *held* not final, so as to be reviewable.—*Bennett v. Knott* (Ky.) 849.

The court on appeal in proceedings to establish a drainage ditch *held* not entitled to pass on a question affecting an individual not a party in the circuit court nor to the appeal.—*Bennett v. Knott* (Ky.) 849.

The court on appeal from a judgment of the circuit court in proceedings to establish a drain-

age ditch *held* not authorized to consider whether the county court committed error on points not urged in the circuit court.—*Bennett v. Knott* (Ky.) 849.

In proceedings to establish a drainage ditch *held* improper to tax as a part of the costs attorney's fees.—*Bennett v. Knott* (Ky.) 849.

§ 2. Assessments and special taxes.

The provisions of Const. art. 16, § 5, regarding taxation, do not apply to assessments for public improvements levied by the General Assembly or authorized by it.—*Caton v. Western Clay Drainage Dist.* (Ark.) 145.

DUE PROCESS OF LAW.

See Constitutional Law, § 5.

DYING DECLARATIONS.

See Homicide, § 7.

EASEMENTS.

Public easement, see Dedication; Highways.

§ 1. Creation, existence, and termination.

*A passway *held* acquired by prescription.—*Vance v. Adams* (Ky.) 927.

*An owner, closing a passway over his land, *held* required to show that the uninterrupted enjoyment of the same for more than 15 years was not exercised under claim of right.—*Vance v. Adams* (Ky.) 927.

§ 2. Extent of right, use, and obstruction.

*An owner through whose land a passway has been acquired by prescription *held* required to apply to the county court, under Ky. St. 1903, § 4289, for an alteration thereof.—*Vance v. Adams* (Ky.) 927.

EJECTION.

Of passenger, see Carriers, § 10.

EJECTMENT.

See Trespass to Try Title.

Applicability of instructions to case, see Trial, § 9.

§ 1. Right of action and defenses.

*A landowner who stands by and sees a railroad constructed on his land by a company having the power of eminent domain without preventing the construction acquiesces therein and cannot recover the land in ejectment.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.* (Ark.) 205.

Where land is taken by a private corporation not possessing the right of eminent domain and a tramroad is built thereon to be used in the private business of the corporation, possession of the land may be recovered on nonperformance of a condition precedent to conveyance of the land by the owner.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.* (Ark.) 205.

A plaintiff in an ejectment suit *held* to bear the burden of proving title in himself.—*Allen v. Phillips* (Ark.) 403.

§ 2. Pleading and evidence.

In an action to recover a strip of land as a part of a lot, certain evidence *held* admissible to throw light on which party was entitled to the strip.—*Tebbs v. Wiseman* (Ark.) 196.

*Evidence in an action of ejectment *held* to support the finding for plaintiff.—*Union Saw-*

*Point annotated. See syllabus.

mill Co. v. Felsenthal Land & Townsite Co. (Ark.) 205.

It is immaterial in an action of ejectment whether a promised conveyance by plaintiff relied on as a defense was to be made to defendant or a company owned by practically the same persons and having the same officers, in default of performance of a condition precedent to the conveyance.—Union Sawmill Co. v. Felsenthal Land & Townsite Co. (Ark.) 205.

Prima facie showing of title under a deed from the commissioner of state lands *held* overcome by a showing that a sale to the state under overdue tax proceedings was never confirmed by the court.—Allen v. Phillips (Ark.) 403.

No question as to decedent's title to land sued for being raised, and there being no evidence that he left children other than plaintiffs, his wife being dead, or that he disposed of the property, plaintiffs are entitled to recover from those claiming under a tax sale.—Dunn v. Garnett (Ky.) 841.

§ 3. Trial, judgment, enforcement of judgment, and review.

Instruction stating the issue in an action to recover a strip of land as a part of a lot *held* sufficient.—Tebbs v. Wiseman (Ark.) 196.

In ejectment, the court *held* required to submit to the jury the issue of the location of the original bed of a creek forming a boundary and adverse possession by defendant.—Hightower v. Borden (Ky.) 675.

ELECTIONS.

Local option elections, see Intoxicating Liquors, § 1.

Scope and extent of review in election contest, see Appeal and Error, § 12.

§ 1. Ballots.

Ballots which were not on plain white paper *held* void on that ground.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

Under Acts Ex. Sess. 1891, p. 42, c. 21, as amended by Acts 1893, p. 208, c. 101, ballots *held* invalid because marked improperly.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

§ 2. Count of votes, returns, and canvass.

*Acts 1887, p. 59, c. 3, § 9, authorizing counties to hold elections to determine whether they shall subscribe for stock of railway companies, construed, and *held* to provide for subscriptions on three-fourths of the legal votes cast at the election favoring subscription.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

§ 3. Contests.

*In the absence of a statute providing for the contest of an election to determine whether a county shall subscribe to the stock of a railway company, a proceeding to contest it should be brought in the chancery court, which has jurisdiction over such controversies.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

*Under Shannon's Code, §§ 4887, 6063, 6074, the circuit court *held* to possess jurisdiction of a proceeding to contest an election to determine whether a county should subscribe for the stock of a railway company, where no objection was taken by demurrer.—Catlett v. Knoxville, S. & E. Ry. Co. (Tenn.) 559.

ELECTRICITY.

Negligence of master in use of, see Master and Servant, § 4.

*An electric light company *held* not liable for the death of a trespasser through coming in contact with a live wire, charged through the failure of the company to comply with city or-

dinances.—Burnett v. Ft. Worth Light & Power Co. (Tex.) 1040.

ELEVATORS.

Liability for injuries to passengers, see Carriers, § 8.

Liability of master for negligent construction of, see Master and Servant, § 4.

EMBEZZLEMENT.

Power of corporate officer to settle for, see Corporations, § 4.

*Under Ky. St. 1903, §§ 1205, 4067, 4241, a sheriff embezzling money collected from taxpayers on property not assessed for taxation *held* not to violate section 1205.—Commonwealth v. Alexander (Ky.) 586.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 4-8.

EMPLOYER'S INDEMNITY INSURANCE.

See Insurance, §§ 2, 9.

EMPLOYÉS.

See Master and Servant.

ENTRY.

Re-entry by landlord, see Landlord and Tenant, § 5.

ENTRY, WRIT OF.

See Ejectment.

EQUITABLE DEFENSES.

In action at law, demurrer to, see Pleading, § 4.

EQUITABLE ESTOPPEL.

See Estoppel, § 1.

EQUITY.

Equitable defenses in action at law, see Action, § 1.

Equitable defenses in action at law, demurrer to, see Pleading, § 4.

Equitable estoppel, see Estoppel, § 1.

Legal or equitable nature of action, see Action, § 1.

Notice of trial in general, see Trial, § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See Cancellation of Instruments; Fraudulent Conveyances; Injunction; Nuisance, §§ 1, 2; Partition, § 2; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Trusts.

Redemption from pledge, see Pledges.

Relief against judgment, see Judgment, § 6.

Vacation of agreed case, see Submission of Controversy.

Review on appeal.

Determination and disposition of cause on appeal, see Appeal and Error, § 24.

*Point annotated. See syllabus.

Presentation of rulings in appeal record for purpose of review, see Appeal and Error, § 7. Scope and extent of review in general, see Appeal and Error, § 12.

§ 1. Jurisdiction, principles, and maxims.

Action by property owners, on behalf of themselves and others interested, to restrain enforcement of city ordinance, *held* within the rule that equity will take cognizance of a controversy to prevent a multiplicity of suits.—*Brizzolara v. City of Ft. Smith* (Ark.) 181.

*Equity will enforce a forfeiture which works equity and protects the rights of the parties.—*Cherokee Const. Co. v. Bishop* (Ark.) 189.

§ 2. Laches and stale demands.

*Equity, in the exercise of its inherent power, may refuse relief for laches.—*Jackson v. Beckett Printing & Book Mfg. Co.* (Ark.) 161.

*Equity will not aid in enforcing stale demands where the party seeking relief has been guilty of negligence.—*Stuckey v. Lockard* (Ark.) 747; *Same v. Stephens*, *Id.*

*Acquiescence is invoked to preclude relief where it appears that a party acting on the assent implied therefrom has materially changed his position.—*Blackford v. Heman Const. Co.* (Mo. App.) 287.

*Laches is enforced against an existing right only where it would be highly unjust and inequitable to enforce the right, notwithstanding laches.—*Blackford v. Heman Const. Co.* (Mo. App.) 287.

§ 3. Parties and process.

*In chancery suits, all persons interested in the subject-matter and result of the suit must be made parties.—*Collins v. Crawford* (Mo.) 538.

§ 4. Pleading.

If it appears on consideration of a demurrer that a complaint in equity shows no cause of action either at law or in equity, the court should dismiss the complaint or authorize an appropriate amendment.—*Rowe v. Allison* (Ark.) 395.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of boundaries, see Boundaries, § 2.

Of counties, see Counties, § 1.

Of courts, see Courts, § 2.

Of drains, see Drains, § 1.

Of highways, see Highways, § 1.

Of railroads, see Railroads, § 2; *Street Railroads*, § 1.

Of trusts, see Trusts, § 4.

Of will, see Wills, § 4.

ESTATES.

Created by deed, see Deeds, § 3.

Created by will, see Wills, § 5.

Decedents' estates, see Descent and Distribution; Executors and Administrators.

Estates for years, see Landlord and Tenant.

Tenancy in common, see Tenancy in Common.

Trusts, see Trusts, § 2.

Particular estates.

See Curtesy; Dower; Life Estates.

ESTOPPEL.

Against infant, see Infants, §§ 1, 2.

Against insurance agent, see Insurance, § 1.

Against married woman, see Husband and Wife, § 3.

*Point annotated. See syllabus.

As to boundaries, see Boundaries, § 2.

By judgment, see Judgment, §§ 9, 10.

Necessity of pleading estoppel by judgment, see Judgment, § 13.

Of tenant to dispute title of landlord, see Landlord and Tenant, § 2.

To allege error on appeal, see Appeal and Error, § 13.

To avoid or forfeit insurance policy, see Insurance, § 6.

To deny dedication, see Dedication, § 1.

To recover damages caused by construction of railroad, see Railroads, § 2.

§ 1. Equitable estoppel.

A husband, claiming title under a conveyance to himself and wife as tenants by the entirety, is not estopped, after the death of the wife, from disputing her title under a deed executed by one having no title.—*Robertson v. Robinson* (Ark.) 883.

*A matter *held* one of estoppel, required to be set up by answer in an action for conversion.—*Brocking v. O'Bryan* (Ky.) 631.

*Generally the public is not estopped by the mere nonaction of the public officials.—*Guilfoyle's Ex'r v. City of Maysville* (Ky.) 666.

Plaintiff *held* not estopped to claim the land in controversy, but covered by the deed to him, by the fact that he knew of defendant's use thereof for a road when he acquired title.—*Rose v. Stephens* (Ky.) 676.

Plaintiff *held* estopped to claim land deeded to him by his father, and reconveyed to the father, on the ground that he was under age when he reconveyed.—*Sackett v. Asher* (Ky.) 833.

*Vendor, who accepted order on third persons for price of the land, *held* estopped by negligence to recover amount thereof of purchaser.—*Collins v. Williamson* (Ky.) 1094.

*That plaintiff was induced by fraud to surrender a vendor's lien that infants' money might be invested in the land did not entitle him to subject the infants' interest to the payment of the debt secured by the lien.—*Hotfil v. Deweese's Trustee* (Ky.) 1095.

*In an action by a wife for conversion of a note, payable to her and transferred by her husband without her authority, *held*, that she was not estopped to claim the note.—*McMahon v. Welsh* (Mo. App.) 43.

A debtor may, by acquiescence, lose his right to question a sale of his collateral.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

The ground on which an estoppel in pais rests is fraud on the part of the person sought to be estopped.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*A pledgor *held* not estopped to attack an invalid sale by the pledgee.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*Insured in a policy pledged to insurer was *held* not the agent of the beneficiary to receive notice of a sale by insurer on default.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*A beneficiary in a life policy, pledged to insurer for a loan, *held* not estopped to assert her rights in the policy, based on an invalid sale by insurer.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*Estoppel in pais by acquiescence *held* founded on knowledge of the material facts and assent.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

EVIDENCE.

See Depositions; Discovery; Witnesses.

Applicability of instructions to evidence, see Trial, § 9.

Conformity of judgment to proofs, see Judgment, § 3.
Questions of fact for jury, see Trial, § 5.
Reception at trial, see Criminal Law, § 9; Trial, § 3.

As to particular facts or issues.

See Adverse Possession, § 1; Boundaries, § 2; Compromise and Settlement; Damages, § 5; Deeds, § 4; Judgment, § 13; Marriage; Partnership, § 1; Payment, § 2.
Assumption of risk by servant, see Master and Servant, § 10.
Authority of agent, see Principal and Agent, § 2.
Competency of fellow servant, see Master and Servant, § 10.
Defense of statute of frauds, see Frauds, Statute of, § 1.
Existence of highway, see Highways, § 1.
Fraud or under undue influence procuring execution of will, see Wills, § 3.
Infancy, see Infants, § 4.
Insanity at time of conviction, see Criminal Law, § 15.
Negligence of fellow servant, see Master and Servant, § 10.
Negligence of livery stable keeper, see Livery Stable Keepers.
Negligence of master, see Master and Servant, §§ 4, 10.
Negligence of servant, see Master and Servant, § 10.
Property conveyed by deed, see Deeds, § 3.
Testamentary capacity, see Wills.

In actions by or against particular classes of persons.

See Counties, § 6.
Assignees for benefit of creditors, see Assignments for Benefit of Creditors, § 1.
Street railroad company, see Street Railroads, § 1.

In particular civil actions or proceedings.

See Assault and Battery, § 1; Conspiracy, § 1; Divorce, § 3; Ejectment, § 2; Fraud, § 2; Libel and Slander, § 3; Mandamus, § 3; Negligence, § 4; Specific Performance, § 1; Trespass, § 2; Trespass to Try Title, § 1.
For alienating husband's affections, see Husband and Wife, § 8.
For breach of covenants, see Covenants, § 1.
For causing death, see Death, § 1.
For compensation of attorney, see Attorney and Client, § 4.
For compensation of broker, see Brokers, § 3.
For compensation of physician or surgeon, see Physicians and Surgeons.
For damages from nuisance, see Nuisance, § 1.
For death caused by operation of railroad, see Railroads, § 9.
Foreclosure, see Mortgages, § 4.
For failure to deliver shipment, see Carriers, § 2.
For injuries from fires caused by operation of railroad, see Railroads, § 11.
For injuries from flowage, see Waters and Water Courses, § 2.
For injuries to animals caused by operation of railroads, see Railroads, § 10.
For injuries to shipment of live stock, see Carriers, § 3.
For loss of or injury to shipment, see Carriers, § 2.
For negligent transmission of telegram, see Telegraphs and Telephones, § 1.
For penalties, see Penalties, § 1.
For personal injuries, see Carriers, § 8; Master and Servant, § 10; Railroads, §§ 6, 7, 9.
For price of goods sold, see Sales, § 5.
For price of liquor sold, see Intoxicating Liquors, § 5.
For price of timber, see Logs and Logging.
For wages, see Master and Servant, § 2.

For wrongful ejection of passenger, see Carriers, § 10.
On bond of trustee, see Trusts, § 5.
On employer's indemnity bond, see Insurance, § 9.
On hearing of motion for new trial, see New Trial, § 2.
On mutual benefit certificate, see Insurance, § 10.
On note, see Bills and Notes, § 6.
Probate proceedings, see Wills, § 4.
To establish will, see Wills, § 4.

In criminal prosecutions.

See Bribery; Conspiracy, § 2; Criminal Law, § 6; Homicide, §§ 6-9; Larceny, § 2; Perjury, § 1; Rape, § 2.
For carrying weapons, see Weapons.
For conducting a lottery, see Lotteries, § 2.
For offenses against liquor law, see Intoxicating Liquors, § 4.

Review and procedure thereon in appellate courts.

See Appeal and Error, § 16.
Harmless error, see Appeal and Error, §§ 19, 20; Criminal Law, § 20.
Objections to rulings for purpose of review, see Appeal and Error, § 3.
Presentation of rulings in appeal record for purpose of review, see Appeal and Error, § 7; Criminal Law, § 19.
Presumptions on appeal, see Appeal and Error, § 14; Criminal Law, § 20.
Review of questions of fact, see Criminal Law, § 20.

§ 1. Judicial notice.

*The court will take judicial notice that such well-known beverages as whisky, brandy, gin, and the like are intoxicating.—Dallas Brewery v. Holmes Bros. (Tex. Civ. App.) 122.

*The court held not authorized to take judicial knowledge that beer is an intoxicating liquor; article 402, Pen. Code, not naming it as an intoxicating liquor.—Dallas Brewery v. Holmes Bros. (Tex. Civ. App.) 122.

*A court held not authorized to take judicial notice that a place, not the county seat, was in a certain county.—Dallas Brewery v. Holmes Bros. (Tex. Civ. App.) 122.

*In an action for the destruction of property by fire communicated by crude oil permitted to saturate the soil surrounding the property, the court will take judicial notice that crude oil is of an inflammable character.—Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.) 323.

§ 2. Presumptions.

*The law presumes every man honest until the contrary is shown.—United States Fidelity & Guaranty Co. v. Bank of Batesville (Ark.) 957.

No presumption can be indulged for or against proceedings calling in county warrants for cancellation and reissue.—Chicago, R. I. & P. Ry. Co. v. Perry County (Ark.) 977.

*In the absence of any proof, the courts of a state having a common-law origin will presume that the law of a sister state having a common-law origin is the same as the law of the forum.—Tennent v. Union Cent. Life Ins. Co. (Mo. App.) 754.

*It will be presumed, in the absence of a contrary showing, that a sheriff complied with Sayle's Ann. Civ. St. 1897, art. 2359, relating to the forfeiture of a delivery bond executed by an execution defendant.—Webb v. Caldwell (Tex. Civ. App.) 97.

No presumption arises in favor of the validity of an award of land by the Commissioner of the General Land Office during the life of a lease as against the validity of his action in making

*Point annotated. See syllabus.

the lease.—*Buchanan v. Barnsley* (Tex. Civ. App.) 118.

§ 3. Relevancy, materiality, and competency in general.

In an action for injuries to a passenger caused by the misconduct of a train auditor toward him when he gave evidence of intoxication, evidence of the passenger's conduct on other occasions *held* not pertinent where it was not shown that the auditor knew thereof.—*St. Louis Southwestern Ry. Co. v. Myzell* (Ark.) 203.

Evidence in a legal sense is external, being brought into the mind through the senses by the mental faculty of perception and appropriated by the faculty of reason.—*Taylor v. McClintock* (Ark.) 405.

That which no sane man would believe is not evidence.—*Taylor v. McClintock* (Ark.) 405.

Evidence is the means by which facts are proved.—*Taylor v. McClintock* (Ark.) 405.

When one's bodily or mental feelings are in issue, the usual expressions of such feelings as made at the time in question are original evidence, and if they are the natural language of the affections, whether of body or mind, they furnish satisfactory evidence.—*Taylor v. McClintock* (Ark.) 405.

*In an action for the death of a passenger, killed while alighting from a train, certain evidence *held* admissible only to contradict the conductor's testimony in the action.—*Wade v. Illinois Cent. R. Co.* (Ky.) 1103.

*In an action for the death of a passenger, killed while alighting from a train, a statement made by the passenger, some hours after the accident, as to how it occurred, *held* inadmissible.—*Wade v. Illinois Cent. R. Co.* (Ky.) 1103.

In a personal injury action, it was not error to prevent defendant from showing that a particular person had been subpoenaed as a witness for plaintiff, that he was present in the courtroom, and that he was not called as a witness; such facts not bearing upon any issue in the case.—*Everett v. St. Louis & S. F. R. Co.* (Mo.) 486.

*In civil actions, the reputation of the parties *held*, as a general rule, not in issue.—*Stewart v. Watson* (Mo. App.) 762.

In an action to recover property alleged to have been fraudulently obtained, plaintiff could not show that one of the defendants had been arrested for swindling.—*Witliff v. Spreen* (Tex. Civ. App.) 98.

*A statement by a bystander made during the progress of a fire communicated to plaintiff's property by oil which escaped from defendant's oil tank as to the cause of the ignition of the oil was not admissible for defendant as a part of the *res gestæ*.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

*In an action against a carrier for failure to deliver goods in accordance with a bill of lading, the exclusion of testimony of the agent of the carrier as to what he would have done *held* not erroneous, in view of the testimony given.—*Texas & G. Ry. Co. v. First Nat. Bank of Carthage* (Tex. Civ. App.) 589.

§ 4. Best and secondary evidence.

*Proceedings of the probate court cannot be shown by oral testimony.—*Hands v. Haughland* (Ark.) 184.

*Where the record of a case is lost, and has not been supplied, the contents thereof may be shown by parol.—*Morrison v. Price* (Ky.) 1090.

Whether decedent at the time of his injuries was employed by an independent contractor or by defendant could not be shown by the understanding of the men employed under the written

contract.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 5. Admissions.

*A letter *held* not inadmissible as an offer of compromise.—*Moseley v. Missouri Pac. Ry. Co.* (Mo. App.) 1010.

*Declarations by local soliciting agent for accident insurance company *held* not binding on the company.—*North American Acc. Ins. Co. v. Frazer* (Tex. Civ. App.) 812.

*Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to a voluntary demeanor or conduct of the party.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

*Mere silence of a party, when facts are asserted in his presence, does not authorize a presumption of acquiescence, unless the conversation is addressed to him.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

*Evidence *held* insufficient to warrant a finding that defendant S. heard the statement of B. to plaintiff, and understood and acquiesced therein.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

§ 6. Hearsay.

*It was not error in a will contest to exclude a question asked a witness as to whether it was understood that testator owned certain real estate in 1863 or earlier.—*Taylor v. McClintock* (Ark.) 405.

*Testimony that testator's widow said that he excluded a daughter as a devisee was hearsay.—*Reaves v. Baker* (Ky.) 600.

*In libel referring to the action of plaintiff as mayor in regard to a census of the city under Rev. St. 1890, § 3028 (Ann. St. 1906, p. 735), a witness *held* not competent to testify unless she could testify of her own knowledge.—*Flowers v. Smith* (Mo.) 499.

*In an action against a railroad company for destruction of property by fire communicated by oil leaking from a tank on defendant's right of way, statements made by a person during the progress of the fire as to the cause of the ignition of the oil was hearsay and inadmissible in behalf of defendants.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

§ 7. Documentary evidence.

Evidence of failure to find a confirmation of an overdue tax sale in judicial records *held* sufficient to show that there had been no such confirmation.—*Allen v. Phillips* (Ark.) 403.

*A written contract cannot be admitted as evidence against one not a party thereto without proof of its execution.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 8. Parol or extrinsic evidence affecting writings.

*A written contract *held* not ambiguous so as to admit parol evidence.—*Griggs v. School District No. 70, Randolph County* (Ark.) 215.

*Parol evidence cannot be introduced to show a contract with a teacher different from a written contract authorized by Kirby's Dig. § 7615.—*Griggs v. School Dist. No. 70, Randolph County* (Ark.) 215.

*Parol evidence to identify property described in a writing is not inadmissible under the rule forbidding parol evidence to explain or modify a writing.—*Kempner v. Gans* (Ark.) 1087.

*A written contract for the sale and installation of an acetylene gas plant *held* to measure the liability of the parties, notwithstanding previous oral representations by the agent of the seller.—*Daylight Acetylene Gas Co. v. Hardesty* (Ky.) 847.

*Acceptance of a check containing the words "in full to date" *held* not to preclude the payee

*Point annotated. See syllabus.

from showing a different intention.—*Dove v. Fansler* (Mo. App.) 1009.

That a deed purporting on its face to convey absolutely certain real estate was executed under an agreement that it should not have any effect as a deed may be shown by parol evidence.—*Ivy v. Ivy* (Tex. Civ. App.) 110.

*Where the terms of a written contract are indefinite, proof of the surrounding circumstances is admissible.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

*Parol testimony is admissible upon proper allegations of fraud, accident, or mistake to defeat a written contract, or to show its real terms.—*Gough Mill & Gin Co. v. Looney* (Tex. Civ. App.) 782.

§ 9. Opinion evidence.

*Whether a witness has qualified as an expert concerning the value of property *held* within the discretion of the trial court.—*McDonough v. Williams* (Ark.) 164.

A witness *held* not qualified to testify as an expert on the value of the property of a certain coal mining company.—*McDonough v. Williams* (Ark.) 164.

*A hypothetical question based on facts not proven is defective.—*Taylor v. McClintock* (Ark.) 405.

*On a will contest, contestant's hypothetical case *held* defective for omitting certain facts.—*Taylor v. McClintock* (Ark.) 405.

On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, it was prejudicial error to allow experts' testimony to assume an argumentative form on the moral phases of testator's conduct towards the daughter and her rights.—*Taylor v. McClintock* (Ark.) 405.

*Hypothetical questions must fairly reflect the evidence, and, unless they do so, the resultant opinion evidence is not responsive to the real facts and can have no probative force.—*Taylor v. McClintock* (Ark.) 405.

*In taking the opinion of an expert on a hypothetical question, either party may assume as proved all facts which the evidence tends to prove, and an opinion may be elicited upon the whole evidence or any part thereof.—*Taylor v. McClintock* (Ark.) 405.

*A hypothetical case must embrace undisputed facts essential to the issue.—*Taylor v. McClintock* (Ark.) 405.

*Duty of court where on seeks to take an expert opinion upon a hypothetical question, based upon the whole or part of the evidence, stated.—*Taylor v. McClintock* (Ark.) 405.

*Admission of physician's opinion in a will contest involving testator's mental capacity *held* not prejudicial error.—*Taylor v. McClintock* (Ark.) 405.

*Exclusion of testimony in a will contest *held* not error.—*Taylor v. McClintock* (Ark.) 405.

Testimony as to the amount of timber cut from land, based upon measurement of the remaining stumps and tree tops and the rule of scaling timber, *held* proper.—*Bryant Lumber Co. v. Crist* (Ark.) 965.

*Whether drawheads of railway cars will pass each other if properly constructed and in good repair is a proper subject for expert testimony.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*Witnesses, without qualifying as experts, *held* entitled to testify as to the speed of a train.—*Illinois Cent. R. Co. v. France's Adm'r* (Ky.) 929.

A witness *held* not competent to testify as to the breakability of emery wheels.—*Brands v. St. Louis Car Co.* (Mo.) 511.

*In an action for the wrongful ejection of plaintiff from a car, a witness *held* properly permitted to testify that defendant's conductor spoke sneeringly, and that his manner was threatening or contemptuous.—*White v. Metropolitan St. Ry. Co.* (Mo. App.) 278.

In an action against carriers for injury to a live stock shipment, plaintiff's testimony that he received no consideration for executing the contract of shipment *held* proper.—*Missouri, K. & T. Ry. Co. of Texas v. Rich* (Tex. Civ. App.) 114.

*A question, asking a witness in effect whether decedent was guilty of negligence, *held* objectionable as calling for a conclusion.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

Certain interrogatories *held* objectionable as calling for the conclusions and opinion of the witness.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

*Witnesses who know and have testified to facts bearing on an issue as to one's sanity may give an opinion as to such person's sanity, founded upon their knowledge.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

*Witness shown to possess certain qualifications, and to be acquainted with the subject-matter, *held* properly permitted to give his opinion that the manner in which a railroad embankment was constructed was not good engineering.—*Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Tex. Civ. App.) 783.

§ 10. Weight and sufficiency.

*In an action for mental anguish caused by delay of a telegram, testimony of plaintiff and another, when uncontradicted by direct evidence or circumstances, was entitled to credit by the jury.—*Western Union Telegraph Co. v. Shofner* (Ark.) 751.

Where a witness testifies unequivocally to a fact, and there is nothing to warrant the jury in rejecting it, it cannot disregard his testimony.—*Sinclair's Adm'r v. Illinois Cent. R. Co.* (Ky.) 910.

*Where plaintiff in a suit against two street railway companies introduced a lease by one to the other, she could not claim the defendants were bound, in order to base a defense on such lease to show municipal assent thereto under Const. art. 12, § 20 (Ann. St. 1906, p. 309).—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

*The existence of an ultimate fact need not be shown by direct evidence, but may be proved by circumstances.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1028.

EXAMINATION.

Of adverse party before trial, see *Discovery*, § 1.

Of expert witnesses, see *Evidence*, § 9.

Of witnesses in general, see *Witnesses*, § 2.

EXCEPTIONS.

In deeds, see *Deeds*, § 3.

Necessity for purpose of review, see *Appeal and Error*, § 3.

Taking exceptions at trial, see *Trial*, §§ 3, 11.

To pleading, see *Pleading*, § 4.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see *Appeal and Error*, § 7; *Criminal Law*, § 19.

*Point annotated. See *syllabus*.

§ 1. Nature, form, and contents in general.

A bill of exceptions is not vitiated because it contains more than is necessary.—Jonesboro, L. C. & E. R. Co. v. Brookfield (Ark.) 977.

§ 2. Settlement, signing, and filing.

The trial court *held* to have no power to amend, as it did, a bill of exceptions by mere argument and deduction from a standing rule, rather than from the record.—Reed v. Colp (Mo.) 255.

What the trial court did *held* not an amendment of the bill of exceptions, but extension of time for filing such a bill, for which it had no power.—Reed v. Colp (Mo.) 255.

EXCESSIVE DAMAGES.

See Damages, § 4.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXECUTION.

See Attachment; Garnishment; Judicial Sales. Exemptions, see Exemptions; Homestead. Presumptions as to forfeiture of delivery bond, see Evidence, § 2.

§ 1. Nature and essentials in general.

*An execution and sale under a void judgment are void and are inoperative to transfer title.—Howell v. Sherwood (Mo.) 50.

§ 2. Lien, levy or extent, and custody of property.

*Where the bond given by an execution defendant, as authorized by Sayles' Ann. Civ. St. 1897, art. 2357, has been forfeited, the levy by virtue of the execution ceased to operate as a lien on the property levied on.—Webb v. Caldwell (Tex. Civ. App.) 97.

§ 3. Stay, quashing, vacating, and relief against execution.

Whether property levied upon is subject to execution must be determined by action; but questions simply going to the validity of the process may be determined summarily on motion.—Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory (Ky.) 608.

Right of a court to quash an execution stated.—Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory (Ky.) 608.

The proper remedy to quash process improperly issued is by motion; an *audita querela* having been the ancient remedy.—Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory (Ky.) 608.

§ 4. Sale.

A party purchasing under a judgment at a time when it is subject to vacation, loses his title on the destruction of the judgment, and this notwithstanding a sale by him to an innocent purchaser.—McLean v. Stith (Tex. Civ. App.) 355.

When an execution sale is attacked, it is not necessary to show affirmatively that the ground relied on to avoid it in connection with inadequacy of price occasioned the inadequacy.—McLean v. Stith (Tex. Civ. App.) 355.

*An execution sale *held* not open to collateral attack.—Sykes v. Speer (Tex. Civ. App.) 422.

*The failure of an execution to state correctly the amount of the judgment and the costs is an irregularity which may justify the setting aside of the sale when sought in a direct action for that purpose, but does not render the sale

void, and it cannot be attacked collaterally.—Sykes v. Speer (Tex. Civ. App.) 422.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Willa.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, § 1.

§ 1. Appointment, qualification, and tenure.

*The appointment of an administrator, without giving the next of kin opportunity to accept, *held* not void, and so not open to collateral attack.—Cunningham v. Clay's Adm'r (Ky.) 852.

§ 2. Collection and management of estate.

*A purchase by an executor or administrator at his own sale *held* voidable, but not void, whatever the circumstances.—Crawford County Bank v. Bolton (Ark.) 398.

*Where executors purchase land with funds belonging to decedent's widow and minor children, and take a deed to them, charging the land with a lien for part of the price, the grantees hold the land subject to the lien and cannot complain that it is enforced.—Leavell v. Carter (Ky.) 1118.

A will *held* to impliedly authorize the executors to execute all necessary releases of liens against the real estate held for the beneficiaries.—Thomas v. Matthews (Tex. Civ. App.) 120.

§ 3. Allowance and payment of claims.

*Payment of claims against estates, once allowed by the probate court, can be enforced without revivor against a new administrator, since they continue until paid as subsisting judgments against the estate.—Brown v. Nelms (Ark.) 373.

The provision of the Constitution of 1874, conferring upon probate courts exclusive jurisdiction over decedents' estates, abrogated the statute authorizing the issuance of execution for the enforcement of judgments against executors and administrators as such, which necessitated that such a judgment should be revived against a successor before execution could issue against him, and vested in the court exclusive power to enforce claims against estates.—Brown v. Nelms (Ark.) 373.

*Under the facts, claimant *held* not entitled to compensation for caring for decedent.—Thomas v. Hobbs' Ex'r (Ky.) 574.

§ 4. Sales and conveyances under order of court.

Occupant's right to taxes and purchase price of land purchased by him at void administrator's sale and his liability for profits stated under the betterment act (Act March 8, 1883, Kirby's Dig. § 2754-2757).—Brown v. Nelms (Ark.) 373.

*The fact that an administrator had wasted assets of the estate sufficient to pay the debts would not deprive creditors of the right to resort to other assets unadministered for the payment of their claims and to procure a sale of decedent's land.—Brown v. Nelms (Ark.) 373.

*Where there are valid and subsisting claims against an estate which are duly probated, errors and irregularities in the allowance of some of the claims will not vitiate a probate sale of lands regularly made to pay debts, nor deprive the court of jurisdiction to order the sale, and Kirby's Dig. § 3793, providing that all probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions, shall be voidable, does not contemplate such a result.—Brown v. Nelms (Ark.) 373.

*Point annotated. See syllabus.

*Kirby's Dig. § 224, providing that administrators shall make final settlement within three years, *held* directory, and not to prevent the court from ordering sale of land to pay debts on petition of administrator after that period.—Brown v. Nelms (Ark.) 373.

Where the probate court acquired jurisdiction to determine a petition for a sale of decedent's land to pay debts, the jurisdiction was not lost by lapse of the term and an order of sale was not invalid because made at a term subsequent to the one at which the petition was first presented.—Brown v. Nelms (Ark.) 373.

*An appraiser of lands to be sold by an administrator *held* disqualified to purchase; Kirby's Dig. § 196, requiring the lands to be appraised by disinterested householders.—Brown v. Nelms (Ark.) 373.

*While a confirmed sale of land by an administrator is valid without any appraisal having been made, the confirmation does not heal the incapacity of the purchaser but the sale is voidable at the instance of the heirs after confirmation, within a reasonable time or within a reasonable time after an infant heir attains his majority.—Brown v. Nelms (Ark.) 373.

*The fact that purchasers at an administrator's sale made payment by crediting the amount of the purchase price on their probated claim, instead of paying in money, did not invalidate the sale, where it was reported to and duly confirmed by the court, and it did not appear that the interests of any other creditor were prejudiced.—Brown v. Nelms (Ark.) 373.

*A purchase by an administrator at his own sale is voidable, and not void.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, *Id.*

The right of persons interested in an estate to have a purchase by the administrator at his own sale set aside must be exercised within a reasonable time after the purchase became known.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, *Id.*

Laches *held* to bar a suit by heirs to set aside a sale by the administratrix on the ground that she was the purchaser at the sale.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, *Id.*

*Persons interested in an estate are not confined to the remedy of avoiding a purchase by the administrator at his own sale, but they may elect to ratify the sale, and hold the representative for the value or price.—Stuckey v. Lockard (Ark.) 747; Same v. Stephens, *Id.*

A devise cannot defeat creditors' right to subject the land to their claims where there are no personal assets.—Reaves v. Baker (Ky.) 609.

Where testatrix devised land to a daughter for life with remainder to decedent's minor child, both were necessary parties to an action to sell the land to pay testatrix's debts.—Reaves v. Baker (Ky.) 609.

A minor remainderman having been properly represented by guardian ad litem in an action to sell land to pay testatrix's debts, as to his interest, the judgment ordering a sale is presumed to have been proper, in the absence of a showing to the contrary.—Reaves v. Baker (Ky.) 609.

Under the facts, *held*, setting aside sale to pay debts of testator was proper.—Mitchell v. Odewalt's Ex'r (Ky.) 612.

*Report of commissioner that certain claims against a decedent's estate had been proved according to law *held* insufficient to authorize a judgment directing a sale of decedent's real estate.—Carter v. Crow's Adm'r (Ky.) 1098.

*Judgment directing sale of decedent's real estate *held* void, unless making provision for infant heirs in the proceeds of sale.—Carter v. Crow's Adm'r (Ky.) 1098.

*Purchaser at sale made in course of settlement of estate *held* to have the right of appeal from a confirmation.—Carter v. Crow's Adm'r (Ky.) 1098.

*Under Civ. Code Prac. §§ 126, 127, 429, a sale of an entire tract of land of a decedent *held* as to infant heirs void.—Carter v. Crow's Adm'r (Ky.) 1098.

§ 5. Actions.

Where children of a deceased administrator of an estate in which they have an interest bring an action against the administrator *de bonis non* for a settlement, the original administrator's estate should be administered, and his administrator made a party to the action.—Rawlings' Guardian v. Rawlings (Ky.) 862.

An action for conversion *held* the only remedy available against an executrix to recover for a special deposit made with decedent.—Stevens v. Stevens (Mo. App.) 35.

§ 6. Accounting and settlement.

In an action by children of a deceased son, who died without having settled his account as administrator of his father's estate, to require the administrator *de bonis non* to make a settlement, a petition failing to aver that any estate came into the hands of the administrator *de bonis non*, or that when the petition was filed there was any estate left by decedent undistributed, is insufficient.—Rawlings' Guardian v. Rawlings (Ky.) 862.

Under a will providing that the executors should be paid for their services one-half the fees allowed by law in such cases, the compensation of the executors *held* to be determined by Sayles' Ann. Civ. St. 1897, art. 2780.—Thomas v. Matthews (Tex. Civ. App.) 120.

EXEMPLARY DAMAGES.

See Damages, § 2.

For libel, see Libel and Slander, § 8.

EXEMPLIFICATIONS.

As evidence, see Evidence, § 7.

EXEMPTIONS.

See Homestead.

From taxation, see Taxation, § 1.

*Things used in a restaurant *held* not "apparatus" of a trade within Rev. St. 1895, art. 2395, subd. 5, as to exemptions.—Simmang v. Pennsylvania Fire Ins. Co. (Tex.) 1044.

Furniture such as dishes, counters, stools, ranges, and the like, used in conducting a restaurant, is not exempt from forced sale under Rev. St. 1895, art. 2397, subd. 3, exempting all "tools, apparatus and books, belonging to any trade or profession."—Stone v. Schneider-Davis Co. (Tex. Civ. App.) 183.

EXHIBITS.

Annexed to pleading, see Pleading, § 6.

EXPERT TESTIMONY.

In civil actions, see Evidence, § 9.

In criminal prosecutions, see Criminal Law, § 6.

EXPLOSIVES.

As nuisance, see Nuisance, § 1.

Negligence of master in use of, see Master and Servant, § 4.

Use of by city in public works, see Municipal Corporations, § 6.

*Point annotated. See syllabus.

EXPRESS COMPANIES.

Offense against liquor law, see Intoxicating Liquors, § 4.

EXTRADITION.

Report of proceedings before Governor as privileged, see Libel and Slander, § 2.

FACTORS.

See Brokers; Principal and Agent.

FALSE IMPRISONMENT.

Amendment of pleading, see Pleading, § 5.

FALSE SWEARING.

See Perjury.

FAMILY.

See Homestead, § 1.

FEEs.

Of attorney, see Attorney and Client, § 4.

FELLOW SERVANTS.

See Master and Servant, § 6.

FENCES.

Railroad fences, see Railroads, §§ 2, 10.

FILING.

Chattel mortgage, see Chattel Mortgages, § 1.

FINAL JUDGMENT.

Appealability, see Appeal and Error, § 1.

FINDINGS.

Review on appeal or writ of error, see Appeal and Error, § 16.

FIRE INSURANCE.

See Insurance, §§ 4, 6, 8.

FIREs.

Caused by operation of railroad, see Railroads, § 11.

Hearsay evidence in action for negligent fire, see Evidence, § 6.

Judicial notice in action for negligent fire, see Evidence, § 1.

Res gestæ in action for negligent fire, see Evidence, § 3.

FISCAL COURT.

See Counties, § 3.

FIXTURES.

On mining property, see Mines and Minerals, § 1.

FLOWAGE.

See Waters and Water Courses, § 2.

FOLLOWING TRUST PROPERTY.

See Trusts, § 4.

FOOD.

Enactment of ordinance by city of St. Louis supplemental and in addition to state laws as to the standard of purity of dairy products *held* expressly authorized by section 26 of article 3 of the charter of the city of St. Louis (Ann. St. 1906, p. 4807).—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

Fact that certain provisions of a city ordinance were impliedly repealed by state statute *held* not to impliedly repeal other provisions of the ordinance which were not inconsistent with the statutes.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

Under Const. art. 9, § 23 (Ann. St. 1906, p. 271), the provision of section 19, Ordinance No. 20,808 of City of St. Louis, fixing the total solids to be contained in skimmed milk *held* void as inconsistent with Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), and Sess. Laws 1907, pp. 238, 245.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

Section 19, Ordinance No. 20,808 of City of St. Louis, *held* not inconsistent with Sess. Laws 1905, p. 133 (Ann. St. 1906, § 4761), and Sess. Laws 1907, pp. 238, 246, prescribing percentages and standards of purity of dairy products.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

Rule as to liability to prosecution under state statutes and municipal ordinance relating to percentages and standards of purity of dairy products, stated.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

Acts 1907, p. 242, § 12, relieving dealers in dairy products from prosecution when they can establish a guaranty as provided for in National Food and Drug Act June 30, 1906, c. 3415, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), construed.—City of St. Louis v. Wortman (Mo.) 520.

Under clause 5, § 4, p. 239, Acts 1907, making it a misdemeanor to place any foreign substance in food which is poisonous or injurious to health, prosecution *held* maintainable, though the quantity of poison placed therein was so small that it was not sufficient to cause death or injury to health.—City of St. Louis v. Wortman (Mo.) 520.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE DETAINER.

To recover possession of demised premises, see Landlord and Tenant, § 5.

FORCIBLE ENTRY AND DETAINER.

By fiscal court of county, see Counties, § 3.

§ 1. Civil liability.

A tenant under an indefinite tenancy, the term beginning the seventh day of the month, *held* not guilty of forcible detainer until June 7th, though 30 days' notice to quit was given April 15th.—Reck & Riehl v. Caulfield (Ky.) 843.

*Point annotated. See syllabus.

FORECLOSURE.

Of lien, see *Mechanics' Liens*, § 3.
Of mortgage, see *Chattel Mortgages*, § 4; *Mortgages*, §§ 3, 4.

FOREIGN CORPORATIONS.

See *Corporations*, § 6.
Taxation of, see *Taxation*, § 1.

FORFEITURES.

Enforcement in equity, see *Equity*, § 1.
For causing death, see *Death*, § 1.
Of bail, see *Bail*, § 1.
Of dower, see *Dower*, § 1.
Of execution bond, see *Execution*.
Of insurance, see *Insurance*, §§ 5, 6, 9.
Of rights of insurance agent, see *Insurance*, § 1.
Of rights under mining lease, see *Mines and Minerals*, § 1.

FORMER ADJUDICATION.

See *Judgment*, §§ 9, 10.

FORMER JEOPARDY.

Bar to prosecution, see *Criminal Law*, § 3.

FORMS OF ACTION.

See *Action*, § 1; *Ejectment*; *Replevin*; *Trespass*, § 2; *Trover and Conversion*.

FORTHCOMING BONDS.

See *Execution*, § 2.

FRANCHISES.

Grant by municipality, see *Municipal Corporations*, §§ 4-8.
Mandamus to compel exercise of, see *Mandamus*, §§ 2, 3.

FRAUD.

See *Fraudulent Conveyances*.
Fraudulent pleading affecting right to remove cause, see *Removal of Causes*, §§ 1, 2.

By particular classes of persons, or persons in particular relations.

Attorneys, see *Attorney and Client*, § 3.

In particular classes of conveyances, contracts, transactions, or proceedings.

See *Insurance*, § 4.

Issuance of corporate stock, see *Corporations*, § 1.

Procuring making of will, see *Wills*, § 3.

Particular remedies.

See *Reformation of Instruments*, § 1.

§ 1. Deception constituting fraud, and liability therefor.

The existence of facts sufficient to put an ordinarily prudent man on inquiry held no defense in an action for fraud where a relation of confidence and trust existed.—*McDonough v. Williams* (Ark.) 164.

*The rule that mere false assertions as to the value of property, where no warranty is intended, does not constitute actionable fraud, does not apply where the parties have not equal opportunities to form and exercise their own judgment.—*Fall v. Hornbeck* (Mo. App.) 41.

*Point annotated. See *syllabus*.

§ 2. Actions.

Subsequently discovered defects in property held not admissible as evidence in an action for fraud in making a purchase.—*McDonough v. Williams* (Ark.) 164.

In an action for fraud in the purchase of corporate stock, evidence of the value of the physical property of the corporation held admissible.—*McDonough v. Williams* (Ark.) 164.

In an action for fraud, certain issues held involved in other issues submitted.—*McDonough v. Williams* (Ark.) 164.

A petition in an action for fraud in inducing a purchase of corporate stock held to state a good cause of action.—*Fall v. Hornbeck* (Mo. App.) 41.

FRAUDS, STATUTE OF.**§ 1. Pleading, evidence, trial, and review.**

Certain facts respecting an instrument giving a community the right to use a building for school purposes held presumed to show compliance with Rev. St. 1895, art. 624.—*Rhodes v. Maret* (Tex. Civ. App.) 433.

FRAUDULENT CONVEYANCES.

As against plaintiff in divorce, see *Divorce*, § 4.

§ 1. Transfers and transactions invalid.

*No fraud was committed in conveying a homestead to an adopted daughter in consideration of affection.—*Wilson v. Hardman* (Ky.) 672.

*A conveyance by a husband to his wife to defraud his creditors held properly vacated.—*Langham v. O'Meara & James* (Ky.) 928.

§ 2. Rights and liabilities of parties and purchasers.

*A transfer of property in fraud of creditors, while void as to the latter, is binding on the parties and their privies, as the statutes against fraudulent conveyances are intended to protect the interest of creditors, but not in any manner to affect the rights of the parties to the conveyance.—*Charles v. White* (Mo.) 545; *Same v. Neill*, Id.

§ 3. Remedies of creditors and purchasers.

Creditors' proof held insufficient to subject stock transferred by their debtor to the payment of their claims, under Acts 1904, p. 72, c. 22.—*Singletary v. Boerner-Morris Candy Co.* (Ky.) 637.

In a suit to subject goods to the transferrer's creditors' claims, it is improper to adjudge a sale for a sum exceeding the amount of the claims.—*Singletary v. Boerner-Morris Candy Co.* (Ky.) 637.

FRIGHT.

Recovery of damages for, see *Damages*, § 1.

FUGITIVE FROM JUSTICE.

Report of extradition proceedings as privileged, see *Libel and Slander*, § 2.

GAMING.

See *Lotteries*.

GARNISHMENT.

See *Attachment*; *Execution*.

Appellate jurisdiction of supreme court, see *Courts*, § 4.

Collateral attack on judgment against garnishee, see Judgment, § 7.
Finality of determination for purpose of review, see Appeal and Error, § 1.

§ 1. Writ or summons and notice, service, and return.

Under Rev. St. 1855, c. 12, § 22, and chapter 63, § 6, the omission of the sheriff summoning a garnishee *held* fatal to the jurisdiction of the court.—Howell v. Sherwood (Mo.) 50.

§ 2. Proceedings to support or enforce.

*A petition against a garnishee *held* insufficient to entitle plaintiff to a personal judgment against him.—Darby v. French (Ky.) 1182.

GENERAL LAND OFFICE.

Mandamus to commissioner of, see Mandamus, § 3.

GIFTS.

Charitable gifts, see Charities.

GOOD FAITH.

Of purchaser, see Bills and Notes, § 3; Vendor and Purchaser, § 4.

GOVERNOR.

Report of extradition proceedings before as privileged, see Libel and Slander, § 2.

GRAND JURY.

See Indictment and Information.

Appealability of action of, see Criminal Law, § 16.

A constitutional and statutory grand jury must be composed of 12 men.—State v. Vaughn (Mo. App.) 728.

A foreman *held* indispensable to a grand jury.—State v. Vaughn (Mo. App.) 728.

The clerk of the circuit court *held* required to enter in the record the names of the grand jurors, the name of the foreman, and the fact that the jury was duly impaneled, sworn, and charged.—State v. Vaughn (Mo. App.) 728.

The court *held* authorized to correct the record by a nunc pro tunc entry showing that a grand jury was composed of 12 men.—State v. Vaughn (Mo. App.) 728.

GRANTS.

Of public lands, see Public Lands.

GRATUITOUS BAILMENT.

See Bailment.

GUARANTY.

See Indemnity; Principal and Surety.

Contracts by corporation, see Corporations, § 4.

GUARANTY INSURANCE.

See Insurance, § 7.

GUARDIAN AND WARD.

Collateral attack on judgment against guardian, see Judgment, § 7.

Guardian ad litem for infant, see Infants, § 4.

*Point annotated. See syllabus.

Judgment against guardian as lien on homestead, see Homestead, § 1.

Liability of guardian on appeal bond, see Appeal and Error, § 25.

Liability of judge for failure to require guardian to settle, see Judges, § 1.

Stay of proceeding pending appeal in action between, see Appeal and Error, § 6.

Subrogation of sureties of guardian to rights of ward, see Subrogation.

§ 1. Sales and conveyances under order of court.

A guardian's successor having paid a judgment for which neither he nor the ward's estate was liable for the return of the purchase price of an unconfirmed sale of the ward's real estate, such succeeding guardian could not recover over against the original guardian's sureties either in his own behalf or by subrogation to the rights of the purchaser.—McMinn v. Cope (Tex. Civ. App.) 809.

"Complied with" defined.—McMinn v. Cope (Tex. Civ. App.) 809.

A guardian's contract for the sale of the ward's real estate does not pass title until the sale is confirmed.—McMinn v. Cope (Tex. Civ. App.) 809.

The estate of a ward and his succeeding guardian *held* liable for so much of the purchase price of an unconfirmed sale of the ward's real estate as was applied directly to the benefit of the ward or his estate.—McMinn v. Cope (Tex. Civ. App.) 809.

Under Rev. St. 1895, arts. 2672, 2679, and article 2673, subd. 8, *held* not to authorize a guardian to receive, so as to bind his ward, the consideration for a sale of the ward's real estate until confirmation.—McMinn v. Cope (Tex. Civ. App.) 809.

§ 2. Actions.

Under Rev. St. 1895, art. 1265, subds. 2, 3, *held* unnecessary for a purported guardian to prove her capacity to sue, it not having been questioned.—Kaack v. Stanton (Tex. Civ. App.) 702.

HABEAS CORPUS.

Right to trial by jury, see Jury, § 1.

§ 1. Jurisdiction, proceedings, and relief.

*A judgment on first application for habeas corpus to obtain custody of a child *held* not res judicata of a second application where there has been a material change of facts.—Pittman v. Byars (Tex. Civ. App.) 102.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 17-21.

HAWKERS AND PEDDLERS.

License tax on peddlers, see Licenses, § 1.

*Oil company, which fills tanks of regular customers every week under a standing order, *held* not a peddler, within Ky. St. 1903, § 4215.—Commonwealth v. Standard Oil Co. (Ky.) 902.

*Mere delivery of goods to a customer *held* not peddling, within Ky. St. 1903, § 4215.—Commonwealth v. Standard Oil Co. (Ky.) 902.

*The words "selling by sample," as used in Ky. St. 1903, § 4218, mean by taking orders for future delivery, as the commercial traveler does.—Commonwealth v. Standard Oil Co. (Ky.) 902.

HEALTH.

See Food.

HEARING.

In probate proceedings, see Wills, § 4.
Of motion for new trial, see New Trial, § 2.
On appeal or writ of error, see Appeal and Error, § 11.

HEARSAY.

In civil actions, see Evidence, § 6.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Municipal Corporations, § 10; Navigable Waters, § 1.

Accidents at railroad crossings, see Railroads, § 7.

§ 1. Establishment, alteration, and discontinuance.

In a suit to recover a strip of land between adjacent owners, a plea *held* a plea of limitations, and not objectionable as a plea of acquisition to title to land by parol.—*Rose v. Stephens* (Ky.) 676.

*In an action to recover certain land which defendants claimed the right to use as a road, plaintiffs' evidence *held* to establish a *prima facie* case.—*Rose v. Stephens* (Ky.) 676.

Statement as to requisites of record as to proof of jurisdictional facts on appeal to Court of Appeals from judgment of circuit on appeal to it from decision of county court ordering a new road opened.—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

The trial on appeal to the circuit court, in a proceeding to open a new road, being, under Ky. St. 1903, § 4303, *de novo*, *held*, that jurisdictional facts put in issue by exceptions in the county court must be proved anew.—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

The burden of proof as to facts jurisdictional, under Ky. St. 1903, §§ 4289, 4290, in a proceeding to open a new road, *held* to be on petitioners, on the filing of exceptions raising the issue.—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

*The swearing of commissioners in proceedings to open a new road as directed by Ky. St. 1903, § 4291, not being jurisdictional, *held* waived by failure to file exception on that account in the county court.—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

Statement of what issues of facts raised by exceptions in proceedings to open a new road are required by Ky. St. 1903, § 4296, to be submitted to a jury (sections 4289, 4290).—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

*Signing of petition and notice, as provided by Ky. St. 1903, §§ 4289, 4290, *held* jurisdictional facts in proceedings to open a new road, and required to be shown in the county court.—*Louisville & N. R. Co. v. Gerard* (Ky.) 915.

The circuit court *held* to have no jurisdiction of an appeal taken from the county court in proceedings to establish a public road where the appeal was not taken within 10 days, notwithstanding appearance of appellees in the circuit court.—*Sidwell v. Jett* (Mo.) 56.

Under Rev. St. 1899, § 1788 (Ann. St. 1906, p. 1248), relating to trials in the circuit court on appeal from the county court and in view of the fact that the county court has original jurisdiction to establish county roads, the circuit court *held* to have jurisdiction of such proceedings only by an appeal from the county court.—*Sidwell v. Jett* (Mo.) 56.

*Point annotated. See syllabus.

HOMESTEAD.

See Exemptions.

Cancellation of deed of, see Cancellation of Instruments, § 2.

Conveyance of, as fraudulent, see Fraudulent Conveyances, § 1.

§ 1. Nature, acquisition, and extent.

In view of Const. art. 9, § 3, *held*, that a guardian could not claim his homestead as exempt from judgments obtained against him by his wards, and that such judgments were a lien on his interest therein.—*Reaves v. Coffman* (Ark.) 194.

A homestead acquired in compromise of a will contest by testator's heir *held* not purchased, within Ky. St. 1903, § 1702, excepting from homestead exemptions one purchased after creation of the debt.—*Burrow v. Maxon* (Ky.) 661.

*The duty of a husband to support his children, notwithstanding a divorce awarding to the wife the custody of the children, *held* to constitute the husband and children, when living together, a family entitled to a homestead.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*Land conveyed to a debtor, never occupied as a homestead, in part payment for a house and lot which was a business homestead, *held* not exempt as the proceeds of the homestead under Const. art. 16, § 51; *Sayles' Ann. Civ. St.* 1897, art. 2396.—*McGovern v. Taliaferro* (Tex. Civ. App.) 814.

*A street improvement assessment not made in accordance with the Constitution and laws *held* not a tax within Const. art. 16, § 50, authorizing sale of the homestead for the payment of taxes due thereon.—*City of Beaumont v. Russell* (Tex. Civ. App.) 950.

§ 2. Transfer or incumbrance.

*To give effect to the wife's signature to a mortgage of the homestead, *held*, that it must be construed to show an intent to join therein.—*Sledge & Norfleet Co. v. Craig* (Ark.) 892.

*Kirby's Dig. § 3901, *held* to prescribe no particular form of acknowledgment by the wife of an instrument affecting the homestead, or of the officer's certificate thereto, so that it is sufficient if the wife joins in the execution, and acknowledges the same before an authorized officer, and his certificate so states.—*Sledge & Norfleet Co. v. Craig* (Ark.) 892.

§ 3. Rights of surviving husband, wife, children, or heirs.

*The constitutional provision that the homestead left by a decedent shall be exempt from sale for debts of decedent, and that the rents and profits thereof shall vest in the widow for life and the children during minority, merely exempts it from sale for debt either during the lifetime of the owner or after his death during the lifetime of his widow or minority of his children, and does not prohibit the original owner of the homestead from dismembering it by grant or devise at least so far as his children are concerned.—*Brown v. Nelms* (Ark.) 373.

*Where the husband or wife dies, the survivor retains the status as head of the family and as such is entitled to the homestead exemption then existing, regardless of whether or not there are other constituents of the family remaining with the survivor.—*Sykes v. Speer* (Tex. Civ. App.) 422.

§ 4. Abandonment, waiver, or forfeiture.

*Whether a homestead has been abandoned is a question of fact ascertainable from the circumstances.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*Facts *held* not to show an abandonment of a homestead by a husband retaining the custody

of his children, notwithstanding a divorce obtained by the wife.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*Where a marriage is dissolved by divorce, the homestead rights of the parties depend on the presence of other constituents of the family and the subsequent relations of the parties to those constituents.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*Abandonment of a homestead *held* accomplished by going away with the definite intention never to return.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*When a homestead character once attaches to property, it continues to be the homestead until the owner voluntarily changes its character by disposing of the property or by leaving with the intention of not returning and occupying it as a home.—*Sykes v. Speer* (Tex. Civ. App.) 422.

§ 5. Protection and enforcement of rights.

A judgment of divorce, awarding the wife costs of the suit, cannot be satisfied out of the homestead of the husband, while he retains custody of the children, though the judgment awarded such custody to the wife.—*Sykes v. Speer* (Tex. Civ. App.) 422.

A forced sale of a homestead, except for that which the constitution makes it liable, is void, and a grantee of the purchaser at such sale acquires no better title than the purchaser did.—*Sykes v. Speer* (Tex. Civ. App.) 422.

*Where land conveyed to a debtor in part payment for a business homestead and other property was conveyed by the debtor after it had been attached, the burden was on the debtor's grantee to show that the land was exempt when attached.—*McGovern v. Taliaferro* (Tex. Civ. App.) 814.

HOMICIDE.

See Homicide, §§ 6, 7; Suicide.

Admissibility of telephone conversations, see Criminal Law, § 6.

Competency of witnesses, see Witnesses, § 1. Evidence at preliminary examination, see Criminal Law, § 6.

Examination of witnesses, see Witnesses, § 2. Former jeopardy, see Criminal Law, § 3. Harmless error in general, see Criminal Law, § 20.

Impeachment of witnesses, see Witnesses, § 3. Opinion evidence, see Criminal Law, § 6.

Requisites and sufficiency of instructions in general, see Criminal Law, § 12.

Selection and drawing of jury, see Jury, § 2.

§ 1. The homicide.

*Homicide is the destruction of human life by another, and the person destroyed must be actually born at the time.—*Cordes v. State* (Tex. Cr. App.) 943.

*Essential attributes of the crime of infanticide stated.—*Cordes v. State* (Tex. Cr. App.) 943.

§ 2. Murder.

*"Murder" defined.—*Combs v. Commonwealth* (Ky.) 658.

Under Pen. Code, arts. 77, 647-649, one inducing another to take a deadly poison under the impression that it is medicine or forcing another against his will to take poison, where death results, is guilty of murder.—*Sanders v. State* (Tex. Cr. App.) 68.

Murder in the first degree and murder in the second degree and manslaughter are mere grades of the same offense.—*Burnett v. State* (Tex. Cr. App.) 74.

*A person was present when another unlawfully and with express malice killed a child,

and had agreed with the other to kill it, and, knowing his unlawful intent, aided him by acts or encouraged him by words or gestures. *Held*, that the person was guilty of murder in the first degree.—*Cordes v. State* (Tex. Cr. App.) 943.

§ 3. Manslaughter.

*"Manslaughter" defined.—*Combs v. Commonwealth* (Ky.) 658.

*One accused of murder *held* entitled, from the standpoint of manslaughter, to defend himself against decedent and a third person.—*Brown v. State* (Tex. Cr. App.) 80.

*On an indictment for murder, accused *held*, under certain facts stated, guilty of manslaughter only.—*Brown v. State* (Tex. Cr. App.) 80.

§ 4. Excusable or justifiable homicide.

*Rule as to one's right to kill a burglar, etc., stated.—*Leach v. Commonwealth* (Ky.) 595.

*If threats alleged to have been made by one person against another are communicated to the other, though not true, and he believes them and that the person made them, he will be justified in acting the same as if they had been in fact made.—*Huddleston v. State* (Tex. Cr. App.) 64.

*On an issue of self-defense in homicide, the jury must look at the facts from accused's standpoint; he being entitled to defend against fear of death or serious bodily injury.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 5. Indictment and information.

An indictment for murder by poison *held* fatally bad.—*Sanders v. State* (Tex. Cr. App.) 68.

§ 6. Evidence—Admissibility in general.

*Rule respecting justification for killing an intruder or trespasser stated.—*Leach v. Commonwealth* (Ky.) 595.

Rule as to one's right to kill another in self-defense stated.—*Long v. Commonwealth* (Ky.) 841.

Evidence *held* to show homicide in self-defense.—*Long v. Commonwealth* (Ky.) 841.

*On a trial for murder by poison evidence of visits made by decedent to the home of accused in his absence *held* inadmissible.—*Sanders v. State* (Tex. Cr. App.) 68.

*In a homicide case, the admission in evidence of the details of a previous difficulty between accused and a third person *held* erroneous.—*Brown v. State* (Tex. Cr. App.) 80.

*Evidence *held* admissible against one accused of uxoricide.—*Rice v. State* (Tex. Cr. App.) 299.

*One convicted of murder *held* not entitled to complain because his witness was permitted to testify on cross-examination that decedent's brother brought witness to the county of prosecution where she was placed in jail.—*Rice v. State* (Tex. Cr. App.) 299.

*The state could show that one accused of uxoricide had had improper relations with another woman more than 18 months or 2 years before the homicide.—*Rice v. State* (Tex. Cr. App.) 299.

*In a homicide case, proof of the conduct and appearance of accused, after coming to the house of decedent where the killing occurred *held* admissible.—*Marsh v. State* (Tex. Cr. App.) 320.

On a trial for homicide committed by accused and his brother pursuant to a conspiracy, proof of certain conduct of the brother *held* admissible, though accused was absent.—*Proctor v. State* (Tex. Cr. App.) 770.

*One accused of manslaughter having shown threats by decedent, under Pen. Code, art. 713,

*Point annotated. See syllabus.

the state could show that decedent was peaceable, etc.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 7. — Dying declarations.

*Under Code Cr. Proc. art. 775, state *held* entitled to show in trial for uxoricide declarations by decedent before her death incriminating accused.—*Rice v. State* (Tex. Cr. App.) 299.

*On a trial for uxoricide, the state *held* entitled to show declaration by decedent shortly before her death.—*Rice v. State* (Tex. Cr. App.) 299.

§ 8. — Proceedings at inquest.

*A transcript of testimony of witnesses taken in writing at an inquest proceeding, at which accused appeared and cross-examined the witnesses, may be introduced in evidence by the prosecution on the trial of accused where the witnesses whose evidence was so taken are dead or beyond the jurisdiction of the court at the time of the trial.—*Hobbs v. State* (Tex. Cr. App.) 308.

*The admissibility of a transcript of the testimony of witnesses taken at an inquest proceeding is not dependent on the necessity for its introduction, or affected by the fact that there is independent testimony of living and available witnesses covering the same matter.—*Hobbs v. State* (Tex. Cr. App.) 308.

The necessity for the introduction in a criminal prosecution of transcripts of the evidence of witnesses deceased or beyond the jurisdiction of the court must be left to the discretion of the prosecuting officer and of the trial court.—*Hobbs v. State* (Tex. Cr. App.) 308.

§ 9. — Weight and sufficiency.

*Evidence *held* to sustain a conviction of murder.—*Foster v. Commonwealth* (Ky.) 563.

*Evidence *held* to justify a conviction of manslaughter.—*Chapman v. Commonwealth* (Ky.) 567.

Where the testimony of the commonwealth, if true, justified a conviction, a verdict of guilty was supported by the evidence, notwithstanding the conflicting evidence of accused.—*Blanton v. Commonwealth* (Ky.) 594.

*Evidence *held* to sustain a conviction of murder in the first degree.—*Leach v. Commonwealth* (Ky.) 595.

Evidence *held* to sufficiently corroborate the testimony of an accomplice that accused was present and aided in the killing of decedent.—*Miller v. Commonwealth* (Ky.) 598.

*On a trial for malicious cutting and wounding with intent to kill, evidence *held* insufficient to establish the intent.—*Hamilton v. Commonwealth* (Ky.) 603.

*The intent in malicious cutting with intent to kill is gathered, not only from accused's declarations, but from the nature of the wounds, and the attending circumstances.—*Hamilton v. Commonwealth* (Ky.) 603.

*Where the jury believe beyond a reasonable doubt that accused has been proven guilty of a homicide, and they entertain a doubt as to the degree of her guilt, they must find her guilty of manslaughter.—*Steely v. Commonwealth* (Ky.) 655.

*Where the jury believe beyond a reasonable doubt that accused has been proven guilty, but have a reasonable doubt whether he has been proven guilty of murder or manslaughter, they should find him guilty of manslaughter.—*Combs v. Commonwealth* (Ky.) 653.

*Evidence *held* to show murder in the first degree.—*Rice v. State* (Tex. Cr. App.) 299.

*Evidence *held* sufficient to support a conviction of murdering an infant.—*Cordes v. State* (Tex. Cr. App.) 948.

§ 10. Trial—Questions for jury.

*In a prosecution for homicide, evidence *held* to raise the issues of manslaughter and self-defense.—*Burnett v. State* (Tex. Cr. App.) 74.

*Evidence *held* to authorize the submission to the jury of the issues of murder in the first and second degrees.—*High v. State* (Tex. Cr. App.) 939.

*Evidence in a manslaughter trial *held* sufficient to raise an issue as to provocation of difficulty by accused.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 11. — Instructions in general.

*Evidence in a murder trial *held* insufficient to require an instruction as to accused's right to shoot if he believed decedent was at the time attempting to break into his house or commit a felony.—*Leach v. Commonwealth* (Ky.) 595.

*On a trial for homicide, an instruction submitting an issue *held* essential to submit the issue of self-defense.—*Combs v. Commonwealth* (Ky.) 653.

Charges in a murder case *held* confusing.—*Huddleston v. State* (Tex. Cr. App.) 64.

On a trial for murder by poison an instruction on the defense of suicide *held* required under the evidence.—*Sanders v. State* (Tex. Cr. App.) 68.

An instruction on a trial for murder by poison *held* insufficient for failing to state the essential elements of the offense.—*Sanders v. State* (Tex. Cr. App.) 68.

In a prosecution for manslaughter, a charge that in determining whether there was adequate cause the jury were entitled to consider any former provocation, etc., *held* proper.—*Burnett v. State* (Tex. Cr. App.) 74.

On a trial for homicide, an instruction eliminating a fact in passing on whether or not accused was the aggressor *held* erroneous.—*Brown v. State* (Tex. Cr. App.) 80.

On a trial for homicide, an instruction on adequate cause *held* not erroneous, in view of the undisputed evidence.—*Proctor v. State* (Tex. Cr. App.) 770.

On a trial for murder committed by accused and his brother pursuant to a conspiracy, an instruction *held* not erroneous for failing to state with whom the brother had formed the common intent to kill decedent.—*Proctor v. State* (Tex. Cr. App.) 770.

§ 12. — Instructions on self-defense.

*An instruction on a trial for homicide *held* to correctly define self-defense under the evidence.—*Commonwealth v. Boyd* (Ky.) 605.

*On a trial for homicide, an instruction on self-defense *held* required to submit to the jury a certain issue.—*Steely v. Commonwealth* (Ky.) 655.

*A charge in a murder case *held* an unwarranted limitation on the right of self-defense.—*Huddleston v. State* (Tex. Cr. App.) 64.

*Where the question of serious bodily injury is involved, and the issues of self-defense and manslaughter arise, the court must definitely instruct the jury so that they will understand where one ends and the other begins, and be able to draw the line of demarcation from the facts.—*Brown v. State* (Tex. Cr. App.) 80.

*Under the evidence in a manslaughter trial, *held* proper to refuse to instruct on the law

*Point annotated. See syllabus.

of retreat.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*Instructions in a manslaughter trial *held* to sufficiently cover the law of self-defense based upon real and apparent danger.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*Any words tending to provoke and provoking a difficulty, being so intended, justify a charge on provoking a difficulty.—*Cornelius v. State* (Tex. Cr. App.) 1050.

§ 13. — Instructions on grade or degree of offense.

*On a trial for homicide, the refusal to charge on voluntary or involuntary manslaughter *held* proper under the evidence.—*Foster v. Commonwealth* (Ky.) 563.

On a trial for homicide, failure to charge on involuntary manslaughter *held* not prejudicial, in view of the evidence and the charge given.—*Blanton v. Commonwealth* (Ky.) 594.

On a trial for homicide, an instruction *held* not erroneous in view of the evidence and charge given.—*Miller v. Commonwealth* (Ky.) 598.

*The word "willful" in an instruction as to "murder" defined.—*Combs v. Commonwealth* (Ky.) 658.

*"Malice aforethought" in an instruction as to "murder" defined.—*Combs v. Commonwealth* (Ky.) 658.

*Evidence *held* to require instructions on involuntary manslaughter and accidental killing.—*Long v. Commonwealth* (Ky.) 841.

A charge on manslaughter *held* erroneous as submitting the question of the abandonment by decedent of an assault on accused preceding the homicide.—*Huddleston v. State* (Tex. Cr. App.) 64.

An instruction on manslaughter which ignored certain rights of accused *held* reversible error.—*Brown v. State* (Tex. Cr. App.) 80.

On a trial for homicide, a charge on manslaughter committed for insults to a female relative of accused *held* proper.—*Proctor v. State* (Tex. Cr. App.) 770.

§ 14. Appeal and error.

Error in a murder trial in submitting an issue not sustained by evidence *held* beneficial to accused, defeating his right to complain.—*Leach v. Commonwealth* (Ky.) 595.

In a prosecution for homicide a statement by defendant's wife on cross-examination that she had told a neighbor that defendant had gone to look for decedent and that she did not know what was going to happen *held* ground for reversal.—*Hobbs v. State* (Tex. Cr. App.) 308.

*Where accused was convicted of manslaughter, errors in the charge of murder in the first degree were immaterial.—*Marsh v. State* (Tex. Cr. App.) 320.

*Where the evidence does not suggest the issue of self-defense, the error in giving a correct charge on the law of self-defense is not ground for reversal.—*Proctor v. State* (Tex. Cr. App.) 770.

*Under Code Cr. Proc. 1895, art. 817, a conviction of manslaughter, while the evidence shows guilt of a higher grade of homicide, *held* not prejudicial to accused.—*High v. State* (Tex. Cr. App.) 939.

*Where there is a conviction of manslaughter, errors in the charge defining murder will not be reviewed.—*High v. State* (Tex. Cr. App.) 939.

*Murder and manslaughter being merely differing grades of one crime, evidence tending to show one guilty of murder is admissible on a new trial after reversal of a conviction of manslaughter, though under Code Cr. Proc. art. 762,

he cannot be convicted of a higher degree than manslaughter.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*Under Code Cr. Proc. art. 723, one convicted of manslaughter *held* not entitled to complain of the court's refusal to submit a certain theory.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*One accused of manslaughter was not prejudiced by the court's failure to instruct as to what offense accused was guilty of if he provoked the difficulty with intent to commit a breach of the peace.—*Cornelius v. State* (Tex. Cr. App.) 1050.

*One accused of manslaughter was not prejudiced by an instruction that, if the relative strength of decedent and accused led accused to reasonably fear death, etc., he must be acquitted, though the record did not disclose decedent's size.—*Cornelius v. State* (Tex. Cr. App.) 1050.

HOUSEBREAKING.

See Burglary.

HUMANITARIAN DOCTRINE.

Application of doctrine in action for injuries caused by operation of street railroad, see Street Railroads, § 2.

HUSBAND AND WIFE.

See Courtesy; Divorce; Dower; Marriage.

Appointment of receiver in suit for divorce, see Receivers, § 2.

Argument and conduct of counsel in action for alienation of affections, see Trial, § 4.

Betterment act as statute of limitations, see Limitation of Actions, § 1.

Competency as witnesses, see Witnesses, § 1.

Competency of witnesses in action for alienation of affections, see Witnesses, § 1.

Computation of limitations in action on joint account of, see Limitation of Actions, § 2.

Estoppel of wife, see Estoppel, § 1.

Fraudulent conveyances between, see Fraudulent Conveyances, § 1.

Liability of wife on sequestration bond, see Sequestration.

Negligence of husband implied to wife, see Negligence, § 3.

Rights of survivor, see Descent and Distribution, § 2; Homestead, § 3.

§ 1. Mutual rights, duties, and liabilities.

*Where land is conveyed to husband and wife as tenants by the entireties, the entire estate vests in the husband on the wife's death.—*Robertson v. Robinson* (Ark.) 883.

A letter written by plaintiff's wife with his knowledge and at his direction *held* admissible against him.—*Cook v. Newby* (Mo.) 722.

§ 2. Marriage settlements.

*An antenuptial contract *held* so unreasonable in its provisions for the benefit of the wife as to warrant the setting aside of the same.—*Shirey v. Shirey* (Ark.) 369.

An antenuptial contract is voidable on account of the incapacity of the wife by reason of infancy.—*Shirey v. Shirey* (Ark.) 369.

The court, in annulling a marriage contract on the ground of infancy of the wife or because of the inadequacy of the provisions made for her, will restore to the husband the property settled on the wife if she has not parted with it.—*Shirey v. Shirey* (Ark.) 369.

*Point annotated. See syllabus.

§ 3. Disabilities and privileges of coverture.

Under Ky. St. 1908, § 506, a married woman *held* empowered to convey, without the concurrence or intervention of her husband, land held by her as a mere trustee.—*Antonini v. Straubs* (Ky.) 1092.

*Under the married woman's statute, the doctrine of estoppel obtains against a married woman.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*That a husband is joined in an action to recover real estate alleged to be the separate property of the wife *held* not to affect the right of the wife to execute a replevy bond to recover the property levied on by defendant in sequestration proceedings.—*Wandelohr v. Grayson County Nat. Bank* (Tex.) 1046.

§ 4. Wife's separate estate.

Facts *held* not to prevent a wife from moving under Ky. St. 1908, § 2548, to quash an execution issued on a judgment against her and her husband on a note on which she was only a surety.—*Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory* (Ky.) 608.

*A sale by the husband of his wife's personal property is invalid, unless he had express authority from her to sell or unless she ratified the sale.—*Hudspeth v. State* (Tex. Cr. App.) 1060.

§ 5. Actions.

In an action for injury to plaintiff's minor son, *held*, that it was necessary that a plea that she was a married woman without right to sue without joining her husband should be sworn to and filed in due order of pleading.—*Hillsboro Cotton Mills v. King* (Tex. Civ. App.) 132.

*A wife cannot sue for injury to a minor son without joining the husband.—*Hillsboro Cotton Mills v. King* (Tex. Civ. App.) 132.

*A wife cannot sue her husband for torts committed by him against her person or reputation while the marriage relation existed.—*Sykes v. Speer* (Tex. Civ. App.) 422.

§ 6. Community property.

A wife who, as community survivor, disposed of land in settlement of an incumbrance thereon, *held* not entitled to recover the land without first offering to pay the amount acknowledged to be due thereon.—*Hames v. Stroud* (Tex. Civ. App.) 775.

*The surviving wife *held* authorized to dispose of community property to settle debts.—*Hames v. Stroud* (Tex. Civ. App.) 775.

§ 7. Separation and separate maintenance.

*In a suit by a wife against her husband for support of herself and child, the husband's plea of infancy is unavailing.—*Pendleton v. Pendleton* (Ky.) 674.

Facts *held* to warrant the sustaining of an attachment against the interests of a husband, and compelling him to contribute to the support of his wife and infant child.—*Pendleton v. Pendleton* (Ky.) 674.

§ 8. Enticing and alienating.

*In an action for the alienation of a husband's affections, certain evidence *held* inadmissible as hearsay.—*Leucht v. Leucht* (Ky.) 845.

*In an action for the alienation of a husband's affections, evidence of the affectionate relations existing between the wife and her husband before the estrangement, and of his conduct indicating a loss of his affection, *held* admissible.—*Leucht v. Leucht* (Ky.) 845.

*In an action for the alienation of a husband's affections, evidence of acts and declarations by defendant showing a purpose to alienate the affections of the husband *held* admissible.—*Leucht v. Leucht* (Ky.) 845.

*Point annotated. See syllabus.

*In an action by a wife for the alienation of her husband's affection, certain evidence *held* admissible to prove the state of her feeling towards her husband.—*Leucht v. Leucht* (Ky.) 845.

HYPOTHETICAL QUESTIONS.

To expert witness, see Criminal Law, § 6; Evidence, § 9.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

Of record, see Appeal and Error, § 7.

Of verdict, see New Trial, § 2.

Of witness, see Witnesses, § 3.

IMPLIED CONTRACTS.

See Contribution; Use and Occupation; Work and Labor.

IMPRISONMENT.

See Bail.

Habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Liens, see Mechanics' Liens.

On mining property, see Mines and Minerals, § 1.

Public improvements, see Municipal Corporations, §§ 4-8.

*"Bona fide occupant," defined.—*Brown v. Nelms* (Ark.) 373.

An appraiser and purchaser of land sold at an administrator's sale, though at law disqualified to purchase, *held* a bona fide occupant and entitled to betterments upon vacating of sale under the betterment act (Act March 8, 1883, Kirby's Dig. §§ 2754-2757).—*Brown v. Nelms* (Ark.) 373.

A person entitled to betterments under the betterment act (Act March 8, 1883, Kirby's Dig. §§ 2754-2757) *held* to be a bona fide occupant in actual good faith.—*Brown v. Nelms* (Ark.) 373.

*Instructions as to the right of one making improvements on property of another to recover the value of such improvements *held* unobjectionable.—*Sires v. Clark* (Mo. App.) 526.

An instruction in an action to recover for improvements as to the rights of a life tenant to recover for improvements *held* properly refused; there being no evidence that plaintiff knew that he held any title short of the fee.—*Sires v. Clark* (Mo. App.) 526.

In an action to recover for improvements, evidence as to the cost of the improvements is admissible.—*Sires v. Clark* (Mo. App.) 526.

*One who makes permanent improvements on the land of another, believing himself to be the true owner, and without notice of the claim of the true owner, may recover the value of the enhancement to the land.—*Sires v. Clark* (Mo. App.) 526.

IMPUTED NEGLIGENCE.

See Negligence, § 3.

INADEQUATE DAMAGES.

See Damages, § 4.

INCOMPETENT PERSONS.

See Insane Persons.

INCUMBRANCES.

On homestead, see Homestead, § 2.

INDEMNITY.

See Principal and Surety.

A judgment having been rendered against a receiver's successor for services of the original receiver's attorney, the successor was entitled to a judgment over against the original receiver for such amount.—*Jones v. Gardner* (Tex. Civ. App.) 828.

INDEMNITY INSURANCE.

See Insurance, § 7.

INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 1, 12.

INDICTMENT AND INFORMATION.

See Grand Jury.

Presumptions on appeal as to, see Criminal Law, § 20.

For particular offenses.

See Homicide, § 5; Nuisance, § 2; Perjury, § 1; Rape, § 2; Robbery.

Against liquor law, see Intoxicating Liquors, § 4.

§ 1. Requisites and sufficiency of accusation.

*An indictment under a statute whose enacting clause contains exceptions must negative such exceptions.—*Adams Express Co. v. Commonwealth* (Ky.) 577.

*An indictment charging a felony under the common law must charge its commission feloniously, or with a felonious intent.—*Howerton v. Commonwealth* (Ky.) 606.

*An indictment charging a statutory crime, defined by the statute itself, in the language of the statute, is sufficient without using the words "feloniously," or "with felonious intent."—*Howerton v. Commonwealth* (Ky.) 606.

*An indictment alleging the statutory offense of carnally knowing a female under the age of 16 years, held sufficient without alleging a felonious intent.—*Howerton v. Commonwealth* (Ky.) 606.

§ 2. Motion to quash or dismiss, and demurrer.

The burden of showing that a grand jury returning an indictment was not composed of 12 men is on the party challenging the jury.—*State v. Vaughn* (Mo. App.) 728.

§ 3. Issues, proof, and variance.

*One indicted as principal may be convicted on a showing that he was present at the time of the commission of the offense, counseling, aiding, or assisting the perpetrator thereof.—*Steely v. Commonwealth* (Ky.) 655.

*One charged as aider and abettor to a murder may be convicted as a principal.—*Combs v. Commonwealth* (Ky.) 658.

§ 4. Conviction of offense included in charge.

Under Cr. Code Prac. § 264, the court on the trial of a violation of Ky. St. 1903, § 807, held authorized to permit a conviction of a

violation of section 1256.—*Commonwealth v. Wells* (Ky.) 568.

Under Cr. Code Prac. § 264, the court on the trial of a violation of Ky. St. 1903, § 1163, held required, under the evidence, to instruct on trespass as defined in section 1256.—*Price v. Commonwealth* (Ky.) 855.

INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 3.

INFANTICIDE.

See Homicide, §§ 1, 9.

Argument and conduct of counsel in prosecution for, see Criminal Law, § 10.

Evidence in prosecution for, see Criminal Law, § 6.

Instructions in prosecution for, see Criminal Law, § 12.

Province of court and jury in prosecution for, see Criminal Law, § 11.

INFANTS.

See Guardian and Ward.

Care required as to children in operation of railroad, see Railroads, § 8.

Contributory negligence on part of children, see Negligence, §§ 3, 4.

Custody and support on divorce of parents, see Divorce, § 5.

Disability of infancy affecting limitations, see Limitation of Actions, § 2.

Employment of, see Master and Servant, §§ 5, 11.

Habeas corpus to secure custody, see Habeas Corpus, § 1.

Injuries to by operation of street railroad, see Street Railroads, § 2.

§ 1. Disabilities in general.

*Facts held to estop plaintiff from suing to recover land on the ground that she was a minor when she conveyed it.—*Edgar v. Gertison* (Ky.) 831.

§ 2. Property and conveyances.

*A minor heir cannot be estopped to claim his inheritance by any conduct during his minority.—*Rowe v. Allison* (Ark.) 395.

§ 3. Contracts.

The defense of innocent purchaser cannot be set up by one purchasing at a sale under a power of sale in a will as against the incapacity of an infant heir of a pretermitted child.—*Rowe v. Allison* (Ark.) 395.

§ 4. Actions.

*Under Civ. Code Prac. § 38, subsec. 2, and section 36, subsec. 3, relating to the appointment of a guardian ad litem for an infant defendant, and section 499, authorizing the appointment of such person if the statutory guardian does not defend, a guardian was properly appointed for an infant defendant in a partition suit; her regular guardian being a plaintiff therein.—*Adams v. De Dominguez* (Ky.) 663.

Under Civ. Code Prac. § 36, subsec. 3, judgment may be rendered in an action against an infant when a proper report is made by the guardian ad litem.—*Adams v. De Dominguez* (Ky.) 663.

Evidence held to show that grantor in a deed was of age when it was executed.—*Edgar v. Gertison* (Ky.) 831.

*In an action to cancel a deed on the ground the grantor was an infant when it was executed, the burden was on the grantor to show her

*Point annotated. See syllabus.

minority at that time.—*Edgar v. Gertison* (Ky.) 831.

*The rights given infants after attaining majority to show cause against a judgment and have it corrected, under Civ. Code Prac. §§ 391, 518, subd. 8, and section 745, *held* not possessed by persons of age.—*Leavell v. Carter* (Ky.) 1118.

INFERIOR COURTS.

See Courts, § 3.

INFORMATION.

Criminal accusation, see Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

Notice of trial, see Trial, § 1.

Rendition of judgment on demurrer, see Judgment, § 3.

Relief against particular acts or proceedings.

See Nuisance, §§ 1, 2.

Collection of tax, see Taxation, § 2.

Disposition of property by defendant in divorce, see Divorce, § 4.

Interference with dedicated property, see Dedication, § 2.

Obstruction of surface waters, see Waters and Water Courses, § 1.

Review of proceedings for injunction.

Scope and extent of review in general, see Appeal and Error, § 12.

§ 1. Nature and grounds in general.

Failure to appeal from refusal to allow intervention *held* not to preclude intervenor from enjoining enforcement of the judgment recovered.—*Spaulding Mfg. Co. v. Chaudoin* (Ark.) 1087.

§ 2. Subjects of protection and relief.

*Equity will not interfere to prevent a cloud on title where the claim asserted is void on its face, or the threatened proceeding will necessarily show on its face that it is void.—*Brizzolara v. City of Ft. Smith* (Ark.) 181.

§ 3. Actions for injunctions.

Averments *held* to entitle plaintiff to an injunction to restrain defendant from collecting a judgment for money he deposited with a bank, and the bank from paying the judgment.—*Spaulding Mfg. Co. v. Chaudoin* (Ark.) 1087.

§ 4. Liabilities on bonds or undertakings.

In a suit to enjoin the sale of property levied on under an execution, the direction of a verdict against plaintiff and the sureties on the injunction bond *held* erroneous.—*Webb v. Caldwell* (Tex. Civ. App.) 97.

IN PAIS.

Estoppel, see Estoppel, § 1.

INQUEST.

Of coroner, see Homicide, § 8.

INSANE PERSONS.

Disability of insanity affecting limitations, see

Limitation of Actions, § 2.

Mental capacity to execute will, see Wills, § 2.

§ 1. Actions.

A judgment on a note foreclosing a vendor's lien *held* voidable for fraud at plaintiff's election on his being restored to sanity.—*McLean v. Stith* (Tex. Civ. App.) 355.

*An instruction in trespass to try title, on the subject of insanity, *held* not misleading.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

INSANITY.

At time of conviction, see Criminal Law, § 15.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

Of corporation, see Corporations, § 5.

§ 1. Assignment, administration, and distribution of insolvent's estate.

Under Rev. St. U. S. §§ 3466, 3467 (U. S. Comp. St. 1901, p. 2314), the claim of the United States against an insolvent *held* prior to other claims.—*United States v. Flint Lumber Co.* (Ark.) 217.

INSPECTION.

Duty of master to inspect appliances, see Master and Servant, § 4.

Ky. St. 1903, § 2209, regulating the sale of illuminating oils, construed, and *held* not to prohibit the owner from mixing oil below the test with other oil, thereby bringing the entire quantity up to the statutory test.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

INSTRUCTIONS.

In civil actions, see Trial, §§ 6-12.

In criminal prosecutions, see Criminal Law, § 12; Homicide, §§ 11-13.

To servant, see Master and Servant, § 5.

INSURANCE.

Amendment of pleading in action on policy, see Pleading, § 5.

Applicability of instructions to case in action on premium note, see Trial, § 9.

Computation of time for payment of premiums, see Time.

Determination and disposition of cause on appeal in action on policy, see Appeal and Error, § 24.

Estoppel of beneficiary in life policy to assert rights, see Estoppel, § 1.

Grounds for continuance in action on policy, see Continuance.

Motions relating to pleading in action on policy, see Pleading, § 7.

Suit on pledged policy, see Pledges.

§ 1. Insurance agents and brokers.

A contract of employment as soliciting agent for an insurance company construed, and *held* that the agent, on the cancellation of the contract by the company, was deprived of his commissions on renewal premiums.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

*A contract of employment as soliciting agent for an insurance company construed, and *held* to authorize the company to discharge the agent for specified grounds.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

The failure of a soliciting agent for an insurance company to make reports in writing as called for by his contract and as demanded by the company, *held*, to forfeit his rights under the contract.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

*Point annotated. See syllabus.

A soliciting agent of an insurance company *held* estopped from asserting as against the company that he was not responsible for applications sent by an associate to the company.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

The failure of a soliciting agent of an insurance company to make reports called for by his contract of employment *held* to forfeit his rights under the contract.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

Certain facts *held* not to show that a soliciting agent of an insurance company had collected money for the company and had failed to remit it.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

*A contract of employment as soliciting agent for an insurance company construed, and *held* that the agent did not in consequence of a certain fact forfeit his rights under the contract.—*Armstrong v. National Life Ins. Co.* (Tex. Civ. App.) 327.

*A surety in a bond of an insurance agent *held* not liable for the failure of the agent to pay a premium note procured from an insured, and indorsed and delivered to the general agent of insurer.—*McClary v. Trezevant & Cochran* (Tex. Civ. App.) 954.

§ 2. The contract in general.

Evidence *held* insufficient to show meeting of minds with reference to a policy desired in exchange for one contracted for so as to abrogate the original contract.—*Graham v. Remmel* (Ark.) 141.

A contract indemnifying an employer against the dishonesty or default of employes is subject to the rules governing the construction of other insurance contracts.—*United States Fidelity & Guaranty Co. v. Bank of Batesville* (Ark.) 957.

§ 3. Premiums, dues, and assessments.

An insurance agent *held* entitled to sue on a premium note payable to him on insured's refusal to complete the contract, under Kirby's Dig. §§ 5999, 6002.—*Graham v. Remmel* (Ark.) 141.

§ 4. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Insurer in a fire policy *held* not entitled to claim a breach of warranty in the policy against incumbrances of the property insured.—*Home Fire Ins. Co. v. Driver* (Ark.) 200.

A false statement in an application for an accident policy *held* not to defeat a recovery for an injury sustained.—*Claypool v. Continental Casualty Co.* (Ky.) 835.

§ 5. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

*Facts *held* to show compliance by insured with the clause in his policy with reference to keeping a set of books and preserving the same.—*Home Fire Ins. Co. v. Driver* (Ark.) 200.

Insured, in an indemnity bond indemnifying him against loss through the fraud or dishonesty of an employe, *held* not entitled to recover for a loss sustained because of breach of the warranties in the application.—*United States Fidelity & Guaranty Co. v. Bank of Batesville* (Ark.) 957.

Forfeitures, when once waived, cannot be afterwards insisted upon.—*New England Mut. Life Ins. Co. v. Springgate* (Ky.) 681.

§ 6. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Forfeiture of a fire policy, occasioned by insured violating a provision thereof, *held* not waived.—*Capital Fire Ins. Co. v. Shearwood* (Ark.) 878.

*A provision that no alteration or waiver of any of the conditions of the policy shall be valid, unless made in writing and signed by an officer of the company, may be waived by a general state agent.—*New England Mut. Life Ins. Co. v. Springgate* (Ky.) 681.

*Defendant insurance company *held* to have waived a forfeiture of a life policy for non-payment of a premium note.—*New England Mut. Life Ins. Co. v. Springgate* (Ky.) 681.

§ 7. Risks and causes of loss.

A bond to indemnify an employer against the fraud or dishonesty of an employe amounting to larceny or embezzlement *held* not to cover a loss due to the carelessness of the employe.—*United States Fidelity & Guaranty Co. v. Bank of Batesville* (Ark.) 957.

Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), declaring when suicide shall be a defense in an action on a life policy, is part of a Missouri contract of insurance.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*A plate glass window *held* to be destroyed by design, and not by accident, within a policy limiting the company's liability to breakage resulting from accident.—*Frisbie v. Fidelity & Casualty Co.* (Mo. App.) 1024.

*Fire *held* to be the proximate cause of the breakage of a plate glass window in a building which was destroyed by dynamite to prevent the spread of the fire, within the provision of a policy exempting the company from liability for loss from fire.—*Frisbie v. Fidelity & Casualty Co.* (Mo. App.) 1024.

§ 8. Notice and proof of loss.

*Certain facts *held* not to show that insurer in a fire policy waived proof of loss.—*Home Fire Ins. Co. v. Driver* (Ark.) 200.

*A failure of insured in a fire policy to furnish proof of loss as required by the policy is fatal to a recovery unless the failure was waived by insurer.—*Home Fire Ins. Co. v. Driver* (Ark.) 200.

§ 9. Actions on policies.

*Evidence in an action on a life policy *held* to show that the first premium had not been paid.—*Industrial Mut. Indemnity Co. v. Perkins* (Ark.) 176.

Under Kirby's Dig. §§ 4376, 4377, sureties on a bond given to the state by an insurance company may be sued with the company in the county in which the loss occurred; section 6072 not applying.—*Neimeyer v. Claiborne* (Ark.) 387.

A complaint in an action on an insurance policy and bond to the state by the insurance company *held* to state a cause of action.—*Neimeyer v. Claiborne* (Ark.) 387.

Facts set out in a complaint on a policy of insurance *held* to show waiver of a forfeiture by other insurance on the property.—*Neimeyer v. Claiborne* (Ark.) 387.

In an action on a policy of insurance and a bond given to the state by the insurance company to secure prompt payment of claims, if the bond presented in evidence in taking default judgment shows that it is not in force, there is a failure of proof, but the complaint is not affected thereby.—*Neimeyer v. Claiborne* (Ark.) 387.

In an action on a bond indemnifying an employer against loss from fraud or dishonesty of an employe evidence *held* not to show a shortage in the accounts of the employe due to his fraud or dishonesty, amounting to larceny or embezzlement.—*United States Fidelity & Guaranty Co. v. Bank of Batesville* (Ark.) 957.

In an action on an accident policy, evidence *held* insufficient to show the existence of a contract of insurance at the time insured was in-

*Point annotated. See syllabus.

jured.—*Claypool v. Continental Casualty Co.* (Ky.) 835.

*In an action on an accident policy, certain instructions *held* not conflicting.—*Continental Casualty Co. v. Semple* (Ky.) 1122.

*In an action on an accident policy, wherein defendant set up that insured's death was caused by disease and not by accident, the refusal of a peremptory instruction for defendant *held* proper under the evidence.—*Continental Casualty Co. v. Semple* (Ky.) 1122.

§ 10. Mutual benefit insurance.

In an action on a benefit certificate, it will be presumed that insured was in good standing at the time of his death in the absence of evidence to the contrary.—*Grand Lodge K. P. v. Whitehead* (Ark.) 199.

Under Rev. St. 1899, §§ 1408, 1410 (Ann. St. 1906, pp. 1111, 1113), a foreign fraternal beneficiary association, *held* not to be taken out of the operation of the exemptions from general laws relating to old line insurance companies by the fact that members were authorized to designate as beneficiaries their personal representatives, one class additional to those mentioned in section 1408, and hence the company was not bound by the terms of Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), relating to the defense of suicide, governing old line insurance companies.—*Armstrong v. Modern Brotherhood of America* (Mo. App.) 24.

INTENT.

Element of contract, see Contracts, § 2.

Element of deed, see Deeds, § 3.

Of Legislature in enactment of statute, see Statutes, § 4.

INTEREST.

Effect as to credibility of witness, see Witnesses, § 3.

INTERLOCUTORY JUDGMENT.

Appealability, see Appeal and Error, § 1.

INTERROGATORIES.

To witnesses, see Depositions.

INTERSTATE COMMERCE.

Regulation, see Commerce.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

Determination and disposition of cause on appeal in prosecution for offense against liquor law, see Criminal Law, § 21.

Illegal sale of as ground for revocation of physician's license, see Physicians and Surgeons.

Impeachment of witness in prosecution for illegal sale of liquor, see Witnesses, § 3.

Judicial notice of intoxicating quality of, see Evidence, § 1.

Jurisdiction of offense against liquor laws, see Criminal Law, § 1.

§ 1. Local option.

Notice of a local option election *held* not defective for failure to specifically state that on a specified date the election "would be held,"

etc.—*State ex rel. Hurst v. Bassett* (Mo. App.) 764.

Under Rev. St. 1899, §§ 3027, 6901 (Ann. St. 1906, pp. 1733, 3408) a local option election notice *held* not defective for failure to state the hours during which the polls would be open.—*State ex rel. Hurst v. Bassett* (Mo. App.) 764.

*An order of approval by a county judge in the minutes of the commissioners' court *held* to adopt a former entry made by the clerk, showing the publication of the order of court declaring the result of a local option election.—*Coleman v. State* (Tex. Cr. App.) 1072.

*Whether a county judge himself writes on the minutes of the commissioners' court an entry showing the publication of the order of court declaring the result of a local option election, or has another do so, *held* immaterial.—*Coleman v. State* (Tex. Cr. App.) 1072.

*Under the express provisions of Rev. Civ. St. 1895, art. 3391, an entry by the county judge on the minutes of the commissioners' court, showing the publication of the order of court declaring the result of a local option election and prohibiting the sale of liquors, is *prima facie* evidence of the fact of publication.—*Coleman v. State* (Tex. Cr. App.) 1072.

A change in the boundary of a precinct, made after the calling of a local option election and before such election, *held* not to render the election void.—*Hill v. Howth* (Tex. Civ. App.) 707.

*A local option election *held* invalid because of the failure to comply with the essential prerequisites of the statutes.—*Hill v. Howth* (Tex. Civ. App.) 707.

*An order for a local option election and the notices therefor *held* to sufficiently describe the territory.—*Hill v. Howth* (Tex. Civ. App.) 707.

§ 2. Regulations.

On a trial for conducting a bar for the sale of intoxicating liquor, certain evidence *held* properly excluded.—*Huber v. Commonwealth* (Ky.) 583.

§ 3. Offenses.

Under Ky. St. 1903, § 2557, penalizing one who knowingly rents a room to another in which liquor is illegally sold, the knowledge of the landlord which makes him liable *held* to be in knowing, when he rented the room, that such use was to be made of it.—*Commonwealth v. Conway* (Ky.) 575.

Acts 1906, p. 320, c. 63, prohibiting the importation of liquors into local option territory, *held* not enacted for the benefit of commerce.—*Adams Express Co. v. Commonwealth* (Ky.) 577.

*Where a carrier has reasonable suspicion that a shipper is attempting to use its vehicle to violate the law, it ought to require enough evidence of the legality of the shipment to satisfy a reasonably prudent mind.—*Adams Express Co. v. Commonwealth* (Ky.) 577.

Lessors of a storeroom *held* not to have violated Ky. St. 1903, § 2557, prohibiting leases of property for use for unlawful sales of intoxicants.—*Commonwealth v. Morris* (Ky.) 580.

Under Ky. St. 1903, § 4198, *held*, that two barrooms in separate and distinct buildings cannot be conducted under one license.—*Huber v. Commonwealth* (Ky.) 583.

Licensee's ownership of two buildings *held* not to affect the question of his right, under Ky. St. 1903, § 4198, to conduct a barroom in each under but one license.—*Huber v. Commonwealth* (Ky.) 583.

Certain defense to indictment for sale of liquor without a license *held* not sustainable.—*Huber v. Commonwealth* (Ky.) 583.

One who under one license opens two bars in separate and distinct buildings cannot maintain

*Point annotated. See syllabus.

that he cannot be punished for maintaining either, as one or the other is lawful.—Huber v. Commonwealth (Ky.) 583.

*To entitle one to an acquittal of unlawfully selling beer on the ground of mistake, *held*, that it must appear that the mistake arose through no want of care.—Coleman v. State (Tex. Cr. App.) 1049.

§ 4. Criminal prosecutions.

*An indictment *held* to sufficiently charge the violation of Acts 1906, p. 320, c. 63, prohibiting bringing of liquors into local option territory.—Adams Express Co. v. Commonwealth (Ky.) 577.

On the trial of an express company for bringing intoxicating liquors into local option territory, evidence *held* to justify a conviction.—Adams Express Co. v. Commonwealth (Ky.) 577.

An instruction on a trial of an express company for bringing liquors into local option territory, in violation of Acts 1906, p. 320, c. 63, *held* too favorable to the company.—Adams Express Co. v. Commonwealth (Ky.) 577.

*Indictment for conducting a bar for the sale of intoxicating liquor without a license *held* sufficient.—Huber v. Commonwealth (Ky.) 583.

*In a prosecution of defendant for selling liquor in violation of the local option law, evidence *held* to show an open violation of the law and to require a verdict of conviction.—Killman v. State (Tex. Cr. App.) 90.

In a prosecution for violating the local option law, a requested instruction as to whether there was a sale *held*, under the circumstances, misleading and properly refused.—Killman v. State (Tex. Cr. App.) 90.

In a prosecution under a local option law which provided that the law should continue for two years after enactment, and should continue thereafter unless repealed by vote within a given territory, the fact that the information, brought more than two years after the law was enacted, did not allege that it had not been repealed by a subsequent election, *held* not to require it to be quashed.—Killman v. State (Tex. Cr. App.) 92.

A prosecution for selling liquor in violation of the local option law, evidence of sales before the sale charged in the information *held* under the circumstances, admissible.—Killman v. State (Tex. Cr. App.) 92.

In a prosecution for selling liquor in violation of the local option law, special charge requested as to whether the transaction amounted to a sale by defendant *held* sufficiently covered by the charge given.—Killman v. State (Tex. Cr. App.) 92.

On a trial for violating the local option law, the refusal to submit certain issues *held* not erroneous.—Coleman v. State (Tex. Cr. App.) 769.

*Facts *held* to show that a sale of intoxicants was made to person alleged.—Coleman v. State (Tex. Cr. App.) 1049.

*Evidence *held* to raise an issue whether a transaction constituted a sale or a gift of intoxicating liquor.—Coleman v. State (Tex. Cr. App.) 1072.

*On a trial for violating the local option law, *held* not error to permit the state to prove that the bottle of beer received by a witness from accused was labeled "Budweiser."—Coleman v. State (Tex. Civ. App.) 769.

§ 5. Rights of property and contracts.

In an action for the price of beer sold defendant on the ground of illegality of consideration, in that the beer was intended to be sold in a local option territory, evidence *held* insufficient to show that the place where the liquor was

retailed was a local option territory, so as to defeat the action.—Dallas Brewery v. Holmes Bros. (Tex. Civ. App.) 122.

*The price of intoxicating liquors *held* not recoverable where the liquors were sold to be retailed in violation of law.—Dallas Brewery v. Holmes Bros. (Tex. Civ. App.) 122.

INVITED ERROR.

See Appeal and Error, § 13.

IRON SAFE CLAUSE.

See Insurance, § 5.

ISSUES.

In criminal prosecutions, see Indictment and Information, § 3.

Presented for review on appeal, see Appeal and Error, § 3.

JEOPARDY.

Former jeopardy bar to prosecution, see Criminal Law, § 3.

JOINDER.

Of causes of action, see Action, § 2.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Courts; Justices of the Peace.

Mandamus to, see Mandamus, § 2.

Prohibition to, see Prohibition, § 1.

Remarks and conduct at trial, see Trial, § 2.

§ 1. Rights, powers, duties, and liabilities.

A county judge *held* liable for failing to require a guardian to make a settlement and to examine into the solvency of his securities, as required by Ky. St. 1903, §§ 1065, 1068.—Cornelison v. Million (Ky.) 654.

§ 2. Disqualification to act.

Under Const. 1874, art. 7, § 20, and under a statute, a judge *held* disqualified to try a cause through relationship to one of the attorneys.—Johnson v. State (Ark.) 143.

JUDGMENT.

As denial of due process of law, see Constitutional Law, § 5.

As lien on homestead, see Homestead, § 1. Conclusiveness of former adjudication against principal as against surety, see Principal and Surety, § 3.

Decisions of courts in general, see Courts, § 2. Effect as curing defects in pleadings, see Pleading, § 8.

Enforcement against homestead, see Homestead, § 5.

Mandamus to compel re-entry of, see Mandamus, § 2.

Prohibition to restrain execution of, see Prohibition, § 1.

Restraining enforcement, see Injunction, §§ 1, 3. Sales under judgment, see Judicial Sales.

Scope and extent of review on appeal from default judgment, see Appeal and Error, § 12.

In actions by or against particular classes of persons.

See Infants, § 4; Insane Persons, § 1.

*Point annotated. See syllabus.

In particular civil actions or proceedings.
 See Divorce, § 3; Mandamus, § 3.
 For wages, see Master and Servant, § 2.
 On appeal or writ of error, see Appeal and Error, § 24.
 To establish drain, see Drains, § 1.
 To sell decedent's land, see Executors and Administrators, § 4.

In criminal prosecutions.
 See Criminal Law, § 15.

Review.
 See Appeal and Error.

§ 1. Nature and essentials in general.

*A decree in chancery entered in vacation as of the date of the previous term *held* void.—*Jackson v. Bechtold Printing & Book Mfg. Co.* (Ark.) 161.

*In a wife's suit against her husband to compel support, in which the husband, being out of the state, is only constructively served, a personal judgment against him is not possible, under Civ. Code Prac. § 419.—*Pendleton v. Pendleton* (Ky.) 674.

§ 2. By default.

A petition cannot be amended in a matter of substance after publication of notice so as to support a default judgment thereon.—*Randall v. Snyder* (Mo.) 529.

§ 3. On trial of issues.

*Rendering judgment for the amount of a verdict with interest from the date the cause of action arose *held* error.—*McDonough v. Williams* (Ark.) 164.

A decree *held* erroneous in not conforming to the pleadings and evidence.—*Reed v. Colp* (Mo.) 255.

The improper joinder of causes of action in one count *held* open to defendant on motion in arrest.—*Flowers v. Smith* (Mo.) 499.

In libel a general verdict for plaintiff *held* bad as against a motion in arrest.—*Flowers v. Smith* (Mo.) 499.

Though a petition in partition brought against a trustee is defective under Rev. St. 1899, §§ 4383, 4384 (Ann. St. 1906, pp. 2415, 2416), yet the court having jurisdiction the beneficiary of the trust *held* bound thereby.—*Collins v. Crawford* (Mo.) 538.

In a creditors' suit against the life tenant and remaindermen to set aside the deed of their grantor, the only issue being whether the deed was void as against the creditor, a decree there-in divesting title to the remaindermen and vesting it in the heirs of the grantor *held* in excess of the court's jurisdiction and void.—*Charles v. White* (Mo.) 545; *Same v. Neill*, Id.

*Plaintiff having sued for a specified sum upon an account and for conversion could not recover a greater sum.—*Morris v. Smith* (Tex. Civ. App.) 130.

Where, in a proceeding to enjoin the enforcement of an order of the Railroad Commission, a general demurrer to the petition was overruled, and defendant declined to further answer, judgment was properly rendered for plaintiff.—*Railroad Commission of Texas v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 345.

A prayer for general and special relief in a suit to set aside a judgment foreclosing a vendor's lien *held* to authorize a judgment setting aside a sale thereunder.—*McLean v. Stith* (Tex. Civ. App.) 355.

In a suit for partition, on the ground that the trustees had unreasonably delayed making partition as directed by the will, that a demurrer to the petition was not acted upon, and evidence of such unreasonable delay was admitted without objection, did not authorize a

judgment of partition on the ground of unreasonable delay, where such delay was not alleged.—*Davis v. Davis* (Tex. Civ. App.) 948.

*In a suit by devisees to have partition in accordance with the provisions of a will, the petition *held* not to allege unreasonable delay in making partition, and judgment based thereon was unauthorized by the pleading and void.—*Davis v. Davis* (Tex. Civ. App.) 948.

§ 4. Amendment, correction, and review in same court.

*Power of a court to amend a record *nunc pro tunc* stated.—*Liddell v. Landau* (Ark.) 1085.

§ 5. Opening or vacating.

*Accidental shooting, preventing attendance on court, *held* unavoidable casualty, a ground under Civ. Code Prac. § 518, for vacating judgment after the term.—*Hargis v. Begley* (Ky.) 602.

*Defendants not versed in law may defend their own causes, and where they interpose no defense the judgment will not be set aside because they did not appreciate the necessity of employing counsel.—*Langham v. O'Meara & James* (Ky.) 928.

In a suit to set aside a judgment, a general allegation that plaintiff was insane at the time the judgment was recovered *held* not limited to the issue of limitation but was available for all purposes in the case.—*McLean v. Stith* (Tex. Civ. App.) 355.

§ 6. Equitable relief.

*Complainants *held* barred by laches from vacating a foreclosure decree because entered in vacation.—*Jackson v. Bechtold Printing & Book Mfg. Co.* (Ark.) 161.

That a decree was erroneously entered in vacation may be established by evidence aliunde.—*Jackson v. Bechtold Printing & Book Mfg. Co.* (Ark.) 161.

*A dismissal of a suit to vacate a judgment because of a prior compromise of the case, upon a finding that there was no compromise, without giving plaintiff judgment for money mistakenly paid on the compromise, *held* error.—*Dotson v. Carter* (Ky.) 1116.

§ 7. Collateral attack.

A judgment of the circuit court affirming a probate judgment adjudging a guardian to be indebted to his ward cannot be attacked collaterally on his appeal from a judgment on his bond superseding the probate judgment.—*Hands v. Haughland* (Ark.) 184.

*A judgment rendered against a garnishee by a court having no jurisdiction over him or over the subject-matter of the suit *held* subject to collateral attack.—*Howell v. Sherwood* (Mo.) 50.

Objections to an action by foreign executors *held* not available on a collateral attack.—*Randall v. Snyder* (Mo.) 529.

A defect in the order of publication in an action on a foreign judgment *held* not to affect the validity of the judgment rendered in the action as against a collateral attack.—*Randall v. Snyder* (Mo.) 529.

Under Rev. St. 1899, § 575 (Ann. St. 1906, p. 601), an attachment proceeding *held* not void as against a collateral attack because the order of publication did not describe the land attached.—*Randall v. Snyder* (Mo.) 529.

*Jurisdiction should include not only the power to hear and determine, but the power to render the particular judgment in the particular case, and, when a court goes beyond the allegation of the pleadings and the prayer for relief, and decrees a matter between parties defendant, to that extent its judgment is void and open to collateral attack.—*Charles v. White* (Mo.) 545; *Same v. Neill*, Id.

*Point annotated. See syllabus.

§ 8. Construction and operation in general.

In view of the petition and judgment in an action against a partnership in the name of an individual, the adjudication *held* against the defendants in the firm name and not as individuals.—House v. Wells (Tex. Civ. App.) 114.

§ 9. Merger and bar of causes of action and defenses.

A judgment of dismissal without prejudice of an action by a city for the removal of piles from land claimed as a street *held* not a bar to a subsequent suit by the city for the land.—City of Covington v. Chesapeake & O. R. Co. (Ky.) 862.

§ 10. Conclusiveness of adjudication.

*Suit by depositor against a bank for funds deposited *held* not res judicata of a subsequent suit by a third person against the depositor and bank to restrain enforcement of the judgment, on the ground that such third person was the owner of the deposit.—Spaulding Mfg. Co. v. Chaudoin (Ark.) 1087.

A judgment of the Court of Appeals affirming a judgment in partition, *held* to preclude a subsequent action to enjoin the execution of a deed to one of the parties for his share.—Mead v. Mead (Ky.) 867.

*In an action by a married woman for being forcibly put out of a house occupied as a tenant of defendant, evidence *held* to establish a prima facie case of wrongful dispossession.—Morrison v. Price (Ky.) 1090.

*Under Ky. St. 1903, § 2128, a married woman *held* entitled to rent property, and to dispossess her as tenant she must be a defendant to the proceedings.—Morrison v. Price (Ky.) 1090.

*Unless defendants contest an issue with each other under the pleadings between themselves and plaintiffs, or on cross-pleadings between themselves, the judgment will not be res adjudicata between them.—Charles v. White (Mo.) 545; Same v. Neill, Id.

A third person made a party in partition by intervention, who filed after judgment and pending motion for a new trial a disclaimer in favor of his son, was bound by the judgment.—Ivy v. Ivy (Tex. Civ. App.) 110.

*A judgment in an action on a contract will bar a future action based on a rescission of the contract or a failure of consideration thereof.—Berry Bros. v. Fairbanks, Morse & Co. (Tex. Civ. App.) 427.

*A cause of action on a written contract and a cause of action for the breach thereof *held* distinct, and a judgment in an action on the contract will not bar a subsequent action for damages for the breach thereof.—Berry Bros. v. Fairbanks, Morse & Co. (Tex. Civ. App.) 427.

§ 11. Lien.

Plaintiff's lien under judgment for alimony on land *held* subsequent to a deed of trust.—Prather v. Hairgrove (Mo.) 552.

§ 12. Assignment.

Kirby's Dig. § 4457, providing for the filing of assignments of judgments, *held* to refer to the filing of such assignments in the court where the judgments are rendered, and not in the Supreme Court.—St. Louis, I. M. & So. Ry. Co. v. Hambright (Ark.) 876.

§ 13. Pleading and evidence of judgment as estoppel or defense.

*Estoppel by judgment, of one who defended the action in the name of the defendant, must be pleaded.—Morrison v. Price (Ky.) 1090.

*A plea in bar of former adjudication must be based upon a judgment or order of court.—Wilson v. Sullivan (Ky.) 1120.

*Point annotated. See syllabus.

A judgment *held* not to be upon consent, but to have been made after trial.—Charles v. White (Mo.) 545; Same v. Neill, Id.

No court will go out of its way to hold infant litigants bound by a consent judgment when they are incapable of giving consent, and, to invoke the doctrine that they are bound by consent of their guardian ad litem, the record should be entirely free from doubt as to the giving of consent.—Charles v. White (Mo.) 545; Same v. Neill, Id.

JUDICIAL NOTICE.

In civil actions, see Evidence, § 1.
On appeal, see Appeal and Error, § 14.

JUDICIAL SALES.

Harmless error in hearing on motion to set aside, see Appeal and Error, § 17.
Of homestead, see Homestead, § 5.
Of property of decedent, see Executors and Administrators, § 4.
Of property of infants, see Guardian and Ward, § 1.
On execution, see Execution, § 4.

*It is the policy of the law to sustain judicial sales and to encourage bidding, so that property may not be sacrificed.—Leavell v. Carter (Ky.) 1118.

JURISDICTION.

Amount in controversy, see Appeal and Error, § 1.
Effect of appearance, see Appearance.

Jurisdiction of particular actions or proceedings.
See Divorce, § 3; Habeas Corpus, § 1; Mandamus, § 3.

Criminal prosecutions, see Criminal Law, § 1.
Election contest, see Elections, § 3.
For causing death, see Death, § 1.
For loss of or injury to shipment, see Carriers, § 2.
Relief against judgment, see Judgment, § 6.
To establish highway, see Highways, § 1.
To sell decedent's land, see Executors and Administrators, § 4.

Special jurisdictions and jurisdictions of particular classes of courts.

See Courts; Equity, § 1.
Appellate jurisdiction, see Criminal Law, §§ 18-21.

JURY.

See Grand Jury.
Custody and conduct, see Criminal Law, § 14; Trial, § 13.
Harmless error in rulings, see Criminal Law, § 20.
Instructions in civil actions, see Trial, §§ 6-12.
Instructions in criminal prosecutions, see Criminal Law, § 12.
Presentation of objections to in appeal record for purpose of review, see Criminal Law, § 19.
Questions for jury in civil actions, see Trial, § 5.
Questions for jury in criminal prosecutions, see Criminal Law, § 11.
Taking case or question from jury at trial, see Trial, § 5.
Verdict in civil actions, see Trial, § 14.

§ 1. Right to trial by jury.

Bill of Rights, art. 1, § 15, and article 5, § 10, *held* not to make a jury trial in a habeas corpus proceeding a constitutional right.—Pittman v. Byars (Tex. Civ. App.) 102.

§ 2. Summoning, attendance, discharge, and compensation.

Laws 1907, 13th Leg. p. 269, c. 139, relating to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of 20,000 inhabitants, is constitutional.—Huddleston v. State (Tex. Cr. App.) 64.

Acts 30th Leg. p. 269, c. 139, providing for the selection of jurors in counties having a city of 20,000 inhabitants, *held* constitutional.—Brown v. State (Tex. Cr. App.) 80.

In a murder trial *held* not error to allow the clerk to explain why the venire was drawn from a list of jurors for the week instead of from the special venire list and why it was drawn before that in other cases pending.—Rice v. State (Tex. Cr. App.) 299.

§ 3. Competency of jurors, challenges, and objections.

*The burden is on the party challenging a juror to make out at least a prima facie case of disqualification.—Shafstall v. Downey (Ark.) 176.

*Where a juror was challenged for relationship under Kirby's Dig. § 4491, it was the duty of the challenger to establish that the relationship was within the fourth degree of consanguinity or affinity.—Shafstall v. Downey (Ark.) 176.

*Answer made by a juror on his voir dire under a misconception of accused's attorney's questions *held* not to show the juror's disqualification.—Rice v. State (Tex. Cr. App.) 299.

*That an attorney for the state assisted the clerk in checking a venire list with the list from which it was drawn *held* not cause for quashing the venire.—Rice v. State (Tex. Cr. App.) 299.

Refusal to quash venire in a murder case on the ground that the sheriff's return failed to show diligence in summoning particular jurors drawn *held* not error.—Rice v. State (Tex. Cr. App.) 299.

*Each defendant was not entitled to six peremptory challenges, where there was no fact issue between them, though one raised an issue between himself and plaintiff not raised by the other defendant.—Witliff v. Spreen (Tex. Civ. App.) 98.

JUSTICES OF THE PEACE.

§ 1. Procedure in civil cases.

A justice's jurisdiction over the subject-matter is derived from the Constitution, but the mode of proceeding is prescribed by statute.—Little Rock Brick Works v. Hoyt (Ark.) 880.

*An order for the payment of wages *held* not a sufficient statement of a demand against the servant's employer to justify a justice of the peace in issuing a summons against such employer, under Kirby's Dig. § 4565.—Little Rock Brick Works v. Hoyt (Ark.) 880.

In an action before a justice of the peace against the president of a corporation, the fact that the account filed before the justice failed to disclose the president's statutory liability was immaterial, where such liability was shown by the evidence.—Mississippi Valley Const. Co. v. Chas. T. Abeles & Co. (Ark.) 894.

*Written pleadings are not required in justice court, nor in the circuit court on appeal.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

*A statement filed with a justice *held* to sufficiently comply with Kirby's Dig. §§ 4565, 4580, as to the statement of facts upon which the action is founded.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

Allegations in justice court *held* sufficient to admit proof of defendant's liability for a pen-

alty and an attorney's fee.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

§ 2. Review of proceedings.

*A trustee in bankruptcy of defendant in replevin in justice's court *held* entitled under Kirby's Dig. § 4665, to appeal from an adverse judgment.—Brown v. Frenken (Ark.) 207.

*The successful party in justice's court *held* entitled to an affirmation of the judgment on appeal by the defeated party and failure to file transcript.—Carden v. Bailey (Ark.) 743.

*In the circuit court on appeal from a justice the cause is tried *de novo*; and defendant appealing from the justice's judgment cannot object in the circuit court to the want of service of summons in the justice court.—Carden v. Bailey (Ark.) 743.

*Where the party appealing from a justice's judgment fails to see that the justice files a transcript, as required by Kirby's Dig. § 4670, the circuit court in its discretion may dismiss the appeal or affirm the judgment.—Carden v. Bailey (Ark.) 743.

*The perfecting of an appeal from a justice of the peace gives the circuit court jurisdiction of the cause.—Carden v. Bailey (Ark.) 743.

*The filing of an affidavit and bond for appeal by a defendant in justice court gives the circuit court jurisdiction of defendant on appeal.—Carden v. Bailey (Ark.) 743.

The circuit court, on appeal from a justice of the peace, can have no jurisdiction if the justice had none.—Little Rock Brick Works v. Hoyt (Ark.) 880.

*Pleadings sufficient in justice court are sufficient in the circuit court, on trial *de novo* on appeal.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

*Formal pleadings are not required in justice court, and on appeal to the circuit court a demurrer should not be sustained to the complaint; plaintiff being entitled to amend as to defects in form.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

*Refusal by the circuit court to allow an amendment on appeal from justice court *held* discretionary.—Morrison v. St. Louis & S. F. R. Co. (Ark.) 975.

JUSTIFICATION.

Of homicide, see Homicide, §§ 4, 6.

KNOWLEDGE.

Actual or constructive knowledge, see Notice. Affecting contributory negligence of servant, see Master and Servant, § 8.

LABOR UNIONS.

Interference with relation of master and servant, see Master and Servant, § 13.

LACHES.

Affecting right to open judgment, see Judgment, § 6.

Affecting particular rights, remedies, or proceedings.

See Equity, § 2.

To enjoin nuisance, see Nuisance, § 1.

To set aside sale of property of decedent, see Executors and Administrators, § 4.

To set aside sale on foreclosure of vendor's lien, see Vendor and Purchaser, § 5.

*Point annotated. See syllabus.

LANDLORD AND TENANT.

See Use and Occupation.

Breach of cultivation contract, see Contracts, § 3.

Conclusiveness of judgment against tenant, see Judgment, § 10.

Lease of public lands, see Public Lands, § 2.

Leases by receiver, see Receivers, § 3.

Liability of landlord renting room for sale of liquor, see Intoxicating Liquors, § 3.

Liability of lessor of street railroad, see Street Railroads, § 2.

Mining leases, see Mines and Minerals, § 1.

Reformation of lease, see Reformation of Instruments, § 1.

§ 1. Creation and existence of the relation.

*The relation of landlord and tenant may be brought about by express contract, or it may arise from an implied contract, which may be implied from slight evidence, as from a permissive holding.—*Starbuck v. Avery* (Mo. App.) 33.

*Where a landlord's grantee knew of the tenancy and the tenant's possession, and the tenant knows of the sale and continues to occupy under the tenancy, the relation of landlord and tenant is created between the grantee and the tenant.—*Starbuck v. Avery* (Mo. App.) 33.

*A formal attornment in affirmative words is unnecessary to an action for rent by a grantee of the landlord against a tenant continuing to occupy under the lease.—*Starbuck v. Avery* (Mo. App.) 33.

*Unless a tenant in possession repudiates the tenancy under a grantee of his landlord, his continued occupancy after the sale of the premises raises the presumption that it is under the tenancy.—*Starbuck v. Avery* (Mo. App.) 33.

§ 2. Landlord's title and reversion.

*A tenant, while in possession, without renouncing and restoring possession to the landlord, cannot set up a conflicting title, however acquired.—*Mullins v. Hall* (Ky.) 920.

*A tenant's continued occupancy of premises under the tenancy, with notice of a sale of the premises, amounts to a recognition of the purchaser as his landlord.—*Starbuck v. Avery* (Mo. App.) 33.

§ 3. Premises, and enjoyment and use thereof.

An agricultural landlord's right to attach the tenant's goods for a debt held improperly based upon the outcome of a crop left by the tenant as handled by the landlord.—*Southern Orchard Planting Co. v. Turner* (Ark.) 956.

Rule as to landlord's rights where the tenant used the premises in violation of law stated.—*Commonwealth v. Morris* (Ky.) 580.

A tenant may, notwithstanding the expiration of the tenancy, gather the remnant of his crop, but he must act promptly, and where he abandons the crop he cannot sue the landlord for a conversion thereof.—*Huggins v. Reynolds* (Tex. Civ. App.) 116.

*Certain facts held to show that a landlord and tenant contracted with reference to a custom, giving the tenant the right to harvest a crop planted before the expiration of the term.—*Bowles v. Driver* (Tex. Civ. App.) 440.

*Where by the terms of a lease the tenant who sows his crop, knows he cannot reap, he cannot, after the expiration of the term, enter and harvest the crop.—*Bowles v. Driver* (Tex. Civ. App.) 440.

§ 4. Rent and advances.

*A landlord's warranty deed assigns whatever right he has as landlord in the letting of the premises, and if the tenant continues to oc-

cupy under the tenancy the grantee may sue for the rent under the original letting.—*Starbuck v. Avery* (Mo. App.) 33.

*Rev. St. 1809, § 4137 (Ann. St. 1906, p. 2246), requiring, on demand of rent by a purchaser of leased premises, the exhibition of the deed, held to apply to actions for possession, and not to a mere action for rent.—*Starbuck v. Avery* (Mo. App.) 33.

§ 5. Re-entry and recovery of possession by landlord.

Notice to quit is waived by the landlord giving a subsequent notice fixing a later date for a surrender of the premises.—*Reck & Riehl v. Caulfield* (Ky.) 843.

*One justifying under a writ of possession issued on a judgment in his favor as landlord in forcible detainer proceedings must plead the writ.—*Morrison v. Price* (Ky.) 1090.

*A landlord, present when, by direction of his attorney, a writ of possession in forcible detainer proceedings was issued and the officer instructed to execute it, held to have procured its issuance and the acts necessarily done by the officer under it.—*Morrison v. Price* (Ky.) 1090.

LANDS.

See Public Lands.

LARCENY.

See Embezzlement; Robbery.

Insanity at time of conviction for, see Criminal Law, § 15.

§ 1. Offenses and responsibility therefor.

*An unauthorized sale by the husband of his wife's personal property is invalid unless ratified by her, and when not ratified the buyer acquires no title; and a subsequent sale of the same property by the husband with the consent of the wife does not make the husband guilty of stealing the property from the first buyer.—*Hudspeth v. State* (Tex. Cr. App.) 1069.

§ 2. Prosecution and punishment.

*Facts held to constitute horse stealing within Ky. St. 1903, § 1195.—*Smith v. Commonwealth* (Ky.) 615.

*Evidence held to sustain a conviction of horse stealing.—*Smith v. Commonwealth* (Ky.) 615.

*Under the evidence in a trial for horse stealing, held a question for the jury whether accused's hiring of the horses was a pretense for the fraudulent purpose of converting them to his own use, or a hiring in good faith with intent to return them to the owner.—*Smith v. Commonwealth* (Ky.) 615.

LAW MERCHANT.

See Bills and Notes.

LAW OF THE CASE.

Decision on appeal, see Appeal and Error, § 23.

LEADING QUESTIONS.

To witness, see Witnesses, § 2.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

*Point annotated. See syllabus.

LEGISLATIVE POWER.

See Constitutional Law, § 2.

LEGITIMACY.

See Bastards, § 1.

LIBEL AND SLANDER.

Applicability of instructions to case, see Trial, § 9.

Arrest of judgment in action for libel, see Judgment, § 3.

Hearsay evidence, see Evidence, § 6.

Reception of evidence, see Trial, § 3.

§ 1. Words and acts actionable, and liability therefor.

*Words charging one with commission of a crime as heinous as perjury are actionable, though they do not set forth the particulars of the case in language necessary to make a good indictment.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*A publication charging one with perjury is actionable per se.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*A newspaper article held to charge one with perjury without containing statements of attending circumstances showing that the charge is unfounded.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

Articles in a newspaper held not libelous per se.—Flowers v. Smith (Mo.) 499.

Where the libel complained of is not libelous per se, it is necessary for plaintiff to allege and prove damages before he can recover.—Flowers v. Smith (Mo.) 499.

§ 2. Privileged communications, and malice therein.

*A publication of parts of the briefs of counsel in a legal proceeding, two days after the rendition of the decision therein, held not privileged.—Brown v. Globe Printing Co. (Mo.) 462.

*The rule that, to justify as privileged a publication of proceedings, the proceedings must have been directly judicial, or in a court of justice, is extended to executive and legislative proceedings and investigations.—Brown v. Globe Printing Co. (Mo.) 462.

*All the proceedings with respect to an indictment after its return into court and in connection therewith, including proceedings for the extradition of accused, held to constitute one privileged occasion.—Brown v. Globe Printing Co. (Mo.) 462.

*The rule that a fair account of the whole proceedings in court or before a public magistrate is a privileged communication held to imply a hearing of some kind.—Brown v. Globe Printing Co. (Mo.) 462.

*The rule that a publication of judicial or quasi judicial proceedings in civil cases may be privileged held to apply to criminal cases.—Brown v. Globe Printing Co. (Mo.) 462.

A publication is not shorn of its privileged character because it is abridged, provided it remains fair and impartial.—Brown v. Globe Printing Co. (Mo.) 462.

*Full or abridged reports of a legal proceeding, continued from day to day, if as fair and impartial as the circumstances will permit, are privileged.—Brown v. Globe Printing Co. (Mo.) 462.

The headlines of a newspaper publication of the report of judicial or quasi judicial proceedings are not a part of the proceedings, but are

the voluntary statements of the publisher.—Brown v. Globe Printing Co. (Mo.) 462.

*The headlines of a newspaper publication of a report of extradition proceedings before a Governor held libelous, and not privileged.—Brown v. Globe Printing Co. (Mo.) 462.

*While defamatory words in a judicial or quasi judicial proceeding are privileged, their publication in a newspaper may not be privileged.—Brown v. Globe Printing Co. (Mo.) 462.

*A publication of only certain portions of the briefs of counsel appearing in behalf of an alleged fugitive in extradition proceedings held not privileged.—Brown v. Globe Printing Co. (Mo.) 462.

*The suppression of testimony heard in a legal proceeding, which would qualify defamatory matter contained in the report of the proceeding, held evidence of malice.—Brown v. Globe Printing Co. (Mo.) 462.

A proceeding before the Governor of a state for the extradition of a fugitive from the justice of another state held of a quasi judicial character, rendering a report thereof privileged.—Brown v. Globe Printing Co. (Mo.) 462.

A proceeding before a Governor for the extradition of a fugitive is of a quasi judicial character, and a full and fair report thereof is privileged.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

A newspaper article held to show on its face that it was not a report of proceedings before a Governor for the extradition of a fugitive.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*A fair and impartial account of judicial proceedings held generally privileged.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*Headlines at the beginning and in the body of an article held not privileged, but libelous.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*A publication of privileged words of comment in a legal proceeding held not privileged.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

§ 3. Actions.

In an action for libel, a verdict held a finding that the article complained of was a libel, and not privileged.—Brown v. Globe Printing Co. (Mo.) 462.

On a trial for libel, the refusal to submit affirmatively the defense of privilege held not erroneous under the evidence.—Brown v. Globe Printing Co. (Mo.) 462.

The verdict of the jury in an action for libel will not be disturbed because of the amount awarded, unless it is so excessive as to indicate that it is the result of bias and prejudice.—Brown v. Globe Printing Co. (Mo.) 462.

*The jury, in determining whether one sued for libel was actuated by actual malice or ill will toward the person defamed when it published the libel, may take into consideration the character of the publication itself.—Brown v. Globe Printing Co. (Mo.) 462.

*It is for the court to determine whether the occasion on which an alleged defamatory statement was made was such as to render the statement privileged.—Brown v. Globe Printing Co. (Mo.) 462.

*Whether an abridged report of proceedings constituting a privileged occasion has the same effect on the character of one referred to as a full report would have is a question for the jury.—Brown v. Globe Printing Co. (Mo.) 462.

*In an action for newspaper libel, a verdict for \$2,000 actual damages and \$10,000 punit-

*Point annotated. See syllabus.

tive damages *held* not excessive.—Brown v. Globe Printing Co. (Mo.) 462.

A publication of an article which is libelous per se, and which is not privileged, gives to the person defamed the right to a verdict.—Brown v. Globe Printing Co. (Mo.) 462.

*Words making a general charge of perjury are actionable in themselves without any colloquium.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

On a trial for libel, an attempt to justify *held* to raise a false issue.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

In an action for libel, the refusal to direct a verdict for defendant *held* proper.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*An action for libel *held* an action to recover damages for a man's reputation and good name.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

In an action for libel based on a newspaper article charging plaintiff with perjury, an instruction relating to the offense of perjury *held* properly refused.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

On a trial for libel based on a newspaper article charging plaintiff with perjury and with making an affidavit he knew to be false, an instruction *held* not erroneous in view of the pleadings and another charge given.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

In an action for libel, an instruction on the subject of exemplary damages *held* not erroneous.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*In an action for libel, a verdict awarding compensatory and pecuniary damages *held* not excessive.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*The question of damages in a case of libel or slander *held* peculiarly within the province of the jury.—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

*A petition in libel *held* to improperly join in one count different causes of action.—Flowers v. Smith (Mo.) 499.

*The statute relating to pleadings in slander construed, and *held*, that the extrinsic facts, when not embraced in the imputed words to show their meaning and the character of the person to whom applied, must be stated as of common law.—Flowers v. Smith (Mo.) 499.

In libel defendant *held* not to admit in his special defense that the articles complained of were published of and concerning plaintiff.—Flowers v. Smith (Mo.) 499.

*A defendant in libel for newspaper articles which made no reference to plaintiff may show that the articles were not intended to refer to plaintiff.—Flowers v. Smith (Mo.) 499.

In libel for newspaper publication certain evidence of defendant *held* admissible.—Flowers v. Smith (Mo.) 499.

*In libel certain evidence *held* competent on the issue of exemplary damages.—Flowers v. Smith (Mo.) 499.

*In libel referring to the action of plaintiff as mayor of a city in denying a petition for a correct census under Rev. St. 1899, § 3028 (Ann. St. 1906, p. 1735), the exclusion of evidence discrediting the census *held* erroneous.—Flowers v. Smith (Mo.) 499.

*Where the defamatory matter complained of in libel points to no person in particular, it is a question of fact whether it applies to plaintiff.—Flowers v. Smith (Mo.) 499.

*In libel an instruction *held* erroneous for not confining certain evidence in mitigation of exemplary damages.—Flowers v. Smith (Mo.) 499.

*Point annotated. See syllabus.

*In libel an instruction *held* erroneous and misleading under the evidence.—Flowers v. Smith (Mo.) 499.

*In libel for newspaper articles, an instruction relating to malice *held* erroneous under the facts.—Flowers v. Smith (Mo.) 499.

LICENSES.

For mining, see Mines and Minerals, § 1. Injuries to licensees, see Railroads, § 6. Laws imposing as granting, privileges and immunities, see Constitutional Law, § 3. Of physicians and surgeons, see Physicians and Surgeons.

§ 1. For occupations and privileges.

*Sales of oil from wagons to retail dealers for resale, *held* within Ky. St. 1903, § 4224, and other sales from wagons, constituting peddling, within section 4215.—Commonwealth v. Standard Oil Co. (Ky.) 902.

Acts 29th Leg. p. 217, c. 111, imposing an occupation tax on those purchasing assignments of unearned wages, *held* violative of Const. art. 8, §§ 1, 2, requiring taxes to be equal and uniform.—Owens v. State (Tex. Cr. App.) 1075.

LIENS.

Conformity of judgment to pleading and proof in suit to foreclose, see Judgment, § 3. Judgment as lien on homestead, see Homestead, § 1.

Release of liens against decedent's estate, see Executors and Administrators, § 2.

Liens acquired by particular remedies or proceedings.

See Execution, § 2; Judgment, § 11.

Particular classes of liens.

See Mechanics' Liens.

Attorney's lien, see Attorney and Client, § 4. Mortgage, see Mortgages, § 1; Chattel Mortgages, § 2.

Pledge, see Pledges.

Railroad liens, see Railroads, § 3.

Vendor's lien on lands sold, see Vendor and Purchaser, § 5.

LIFE ESTATES.

See Curtesy; Dower.

Creation by deed, see Deeds, § 3.

Right of life tenants to partition, see Partition, § 2.

Defendant in an action to annul a deed giving a life estate with remainder to the life tenant's children, *held* not entitled to complain of the judgment.—Williams v. Grimm (Ky.) 839.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession.

Laches, see Equity, § 2.

§ 1. Statutes of limitation.

Where a statutory right of action is given which did not exist at common law, time within which the right may be enforced becomes a limitation upon the right of action, in whatever forum the action is brought.—Earnest v. St. Louis, M. & S. E. R. Co. (Ark.) 141.

The betterment act (Act March 8, 1883, Kirby's Dig. §§ 2754-2757) *held* to be not a

statute of limitation.—*Brown v. Nelms* (Ark.) 373.

The betterment act (Act March 8, 1883, Kirby's Dig. §§ 2754-2757) *held* to apply to infants as well as adults.—*Brown v. Nelms* (Ark.) 373.

A bill of review to set aside a judgment for fraud and to set aside sales of land thereunder is barred only after four years.—*McLean v. Stith* (Tex. Civ. App.) 355.

One who would escape the rigors of the law by a resort to equity must not himself invoke the rules from which he flees.—*United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.) 447.

Where the failure of a contractor to perform its contract is urged against its prayer for equitable relief, the contractor is not entitled to rely on a plea of limitations.—*United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.) 447.

§ 2. Computation of period of limitation.

The statute of limitations *held* not to run against a minor child of a pretermitted child during minority.—*Rowe v. Allison* (Ark.) 395.

*Where a joint account of a husband and wife with defendant contained items on both sides running for a number of years down to December, 1904, an action thereon was not barred in 1905.—*Mt. Nebo Anthracite Coal Co. v. Martin* (Ark.) 882.

*Limitations within which to set aside a tax deed on the homestead of a decedent *held* not to run against adult heirs until the minor heir reaches his majority.—*Harris v. Brady* (Ark.) 974.

*Under Kirby's Dig. § 5075, one reaching his majority in April, 1904, *held* entitled to maintain a suit begun in April, 1905, to set aside a void tax deed.—*Harris v. Brady* (Ark.) 974.

Land dedicated to the public for use as a cemetery is dedicated for a public or charitable use and is within Rev. St. 1899, § 4270 (Ann. St. 1906, p. 2344), providing that nothing contained in any statute of limitations shall extend to lands given to any public, pious, or charitable use.—*Tracy v. Bittle* (Mo.) 45.

Limitation could not run against plaintiff's right to set aside a judgment and certain sales thereunder for fraud, while plaintiff was a lunatic, nor until his sanity was restored.—*McLean v. Stith* (Tex. Civ. App.) 355.

*Limitations *held* not to begin to run against one's right to recover land when actual possession is taken by others, if he is then insane.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

§ 3. Operation and effect of bar by limitation.

One entitled to subrogation is substituted in the place of the original holder of the right, with no greater rights or equities than he had, and hence, where the right of mortgagees to enforce their lien had been barred by limitation, the right of one entitled to be subrogated to their lien was also barred, and the fact that such person was an infant during part of the period of limitation was immaterial.—*Brown v. Nelms* (Ark.) 373.

§ 4. Pleading, evidence, trial, and review.

*Limitations cannot be taken advantage of by demurrer unless the complaint shows that a sufficient time has elapsed to bar the action and the nonexistence of any ground of avoidance.—*Earnest v. St. Louis, M. & S. E. R. Co.* (Ark.) 141.

LIMITATION OF LIABILITY.

Of carrier, see Carriers, §§ 2, 3.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

*A notice of the pendency of a suit affecting lands having been filed as required by the statute (Acts 1903, p. 118), before a purchase thereof, the purchasers are not bona fide purchasers entitled to protection.—*Reaves v. Coffman* (Ark.) 194.

Lis pendens does not necessarily terminate on the rendition of judgment.—*McLean v. Stith* (Tex. Civ. App.) 355.

LIVERY STABLE KEEPERS.

*Livery stable keeper is liable for injuries to animals placed in his care for hire only by a failure to exercise ordinary care.—*Bigger v. Acree* (Ark.) 879.

*Facts *held* insufficient to establish negligence on the part of a livery stable keeper in the care of plaintiff's horse.—*Bigger v. Acree* (Ark.) 879.

LIVE STOCK.

Carriage of, see Carriers, § 3.
Injuries from operation of railroads, see Railroads, § 10.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOCAL ACTIONS.

See Venue, § 1.

LOCAL LAWS.

Notice of intention to apply for Enactment, see Statutes, § 1.

LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 1, 4.

LOGS AND LOGGING.

Reservations of timber in deed, see Deeds, § 3.
Review of questions of fact in action for destruction of trees, see Appeal and Error, § 16.

Trespass in removing timber, see Trespass, §§ 2, 3.

Use of stream for floating logs, see Navigable Waters, § 1.

A sale of timber *held* to require the buyer to pay for all timber on land whether used or not.—*Bryant Lumber Co. v. Crist* (Ark.) 965.

Evidence, in an action for the price of timber, *held* to sustain a verdict for plaintiff.—*Bryant Lumber Co. v. Crist* (Ark.) 965.

A contract for the sale of standing timber *held* to convey to the purchaser the right to cut timber suitable for a specified purpose at the time of the execution of the contract.—*Evans v. Dobbs* (Ky.) 667.

*Where a contract for the sale of standing timber fixes no time in which it is to be exe

*Point annotated. See syllabus.

cuted, the law implies that it is to be carried into effect within a reasonable time.—*Evans v. Dobbs* (Ky.) 667.

*An assignee of a contract for the sale of standing timber *held* to acquire no rights thereunder where the purchaser had cut all the timber conveyed.—*Evans v. Dobbs* (Ky.) 667.

LOST INSTRUMENTS.

Supplying lost records, see Records.

LOTTERIES.

§ 1. Regulation and prohibition.

*Elements of drawing constituting a lottery stated.—*Grant v. State* (Tex. Cr. App.) 1068.

§ 2. Criminal responsibility.

*Evidence *held* to sustain a conviction of conducting a lottery in violation of Pen. Code, art. 373.—*Grant v. State* (Tex. Cr. App.) 1068.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Liability of employer for defects, see Master and Servant, §§ 4, 7, 8, 10.

Production and use of electricity, see Electricity.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

Element of homicide, see Homicide, § 13.

Element of libel or slander, see Libel and Slander, § 2.

MALICIOUS TRESPASS.

See Trespass, § 3.

MANDAMUS.

§ 1. Nature and grounds in general.

*A city, contracting with one for water for itself and its inhabitants, *held* entitled to maintain mandamus to compel performance thereof, as against the objection that its other remedy was adequate.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

*The legal remedy which will bar mandamus must not only be adequate, but it must be specific and appropriate.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

§ 2. Subjects and purposes of relief.

Mandamus *held* not to lie, under Ky. St. 1903, § 3991, to compel re-entry of a judgment, the record of which has been destroyed; appeal being the proper remedy.—*Jones v. Drake* (Ky.) 644.

*Rule as to when mandamus will lie stated.—*Jones v. Drake* (Ky.) 644.

A city, granting to a company a franchise to supply the city and its inhabitants with water, *held* entitled to maintain mandamus to compel the company to construct the necessary connections to supply water to consumers, without

applying for such connections in each case.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

A city *held* not deprived, by reason of contracts, of its right to maintain mandamus to compel a water company to construct, at its own cost, the necessary connections to supply water to consumers.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

*Mandamus *held* not to lie to compel a county attorney to institute a criminal prosecution.—*Murphy v. Summers* (Tex. Cr. App.) 1070.

§ 3. Jurisdiction, proceedings, and relief.

*A mandamus to compel the commissioner of the General Land Office to award to relator public land previously awarded to others cannot be directed to land awarded to an applicant not made a party.—*Halbert v. Terrell* (Tex.) 1036.

A judgment in mandamus to compel a street railway to pave its portion of a street *held* to sufficiently describe the material to be used and the time and manner of doing the work.—*Denison & S. Ry. Co. v. City of Denison* (Tex. Civ. App.) 780.

Facts *held* to justify mandamus compelling a street railway to forthwith proceed to perform its franchise obligation to pave its portion of a street which was then being improved by the city.—*Denison & S. Ry. Co. v. City of Denison* (Tex. Civ. App.) 780.

*A city, contracting with a person to furnish water to it and its inhabitants, *held* entitled to maintain mandamus to compel performance of the contract.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

A city *held* entitled to maintain mandamus to compel a water company to construct necessary connections to supply a particular consumer with water.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

MANDATE.

See Mandamus.

To lower court on decision on appeal or writ of error, see Appeal and Error, § 24.

MANSLAUGHTER.

See Homicide, § 3.

MARRIAGE.

See Divorce; Husband and Wife.

Harmless error in exclusion of evidence as to, see Appeal and Error, § 20.

*Proof of a marriage occurring over 50 years ago, especially as between slaves, need not be as strong as is required to establish more recent marriages.—*Dunn v. Garnett* (Ky.) 841.

*Declarations of persons who knew the parties are admissible to establish a marriage between slaves before the Civil War.—*Dunn v. Garnett* (Ky.) 841.

*Evidence considered, and *held* sufficient to show a common-law marriage.—*Davis v. Stouffer* (Mo. App.) 282.

*Where a present agreement to marry, followed by cohabitation, is shown, subsequent declarations of the husband tending to negative the fact of a marriage, are inadmissible.—*Davis v. Stouffer* (Mo. App.) 282.

*Where a present agreement of marriage is entered into in good faith by persons capable of entering into the contract, the relation of husband and wife is thereby fixed, though such

*Point annotated. See syllabus.

agreement is not followed by cohabitation.—*Davis v. Stouffer* (Mo. App.) 282.

MARRIAGE SETTLEMENTS.

See Husband and Wife, § 2.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Work and Labor.

Agency to employ, see Principal and Agent, § 2.

Applicability of instructions to case in action

for injuries to servant, see Trial, § 9.

Construction of instructions in action for injuries to servant, see Trial, § 12.

Employer's liability insurance, see Insurance, §§ 2, 9.

Harmless error in action for injuries to employee, see Appeal and Error, § 21.

Imposition of occupation tax on purchasers of assignment of wages, see Licenses, § 1.

Prevention of employment, see Torts.

Province of court and jury in general in action for injuries to servant, see Trial, § 6.

§ 1. The relation.

*The measure of damages for a wrongful discharge of an employee stated.—*Carter v. Oster* (Mo. App.) 996.

*A contract between M. and defendant railroad company for the construction of right of way buildings, bridges, trestles, etc., *held* an independent contract, and not to make M. and his employees servants of the railroad company.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 2. Services and compensation.

Under Acts 1905, p. 533, relating to the payment of wages to discharged servants, *held* error to render judgment for a penalty in an action by a discharged employee for wages, where the judge did not submit the issue whether plaintiff requested the amount due him sent to a particular station, though it was found that he applied for his wages within seven days after discharge.—*St. Louis, I. M. & S. Ry. Co. v. Bailey* (Ark.) 180.

In an action for salary for managing a skating rink, *held* not error to exclude a writing claimed by defendant to embody the terms of the contract of employment.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

In an action for salary for managing a skating rink, organized by a consolidation of a rink owned by defendant and one owned by plaintiff and his associates, plaintiff *held* entitled to show certain facts.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

Findings in an action to recover compensation for personal services *held* to warrant a judgment for plaintiff.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

§ 3. Master's liability for injuries to servant—Nature and extent in general.

Where a servant was directed how to operate an emery wheel, and the wheel did not break on account of any misuse thereof by him, the failure of the master to inform him that emery wheels will explode at times did not contribute to the injury caused by the breaking of the wheel.—*Brands v. St. Louis Car Co.* (Mo.) 511.

Conductor of a freight train *held* not acting outside his employment in acting as brakeman

on his own train in an emergency, so as to preclude recovery for his death.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

§ 4. — Tools, machinery, appliances, and places for work.

*A railroad company permitting a depression to remain in its roadbed at a switching place *held* guilty of negligence.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

Statement of duty of master to inspect the roof of an entry of a coal mine.—*Mammoth Vein Coal Co. v. Looper* (Ark.) 390.

Proximate cause of an explosion of powder, if occurring as claimed, and any actionable negligence of the master, *held* to be failure to properly erect electric wires.—*Western Coal & Mining Co. v. Garner* (Ark.) 392.

A master *held* not negligent in placing cans of powder near electric wires, provided they were properly erected and insulated.—*Western Coal & Mining Co. v. Garner* (Ark.) 392.

*The placing for distribution of cans of powder by the master in the entry of a mine, explosion of which injured employees, *held* not negligence.—*Western Coal & Mining Co. v. Garner* (Ark.) 392.

*Rule as to care required of an employer to discover and repair defects, etc., stated.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*An employer's duty to provide a safe place of work cannot be delegated.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*Master's duty *held* discharged by exercising ordinary care to provide reasonably safe appliances.—*Pettus & Buford v. Kerr* (Ark.) 886.

A railway company is not negligent toward alighting brakemen in permitting a space of 14 inches between the edge of a station platform and passing cars.—*Arkansas Cent. R. Co. v. Workman* (Ark.) 1082.

*A railway company *held* not bound to light its station platforms for the benefit of alighting brakemen.—*Arkansas Cent. R. Co. v. Workman* (Ark.) 1082.

*A master is required to provide his servant with a reasonably safe place to work, and to maintain it in a reasonably safe condition.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*A master *held* bound to use only reasonable care to furnish safe appliances.—*Brands v. St. Louis Car Co.* (Mo.) 511.

*No inference of negligence of a master arises from evidence that an appliance furnished was such as is ordinarily used for like purposes by persons in the same kind of business, and negligence cannot be imputed from the employment of machinery in general use.—*Brands v. St. Louis Car Co.* (Mo.) 511.

*A master furnishing a straight emery wheel *held* not guilty of negligence in failing to furnish a convex wheel.—*Brands v. St. Louis Car Co.* (Mo.) 511.

Knives of a planer *held* not "shafting" required by Rev. St. 199, § 6433 (Ann. St. 1900, p. 3217) to be covered by an employer. Section 4160 (page 2252).—*Cole v. North American Lead Co.* (Mo. App.) 753.

*Allowing shavings on the floor near a planer, stepping on a block covered by which the operator lost his balance and was thrown against the machine knives, *held* not actionable negligence.—*Cole v. North American Lead Co.* (Mo. App.) 753.

*The right of a master to conduct its business in its own way, and use such instrumentalities as it chooses, is not absolute, but circumscribed

*Point annotated. See syllabus.

by its duty to provide for the safety of its employees.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

*An independent contractor's negligence in using a defective appliance *held* the proximate cause of injuries to his servant from the defect, and not the negligence of the employer, for whom the work was done, in furnishing the contractor with the defective cable.—*Kiser v. Suppe* (Mo. App.) 1005.

*Plaintiff's employer *held* negligent in not repairing a cable used in performing the work, from the defective condition of which plaintiff was injured.—*Kiser v. Suppe* (Mo. App.) 1005.

*Plaintiff's employer owed him the duty to exercise reasonable care to furnish reasonably safe appliances for the work, and to continue the exercise of such care during the work.—*Kiser v. Suppe* (Mo. App.) 1005.

*The fact that a dummy elevator brake was defective at the time the elevator fell and decedent was killed *held* immaterial.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

*Defendant *held* bound to anticipate that deceased, a girl 13 years old employed in defendant's department store, might be injured by the fall of a dummy elevator counterbalance weight which was defectively constructed.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

*It is the duty of a master to afford a servant a reasonably safe place to work.—*Moriarty v. Schwarzschild & Sulzberger Co.* (Mo. App.) 1034.

Cotton mill company which changed employment of minor to more dangerous work without his mother's consent *held* liable for injury proximately resulting.—*Hillsboro Cotton Mills v. King* (Tex. Civ. App.) 132.

*Duty of a railway company acquiescing in a custom of its conductors to alight from moving trains at a particular station in performing a duty, stated.—*Missouri, K. & T. Ry. Co. of Tex. v. Kennedy* (Tex. Civ. App.) 339.

§ 5. — Warning and instructing servant.

Under facts stated, a lumber yard foreman *held* not negligent towards employé respecting the fall of lumber.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*Facts *held* to make an employer liable for injury to an employé, directed to go to a particular place to work.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*An employer must instruct an employé as to patent, as well as latent, dangers, if through the employé's youth and inexperience he does not appreciate them.—*Arkansas Cent. R. Co. v. Workman* (Ark.) 1082.

*A railway company is liable for injury to a young, inexperienced brakeman by his alighting from a moving train in an improper way, where he was not instructed as to the proper way.—*Arkansas Cent. R. Co. v. Workman* (Ark.) 1082.

A master *held* not guilty of negligence in failing to warn an employé of the danger incident to the use of an emery wheel.—*Brands v. St. Louis Car Co.* (Mo.) 511.

§ 6. — Fellow servants.

*The fellow servant doctrine *held* inapplicable to a suit by an employé for injury caused by lumber falling.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*A master *held* liable for injuries to a servant in consequence of his failure to furnish an adequate force for the work.—*Standard Sanitary Mfg. Co. v. Minor* (Ky.) 572.

*A master must furnish enough force to do the work with reasonable safety to all servants

engaged in it.—*Standard Sanitary Mfg. Co. v. Minor* (Ky.) 572.

*Negligence of a foreman in giving orders to the engineer to drop a log when it was several feet above the truck on which it was being loaded, causing the death of an employé, *held* negligence of a vice principal.—*Gould Const. Co. v. Childers' Adm'r* (Ky.) 622.

Negligence in giving orders of one temporarily put by the foreman in his place, causing death of an employé, *held* that of a vice principal.—*Gould Const. Co. v. Childers' Adm'r* (Ky.) 622.

Employés in a sawmill *held* not fellow servants.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*Incompetency of a servant is a state or condition the existence of which must be shown by other facts and circumstances.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

*In an action for injuries to a servant by negligence of a fellow servant, plaintiff must prove that the fellow servant was incompetent, that the injury was caused thereby, and that the master, with notice of the incompetency, negligently retained the servant.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

Where the negligent act of a foreman complained of was not done in the exercise of his authority, but as a collaborer at the time with those under his control, his act is that of a fellow servant, and not that of a vice principal.—*Robinson v. St. Louis & S. F. R. Co.* (Mo. App.) 730.

*A petition, in an action for injuries to a railroad employé, *held* to show that a vice principal was but a fellow servant within the fellow servant law. *Ann. St. 1906, § 2875.*—*Robinson v. St. Louis & S. F. R. Co.* (Mo. App.) 730.

*Where a master was negligent, he was not excused because a fellow servant's negligence contributed with the master's to a servant's injury.—*Moriarty v. Schwarzschild & Sulzberger Co.* (Mo. App.) 1034.

*Where decedent was injured while unloading timbers from defendant's cars, he was not engaged in operating the cars, locomotives, or trains of defendant within the fellow servant act (Rev. St. 1895, arts. 4560f, 4560g, 4560h).—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 7. — Risks assumed by servant.

*Where a master promises to repair, his servant is relieved of the assumption of the risk for a reasonable time, unless the danger is so imminent that no prudent person would continue in the work.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

*A switchman continuing to work for about a year with knowledge of defect in the roadbed *held* to have assumed the risk in the absence of a promise to repair.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

*A servant *held* not presumed to know of risks caused by the negligence of his master.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

A miner *held* not to assume risk in going under roof of entry of a coal mine.—*Mammoth Vein Coal Co. v. Looper* (Ark.) 390.

*Danger from powder in an entry of a mine *held* assumed by employés.—*Western Coal & Mining Co. v. Garner* (Ark.) 892.

Servant *held* entitled to act on presumption that master has discharged his duty.—*Pettus & Buford v. Kerr* (Ark.) 886.

*Where running boards on the ends of cars are so constructed that they come close to each other when cars are coupled on a curve, the condition is an obvious danger of which train-

*Point annotated. See syllabus.

men must take notice.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*Statement of conditions under which the master is liable to an employé for injury from using a defective tool on the direction and assurances of the foreman.—*Rogers v. South Covington & C. St. Ry. Co.* (Ky.) 630.

*An employé suing for injuries held not entitled to rely upon inexperience or ignorance of danger as to certain matters.—*Hutchison v. Cohankus Mfg. Co.* (Ky.) 899.

*The risk of injury to a servant from a defect in the place provided for work which arose from the nature of the work held a risk which the servant assumes.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*A servant does not assume the risk of a master's neglect to provide a reasonably safe place to work.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*An employé held not to assume the risk of injury from being struck with a stove thrown from a window above him.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*A servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so obvious that a reasonably prudent person would not attempt to use it.—*Brands v. St. Louis Car Co.* (Mo.) 511.

*Ordinarily a servant assumes only such risks as are incident to his employment, after the master has fulfilled the primary duty of using care to furnish proper working appliances and a safe place to work.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

A servant thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine.—*Continental Oil & Cotton Co. v. Scott* (Tex. Civ. App.) 107.

*A switchman held entitled to recover for injuries caused by the negligence of defendant's engineer, concurring with defects in the cars, the risk of which plaintiff assumed, so that charges exempting defendant from liability because of such defects were properly refused.—*Texas & N. O. R. Co. v. Powell* (Tex. Civ. App.) 697.

§ 8. — Contributory negligence of servant.

*Where the danger is so obvious and imminent that a servant is not justified in continuing in his work, he is usually held guilty of contributory negligence if he does continue.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

A switchman having knowledge of the promise of the foreman of a switching yard to repair a defect in the roadbed held entitled to rely on such promise though it was made to another employé who communicated it to the switchman.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

An employé held not guilty of contributory negligence in getting to the side of a truck to get hold of the end of a log suspended above it, and which was being loaded on it.—*Gould Const. Co. v. Childers Adm'r* (Ky.) 622.

A factory employé held not entitled to recover for loss of a hand caught in a revolving cylinder while attempting to remove an obstruction therefrom.—*Hutchison v. Cohankus Mfg. Co.* (Ky.) 899.

*An employé cannot recover for injuries from his voluntary selection of a dangerous rather than a safe way of performing his work.—*Hutchison v. Cohankus Mfg. Co.* (Ky.) 899.

*Plaintiff held not bound to inspect the platform on which he was employed in order to discover a defect.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*An employé engaged in caring for the machinery of a sawmill held not guilty of contributory negligence in going on a passway, where he was injured, to observe the machinery.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*Where two courses are open to an employé in the discharge of his duty, and each is attended, under normal conditions, with the same degree of safety, it is not negligence to take one course rather than the other.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

*Where a fireman disobeyed a train order, and his death resulted from a collision caused thereby, held, that there could be no recovery.—*Sinclair's Adm'r v. Illinois Cent. R. Co.* (Ky.) 910.

If the conductor of a freight train threw himself from the train to escape the peril in which the company's negligence had placed him, his act was no defense to an action against the company for his death caused thereby.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

*Failure of an employé to obey his employer's rules, which are reasonable and known to him, is negligence, and a defense to his action for damages for a resulting injury.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

§ 9. — Pleading.

*An employé, relying upon the employer's failure to furnish reasonably safe machinery, must show that his injuries were caused by defective machinery.—*Hutchison v. Cohankus Mfg. Co.* (Ky.) 899.

*A petition for injuries to a servant by falling from a defective platform, alleging that the dangerous condition of the platform was unknown to plaintiff, was sufficient, without alleging that plaintiff did not have equal means of knowing the defect, or that by ordinary care he could not have discovered it.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*A petition for injuries to a servant by falling through a platform held to sufficiently point out the dangerous condition of the platform.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*A petition for injuries to a servant held to sufficiently allege that plaintiff did not know of the existence of the space in the platform through which he fell.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*In an action for injuries to a servant, the petition held to sufficiently charge that the proximate cause of plaintiff's injury was defendant's negligence not only in providing an unsafe place to work, but in requiring plaintiff to work with an incompetent fellow servant.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

Where a master relies upon a violation of rules by the servant to prevent a recovery, he must plead the violation.—*Texas & N. O. R. Co. v. Powell* (Tex. Civ. App.) 697.

§ 10. — Evidence.

*The doctrine of *res ipsa loquitur* held not to apply in case of explosion of powder near electric wires, injuring employes.—*Western Coal & Mining Co. v. Garner* (Ark.) 392.

*Negligence of an employer held not presumed because an employé was injured by lumber falling.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*Evidence in an action for injuries sustained by an employé held to support a finding that the employers were negligent.—*Pettus & Buford v. Kerr* (Ark.) 886.

*Point annotated. See syllabus.

Evidence, in an action against a railway company for death of a conductor crushed between cars, *held* to sustain findings that the company was negligent.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

Evidence *held* to indicate that using a defective tool, on the direction and assurances of the foreman, was not obviously dangerous.—*Rogers v. South Covington & C. St. Ry. Co.* (Ky.) 630.

*Evidence *held* to show that the worn-out condition of a machine was not the cause of injury to an employé.—*Hutchison v. Cohankus Mfg. Co.* (Ky.) 899.

*In an action for injuries to a servant by the breaking of an emery wheel, evidence *held* not to show that the master knew that the wheel was dangerous.—*Brands v. St. Louis Car Co.* (Mo.) 511.

Evidence that plaintiff's fellow servant suffered from epileptic fits *held* admissible to show his incompetency.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

*Prior specific acts of negligence *held* admissible to show incompetency of plaintiff's fellow servant.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

*That plaintiff's fellow servant was negligent in one instance does not even tend to prove his incompetency.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

*Alleged incompetency of plaintiff's fellow servant cannot be proved by the injurious act complained of.—*Tucker v. Missouri & K. Telephone Co.* (Mo. App.) 6.

*In an action for injuries to a railroad employé while loading trucks on a flat car, evidence *held* admissible to show the employer's negligence in not employing the method in common use.—*Robinson v. St. Louis & S. F. R. Co.* (Mo. App.) 730.

*Where a servant's injury may have resulted from one of several causes for only one of which the master is liable, the servant must show with reasonable certainty that such cause produced the injury.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

*The rule that other independent and disconnected acts of negligence are inadmissible does not apply to certain actions for injuries to a servant.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

*Evidence of previous falls of the elevator weight which struck decedent *held* admissible to show that the elevator was defective to defendant's knowledge.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

*Proof of a defect in appliances, in itself does not give a right of recovery, but it must appear affirmatively that the defect was the proximate cause of the injury, and that the master was chargeable with knowledge of it.—*Moriarty v. Schwarzschild & Sulzberger Co.* (Mo. App.) 1034.

*Evidence *held* to show that the placing of a barrel on a floor, inclined toward an open elevator door, by a fellow servant, combined with the defect in the floor and the master's failure to guard the elevator opening, was the direct cause of a servant's injury.—*Moriarty v. Schwarzschild & Sulzberger Co.* (Mo. App.) 1034.

In an action for injuries to a servant while operating a defective machine, evidence *held* to show that plaintiff was an experienced operator with full knowledge of the condition of the machine and of the danger therefrom and assumed the risks incident thereto by his continued use thereof.—*Continental Oil & Cotton Co. v. Scott* (Tex. Civ. App.) 107.

Evidence of a custom of railway conductors to alight from moving trains at a particular station *held* admissible in an action against a company for injury to an alighting conductor caused by a defective platform.—*Missouri, K. & T. Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 389.

§ 11. — Trial.

*Whether the danger arising from a defect in a railroad roadbed, resulting from a depression at a switching place in a switching yard was so obvious that a switchman could not rely on the promise of the foreman of the company to repair the defect as speedily as possible, *held* for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

*A switchman continuing in his work, with knowledge of the defective condition of the roadbed *held* not to have assumed the risk as a matter of law.—*St. Louis, I. M. & S. Ry. Co. v. Mangan* (Ark.) 168.

Evidence *held* to warrant finding that the master by proper inspection would have discovered the dangerous condition of a rock in the roof of an entry of a mine.—*Mammoth Vein Coal Co. v. Looper* (Ark.) 390.

*Whether it was obviously dangerous for an employé to go upon a lumber pile *held*, under the evidence, a jury question in an action for injury to him resulting from the lumber falling.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*In a suit for injury to an employé, caused by lumber falling, whether he was directed to go to the place of injury *held*, under the evidence, a jury question.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

Instructions in an action for injuries sustained by an employé *held* not conflicting.—*Pettus & Buford v. Kerr* (Ark.) 886.

*Instructions, in an action against a railway company for the death of a conductor crushed between cars while coupling them, *held* properly refused, as making him insurer of his own safety.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*When there are no safety coupling appliances, or they are out of repair, it is always a jury question whether under the circumstances an employé going between cars to couple them was negligent.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*It is not negligent per se for a trainman to go between cars in coupling them.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

An instruction in an action for injuries to a servant from falling through an opening in a platform *held* not objectionable as calling the jury's attention to evidence from which they might find the platform to be defective, and in referring to the opening therein as a "hole."—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

An instruction in an action for injuries to a servant *held* not objectionable as characterizing the place where plaintiff was at work as one of hidden danger.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*In an action for injuries to a servant by falling through a hole in a platform, plaintiff's negligence *held* properly submitted to the jury.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

In an action for injuries to an employé, an instruction *held* not prejudicial to the employer.—*Swann-Day Lumber Co. v. Thomas* (Ky.) 907.

In an action for injuries to a railway employé, an instruction *held* proper under the railroad fellow servant act, and within the issues raised by the petition.—*Robinson v. St. Louis & S. F. R. Co.* (Mo. App.) 730.

*Point annotated. See syllabus.

In an action for injuries to a railroad employé while loading trucks on flat cars, an instruction *held* properly refused as inapplicable to the evidence.—*Robinson v. St. Louis & S. F. R. Co.* (Mo. App.) 730.

*The operator of a planer who stepped on a block in some shavings, lost his balance, and was thrown against the machine knives, *held* not guilty of contributory negligence as matter of law.—*Cole v. North American Lead Co.* (Mo. App.) 753.

The question of the breach of rules of a railroad by an employé *held* to be an element of the defense of contributory negligence, in an action for his death, and to be for the jury.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

In an action for the death of a railroad conductor, the court *held* not warranted in charging that decedent had not examined the brakes to "see they were all right," and if an inference might be drawn from the evidence that he had failed to do so, the issue should be submitted by a hypothetical instruction.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

Whether negligence of a railroad company in permitting a defective condition of its track and brakes was the proximate cause of the death of an employé *held* to be for the jury, under the evidence.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

*Decedent, a child 13 years old employed in defendant's department store, *held* not negligent as a matter of law in putting her head into the shaft of a dummy elevator after the fall thereof.—*Winkle v. George B. Peck Dry Goods Co.* (Mo. App.) 1026.

In an action for injuries to an employé while assisting in moving an engine and smokestack, evidence *held* to require the submission to the jury of the issues of the employer's negligence and the employé's contributory negligence.—*Binyon v. Smith* (Tex. Civ. App.) 138.

In an action for injury to a conductor who alighted from a moving train, *held*, not error prejudicial to the company to refuse to give an instruction.—*Missouri, K. & T. Ry. Co. of Texas v. Kennedy* (Tex. Civ. App.) 339.

§ 12. Liabilities for injuries to third persons.

*The duty of an employer to an independent contractor and his servants stated, where the employer retains the right to furnish instrumentalities for the work.—*Kiser v. Suppe* (Mo. App.) 1005.

*Defendant *held* to be under a duty, to the servants of a contractor employed by him, to exercise reasonable care to furnish appliances reasonably safe for their intended use.—*Kiser v. Suppe* (Mo. App.) 1005.

*Plaintiff *held* a servant of another, and not a subcontractor.—*Kiser v. Suppe* (Mo. App.) 1005.

*One *held* an independent contractor under defendant, and not his servant.—*Kiser v. Suppe* (Mo. App.) 1005.

Relation of master and servant defined.—*Kiser v. Suppe* (Mo. App.) 1005.

*Plaintiff *held* not defendant's servant.—*Kiser v. Suppe* (Mo. App.) 1005.

Railway mail clerk, injured while attempting to alight from the mail coach of one railway, *held* to have no right of action against another railway because of a failure of its employé to warn him that the train was about to start.—*Houston & T. C. R. Co. v. Keeling* (Tex. Civ. App.) 808.

§ 13. Interference with the relation by third persons.

*The threat of a strike which will give a right of action to an employé discharged in con-

sequence thereof must be of a substantial character and adapted to influence a person of reasonable firmness and prudence.—*Carter v. Oster* (Mo. App.) 995.

*Certain acts of union men in procuring the dismissal of a nonunion man from various employments *held* illegal.—*Carter v. Oster* (Mo. App.) 995.

*A cause of action in favor of a laborer discharged from his employment in consequence of the illegal methods of third persons *held* established.—*Carter v. Oster* (Mo. App.) 995.

MATERIALITY.

Of alteration of written instrument, see Alteration of Instruments.

Of evidence in criminal prosecutions, see Criminal Law, § 6.

MAYHEM.

Appellate jurisdiction of particular courts, see Courts, § 4.

MEASURE OF DAMAGES.

See Damages, § 3.

For discharge from employment, see Master and Servant, § 1.

MECHANICS' LIENS.

For work and materials used in public works, see Municipal Corporations, § 6.

Law relating to as denying equal protection of law, see Constitutional Law, § 4.

§ 1. Right to lien.

Building contract *held* not to authorize the architect to bind the owner or to create a lien beyond the original contract price.—*Sternberg v. Ft. Smith Refrigerator Works* (Ark.) 174.

§ 2. Assignment of lien or claim.

*Persons furnishing a principal contractor with labor or material *held* entitled on an equal footing to liens not exceeding the contract price, or if the work is abandoned by the principal contractor, to the amount of the contract price less the cost of completing the building.—*Sternberg v. Ft. Smith Refrigerator Works* (Ark.) 174.

§ 3. Enforcement.

A defendant in a suit to enforce a materialman's lien who pleads payment has the burden of proof on the issue raised by the reply controverting the plea.—*Flexner University School v. Strassel Gans Paint Co.* (Ky.) 686.

In a suit to enforce a materialman's lien, evidence *held* not to show payment of the claim.—*Flexner University School v. Strassel Gans Paint Co.* (Ky.) 686.

MENTAL CAPACITY.

Opinion evidence of, see Evidence, § 9.

MENTAL SUFFERING.

Element of damage, see Damages, § 1.

MERGER.

Of cause of action in judgment, see Judgment, § 9.

MINES AND MINERALS.

Mine operators as employers, see Master and Servant, §§ 4, 7.

*Point annotated. See syllabus.

§ 1. Title, conveyances, and contracts.

*A mining lease held forfeitable at the option of the lessors according to its provisions on the lessors' failure to operate the mine.—Cherokee Const. Co. v. Bishop (Ark.) 189.

Buildings, machinery, etc., constructed on land leased for mining, held not fixtures, but removable by the lessees, subject to landlord's lien for unpaid royalty.—Cherokee Const. Co. v. Bishop (Ark.) 189.

MINORS.

See Infants.

MISREPRESENTATION.

See Fraud.

By insured, see Insurance, § 4.

MISTAKE.

Ground for reformation of instrument, see Reformation of Instruments, § 1.

In contract for sale of land, see Vendor and Purchaser, § 1.

MITIGATION.

Of damages, see Damages, § 1.

MODIFICATION.

Of bill of exchange or promissory note, see Bills and Notes, § 2.

MONEY RECEIVED.

Recovery of payment in general, see Payment, § 3.

MONOPOLIES.

Grants of privileges or immunities, see Constitutional Law, § 3.

MORTGAGES.

Curtsey in equity of redemption, see Curtsey.

Of homestead, see Homestead, § 2.

Of personal property, see Chattel Mortgages.

§ 1. Construction and operation.

Where a person executed a mortgage which was not recorded until after he had deeded the property to others, the title conveyed by the deed takes precedence over the mortgage.—Brown v. Nelms (Ark.) 373.

§ 2. Payment or performance of condition, release, and satisfaction.

In an action to set aside a note and mortgage, evidence held to justify a finding that the note and mortgage had been paid by substituted note and mortgage, authorizing the relief.—Citizens' Sav. Bank v. Leigh (Ky.) 628.

§ 3. Foreclosure by exercise of power of sale.

*Where land estimated to be worth from \$1,000 to \$1,500 was sold at a trustee's sale for \$832, there was no evidence of inadequacy of price.—Prather v. Hairgrove (Mo.) 552.

§ 4. Foreclosure by action.

A finding that mortgaged property belonged to the mortgagor, or, if it was his wife's separate property, plaintiff did not know that fact, authorized a judgment of foreclosure of the mortgage.—Goode v. Pierce (Tex. Civ. App.) 688.

*Point annotated. See syllabus.

MOTIONS.

For particular purposes or relief.

Arrest of judgment in civil actions, see Judgment, § 3.

Continuance in civil actions, see Continuance.

Direction of verdict in civil actions, see Trial, § 5.

New trial in civil actions, see New Trial, § 2.

Presentation of objections for review, see Appeal and Error, § 3.

Quashing indictment or information, see Indictment and Information, § 2.

Quashing or vacating execution, see Execution, § 3.

Relating to pleadings, see Pleading, § 7.

Striking out evidence, see Trial, § 3.

MULTIPLICITY OF SUITS.

Jurisdiction of equity to avoid, see Equity, § 1.

MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, § 1.

Applicability of instructions to case in action against, see Trial, § 9.

Estoppel of municipality to deny dedication, see Dedication, § 1.

Exemption of sinking funds from taxation, see Taxation, § 1.

Judgment against as bar to subsequent action, see Judgment, § 9.

Libelous publication concerning mayor, see Libel and Slander, § 3.

Mandamus, see Mandamus, §§ 1-3.

Order for public improvement as denying due process of law, see Constitutional Law, § 5.

Ordinances regulating sale of food, see Food.

Ordinances relating to intoxicating liquors, see Intoxicating Liquors.

Prohibition to police judge, see Prohibition, § 1.

Province of court and jury in action against, see Trial, § 6.

Street railroads, see Street Railroads.

Water supply, see Waters and Water Courses, § 3.

§ 1. Creation, alteration, existence, and dissolution.

Under Kirby's Dig. §§ 5519, 5575, held to allow a mere protest by persons to proceedings for annexing territory to city is sufficient to make them parties to the proceeding, with right to appeal.—Barnwell v. Town of Gravette (Ark.) 973.

§ 2. Proceedings of council or other governing body.

*The invalidity of an ordinance requiring property owners to construct sidewalks, curbing, and guttering, as to the guttering, held not to render the remainder of the ordinance invalid.—Brizzolara v. City of Ft. Smith (Ark.) 181.

Under Rev. St. 1899, § 4160, cl. 7 (Ann. St. 1906, p. 2253), and the charter of a city, the name of the mayor affixed to an ordinance approved by him may be written by another under the immediate direction and by the authority of the mayor.—Porter v. R. J. Boyd Pav. & Const. Co. (Mo.) 235.

*The repeal of a city ordinance pending a prosecution under its provisions operates to relieve the defendant, unless it is otherwise provided in the act repealing the ordinance.—City of St. Louis v. Wortman (Mo.) 520.

*Section 17, Ordinance No. 20,808 of city of St. Louis, held impliedly repealed by Acts 1905, p. 135, § 5 (Ann. St. 1906, § 4761-5) if such act were valid.—City of St. Louis v. Wortman (Mo.) 520.

*An ordinance inconsistent with a state law, invalid because not clearly expressing the subject of the act in the title, was not repealed by implication.—*City of St. Louis v. Wortman* (Mo.) 520.

*Section 17, Ordinance No. 20,808, of city of St. Louis, prohibiting adding foreign substances to milk and cream, *held* repealed by clause 5, § 4, p. 239, Acts 1907, entitled "An act to prohibit the manufacture and sale of foods * * * and prescribing penalties for violations thereof."—*City of St. Louis v. Wortman* (Mo.) 520.

§ 3. Contracts in general.

*Where a city purchased waterworks machinery under a contract void for failure to comply with Kirby's Dig. § 5473, but received and used the machinery for nearly two years, it was liable for the price.—*Forrest City v. Orgill Bros. & Co.* (Ark.) 891.

A contract to purchase waterworks machinery by a city, not authorized or formally ratified by the city council, as required by Kirby's Dig. § 5473, *held* void.—*Forrest City v. Orgill Bros. & Co.* (Ark.) 891.

*Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327), prohibiting counties and other municipal bodies from making contracts not within the scope of their powers or expressly authorized by law, *held* but declaratory of the common law.—*Blades v. Hawkins* (Mo. App.) 979.

§ 4. Public improvements—Power to make improvements or grant aid therefor.

*Incorporated cities and towns have no power to compel property owners to construct gutters.—*Brizzolara v. City of Ft. Smith* (Ark.) 181.

*Kirby's Dig. §§ 5462, 5466, *held* to authorize provisions of an ordinance requiring property owners to construct sidewalks, curbing, and guttering, making it a misdemeanor to fail to do so, imposing a fine, and declaring each day's delay a separate offense.—*Brizzolara v. City of Ft. Smith* (Ark.) 181.

*An ordinance requiring property owners to construct sidewalks, curbing, and guttering *held* not invalid because failing to provide for proper grading before the curbing and guttering is placed.—*Brizzolara v. City of Ft. Smith* (Ark.) 181.

The time and manner for improving city streets are solely for the legislative department, and acts of abutting owners in constructing a sidewalk do not deprive a city of its power to order the construction of a sidewalk at the cost of abutting owners as authorized by statute.—*Guilfoyle's Ex'r v. City of Maysville* (Ky.) 666.

*Meaning of "original construction" within a statute allowing a city to order the original construction of a city improvement at the exclusive cost of abutting owners determined.—*Guilfoyle's Ex'r v. City of Maysville* (Ky.) 666.

§ 5. — Preliminary proceedings and ordinances or resolutions.

In the absence of a charter provision prohibiting it, a city may contract for extra work connected with street improvements without first making a specific appropriation for the purpose, subject only to the constitutional limitation of five per cent. on the assessed value of the property within the city limits.—*Heman v. City of St. Louis* (Mo.) 259.

Charter St. Louis City, art. 6, § 23 (Ann. St. 1906, p. 4869), providing that every ordinance requiring public work to be done shall contain a specific appropriation therefor, *held* not to apply to emergency and unforeseen work, not required to be ordered by ordinance.—*Heman v. City of St. Louis* (Mo.) 259.

*Under Charter St. Louis City, art. 6, § 15 (Ann. St. 1906, p. 4857), certain extra work,

relating to the repair and improvement of sidewalks, etc., *held* not required to be ordered done by ordinance and performed under contract awarded by competitive bidding.—*Heman v. City of St. Louis* (Mo.) 259.

§ 6. — Contracts.

Tools, implements, and appliances, are not materials, within the meaning of guaranty that contractors would pay for material used in the work of building a sewer, and the fact that they were entirely consumed therein, being worn out and broken, does not change the rule.—*Kansas City v. Youmans* (Mo.) 225.

Blasting powder, dynamite, fuse, and caps, necessarily used by contractors in building a sewer, are materials within the meaning of a guaranty that the contractors would pay for materials used in the work.—*Kansas City v. Youmans* (Mo.) 225.

A guaranty clause in a sewer construction contract construed as a continuing guaranty.—*Kansas City v. Youmans* (Mo.) 225.

Provisions of Kansas City Charter, art. 9, § 20, relating to contracts for making city improvements, *held* not to violate any constitutional provision.—*Kansas City v. Youmans* (Mo.) 225.

*A publication of a notice for bids for a public improvement *held* sufficient under a municipal ordinance providing for publication of notice.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

Under Charter St. Louis City, art. 6, §§ 15, 27 (Ann. St. 1906, pp. 4857, 4867), and article 4, § 35 (Ann. St. 1906, p. 4832) the board of public improvements *held* empowered, in contracting for the construction, repair, etc., of sidewalks, to authorize the street commissioner to determine what part of the improvement should be considered as extra, and to agree on the price to be paid therefor.—*Heman v. City of St. Louis* (Mo.) 259.

Under Charter St. Louis City, art. 6, § 15 (Ann. St. 1906, p. 4857), certain extra work relating to the repair and improvement of sidewalks, etc., *held* not required to be ordered done by ordinance and performed under contract awarded by competitive bidding.—*Heman v. City of St. Louis* (Mo.) 259.

§ 7. — Assessments for benefits, and special taxes.

A city, ordering the grading and paving of a street, *held* to order the original construction of a street, so that the abutting owners may be taxed therefor.—*Sparks v. Barber Asphalt Pav. Co.* (Ky.) 830.

*A street is not constructed, within the law authorizing the original construction of a street at the cost of abutting owners, until its construction is prescribed by the city authorities.—*Sparks v. Barber Asphalt Pav. Co.* (Ky.) 830.

*Owners of property assessed for the payment of a sewer *held* not entitled to complain of the failure of the contractor to construct certain catch basins.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

*In determining whether a sewer has been completed within the charter of a city providing for the issuance of tax bills, the test is whether the sewer has been completed, and not whether the details of the work are in strict accordance with the contract.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

*An owner *held* not entitled on the showing made to maintain a suit to cancel tax bills issued pursuant to city charter for the construction of a sewer.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

*The levying of special assessments is an exercise of the taxing power.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

*Point annotated. See syllabus.

A provision in a city charter relating to actions on tax bills *held* to apply in a suit by an owner to cancel a tax bill and offering to pay the value of the work done.—Porter v. R. J. Boyd Pav. & Const. Co. (Mo.) 235.

Under the charter of the city of Beaumont (Laws 1903, p. 55, c. 15) § 36j; Sp. Laws, 26th Leg. (Laws 1899, p. 147, c. 12), as amended by Sp. Laws, 28th Leg (Laws 1903, p. 48, c. 15) the finding of the city council on the issue whether the special benefit to abutting property from a street improvement exceeded the assessment *held* prima facie evidence of the fact found.—City of Beaumont v. Russell (Tex. Civ. App.) 950.

§ 8. — Enforcement of assessments and special taxes.

Under the charter of the city of Beaumont (Laws 1903, p. 55, c. 15), § 36j; Sp. Laws, 26th Leg. (Laws 1899, p. 147, c. 12), as amended by Sp. Laws, 28th Leg. (Laws 1903, p. 48, c. 15), limitations *held* not to run against the city, as to a street improvement assessment, until 30 days after it has become due.—City of Beaumont v. Russell (Tex. Civ. App.) 950.

§ 9. Police power and regulations.

*The ordinances of the city of St. Louis, in order to be valid, must be consistent with the general laws of the state and must be in harmony with the legislative policy of the state, manifested by its general enactments and as provided for in express terms by the Constitution.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

*A city *held* authorized to prescribe different penalty from that prescribed by the state.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

*The fact that city ordinance was not as broad as state ordinance covering the same subject *held* not to render it void as inconsistent with the statute.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

§ 10. Torts.

*A city *held* liable to a pedestrian, falling into hole in sidewalk concealed by steam from gas company, and not entitled to recover over against the gas company.—City of Bowling Green v. Bowling Green Gaslight Co. (Ky.) 917.

*Damages for a permanent injury to the property of a riparian owner *held* recoverable in an action for the pollution of the stream.—Kellogg v. City of Kirkeville (Mo. App.) 296.

*The liability of a municipal corporation for the wrongful acts of its servants determined.—Barree v. City of Cape Girardeau (Mo. App.) 724.

*A municipal corporation *held* liable for a wrongful act committed by its street commissioner while engaged in the performance of his duties in improving a street.—Barree v. City of Cape Girardeau (Mo. App.) 724.

§ 11. Fiscal management, public debt, securities, and taxation.

An indebtedness *held* not a municipal indebtedness within the constitutional limit of municipal indebtedness.—Guilfoyle's Ex'r v. City of Maysville (Ky.) 666.

Suit does not lie on warrants drawn on a municipal treasurer without allegation and proof of their presentation and demand for payment.—Farmer's Bank of Wickliffe v. City of Wickliffe (Ky.) 835.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, § 10.

NAMES.

Signatures, see Signatures.

NAVIGABLE WATERS.

See Waters and Water Courses.

§ 1. Rights of public.

*A stream *held* not navigable and not subject to use for floating out staves against the wishes of the owners of the land through which it flows without compensation.—Asher v. McKnight (Ky.) 647.

NAVIGATION.

See Navigable Waters, § 1.

NEGLIGENCE.

Causing death, see Death, § 1.

Measure of damages, see Damages, § 3.

By particular classes of persons.

See Carriers, §§ 2, 7, 8; Livery Stable Keepers; Municipal Corporations, § 10; Railroads, §§ 5-11.

Employers, see Master and Servant, §§ 3-11. Telegraph or telephone companies, see Telegraphs and Telephones, § 1.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Electricity; Railroads, §§ 5-11; Street Railroads, § 2.

Contributory negligence.

Of passenger, see Carriers, § 9.

Of person injured by operation of street railroad, see Street Railroads, § 2.

Of person killed by operation of railroad, see Railroads, § 9.

Of servant, see Master and Servant, §§ 8, 11.

§ 1. Acts or omissions constituting negligence.

*Ordinary care is that degree of care which a person of ordinary prudence would take of the property under the same circumstances if it were his own.—Bigger v. Acree (Ark.) 879.

*One assaulting another, without seeing a third person, and without knowing of her presence in an adjacent room, and without being seen by her, is not guilty of negligence toward the third person.—Reed v. Ford (Ky.) 600.

*A railroad company, maintaining a signal wire two feet from the end of a walk extending from the grade of its main line to the storehouse of an individual, *held* not liable for injuries sustained to a pedestrian using the walk and coming in contact with the wire.—Burden v. Illinois Cent. R. Co. (Ky.) 867.

*That boys who were smothered in a distillery corn bin had entered the bin on a previous occasion in the presence of the person in charge *held* not to charge him with notice that they would go into it on other occasions under different conditions when trespassing on the property.—Kisler's Adm'r v. Kentucky Distilleries & Warehouse Co. (Ky.) 913.

*Where boys trespassing in a distillery mill fell into a corn bin and were smothered, that the person in charge had allowed them to frequent the mill without warning them of danger *held* not to render the proprietors liable.—Kisler's Adm'r v. Kentucky Distilleries & Warehouse Co. (Ky.) 913.

*"Ordinary care" defined.—Everett v. St. Louis & S. F. R. Co. (Mo.) 486.

*The conduct of an ordinarily prudent person is the standard for measuring negligence.—Mitchell v. Chicago & A. Ry. Co. (Mo. App.) 291.

*Point annotated. See syllabus.

§ 2. Proximate cause of injury.

*An injured person cannot recover for the negligence of another unless a causal connection is shown between the negligence and the injury.—*Yongue v. St. Louis & S. F. R. Co.* (Mo. App.) 985.

*"Proximate cause" defined.—*Frisbie v. Fidelity & Casualty Co.* (Mo. App.) 1024.

*The proximate cause of an injury is not always that last act of cause or the nearest act to the injury; but it may be such a negligent act as actively aids in producing the injury as a direct and existing concurrent cause and such as might reasonably be expected to result in the injury.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

§ 3. Contributory negligence.

*Under the Weissinger married women's act, a wife held not chargeable with the negligent acts of her husband, unless the relation of principal and agent or master and servant existed.—*Louisville Ry. Co. v. McCarthy* (Ky.) 925.

*Principle of the humanitarian doctrine stated.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 9.

*It is the fact that a person is in danger and has perhaps been negligent that calls the humanitarian doctrine into play.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 9.

*Before contributory negligence will defeat recovery for negligent personal injury, the danger must be so obvious that an ordinarily prudent man would not assume the situation.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*A minor is only required to exercise that degree of care which is expected of one of his age, experience, and capacity.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

*The rule of contributory negligence applicable to adults cannot be applied to young children.—*Gulf, C. & S. F. Ry. Co. v. Coleman* (Tex. Civ. App.) 690.

*Though plaintiff shows violation of the provisions of an ordinance and his resulting injury, it does not preclude defendant from showing contributory negligence.—*Burnett v. Ft. Worth Light & Power Co.* (Tex.) 1040.

§ 4. Actions.

*Where no reply was filed to defendant's plea of contributory negligence, a verdict for defendant was properly directed; defendant being entitled to judgment on the pleadings.—*Smith v. Louisville & N. R. Co.* (Ky.) 874.

*Where plaintiff's want of care appeared in making out his own case, contributory negligence was in issue, though not set up in answer.—*Hebeler v. Metropolitan St. Ry. Co.* (Mo. App.) 34.

*Res ipsa loquitur rule stated.—*Mitchell v. Chicago & A. Ry. Co.* (Mo. App.) 291.

*Whether an infant is guilty of contributory negligence held ordinarily for the jury.—*Moeller v. United Rys. Co. of St. Louis* (Mo. App.) 714.

*Where defendant's negligence is not shown to be the proximate cause of an injury, but it might reasonably be inferred that it was due to other causes, the rule res ipsa loquitur held not applicable.—*Moriarty v. Schwarzschild & Suzlberger Co.* (Mo. App.) 1034.

*Whether a seven year old child had sufficient intelligence and discretion to be chargeable with negligence contributing to his injury held a jury question.—*Gulf, C. & S. F. Ry. Co. v. Coleman* (Tex. Civ. App.) 690.

*A child, 25 months old, is not, as a matter of law, guilty of contributory negligence in going and remaining on a railroad track, notwithstanding

ing the approach of a train.—*Galveston, H. & N. Ry. Co. v. Olds* (Tex. Civ. App.) 787.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see New Trial, § 1.

NEWSPAPERS.

Publication of libel, see Libel and Slander, §§ 1, 3.

NEW TRIAL.

Necessity of motion for purpose of review, see Appeal and Error, § 3.

Opening or vacating judgment, see Judgment, § 5.

Review of proceedings.

Assignment of errors, see Appeal and Error, § 8.

Review of discretionary rulings, see Appeal and Error, § 15.

Scope and extent of review general, see Appeal and Error, § 12.

§ 1. Grounds.

*Denial of an application for a new trial for newly discovered evidence held error.—*Sympton v. Bell* (Ky.) 1133.

*Damages so great as to indicate passion or prejudice on the part of the jury are ground for a new trial.—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

*Refusal of new trial for newly discovered cumulative evidence held not error.—*Blake v. Royal Ins. Co.* (Mo. App.) 1000.

§ 2. Proceedings to procure new trial.

*Under the direct provisions of Laws 1905, p. 21, c. 18, it is competent, on a motion for a new trial, to show by the testimony of the jurors that the jury was guilty of misconduct in receiving communications or in receiving other testimony than that offered on the trial.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

On the hearing of a motion for a new trial, testimony of jurors tending to show misconduct on the part of the jury is properly disregarded by the court, where the motion for a new trial contains no allegation as to misconduct.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

Evidence considered, and held insufficient to show misconduct on the part of jurors warranting the granting of a new trial.—*Texas & N. O. R. Co. v. Bellar* (Tex. Civ. App.) 323.

NEXT OF KIN.

See Descant and Distribution.

NOLLE PROSEQUI.

Of criminal prosecution, see Criminal Law, § 5.

NONSUIT.

Before trial, see Dismissal and Nonsuit.

NOTES.

Promissory notes, see Bills and Notes.

*Point annotated. See syllabus.

NOTICE.

Of intention to apply for enactment of statute, see Statutes, § 1.

As affecting particular classes of persons.
See Principal and Agent, § 2.

Of particular facts, acts, or proceedings not judicial.

Local option election, see Intoxicating Liquors, § 1.

Loss insured against, see Insurance, § 8.

Nonpayment or protest of bill or note, see Bills and Notes, § 4.

Public improvements, see Municipal Corporations, § 6.

Quitting demised premises, see Landlord and Tenant, § 5.

Of particular judicial proceedings.

See Garnishment, § 1; Lis Pendens; Trial, § 1.

To establish highway, see Highways, § 1.

*Waiver of notice within a specified time, to be effective, must be made within the time limited therefor.—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

NUISANCE.

§ 1. Private nuisances.

*Evidence in an action for permitting filth to accumulate on premises near plaintiff's home *held* sufficient to take the case to the jury on the question of damages to the use of her property.—Kentucky Distilleries & Warehouse Co. v. Barrett (Ky.) 643.

*Evidence in an action for permitting filth to accumulate on premises near plaintiff's residence *held* to raise a jury question whether defendant caused the injury.—Kentucky Distilleries & Warehouse Co. v. Barrett (Ky.) 643.

*The measure of plaintiff's damages in an action for permitting filth to accumulate on premises near her residence was the decrease in value of the use of the property.—Kentucky Distilleries & Warehouse Co. v. Barrett (Ky.) 643.

*A decree restraining the operation of a stone quarry and stone-crusher only in so far as it was offensive is to be commended, for freedom of action ought not to be curtailed more than the right to relief demands.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*The word "vibrate," in a decree enjoining the operation of a quarry so as to jar buildings or to cause the same to shake and vibrate, *held* to award the measure of relief, only, to which the owner of the buildings was entitled.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*Laches or acquiescence so as to bar relief against nuisance *held* not to arise from short period of delay.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*Acquiescence in the conduct of noxious works *held* not to operate as acquiescence after they have been greatly enlarged and are productive of greater injury.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*Under the facts, *held*, that there appeared to be no sound reason for invoking the doctrines of laches or acquiescence against an action to enjoin the operation of the quarry as a nuisance.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*The conduct of a business, though lawful in itself, will not be permitted in a locality, where, because of unusual noise, it entails substantial injury to others.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*Point annotated. See syllabus.

The escape of fine limestone dust from a stone crusher which disturbs the comfortable enjoyment of contiguous premises, may be enjoined as a nuisance.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*The jarring of buildings by explosives and the operation of heavy machinery may be enjoined as a nuisance.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*The employment of explosives in a quarry contiguous to another's property in a large city *held* unreasonable, authorizing either injunctive relief as against a nuisance or an action for damages.—Blackford v. Heman Const. Co. (Mo. App.) 287.

*Test of a nuisance declared.—Blackford v. Heman Const. Co. (Mo. App.) 287.

A railroad company succeeding to the property of another company, which created a nuisance, *held* not liable for the erection of the nuisance, but only for the continuance thereof after notice.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

§ 2. Public nuisances.

In a suit to enjoin the operation of a planing mill as a nuisance, evidence *held* to justify a finding that the noise and smoke and cinders from the mill were a mere inconvenience, justifying the denial of relief.—Terrell v. Wright (Ark.) 211.

Equity *held* authorized to restrain the prosecution of a business under circumstances making it a nuisance.—Terrell v. Wright (Ark.) 211.

*An indictment charging a public nuisance *held* to sufficiently describe the premises.—Ehrlick v. Commonwealth (Ky.) 565.

*An indictment charging a public nuisance should describe the premises with sufficient definiteness to enable the sheriff to find the same after the entry of a judgment of abatement.—Ehrlick v. Commonwealth (Ky.) 565.

*Dancing and drinking, accompanied by swearing and loud noises, constitute a common nuisance indictable as a public offense.—Commonwealth v. Cincinnati, N. O. & T. P. R. Co. (Ky.) 613.

*An indictment charging the maintenance of a nuisance *held* to sufficiently allege that the acts complained of took place within the sight or hearing of those passing defendant's premises or living in the vicinity.—Commonwealth v. Cincinnati, N. O. & T. P. R. Co. (Ky.) 613.

NUNC PRO TUNC.

Amendment of judgment, see Judgment, § 4.
Order correcting record of grand jury, see Grand Jury.

OBJECTIONS.

For purpose of review, see Appeal and Error, § 3.
To depositions, see Depositions.

OBSTRUCTIONS.

Of surface waters, see Waters and Water Courses, § 1.

OCCUPATION.

Of real property, see Use and Occupation.

OFFER.

Of proof, see Trial, § 3.
Proposals for contract, see Contracts, § 1.

OFFICERS.

Bribery, *see* Bribery.
Embezzlement, *see* Embezzlement.
Libelous publication concerning mayor, *see* Libel and Slander, § 8.
Mandamus, *see* Mandamus, § 2.

Particular classes of officers.

See Attorney General; Judges; Justices of the Peace; Receivers; Sheriffs and Constables.
Corporate officers, *see* Corporations, §§ 3, 4.
Municipal officers, *see* Municipal Corporations, § 10.
Recording officers, *see* Records.

§ 1. Rights, powers, duties, and liabilities.

The rule that a public officer is not responsible for a judicial determination, however erroneous and however malicious the motive, is applicable only where he had jurisdiction.—*Ray v. Dodd* (Mo. App.) 2.

OILS.

Inspection of, *see* Inspection.
License tax on persons peddling, *see* Licenses, § 1.

OPENING.

Judgment, *see* Judgment, § 5.

OPINION EVIDENCE.

Harmless error as to, *see* Appeal and Error, § 20.
In civil actions, *see* Evidence, § 9.
In criminal prosecutions, *see* Criminal Law, § 6.

OPINIONS.

Of courts, *see* Courts, § 2.

ORDER OF PROOF.

At trial, *see* Trial, § 3.

ORDERS.

Review of appealable orders, *see* Appeal and Error.

ORDINANCES.

Municipal ordinances, *see* Municipal Corporations, §§ 2, 5, 9.
Regulating sale of food, *see* Food.

ORIGINAL PACKAGES.

See Commerce, § 1.

PARDON.

Secondary evidence of, in criminal prosecution, *see* Criminal Law, § 6.

PARENT AND CHILD.

See Bastards; Guardian and Ward; Infants.
Custody of children on divorce, *see* Divorce, § 5.

PAROL EVIDENCE.

In civil actions, *see* Evidence, § 8.

PARTIES.

Death ground for abatement, *see* Abatement and Revival, § 1.

In particular actions or proceedings.

See Equity, § 3; Mandamus, § 3.
For causing death, *see* Death, § 1.
On indebtedness secured by pledge, *see* Pledges.
To sell property of decedent, *see* Executors and Administrators, § 4.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Persons concluded by judgment, *see* Judgment, § 10.

Review as to parties, and parties to proceedings in appellate courts.

Harmless error, *see* Appeal and Error, § 17.
Objections for purpose of review, *see* Appeal and Error, § 3.
On appeal or writ of error, *see* Appeal and Error, §§ 2, 4.

To conveyances, contracts, or other transactions.
See Assignments, § 1; Contracts, § 1; Fraudulent Conveyances, § 2.

PARTITION.

Conclusiveness of judgment, *see* Judgment, § 10.
Conformity of judgment to pleading and proof, *see* Judgment, § 3.

Guardian ad litem for infant, *see* Infants, § 4.
Of trust property, *see* Trusts, § 3.

§ 1. By acts of parties.

The property of a rural telephone association *held* to be that of joint ownership, and subject to partition under Rev. St. 1899, § 4432 (Ann. St. 1906, p. 2431).—*Meinhart v. Draper* (Mo. App.) 709.

§ 2. Actions for partition.

*In partition by heirs for the sale of land, that the circuit court did not properly construe the will of an ancestor did not affect the title of the purchaser at the sale; the heirs being before the court.—*Adams v. De Dominguez* (Ky.) 663.

A mortgagee of partitioned property having been required to give bond before the proceeds were paid out, under Civ. Code Prac. § 411, the fact that certain nonresident defendants, who were constructively summoned were not before the court on the mortgagee's cross-petition in a partition suit, did not invalidate the sale.—*Adams v. De Dominguez* (Ky.) 663.

In partition between heirs to sell land, no bond to nonresident defendants is necessary, under Civ. Code Prac. § 410, requiring a refunding bond before judgment against defendants constructively summoned.—*Adams v. De Dominguez* (Ky.) 663.

Civ. Code Prac. § 490, subsec. 2, relating to the sale of land on partition, *held* not to require the joint owners to be in actual possession, but only that the estate be a present and not a future one.—*Adams v. De Dominguez* (Ky.) 663.

Statement of right of an infant, whose share of the proceeds of a partition sale was contrary to Civ. Code Prac. § 497, paid into court, when he had no guardian who had given a bond, and was squandered by the commissioner.—*Commonwealth v. Catlin* (Ky.) 665.

*Life tenants may enforce a partition of land held jointly.—*Eversole v. Combs* (Ky.) 1132.

*If one owns a nine-tenths interest in land for her life, and another owns a one-tenth interest for the life of the same person, and also the same interest in remainder, they might have a partition as between themselves, but

*Point annotated. *See* syllabus.

can obtain no relief against the other remaindermen, and, at the death of the cestui que vie, the whole tract would have to be redivided.—*Eversole v. Combs* (Ky.) 1132.

*Civ. Code Prac. § 499, providing for the division of land held under a deed or will vesting a life estate in two or more persons, with remainder as to each share to the life tenant's children, does not apply where one owns a nine-tenths interest for life and others own the remainder in the nine-tenths interest, not under the life tenant, but by conveyance from the testator's children.—*Eversole v. Combs* (Ky.) 1132.

PARTNERSHIP.

Construction of judgment as to parties liable, see Judgment, § 8.

Recovery of payments made by partner, see Payment, § 3.

§ 1. The relation.

*Certain facts held to show that one was a partner as to a third person.—*Buford v. Lewis* (Ark.) 963.

*Rule stated as to partnership as to third persons, between persons contributing to the resources and sharing in the profits.—*Buford v. Lewis* (Ark.) 963.

*Whether an agreement creates a partnership as between the parties thereto depends on their intention.—*Buford v. Lewis* (Ark.) 963.

*Participation in the profits of a business held a cogent, but not conclusive, test for trying the question of existence of a partnership, where the rights of third persons are concerned.—*Buford v. Lewis* (Ark.) 963.

A rural telephone association held not a partnership, but a joint voluntary association.—*Meinhart v. Draper* (Mo. App.) 709.

*An agreement to share profits is essential to every partnership, and voluntary associations not organized for profit are not partnerships.—*Meinhart v. Draper* (Mo. App.) 709.

*Partnership defined.—*Meinhart v. Draper* (Mo. App.) 709.

*Facts held insufficient to establish a partnership between defendants B., M., and S. in the purchase of land, so as to render the latter liable for B.'s breach of contract to plaintiff in the purchase of certain land for defendants' benefit.—*Bass v. Tolbert* (Tex. Civ. App.) 1077.

§ 2. Rights and liabilities as to third persons.

*In an action by a former partner against defendants, as assignees of the firm's property, to recover his pro rata share as a creditor for the selling price of his interest in the firm, evidence examined, and held that plaintiff was not entitled to recover.—*Brewer v. Johnson* (Ark.) 364.

*A partner held bound by warranties of his copartner in making a sale for them.—*Chestnut v. Ohler* (Ky.) 1101.

§ 3. Dissolution, settlement, and accounting.

A partner agreeing on the dissolution of the firm to assume all liabilities of the firm held to have assumed the liability of the firm to an employee injured through its negligence.—*Binyon v. Smith* (Tex. Civ. App.) 138.

The right of a surviving partner to a portion of the salary due and unpaid the deceased partner at the time of his death, for services rendered such surviving partner as receiver of a railroad, could be determined only on a partnership accounting.—*Jones v. Gardner* (Tex. Civ. App.) 826.

PASSENGERS.

See Carriers, §§ 4-10.

PATENTS.

To public lands, see Public Lands, § 2.

PAYMENT.

See Compromise and Settlement.

Subrogation on payment, see Subrogation.

Of particular classes of obligations or liabilities.

See Mortgages, § 2.

Bill of exchange or promissory note, see Bills and Notes, § 5.

Claims against estate of decedent, see Executors and Administrators, § 3.

§ 1. Application.

*A county bridge contractor to whom a warrant had been issued as part payment on designated bridges held without power to change the application so made.—*Sparks v. Jasper County* (Mo.) 265.

§ 2. Pleading, evidence, trial, and review.

*The burden of proving payment is upon the party pleading it.—*Black v. Roberson* (Ark.) 402.

Instructions as to the amount of credit defendant should receive for cotton delivered to plaintiff in payment of a debt and sold after a fall in the market held to fairly present the issue.—*Black v. Roberson* (Ark.) 402.

§ 3. Recovery of payments.

Payments by one of the members of a law firm to his partners, in the division of salary received by him as attorney for his partner as receiver for a railroad, held voluntary and not recoverable.—*Jones v. Gardner* (Tex. Civ. App.) 826.

PEACE.

Breach of public peace, see Breach of the Peace.

PEDDLERS.

See Hawkers and Peddlers.

PENALTIES.

Construction of penal statutes, see Statutes, § 4. For failure of corporation to make report, see Corporations, § 4.

For failure to pay wages to discharged servant, see Master and Servant, § 2.

Presumptions on appeal in action for, see Appeal and Error, § 14.

Venue of action for, see Venue, § 1.

§ 1. Actions and other proceedings.

Where defendant in a penal action sets up in his answer an affirmative defense, the defense must be judged by the rules of practice applicable to pleadings in civil actions.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

In a penal action, a plea of not guilty amounts to a traverse of every material averment of the petition, and a conviction cannot be had unless accused is proven guilty beyond a reasonable doubt of the offense charged.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

*In prosecutions, whether by indictment or penal action, the burden of proving every fact necessary to establish the guilt of accused is, as a general rule, on the commonwealth.—*Commonwealth v. Standard Oil Co.* (Ky.) 632.

*Point annotated. See syllabus.

*In a penal action for offering for sale illuminating oil below the test fixed by Ky. St. 1903, § 2209, the burden of proving an issue *held* to rest on defendant.—*Commonwealth v. Standard Oil Co. (Ky.)* 632.

*Matters of defense in a penal action *held* to constitute an affirmative matter, imposing on defendant the burden of proof.—*Commonwealth v. Standard Oil Co. (Ky.)* 632.

*In many statutory misdemeanors, defendant may by relying on a distinct affirmative defense relieve the commonwealth of proving all the facts necessary to constitute his guilt, especially in penal actions where defendant may set up his defense in a written pleading.—*Commonwealth v. Standard Oil Co. (Ky.)* 632.

PENDENCY OF ACTION.

Effect as to property involved, see *Lis Pendens*.

PERFORMANCE.

Of contract of sale, see *Sales*, § 3.

PERJURY.

Publication charging perjury as libel, see *Libel and Slander*, §§ 1, 3.

§ 1. Prosecution and punishment.

*An indictment *held* to sufficiently charge perjury.—*Gonzales v. State (Tex. Cr. App.)* 941.

*Evidence *held* to sustain a conviction of perjury.—*Gonzales v. State (Tex. Cr. App.)* 941.

PERSONAL INJURIES.

Particular causes or means of injury.

See *Assault and Battery*, § 1; *Negligence*.
Operation of railroads, see *Railroads*, §§ 6-9.
Operation of street railroad, see *Street Railroads*, § 2.

Particular classes of persons injured.

Employé, see *Master and Servant*, §§ 3-11.
Passenger, see *Carriers*, §§ 7, 8.
Traveler on highway, see *Municipal Corporations*, § 10.
Traveler on highway crossing railroad, see *Railroads*, § 7.

Remedies.

Abatement of action, see *Abatement and Revival*, § 1.
Applicability of instructions to case, see *Trial*, § 9.
Assignment of errors, see *Appeal and Error*, § 8.
Best and secondary evidence, see *Evidence*, § 4.
Construction of instructions, see *Trial*, § 12.
Harmless error, see *Appeal and Error*, §§ 17, 19-21.
Joinder of causes of action, see *Action*, § 2.
Measure of damages, see *Damages*, § 3.
Parties on appeal, see *Appeal and Error*, § 4.
Pleading evidence and assessment of damages, see *Damages*, § 5.
Province of court and jury in general, see *Trial*, § 6.
Reception of evidence, see *Trial*, § 3.
Relevancy of evidence in general, see *Evidence*, § 3.
Requisites and sufficiency of instructions, see *Trial*, § 8.
Review of questions of fact, see *Appeal and Error*, § 16.

PERSONAL PROPERTY.

See *Property*.

PETITION.

In pleading, see *Pleading*, § 2.

PHYSICIANS AND SURGEONS.

As expert witnesses, see *Evidence*, § 9.

Privileged communications, see *Witnesses*, § 1.

A physician rendering services at the request of an attorney in physically examining a client injured through the negligence of another *held* entitled to compensation only for the value of the services, which was not increased because plaintiff might have had to testify in court.—*Henderson & Campbell v. Hall & Hughes (Ark.)* 171.

In an action by physicians for the value of medical services, certain evidence *held* inadmissible.—*Henderson & Campbell v. Hall & Hughes (Ark.)* 171.

In an action on contract by physicians for medical services, either party *held* authorized, in view of the answer, to give evidence of the value of the services.—*Henderson & Campbell v. Hall & Hughes (Ark.)* 171.

Under Kirby's Dig. §§ 5247, 5590, the mayor of a city *held* authorized to revoke the license of a physician, convicted of violating the state law, as part of the penalty.—*Fort v. City of Brinkley (Ark.)* 1084.

*The illegal sale of intoxicating liquors *held* a crime not involving moral turpitude, within Kirby's Dig. § 5247, relating to the revocation of licenses of physicians.—*Fort v. City of Brinkley (Ark.)* 1084.

PLEA.

In civil actions, see *Pleading*, § 3.

In criminal prosecution, see *Criminal Law*, § 5.

PLEADING.

Amendment on appeal from justice court, see *Justices of the Peace*, § 2.
Amendment to support default judgment, see *Judgment*, § 2.
Applicability of instructions to pleadings, see *Trial*, § 9.
Conformity of judgment to pleadings, see *Judgment*, § 3.
Continuance on amendment of, see *Continuance*.
Fraudulent pleading affecting right of removal of cause, see *Removal of Causes*, §§ 1, 2.
Pleading existence of highway, see *Highways*, § 1.

Allegations as to particular facts, acts, or transactions.

See *Damages*, § 5; *Estoppel*, § 1; *Judgment*, § 13.
Statute of limitations, see *Limitation of Actions*, § 4.

In actions by or against particular classes of persons.

See *Corporations*, § 6.
Foreign corporations, see *Corporations*, § 6.

In particular actions or proceedings.

See *Account*, *Action on*; *Equity*, § 4; *Fraud*, § 2; *Garnishment*, § 2; *Libel and Slander*, § 3; *Negligence*, § 4; *Quieting Title*, § 2; *Trespass to Try Title*, § 1.

For breach of warranty, see *Sales*, § 6.

For death of animals caused by operation of railroad, see *Railroads*, § 10.

For injuries from overflow caused by construction of railroad, see *Railroads*, § 2.

For loss of or injury to shipment of live stock, see *Carriers*, § 3.

*Point annotated. See *syllabus*.

For personal injuries, see Carriers, § 8; Master and Servant, § 9; Railroads, §§ 7, 9.
 For price of goods sold, see Sales, § 5.
 For sale of property for taxes, see Taxation, § 3.
 Indictment or criminal information or complaint, see Indictment and Information.
 On insurance policy, see Insurance, § 9.
 Pleas in criminal prosecutions, see Criminal Law, § 5.
 Suits to set aside fraudulent conveyances, see Fraudulent Conveyances, § 3.

Review of decisions and pleading in appellate courts.

Additional pleading on appeal from justice court, see Justices of the Peace, § 2.
 Appealability of order relating to, see Appeal and Error, § 1.
 Exceptions to, for purpose of review, see Appeal and Error, § 3.
 Harmless error, see Appeal and Error, § 18.
 Presentation of rulings on appeal record for purpose of review, see Appeal and Error, § 7.
 Presumptions as to, see Appeal and Error, § 14.

§ 1. Form and allegations in general.

*The averments of a petition must be liberally construed in aid of the cause of action alleged where defendant has not demurred but has answered to the merits.—Tucker v. Missouri & K. Telephone Co. (Mo. App.) 6.

§ 2. Declaration, complaint, petition, or statement.

The rule that a petition cannot allege two states of case, in one of which defendant is liable and the other he is not, *held* not to apply where a petition sets up defendant's liability in the alternative.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

*Under Ann. St. 1906, § 593, each count in a petition must contain all the allegations necessary to the statement of a cause of action.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

§ 3. Plea or answer, cross-complaint, and affidavit of defense.

*Defendant, pleading to the jurisdiction, *held* required to point out distinctly, as provided in Civ. Code Prac. § 118, the reasons why the court has not jurisdiction.—Richardson v. Louisville & N. R. Co. (Ky.) 582.

An answer *held* insufficient to put in issue the date of a debtor's transfer of property.—Singleton v. Boerner-Morris Candy Co. (Ky.) 637.

*Where the allegations of the petition are not denied by the answer, they must be taken as true.—Langham v. O'Meara & James (Ky.) 928.

An exception to a paragraph in defendant's answer based on the failure to set out the terms of an alleged contract was without merit, where the succeeding paragraph sufficiently showed the terms of the contract.—Walker v. Texas & N. O. R. Co. (Tex. Civ. App.) 430.

§ 4. Demurrer or exception.

An equitable defense to an action at law *held* not demurrable in view of Kirby's Dig. § 6098.—Crawford County Bank v. Bolton (Ark.) 398.

*A complaint must be tested, on demurrer, by its own allegations.—Spaulding Mfg. Co. v. Chaudoin (Ark.) 1087.

*A defect in a petition *held* apparent on its face, so that advantage thereof must be taken by demurrer, as provided by Ann. St. 1906, § 598.—Robinson v. St. Louis & S. F. R. Co. (Mo. App.) 730.

§ 5. Amended and supplemental pleadings and replender.

*An amendment of a petition, after issue joined, *held* properly denied.—Dotson v. Carter (Ky.) 1116.

*In an action on an accident policy, defendant's application to file a trial amendment alleging that insured had more accident insurance than his application disclosed *held* properly refused.—Continental Casualty Co. v. Semple (Ky.) 1122.

*Amendment of petition for false imprisonment *held* properly refused as substituting one cause of action for another.—Ray v. Dodd (Mo. App.) 2.

§ 6. Profert, oyer, and exhibits.

*Exhibits filed with a pleading will not cure an omission to state a cause of action.—City of Bowling Green v. Bowling Green Gaslight Co. (Ky.) 917.

§ 7. Motions.

*A defective statement of a cause of action can only be questioned by motion to make the complaint more definite and certain.—St. Louis Southwestern Ry. Co. v. Adams (Ark.) 186.

Failure, in an action on an insurance policy and bond to the state by the insurance company, to set out the bond may be remedied on motion.—Neimeyer v. Claiborne (Ark.) 387.

*Defects, if any, in a petition, *held* to be ground for a motion to elect or to make the petition more certain, but not for a dismissal of the action.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

*Where the petition improperly joins in one count different causes of action, defendant may require plaintiff to elect the charge on which he will seek a recovery and dismiss the others.—Flowers v. Smith (Mo.) 499.

*As against a motion to elect, a count in a petition for the pollution of a stream *held* not to contain more than one cause of action in asking for separate damages arising from the injury.—Kellogg v. City of Kirksville (Mo. App.) 296.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

*A defect in the petition is waived by answer to the merits.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

*The question whether suit can be maintained in the manner in which it was brought is the subject of demurrer, and is waived by answer to the merits.—Kansas City v. Youmans (Mo.) 225.

*The overruling of a motion to require plaintiff to elect on which one of several causes of action pleaded in a single count he will proceed to trial *held* reviewable on appeal, though after the ruling defendant answered to the merits.—Flowers v. Smith (Mo.) 499.

*A defendant answering over to the amended petition, after the overruling of a motion to strike out the same, cannot avail himself of the motion.—Flowers v. Smith (Mo.) 499.

*Under Ann. St. 1906, § 602, a defendant, failing to demur to a petition setting forth two causes of action in separate paragraphs of one count, waives the defect.—Robinson v. St. Louis & S. F. R. Co. (Mo. App.) 730.

*An objection to evidence on a count in the petition *held* not to reach the objection that several causes of action are blended in the count.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

*The defect in a petition *held* cured by the verdict.—Missouri, K. & T. Ry. Co. of Texas v. James (Tex. Civ. App.) 774.

*If a demurrer to the petition is not acted upon, it will be considered as waived.—Davis v. Davis (Tex. Civ. App.) 948.

*Point annotated. See syllabus.

PLEDGES.

Estoppel of pledgor, see Estoppel, § 1.

*The nature of a contract of pledge stated.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*The *lex loci contractus* is a part of a contract for the loan of money and the pledge of property as security therefor.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*A note for a loan held an Ohio contract.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

Where, notwithstanding the payment of the debt secured by a pledge or a proper tender thereof, the pledgee continues to withhold the pledge from the pledgor, detain or replevin lies.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

A pledgee, who insists that the indebtedness has been paid by the sale of the pledge, waives a further tender of the debt.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

A suit in equity to redeem a pledge after an illegal sale is not maintainable; the remedy at law by an action for conversion being adequate.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*A contract of pledge held not to authorize a public sale of the pledge without public notice.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

*Under the Code, a suit on a chose in action, pledged to secure a debt, should be brought in the name of both the pledgor and pledgee.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

One who has assigned an obligation or lien as collateral, if he has an interest in it, may sue to enforce it, but the assignee is a necessary party.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

A beneficiary in a life policy, pledged to insurer for a loan, may, on an invalid sale by insurer, and after the death of insured, sue on the policy.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

Where the pledge remains in the possession of the pledgee after an invalid sale, he still holds it as a pledge, subject to the rights of the pledgor, as before a sale.—*Tennent v. Union Cent. Life Ins. Co.* (Mo. App.) 754.

POISONS.

Homicide by use of, see Homicide, §§ 2, 5, 6, 11.

POLICE POWER.

Of municipality, see Municipal Corporations, § 9.

POLICY.

Of insurance, see Insurance.

POLITICAL RIGHTS.

Suffrage, see Elections.

POSSESSION.

See Adverse Possession.

Of demised premises, see Landlord and Tenant, §§ 3, 4.

*Point annotated. See syllabus.

POWERS.

Of attorney, see Principal and Agent.

Of sale in mortgage, see Mortgages, § 3.

§ 1. Construction and execution.

A conveyance containing no reference to a power should be construed as an execution of the power, and hence where a will authorized a person not named as executrix to control property and sell it to provide a home for herself and children, and she conveyed it as executrix, instead of as trustee, by a deed which did not refer to the power, but recited that the purchase price was to be used to purchase a home for herself and children, the deed should be construed as an execution of the power.—*Brown v. Nelms* (Ark.) 373.

PRACTICE.*In particular civil actions or proceedings.*

See Account, Action on; Contempt, § 2; Divorce, § 3; Ejectment; Habeas Corpus, § 1; Mandamus, § 3; Prohibition; Replevin; Trespas to Try Title, § 1.

Particular proceedings in actions.

See Abatement and Revival; Appearance; Continuance; Costs; Damages, § 5; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; Pleading; Removal of Causes; Stipulations; Trial; Venue. Verdict, see Trial, § 14.

Particular remedies in or incident to actions.

See Attachment; Discovery; Garnishment; Injunction; Receivers; Sequestration.

Procedure in criminal prosecutions.

See Bail, § 1; Criminal Law.

For offenses against liquor laws, see Intoxicating Liquors, § 4.

Procedure in exercise of special or limited jurisdiction.

In equity, see Equity.

In insolvency, see Insolvency.

In justices' courts, see Justices of the Peace, § 1.

Procedure in or by particular courts or tribunals.

See Courts.

Procedure on review.

See Appeal and Error; Exceptions, Bill of; Justices of the Peace, § 2; New Trial.

PREFERENCES.

By insolvent corporation, see Corporations, § 5.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 17-21.

PRELIMINARY EXAMINATION.

On criminal charge, see Criminal Law, § 6.

PREMIUMS.

For insurance, see Insurance, §§ 3, 5, 9.

PRESCRIPTION.

Acquisition of rights, see Adverse Possession, § 1.

Establishment of highways, see Highways, § 1.

PRESENTMENT.

Of bill or note, see Bills and Notes, § 4.
Of claims against estate of decedent, see Executors and Administrators, § 3.

PRESUMPTIONS.

In civil actions, see Evidence, § 2.
On appeal or error, see Appeal and Error, § 14;
Criminal Law, § 20.

PRETERMITTED CHILD.

See Descent and Distribution, § 2.

PRINCIPAL AND AGENT.

Admissions by agent, see Evidence, § 5.
Agency for sale of goods, see Sales, § 2.
Authority of agent as attorney, see Attorney and Client, § 2.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Brokers.

Agency of partner for firm, see Partnership, § 2.
Corporate agents, see Corporations, §§ 3, 4.
Insurance agents, see Insurance, §§ 1, 3.
Municipal agents, see Municipal Corporations, § 10.

§ 1. The relation.

*"Agency" defined.—Harkins v. Murphy & Bolanz (Tex. Civ. App.) 136.

*"Attorney in fact" defined, and *held* not authorized to represent his principal in proceedings in court.—Harkins v. Murphy & Bolanz (Tex. Civ. App.) 136.

*Ordinarily any breach of a duty undertaken by an agent is good cause for the termination of the agency by the principal.—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

§ 2. Rights and liabilities as to third persons.

*Where an agent takes a note in his own name, acceptance thereof by his principal amounts to a ratification of his unauthorized act.—Billingsley v. Benefield (Ark.) 188.

*Evidence examined, and *held* sufficient to support a finding that a party had authority to sign defendant's name to a promissory note.—Eoff v. Citizens' Bank of Harrison (Ark.) 213.

*A conductor *held* to possess implied authority to employ a surgeon to treat a person struck by a train.—Bonnelle v. St. Louis, I. M. & S. Ry. Co. (Ark.) 220.

*B., the superintendent of a building in course of construction by defendant corporation, *held* apparently authorized to purchase the materials therefor in question on the corporation's credit.—Mississippi Valley Const. Co. v. Chas. T. Abeles & Co. (Ark.) 894.

*A party dealing with an agent of an undisclosed principal without knowledge of the agency may elect to hold the after-discovered principal, if he does so within a reasonable time after the discovery.—Mississippi Valley Const. Co. v. Chas. T. Abeles & Co. (Ark.) 894.

*An agent making a contract is primarily liable thereon, and the principal, when discovered, can also be held.—Bryant Lumber Co. v. Crist (Ark.) 965.

If a creditor elects to give credit to an agent, and not to his principal, when he has all the facts before him, he cannot hold the principal for the debt.—Hazelhurst Lumber Co. v. Carlisle Mfg. Co. (Ky.) 934.

Where insured, in a policy pledged for a loan from insurer, was the agent of the beneficiary

for the purpose of receiving notice of sale of the policy on default, only such knowledge could be imputed to the beneficiary as insured possessed as to the sale.—Tennent v. Union Cent. Life Ins. Co. (Mo. App.) 754.

*Evidence *held* to require a finding that P. was authorized as plaintiff's agent to make a loan to H.—Jolly v. Huebler (Mo. App.) 1013.

*Where defendants claimed that P. had authority to accept payment of a deed of trust for plaintiff, the burden of proof of such agency was on them.—Jolly v. Huebler (Mo. App.) 1013.

*Transfer of a note and deed of trust securing a loan by plaintiff's agent *held* to amount to a collection of the principal and interest of the debt within the agent's authority.—Jolly v. Huebler (Mo. App.) 1013.

*An agent *held* without implied authority to bind his principal by an agreement that a note taken in part for the price of mules sold should be paid by the purchaser breaking land for another.—Gunter v. Robinson (Tex. Civ. App.) 134.

*A purchaser procuring land through an agent having knowledge of the facts is not a bona fide purchaser without notice, for the knowledge of the agent is the knowledge of the purchaser.—Sykes v. Speer (Tex. Civ. App.) 422.

A power of attorney to sell land, granting full power to do with it as if it were the agent's own property, authorized a sale upon credit, and any disposition of the proceeds which the agent might make would not invalidate the sale, as the purchaser could assume that under the power the agent could dispose of the proceeds as he desired.—Neill v. Kleiber (Tex. Civ. App.) 694.

If, from the circumstances or the instrument executed, it is doubtful whether an agent intended to execute a power, it will be held that the power was not in fact executed.—Neill v. Kleiber (Tex. Civ. App.) 694.

An agent *held* to have acted under a power of attorney in conveying land, even though the deed was signed only individually.—Neill v. Kleiber (Tex. Civ. App.) 694.

PRINCIPAL AND SURETY.

See Indemnity.

Liability of sureties on insurance agent's bond, see Insurance, § 1.

Liability of sureties on sheriff's bond, see Sheriffs and Constables, § 1.

Subrogation of sureties to rights of principal, see Subrogation.

Sureties on bonds for performance of duties of trust or office.

See Trusts, § 5.

Sureties on bonds in judicial proceedings.

See Appeal and Error, § 25; Bail; Injunction, § 4.

§ 1. Creation and existence of relation.

*The liability of sureties cannot be extended by construction.—McClary v. Trezevant & Cochran (Tex. Civ. App.) 954.

§ 2. Discharge of surety.

*That the record does not show that defendant was only a surety in a debt *held* immaterial to his rights, under Ky. St. 1903, § 2548, relating to discharge of sureties against whom judgments are awarded.—Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory (Ky.) 608.

§ 3. Remedies of creditors.

*A decision on appeal that a judgment was valid *held* res judicata in an action on the super-seas bond on such appeal.—Mershman v. Robert Field Co. (Ky.) 1119.

*Point annotated. See syllabus.

PRIORITIES.

Of claims against estate of decedent, see Executors and Administrators, § 3.
Of mortgages, see Chattel Mortgages, § 2; Mortgages, § 1.

PRIVATE NUISANCES.

See Nuisance, § 1.

PRIVATE ROADS.

Rights of way, see Easements.

PRIVILEGE.

Of attorneys, see Attorney and Client, § 1.
Of married women, see Husband and Wife, § 3.
Of witness as to testimony, see Witnesses, § 2.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see Libel and Slander, § 2.
Disclosure by witness, see Witnesses, § 1.

PROBATE.

Of will, see Wills, § 4.

PROCEEDS.

Of partition sale, see Partition, § 2.

PROCESS.

Effect of appearance, see Appearance.
Particular forms of writs or other process.
See Execution; Garnishment; Injunction; Mandamus; Prohibition; Replevin; Sequestration.

PROFITS.

As element of damage, see Damages, § 1.
Sharing in as element of partnership, see Partnership, § 1.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

§ 1. *Nature and grounds.*
Under Cr. Code Prac. § 25, Civ. Code Prac. § 479, prohibition held to lie to prevent one claiming to be police judge from executing a judgment rendered after conviction for a misdemeanor, where the provision creating the police court has been repealed.—*Morris v. Randall* (Ky.) 856.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

Of loss insured against, see Insurance, § 8.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, § 5.

Particular species of property.

See Improvements; Intoxicating Liquors, § 5; Mines and Minerals.
Logs or lumber, see Logs and Logging.

Transfers and other matters affecting title.
See Abandonment; Adverse Possession.
Dedication to public use, see Dedication.

Possession of personal property is prima facie evidence of ownership.—*Black v. Roberson* (Ark.) 402.

PROTEST.

Of bill or note, see Bills and Notes, § 4.

PROVINCE OF COURT AND JURY.

In civil actions, see Trial, § 6.
In criminal prosecutions, see Criminal Law, § 11.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see Damages, § 1.
Of injury in general, see Negligence, § 2.
Of injury from negligent transmission of telegram, see Telegraphs and Telephones, § 1.
Of injury to servant, see Master and Servant, §§ 4, 9.

PUBLICATION.

Of order declaring effect of local option election, see Intoxicating Liquors, § 1.

PUBLIC BUILDINGS.

See Counties, § 3.

PUBLIC DEBT.

See Counties, § 4; Municipal Corporations, § 11; States, § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see Municipal Corporations, §§ 4-8.

PUBLIC LANDS.

Mandamus to commissioner of general land office, see Mandamus, § 3.
Presumptions as to award of land by land commissioners, see Evidence, § 2.

§ 1. *Government ownership.*
A company obtaining lumber from government land through a fraudulent scheme with an individual to enter on it as a homestead held liable for the full value of the lumber received.—*United States v. Flint Lumber Co.* (Ark.) 217.

§ 2. *Disposal of lands of the states.*
*That a lessee of public school land who makes application to purchase it, and tenders his lease for cancellation, is not entitled to buy, does not subject the land to purchase by another.—*Halbert v. Terrell* (Tex.) 1036.

A lease of school lands held void and no obstacle to a subsequent award to defendant on which judgment was rendered.—*Buchanan v. Barnsley* (Tex. Civ. App.) 118.

The statute of limitations of 1905 held not intended to deny to the state rights previously exercised as to public lands by its agents, so that the rights of one holding an invalid lease were cut off by the action of the commissioner

*Point annotated. See syllabus.

in making a subsequent award of the land without bringing suit.—*Buchanan v. Barnsley* (Tex. Civ. App.) 118.

Defendant *held* entitled to apply to have surveyed, classified, and to purchase unsurveyed state land within plaintiff's inclosure, subject to plaintiff's prior right, without settling on the land.—*King v. Underwood* (Tex. Civ. App.) 334.

That defendant settled on and improved vacant state land within plaintiff's inclosure did not deprive plaintiff of the prior right to purchase within 90 days after the land had been surveyed, classified, and appraised.—*King v. Underwood* (Tex. Civ. App.) 334.

B., having voluntarily made certain payments on state lands to which plaintiff had a prior right to purchase with knowledge of such right, *held* not entitled to reimbursement as a condition to plaintiff's right to a decree vesting title in her.—*King v. Underwood* (Tex. Civ. App.) 334.

Where B. abandoned certain land in controversy in 1896 and made no claim thereto until 1905 prior to which plaintiff had acquired a right to purchase, no equities survived B.'s abandonment which he could transfer to defendant.—*King v. Underwood* (Tex. Civ. App.) 334.

Evidence *held* to establish a valid tender of the cost of surveying certain state land so as to protect plaintiff's prior right to purchase.—*King v. Underwood* (Tex. Civ. App.) 334.

Parol evidence that the seal accompanying a notary public's jurat on an application to purchase state land contained the words "notary public, Hunt county, Tex.," *held* admissible.—*King v. Underwood* (Tex. Civ. App.) 334.

Where plaintiff, who was entitled to a preference right to purchase school land, filed her application under Act April 15, 1905 (Laws 1905, p. 159, c. 103), within 90 days after classification and appraisal, it was immaterial that she had not been notified thereof.—*King v. Underwood* (Tex. Civ. App.) 334.

Where, prior to Act April 15, 1905 (Laws 1905, p. 159, c. 103), state land had been inclosed by plaintiff, she acquired a preference right to purchase which she could exercise within 90 days after she had been notified that the land had been surveyed, classified, and appraised.—*King v. Underwood* (Tex. Civ. App.) 334.

A certificate and patent to the heirs of a soldier of the war of Texas for her independence *held* a certificate and patent to those who were the heirs of such person at the time of his death.—*Waterman v. Charlton* (Tex. Civ. App.) 779.

A certificate for land issued for military services in the Army of the Republic of Texas as provided by the declaration of 1835 is, until located, personal property.—*Waterman v. Charlton* (Tex. Civ. App.) 779.

PUBLIC NUISANCES.

See Nuisance, § 2.

PUBLIC SCHOOLS.

See Schools and School Districts, § 1.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

Water companies, see Waters and Water Courses, § 3.

PUBLIC USE.

Dedication of property, see Dedication.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 3.

PUNISHMENT.

See Penalties.

PUNITIVE DAMAGES.

See Damages, § 2.

For libel, see Libel and Slander, § 3.

QUANTUM MERUIT.

See Work and Labor.

QUASHING.

Execution, see Execution, § 3.

Indictment or information, see Indictment and Information, § 2.

QUESTIONS FOR JURY.

In civil actions, see Trial, § 5.

In criminal prosecutions, see Criminal Law, § 11; Homicide, §§ 10-13.

QUIETING TITLE.

§ 1. **Right of action and defenses.**

Elements essential to an equitable cause of action to remove a cloud from title and reasons therefor stated.—*Rowe v. Allison* (Ark.) 395.

In an action to try title under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), permitting any person to bring an action to determine the title to real property claimed by the respective parties, where both plaintiff and defendant asserted title through S. as the common source, if plaintiff has a better title through S., it is immaterial that there was a defect in his title, as he does not have to show an indefeasible title.—*Charles v. White* (Mo.) 545; *Same v. Neill*, Id.

§ 2. **Proceedings and relief.**

A reply *held* not a denial that plaintiff, while a tenant of defendant H., procured a patent to the land in controversy, but only that he did not do so in 1897 or 1898.—*Mullins v. Hall* (Ky.) 920.

A party, asserting ownership and possession of land, suing to quiet title, may obtain such relief as to a part of the land, though defendants held a superior title to a part.—*Mullins v. Hall* (Ky.) 920.

QUITCLAIM.

See Penalties, § 1.

RAILROADS.

See Street Railroads.

Applicability of instructions to case in action for death caused by operation of, see Trial, § 9.

As employers, see Master and Servant. Burglary from railroad cars, see Burglary, § 1. Carriage of goods and passengers, see Carriers. Construction in general of railroad construction contract, see Contracts, § 2.

*Point annotated. See syllabus.

Construction of instructions in action for death caused by operation of, see Trial, § 12.
 Election to determine subscription in railroad stock, see Elections, §§ 2, 3.
 Harmless error in action for death caused by operation of, see Appeal and Error, § 20.
 Harmless error in action for injuries from operation of, see Appeal and Error, § 21.
 Hearsay evidence in action for fire caused by operation of, see Evidence, § 6.
 Judicial notice in action for fire caused by operation of, see Evidence, § 1.
 Liability for flooding land, see Waters and Water Courses, § 2.
 Liability for nuisance, see Nuisance, § 1.
 Offer to contract for sale of bonds of, see Contracts, § 1.
 Performance of contract to convey right of way, see Vendor and Purchaser, § 3.
 Presentation in lower court of grounds of review in action for fire caused by operation of, see Appeal and Error, § 3.
 Province of court and jury in action for injuries from operation of, see Trial, § 6.
 Rendition of judgment on demurrer in suit to enjoin railroad commission, see Judgment, § 3.
 Res gestæ in action from fire caused by operation of, see Evidence, § 3.
 Review of questions of fact in action for death caused by operation of, see Appeal and Error, § 16.

§ 1. Railroad companies.

The stock and bond law of which Sayles' Ann. Civ. St. art. 4584f, is a part, *held* to prevent the overcapitalization of railroad corporations and to create the railroad commission for the purpose of controlling the issue of bonds and stocks of domestic railroad corporations.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

A final adjudication of the railroad commission acting, under the stock and bond law on the issue of fact presented on an application by a railroad company for permission to issue stocks and bonds, *held* conclusive on the court.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 2. Construction, maintenance, and equipment.

Rules as to a railroad company's duty to fence its track, as affected by Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), stated.—Bridges v. Missouri, K. & T. Ry. Co. (Mo. App.) 37.

One *held* stopped from recovering consequential damages caused by the construction of a railroad on a right of way until the deed conveying the right of way was set aside.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

In an action against a railway company for overflowing lands adjacent to its track, a count in the petition *held* bad for failing to contain certain allegations, though it referred to other counts.—Graves v. St. Louis, M. & S. E. Ry. Co. (Mo. App.) 736.

§ 3. Indebtedness, securities, liens, and mortgages.

A proceeding asking that a lien be decreed in favor of a contractor for construction work for a railroad against the property of the railroad is an appeal to the equitable powers of the court.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

A contract for construction work for a railroad construed, and *held* to make the contractor responsible for the cost of the work done on the credit of the railroad.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

A contract for construction work for a railroad construed, and *held* that a debt incurred was a debt of the contractor, and not of the

railroad.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

A contract for railroad construction work construed, and *held* to create the railroad commission the arbiter to determine what issue of stocks and bonds by the railroad should be compensation for the work.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

Where a contractor for construction work for a railroad owned all the stock of the railroad, the contractor *held* without authority to incumber the railroad property with a lien in its own favor.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 4. Receivers.

The appointment of a receiver to take charge of the property of a railroad company *held* proper.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

The appointment of a receiver of a railroad company *held* not to oust the jurisdiction of the railroad commission granted by the stock and bond law.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

The appointment of a receiver of a railroad company *held* not to dissolve the company nor to hinder the exercise of corporate functions except those involved in the management of the property by the receiver.—United States & Mexican Trust Co. v. Delaware Western Const. Co. (Tex. Civ. App.) 447.

§ 5. Operation—Statutory, municipal, and official regulations.

Act May 1, 1905, to provide for the protection of mechanics employed in the construction and repair of railroad equipment, construed to apply to places where work is constantly done and to persons regularly employed.—St. Louis, I. M. & S. Ry. Co. v. State (Ark.) 150.

Use of certain words in an instruction *held* not prejudicial error, where the jury could not have been misled.—Louisville & N. R. Co. v. Commonwealth (Ky.) 573.

*Indictment charging that railroad "willfully" obstructed a street crossing *held* to mean that it was intentionally, and not accidentally, obstructed.—Louisville & N. R. Co. v. Commonwealth (Ky.) 573.

A railroad company is bound to afford adequate facilities for such business, both passenger and freight, as may be offered it, or may be reasonably expected, and the company is given large discretion in determining questions as to the equipment and operation of its road, subject, however, to the state or railroad commission to control such discretion when the interests of the public require it.—Railroad Commission of Texas v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 345.

Under Acts 29th Leg. (Laws 1903, p. 183, c. 117), giving the railroad commission certain control over railroads, *held*, that it has power, when circumstances warrant it, to require them to run more than one passenger train a day, each way, and hence, where the enforcement of an order requiring such increase of trains is enjoined in a given case, the judgment should not be perpetual.—Railroad Commission of Texas v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 345.

The statute requiring railway companies to keep their waiting rooms open before and after the arrival and departure of trains *held* not applicable to through passengers awaiting connections at junctions.—St. Louis Southwestern Ry. Co. of Texas v. Foster (Tex. Civ. App.) 797.

*Point annotated. See syllabus.

§ 6. — Injuries to licensees or trespassers in general.

*In an action against a railroad for injuries to an employé of a third person evidence *held* to show that servant of defendant was negligent, authorizing a recovery.—Chicago, R. I. & P. Ry. Co. v. Lannon (Ark.) 177.

*One employed to look after Pullman cars while standing in railway yards *held* entitled to the same care from the railway company as if he were its own employé.—Nelson v. Wabash R. Co. (Mo. App.) 1017.

*Rights of licensees on railway tracks by invitation stated.—Nelson v. Wabash R. Co. (Mo. App.) 1017.

*Evidence, in an action against a railway company for injury to a licensee while on a track in railroad yards, *held* to sustain a verdict for him.—Nelson v. Wabash R. Co. (Mo. App.) 1017.

§ 7. — Accidents at crossings.

A complaint in an action against a railroad company and a conductor to recover for being knocked down and injured by moving cars *held* to state a cause of action against both defendants for joint or concurrent negligence.—St. Louis Southwestern Ry. Co. v. Adams (Ark.) 186.

An instruction in an action against a railway company for a death at a street crossing *held* objectionable, but not reversible error.—Louisville & N. R. Co. v. Veach's Adm'r (Ky.) 869.

*Facts *held* to require a railway company to keep a lookout on cars being backed towards a street crossing.—Louisville & N. R. Co. v. Veach's Adm'r (Ky.) 869.

*Trainmen must give notice of the approach of trains to public crossings and when passing through populous communities, where they ought to expect the presence of people on the right of way.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*Evidence *held* to support a finding that the negligence of a railroad company in failing to keep the approaches to a highway crossing covered with six inches of macadam or gravel, as required by Rev. St. 1899, § 1103 (Ann. St. 1906, p. 943), was the proximate cause of an injury resulting from a collision with plaintiff's wagon at the crossing.—Day v. Missouri, K. & T. Ry. Co. (Mo. App.) 1019.

*A person injured by a collision at a highway railway crossing *held* not negligent as a matter of law.—Day v. Missouri, K. & T. Ry. Co. (Mo. App.) 1019.

*Under Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), a failure of those operating a locomotive to signal upon approaching a crossing is prima facie the direct cause of an accident caused by collision at the crossing, which may be overcome, and, when defendant's evidence tending to overthrow it is opposed by plaintiff's adduced facts and circumstances showing the failure to be the direct cause, the issue is for the jury.—Day v. Missouri, K. & T. Ry. Co. (Mo. App.) 1019.

*Whether the failure of those operating a locomotive to signal its approach to a highway crossing was the proximate cause of an injury resulting from a collision with plaintiff's wagon at the crossing *held* for the jury.—Day v. Missouri, K. & T. Ry. Co. (Mo. App.) 1019.

§ 8. — Injuries to persons on or near tracks.

*The duty of trainmen *held* not limited to a compliance with the statute requiring signals for trains approaching crossings, but they must exercise reasonable care.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*Persons walking along a railroad track must keep out of the way of trains, and cannot com-

plain that the train is run on one track and not on another.—Boulden v. Louisville & N. R. Co. (Ky.) 936.

*A pedestrian on the track, struck by a train, *held* not entitled to recover.—Boulden v. Louisville & N. R. Co. (Ky.) 936.

*To back a train without lookout or warning *held* negligence.—Chesapeake & O. Ry. Co. v. McCoy (Ky.) 1105.

*Rule as to applicability of doctrine that a railway company is only liable for injury to a person on its track caused by wanton negligence or willfulness, stated.—Everett v. St. Louis & S. F. R. Co. (Mo.) 486.

*Duty of railroads towards pedestrians stated.—Gulf, C. & S. F. Ry. Co. v. Coleman (Tex. Civ. App.) 690.

*Operatives of a train *held* required to use ordinary care to discover, not only those who have a right to be on the track, but trespassers as well.—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

*The discovery by trainmen of a child, 25 months old, on the track, is a discovery of its peril, there being no presumption that it will leave the track.—Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.) 787.

§ 9. — Actions for injuries to persons on or near tracks.

*The schedule rate of a train *held* admissible on the issue of its rate of speed.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*In an action for the death of a person struck by a train, certain evidence *held* admissible to show that the switchyard, side tracks, and main line where the accident happened were in constant use by people living in the vicinity.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*Whether the speed of a train through a populous community, where the tracks are daily used by numerous persons, is negligence, is for the jury.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*Instructions in an action against a railroad company for the death of a person struck by a train *held* misleading.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

An instruction in an action for the death of a person struck by a train *held* not erroneous for using certain words.—Illinois Cent. R. Co. v. France's Adm'r (Ky.) 929.

*In an action for injuries to a pedestrian on the track, struck by a train, instructions *held* not misleading.—Boulden v. Louisville & N. R. Co. (Ky.) 936.

*Whether a brakeman on a dinky train used by contractors was guilty of contributory negligence in standing upon defendant railroad company's track *held* for the jury.—Chesapeake & O. Ry. Co. v. McCoy (Ky.) 1105.

That the petition, in an action against a railway company for the death of a pedestrian, charges that the injury was willfully and wantonly caused, *held* not to prevent recovery, if the evidence shows that the injury was negligent.—Everett v. St. Louis & S. F. R. Co. (Mo.) 486.

Evidence *held* to warrant a particular finding in an action against a railway company for the death of a pedestrian.—Everett v. St. Louis & S. F. R. Co. (Mo.) 486.

*Under the evidence in an action against a railway company for the death of a pedestrian, *held* not error to overrule a demurrer to the evidence upon the ground of contributory negligence.—Everett v. St. Louis & S. F. R. Co. (Mo.) 486.

*Point annotated. See syllabus.

Whether a pedestrian killed on a railway track was a trespasser *held* a jury question.—*Everett v. St. Louis & S. F. R. Co. (Mo.)* 486.

In an action for the death of one struck by defendant's train while standing beside the track, instructions *held* to properly state the law applicable.—*Everett v. St. Louis & S. F. R. Co. (Mo.)* 486.

*Evidence *held* to sustain findings of negligence, in an action against a railway company for injury to a child on the track.—*Gulf, C. & S. F. Ry. Co. v. Coleman (Tex. Civ. App.)* 690.

In an action for the death of a child struck by a train, certain evidence *held* inadmissible under the issues.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

In an action for the negligent death of a child, struck by a train, the exclusion of evidence of the competency of the engineer operating the train *held* not erroneous.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

In an action for the death of a child, struck by a train, certain evidence *held* admissible to show at what point the engineer, by ordinary care, could have discovered the child on the track.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

In an action for the death of a child struck by a train, the issue of the negligence of the mother *held* not raised by the evidence.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*An instruction in an action for the death of a child struck by a train, which ignores the question of liability, based on the negligent failure to discover the child sooner, *held* properly refused.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*An instruction, in an action for the death of a child struck by a train, *held* not erroneous for failing to distinguish between the discovery of the child on the track and the discovery of its peril.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*An instruction, in an action for the death of a child struck by a train, *held* not misleading.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*An instruction, in an action for the negligent death of a child struck by a train, *held* not objectionable, as authorizing a recovery notwithstanding the contributory negligence of plaintiffs, the parents of the child.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*In an action for the death of a child, struck by a train, an instruction, submitting the contributory negligence of the person having control of the child, *held* required to qualify the care to be exacted of him as such care as a person of ordinary prudence of his age would exercise.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

§ 10. — Injuries to animals on or near tracks.

*In an action against a railroad for injuries to plaintiff's horse from failure to maintain a secure gate at a necessary farm crossing, evidence *held* to support a judgment for plaintiff.—*Smith v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)* 32.

Where land was divided by a railroad track so that the owner could not go from one portion to the other unless a crossing was provided, the legal implication arose that one was necessary.—*Smith v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)* 32.

*Where a railroad company so constructs its fence that an animal after passing onto the track over a defective cattle guard is unable to leave the right of way and is injured by contact with the fence on being frightened by an approaching

hand car, the railroad company is liable, irrespective of Rev. St. 1899, §§ 1105, 1106, (Ann. St. 1906, pp. 945, 959).—*Shell v. Missouri Pac. Ry. Co. (Mo. App.)* 39.

The fact that a right of action against a railroad company for killing stock arises from a violation of Rev. St. 1899, §§ 1105, 1106 (Ann. St. 1906, pp. 945, 959), does not necessarily render the action a statutory one.—*Shell v. Missouri Pac. Ry. Co. (Mo. App.)* 39.

Petition in action against railroad company for killing an animal *held* to set up a cause of action at common law, and not one under Rev. St. 1899, §§ 1105-1107 (Ann. St. 1906, pp. 945, 959).—*Shell v. Missouri Pac. Ry. Co. (Mo. App.)* 39.

*Rule as for determination of a question whether a cattle guard at a particular point would be an obstruction to the company's business stated.—*Edie v. Kansas City Southern Ry. Co. (Mo. App.)* 993.

*It is the point at which cattle enter a railway right of way that determines the company's liability for injury to them.—*Edie v. Kansas City Southern Ry. Co. (Mo. App.)* 993.

*Rev. St. 1899, § 2867 (Ann. St. 1906, p. 1049), *held* not to make a railway company liable for killing stock in certain cases.—*Edie v. Kansas City Southern Ry. Co. (Mo. App.)* 993.

§ 11. — Fires.

*Where defendant railroad company permitted a tank containing crude oil for use as fuel in its engines to remain on its right of way, it was liable for destruction of plaintiff's property by fire communicated by oil which defendant negligently permitted to leak from such tank, though plaintiff failed to show that defendant ignited the oil.—*Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 323.

*Where a railroad company permitted crude oil which it used as fuel in its locomotives to escape from a tank on its right of way and to saturate the surrounding soil, it was liable for the destruction of property on the adjoining land by fire communicated by the oil, though a flood occurring before the fire had carried a greater quantity of oil to the surrounding land than might have been carried to it if there had been no flood.—*Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 323.

In an action against a railroad company for destruction of property by fire communicated from an oil tank on defendant's right of way, evidence *held* sufficient to support a finding that the oil was of an inflammable character.—*Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 323.

In an action against a railroad company for destruction of property by fire communicated by oil escaping from defendant's oil tank, evidence *held* sufficient to support a finding that the saturation of the ground with the oil was the proximate cause of the injury.—*Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 323.

In an action against a railroad company for destruction of plaintiff's property by fire communicated from an oil tank, evidence *held* sufficient to support a finding that defendant was negligent and that the oil was the means of communicating the fire.—*Texas & N. O. R. Co. v. Bellar (Tex. Civ. App.)* 323.

RAPE.

Presentation of questions in appeal record for purpose of review, see Criminal Law, § 19. Province of court and jury in general, see Criminal Law, § 11. Sufficiency of indictment, see Indictment and Information, § 1.

*Point annotated. See syllabus.

§ 1. Offenses and responsibility therefor.

*One may be convicted of assault to commit rape on a girl under 15 years of age, though she consented to the intercourse, or did not resist.—*Sanders v. State* (Tex. Cr. App.) 938.

§ 2. Prosecution and punishment.

Under Ky. St. 1903, § 1155, as amended by Acts 1906, p. 252, c. 24, and Cr. Code Prac. §§ 122, subd. 2, 124, 136, an indictment for carnally knowing a female under 16 years old held not insufficient for failing to charge that accused and prosecutrix were not husband and wife.—*Commonwealth v. Landis* (Ky.) 581.

On a trial for carnally knowing a female under the age of 16 years, certain evidence held admissible to show that she was over 16 at the time of the commission of the offense.—*Howerton v. Commonwealth* (Ky.) 606.

RATIFICATION.

Of act of agent, see Principal and Agent, § 2.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, § 1; Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REASONABLE DOUBT.

See Homicide, § 9.

REBUTTAL

Evidence, see Trial, § 3.

RECEIVERS.

In divorce proceedings, see Divorce, § 4.
Of corporations in general, see Corporations, § 5.
Of railroad companies, see Railroads, § 4.

§ 1. Nature and grounds of receivership.

Rev. St. 1895, art. 1465, § 4, relating to the appointment of receivers, held not to limit the right to a receiver given by sections 1, 2, 3, but to extend it.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

§ 2. Appointment, qualification, and tenure.

In an action by a wife against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, a receiver of the property could be appointed solely upon plaintiff's affidavit therefor, notwithstanding defendant's denial by affidavit of all of the allegations of the petition.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

§ 3. Management and disposition of property.

Leases by a receiver held not determined by the dissolution of the receivership.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

§ 4. Accounting and compensation.

*Where an applicant for a receiver asks and obtains the receiver's discharge, all the costs of the receivership, including the receiver's compensation should be borne by the applicant.—*Shaw v. Shaw* (Tex. Civ. App.) 124.

An exreceiver of a railroad company held not entitled to recover against his successor,

*Point annotated. See syllabus.

for services as an attorney in assisting his attorney in performing services for which such attorney was employed.—*Jones v. Gardner* (Tex. Civ. App.) 826.

RECEPTION.

Of evidence at trial, see Trial, § 3.

RECITALS.

In deeds, see Deeds, § 3.

RECORDS.

Of particular facts, acts, instruments, or proceedings not judicial.

See Chattel Mortgages, § 1; Deeds, § 2; Mortgages, § 1.

Of judicial proceedings.

Abstract for purpose of review, see Appeal and Error, § 7.

Proceedings of grand jury, see Grand Jury.

Transcript on appeal or writ of error, see Appeal and Error, § 7; Criminal Law, § 19.

*Where the papers of a case are lost, and a proceeding is instituted to supply the lost record, the proof taken by the commissioner may not be read as substituted record.—*Morrison v. Price* (Ky.) 1090.

*Where a lost record has been supplied in a proceeding therefor, the judgment of the court is conclusive that all preliminary steps were properly taken.—*Morrison v. Price* (Ky.) 1090.

The duties of a recording officer are ministerial.—*First Nat. Bank v. McElroy* (Tex. Civ. App.) 801.

REDEMPTION.

From pledge, see Pledges.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

§ 1. Proceedings and relief.

*Evidence of a single witness held insufficient to justify the reformation of a lease for mistake.—*Zeilda Forsee Inv. Co. v. Ozenberger* (Mo. App.) 22.

*A party claiming reformation of an instrument for fraud or mistake must show the fraud or mistake by convincing evidence.—*Zeilda Forsee Inv. Co. v. Ozenberger* (Mo. App.) 22.

REGISTRATION.

See Chattel Mortgages, § 1; Deeds, § 2; Records.

REHEARING.

See New Trial.

On appeal or writ of error, see Appeal and Error, § 11.

RELEASE.

See Compromise and Settlement; Payment.

Of dower right, see Dower, § 1.
Of mortgage, see Mortgages, § 2.

RELEVANCY.

Of evidence in civil actions, see Evidence, § 3.

Of evidence in criminal prosecutions, see Criminal Law, § 6.

REMAINDERS.

See Life Estates.

Conformity of judgment to pleading and proof in suit against, see Judgment, § 3.

Creation by deed, see Deeds, § 3.

Partition by remaindermen, see Partition, § 2.

REMAND.

Of cause on appeal or writ of error, see Appeal and Error, § 24.

REMEDY AT LAW.

Effect on jurisdiction of equity to redeem from pledge, see Pledges.

Effect on right to mandamus of existence of other remedy, see Mandamus, § 1.

REMITTITUR.

Of cause on appeal or writ of error, see Appeal and Error, § 24.

REMOVAL OF CAUSES.

§ 1. Citizenship or alienage of parties.

Where a complaint on its face states a cause of action against both defendants who can be properly joined in one action, the cause cannot be removed on the ground that it is a separable controversy merely by raising an issue of fact in the petition for removal as to whether or not a joint cause of action exists.—*St. Louis Southwestern Ry. Co. v. Adams* (Ark.) 186.

The jurisdiction of the federal court cannot be defeated by plaintiff's fraud in stating a case of joint liability against two or more defendants for that sole purpose.—*St. Louis Southwestern Ry. Co. v. Adams* (Ark.) 186.

§ 2. Proceedings to procure and effect of removal.

Where a petition for removal alleges fraud in wrongfully joining two parties as defendants solely to defeat removal, the federal court and not the state court must inquire into and determine the issue thus presented.—*St. Louis Southwestern Ry. Co. v. Adams* (Ark.) 186.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

Of bill of exchange or promissory note, see Bills and Notes, § 2.

RENT.

See Landlord and Tenant, § 4.

REPAIRS.

Duty of master to make, see Master and Servant, § 4.

REPEAL.

Of ordinance, see Municipal Corporations, § 2.
Of statute, see Statutes, § 3.

REPLEVIN.

Applicability of instructions to case, see Trial, § 9.

For pledged property, see Pledges.

To recover mortgaged chattels, see Chattel Mortgages, § 3.

§ 1. Right of action and defenses.

*A plaintiff in replevin must recover on the strength of his own title, and must establish either a general or special ownership in the property in question.—*Black v. Roberson* (Ark.) 402.

REPORT.

Of reviewers in drainage proceedings, see Drains, § 1.

REQUESTS.

For instructions in civil actions, see Trial, § 10.

For instructions in criminal prosecutions, see Criminal Law, § 13.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.

Of contract for sale of goods, see Sales, § 2.

Of contract for sale of land, see Vendor and Purchaser, § 2.

RESERVATIONS.

In deeds, see Deeds, § 3.

RES GESTÆ.

In civil actions, see Evidence, § 3.

RES IPSA LOQUITUR.

Application of doctrine in action for injuries to passenger, see Carriers, § 8.

Application of doctrine in action for injuries to servant, see Master and Servant, § 10.

Application of doctrine in action for negligence, see Negligence, § 4.

RES JUDICATA.

See Judgment, §§ 9, 10.

RETAINER.

Of attorney, see Attorney and Client, § 2.

RETURN.

Of election, see Elections, § 2.

Of garnishment process, see Garnishment, § 1.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Criminal Law, §§ 16-21; Justices of the Peace, § 2.

REVIVAL.

Of action, see Abatement and Revival, § 1.

REVOCATION.

Of license of physician, see Physicians and Surgeons.

Of will, see Wills, § 3.

RIGHT OF WAY.

See Easements.

*Point annotated. See syllabus.

RISKS.

Assumed by employé, see Master and Servant, §§ 7, 10, 11.
Within insurance policy, see Insurance, § 7.

ROADS.

See Highways.
Streets in cities, see Municipal Corporations, § 10.

ROBBERY.

*One *held* not guilty of robbery, but of larceny only.—*Bibb v. Commonwealth* (Ky.) 401.
*Under Cr. Code Prac. § 128, the variance between an indictment charging robbery and the proof *held* not material.—*Bibb v. Commonwealth* (Ky.) 401.

SALES.

Harmless error in action by seller against buyer, see Appeal and Error, § 20.
Reception of evidence in action on contract of sale, see Trial, § 3.

Sales by or to particular classes of persons.
See Hawkers and Peddlers.
Partners, see Partnership, § 2.

Sales of particular species of, or estates or interests in, property.
See Intoxicating Liquors.
Pledged property, see Pledges.
Realty, see Vendor and Purchaser.
Standing timber, see Logs and Logging.

Sales on judicial or other proceedings.
See Judicial Sales.
Of property of decedent under order of court, see Executors and Administrators, § 4.
Of property of infant under order of court, see Guardian and Ward, § 1.
On execution, see Execution, § 4.
On foreclosure of mortgage, see Mortgages, § 3.
Tax sales, see Taxation, § 3.

§ 1. Construction of contract.

That a contract for the sale of an engine to be shipped as soon as possible was modified by substituting two engines *held* not to change the requirement for shipment as soon as possible.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

§ 2. Modification or rescission of contract.

A contract for the sale of an acetylene gas plant *held* not subject to rescission on the ground of a misrepresentation by an agent of the seller.—*Daylight Acetylene Gas Co. v. Hardesty* (Ky.) 847.

*A buyer *held* entitled to rescind the contract for failure to deliver article ordered.—*Smith & Nixon Co. v. Lewis* (Ky.) 1113.

§ 3. Performance of contract.

The delay in performance of a contract by a manufacturer agreeing to manufacture an article ready for shipment on a designated day *held* not unreasonable.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

Acquiescence by a buyer in the delay of a seller in manufacturing the article and making the same ready for shipment operates as an extension of the time for delivery.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

A buyer of machinery to be manufactured by the seller ready for shipment on a designated date waived the delay in the shipment by treating the contract as in force after the designated date.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

Where a written contract of sale stipulated for delivery as soon as possible, certain evidence *held* admissible.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

Whether a seller in a contract for the sale complied with the contract *held* a mixed question of fact and law.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

§ 4. Warranties.

*Representations at time of a sale to induce a purchase *held* warranties.—*Chestnut v. Ohler* (Ky.) 1101.

§ 5. Remedies of seller.

A buyer countermanding an order *held* liable for a specified amount as liquidated damages stipulated for in the contract of sale.—*Tidwell v. Southern Engine & Boiler Works* (Ark.) 152.

*A plea of failure of consideration *held* to include that of partial failure.—*Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Tex.) 1047.

*Defendant, in an action for price of articles sold, *held* to have the burden of proof as to failure and partial failure of consideration.—*Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Tex.) 1047.

*Evidence *held* sufficient to go to the jury on the question of amount of partial failure of consideration.—*Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Tex.) 1047.

*Instructions *held* to improperly submit only the issue of failure of consideration of sale, and not that of partial failure.—*Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Tex.) 1047.

§ 6. Remedies of buyer.

*The petition *held* to state a cause of action for breach of warranty, notwithstanding allegations of fraud.—*Chestnut v. Ohler* (Ky.) 1101.

§ 7. Conditional sales.

Where an alleged sale with reservation of title until payment is not admitted by the alleged buyer, the burden of proving a continuance of the indebtedness is on the seller.—*Black v. Roberson* (Ark.) 402.

A contract for the sale of a stock of goods *held* to be an absolute sale, with mortgage back, and the vendor's remedy on breach of contract by the vendee to be a suit in equity to enforce the mortgage lien.—*Jones' Adm'r v. Jones' Adm'r* (Ky.) 650.

SATISFACTION.

See Compromise and Settlement; Payment.
Of mortgage, see Mortgages, § 2.

SCHOOLS AND SCHOOL DISTRICTS.

Conveyance of property in trust for school, see Trusts, § 1.

Opinion evidence as to timber, see Evidence, § 9.
Parol evidence to vary contract with teacher, see Evidence, § 8.

Payment of school directors, warrants by county, see Counties, § 4.
Public school lands, see Public Lands, § 2.

§ 1. Public schools.

*Under Kirby's Dig. § 7615, school directors can make only written contracts with teachers.—*Griggs v. School Dist. No. 70, Randolph County* (Ark.) 215.

Under Rev. St. 1895, art. 3992, school district trustees *held* to have succeeded lodge trustees in the control of the lower story of a building used jointly for lodge and school purposes.—*Rhodes v. Maret* (Tex. Civ. App.) 433.

*Point annotated. See syllabus.

SCIRE FACIAS.

Remedy of pretermitted child, see Descent and Distribution, § 8.

SCOPE OF EMPLOYMENT.

See Master and Servant, § 3.

SECONDARY EVIDENCE.

In civil actions, see Evidence, § 4.

In criminal prosecutions, see Criminal Law, § 6.

SECURITY.

For costs, see Costs, § 2.

SELF-DEFENSE.

See Homicide, §§ 4, 6, 10-12, 14.

SENTENCE.

In criminal prosecutions, see Criminal Law, § 15.

SEPARABLE CONTROVERSY.

Removal from state court, see Removal of Causes, § 1.

SEPARATE ESTATE.

Of married women, see Husband and Wife, § 4.

SEQUESTRATION.

Of property on divorce of parties, see Divorce, § 4.

*The failure to render judgment against a wife, who with her husband were principals on a replevy bond, *held* error as to the sureties on the bond.—*Wandelohr v. Grayson County Nat. Bank* (Tex.) 1046.

SERVICE.

Of summons in garnishment, see Garnishment, § 1.

SERVICES.

See Master and Servant, § 2; Work and Labor.

SERVITUDES.

See Easements.

SET-OFF AND COUNTERCLAIM.

§ 1. **Subject-matter.**

*A counterclaim *held* not to arise out of the contract or transaction set forth in the complaint or to be connected with the subject of the action, as required by Kirby's Dig. § 6099.—*Mitchell v. Moore* (Ark.) 216.

SETTLEMENT.

See Compromise and Settlement; Payment.

By executor or administrator, see Executors and Administrators, § 6.

By partners, see Partnership, § 3.

Marriage settlements, see Husband and Wife, § 2.

SEWERS.

Construction of by city, see Municipal Corporations, §§ 6; 7.
Defects or obstructions, see Municipal Corporations, § 10.

SHERIFFS AND CONSTABLES.

Embezzlement by sheriff, see Embezzlement.
Presumptions as to action of sheriff, see Evidence, § 1.

§ 1. **Powers, duties, and liabilities.**

*Under Kirby's Dig. § 380, an officer *held* required to perfect the lien created by an attachment by seizing property thereunder, and for a failure to do so he and the sureties on his bond are liable.—*McKinney v. Blakeley* (Ark.) 976.

SIDEWALKS.

In city, see Municipal Corporations, §§ 2, 5.

SIGNATURES.

*The general rule is that, where a document is required by the common law or by statute to be signed by any person, the signature of his name in his own handwriting is not required.—*Porter v. R. J. Boyd Pav. & Const. Co.* (Mo.) 235.

SINKING FUNDS.

Exemption from taxation, see Taxation, § 1.

SLANDER.

See Libel and Slander.

SLAVES.

Evidence of marriage of, see Marriage.

SPECIFIC PERFORMANCE.

Of stipulation, see Stipulations.

§ 1. **Proceedings and relief.**

*Evidence in a suit to specifically perform a contract to sell property made by brokers *held* to show that authority was given the brokers to sell.—*Kempner v. Gans* (Ark.) 1087.

SPEED.

Opinion evidence as to, see Evidence, § 9.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STALE DEMAND.

See Equity, § 2.

STARE DECISIS.

See Courts, § 2

STATEMENT.

By witness inconsistent with testimony, see Witnesses, § 3.

Of case or facts for purpose of review, see Appeal and Error, § 7.

*Point annotated. See syllabus.

Of facts agreed on for submission to court, see Submission of Controversy.
Of plaintiff's claim, see Pleading, § 2.
Pleading in justice court, see Justices of the Peace, § 1.

STATES.

Attorney general, see Attorney General.
Courts, see Courts.
Legislative power, see Constitutional Law, § 2.
Public lands, see Public Lands, § 2.
State depository, see Depositories.

§ 1. Fiscal management, public debt, and securities.

Under Const. § 249, and Ky. St. 1903, § 342, one employed by the chief clerk of the Senate to copy bills *held* not entitled to payment out of the state treasury as a contingent expense.—James v. Cromwell (Ky.) 611.

STATUTES.

As denying due process of law, see Constitutional Law, § 5.
As granting privileges and immunities, see Constitutional Law, § 8.

Provisions relating to particular subjects.

See Acknowledgment, § 2; Appeal and Error, § 6; Attorney and Client, § 1; Building and Loan Associations; Burglary, § 1; Carriers, § 2; Census; Chattel Mortgages, § 1; Corporations, § 6; Counties, § 4; Descent and Distribution, § 2; Discovery, § 1; Elections, § 2; Executors and Administrators, § 4; Food; Highways, § 1; Homestead, § 2; Homicide, §§ 2, 6, 7, 14; Husband and Wife, §§ 3, 4; Improvements; Indictment and Information, § 4; Infants, § 4; Insolvency, § 1; Inspection; Insurance, §§ 3, 7, 9, 10; Intoxicating Liquors; Judges, § 1; Judgment, §§ 1, 3, 7, 10, 12; Jury, §§ 2, 3; Justices of the Peace, § 1; Landlord and Tenant, § 4; Larceny, § 2; Licensees, § 1; Limitation of Actions; Lis Pendens; Lotteries, § 2; Mandamus, § 2; Master and Servant, §§ 2, 4, 6; Mechanics' Liens; Municipal Corporations, §§ 1-3, 5, 7, 8; Partition, § 2; Railroads, §§ 1, 2, 5, 7, 10; Rape, § 2; Receivers, § 1; Robbery; Schools and School Districts, § 1; Set-Off and Counterclaim, § 1; Sheriffs and Constables, § 1; Witnesses, § 1.

Bill of lading, see Carriers, § 2.
Disbarment of attorney, see Attorney and Client, § 1.

Foreign corporations, see Corporations, § 6.
Recording chattel mortgage, see Chattel Mortgages, § 1.

Statute of frauds, see Frauds, Statute of.

§ 1. Enactment, requisites, and validity in general.

*The question whether an act is a local or special one so as to require notice of intention to apply therefor under Const. art. 5, § 25, *held* a legislative and not a judicial one.—Caton v. Western Clay Drainage Dist. (Ark.) 145.

§ 2. Subjects and titles of acts.

Acts 1905, p. 135, § 5 (Ann. St. 1906, §§ 4761-5), entitled an act to create the office of state dairy commissioner and to define his term of office, duties and powers, *held* invalid under Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.—City of St. Louis v. Wortman (Mo.) 520.

Courts *held* not entitled to enlarge the scope of the title of an act to make it a sufficient compliance with the constitutional requirement that the subject of the act be clearly expressed in its title.—City of St. Louis v. Wortman (Mo.) 520.

*The object of the provision of the organic law that an act shall contain only one subject, to be clearly expressed in its title, stated.—City of St. Louis v. Wortman (Mo.) 520.

§ 3. Repeal, suspension, expiration, and revival.

*In order that there be a conflict between two laws, both must contain either express or implied provisions which are irreconcilable with each other, and when either is silent, where the other speaks, there can be no conflict between them.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

*Repeals by implication *held* not favored.—City of St. Louis v. Klausmeier (Mo.) 516; Same v. Union Dairy Co. (Mo.) 525.

§ 4. Construction and operation.

*In construing a statute, inapt words should be disregarded, and the intent gathered from the whole act read in connection with its title and evident purpose.—St. Louis, I. M. & S. Ry. Co. v. State (Ark.) 150.

*Under Kirby's Dig. § 7792, providing that all general terms and expressions used in statutes shall be liberally construed so that the true intent of the General Assembly may be fully carried out, the terms of a statute must be given such a meaning, consistent with a reasonable interpretation of the language used, as will carry out the real intention of the Legislature.—Brown v. Nelms (Ark.) 373.

*Penal statutes must be strictly construed.—Jonesboro, L. C. & E. R. Co. v. Brookfield (Ark.) 977.

*A word which is well known, and has a definite sense at common law, will, when used in a statute, be construed in that sense.—Fort v. City of Brinkley (Ark.) 1084.

*Rule respecting construction of criminal statutes stated.—Commonwealth v. Standard Oil Co. (Ky.) 902.

*The court in construing and declaring the effect of statutes should effectuate the obvious intention of the Legislature, and this doctrine obtains with special force when it appears the intention of the Legislature conserves a wholesome purpose.—Armstrong v. Modern Brotherhood of America (Mo. App.) 24.

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STAY.

Of proceedings pending appeal, see Criminal Law, § 18.
Pending appeal or writ of error, see Appeal and Error, § 6.

STENOGRAPHERS.

Allowance of fees of as costs, see Costs, § 1.

STIPULATIONS.

Under the facts, *held*, refusal of a court of equity to specifically enforce a stipulation was proper.—Cook v. Newby (Mo.) 272.

STOCK.

Corporate stock, see Corporations, § 1.

STOCKHOLDERS.

Of corporations, see Corporations, § 2.

STREET RAILROADS.

See Railroads.

Carriage of passengers, see Carriers.

Mandamus, see Mandamus, § 3.

Province of court and jury in general in action for injuries from operation of, see Trial, § 6.
Reception of evidence in action for injuries from operation of, see Trial, § 3.

§ 1. Establishment, construction, and maintenance.

Where one street railway company leased its line and property to another, it would be presumed, in the absence of evidence to the contrary, that municipal assent required by Const. art. 12, § 20 (Ann. St. 1906, p. 309), was obtained.—Chlanda v. St. Louis Transit Co. (Mo.) 249.

§ 2. Regulation and operation.

*In an action for injuries by being struck by a street car, an instruction *held* erroneous as permitting recovery, though the accident could not have been avoided had the car been running at a reasonable rate of speed and under control.—Louisville Ry. Co. v. Gaar (Ky.) 1130.

*In an action for injuries to plaintiff by being struck by a street car, an instruction *held* erroneous as making defendant liable for the fail-

*Point annotated. See syllabus.

ure of the conductor to keep a lookout when his duty did not require him to do so.—*Louisville Ry. Co. v. Gaar* (Ky.) 1130.

*In an action for injury to a child on defendant's street railway track, instructions to be given on new trial determined.—*Louisville Ry. Co. v. Gaar* (Ky.) 1130.

*Though a street car was running too fast, and was not under reasonable control, the company would not be liable for injuries to plaintiff if he came upon the track in front of the car so close to it that a collision could not have been avoided, even if the car had been running at a reasonable rate of speed, and was under control.—*Louisville Ry. Co. v. Gaar* (Ky.) 1130.

In an action against a street railroad for injury to a $4\frac{1}{2}$ year old child, plaintiff was too young to be charged with contributory negligence, and no instruction upon that subject should be given.—*Louisville Ry. Co. v. Gaar* (Ky.) 1130.

A contract between two street railroad companies *held* a lease which was effective to release a lessor from liability and for torts committed by the lessees' servants in the operation of the road.—*Chlanda v. St. Louis Transit Co.* (Mo.) 249.

In an action for injuries to a driver of a team sustained in a collision with a street car, an instruction *held* erroneous as ignoring the defense of contributory negligence and in not restricting the application of the principle stated therein to the doctrine of humanitarian negligence.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 9.

*In an action for injuries sustained by the driver of a team in a collision with a street car, a demurrer to plaintiff's evidence *held* properly overruled as the acts shown by plaintiff established defendant's negligence as a matter of law.—*Ross v. Metropolitan St. Ry. Co.* (Mo. App.) 9.

An instruction in an action for injuries caused by a collision with a street car *held* contradictory and misleading.—*Gessner v. Metropolitan St. Ry. Co.* (Mo. App.) 30.

In an action against a street railway for damage to plaintiff's team, caused by a collision, *held*, that defendant's motorman was not guilty of negligence.—*Hebeler v. Metropolitan St. Ry. Co.* (Mo. App.) 34.

STREETS.

See Highways; Municipal Corporations, § 10. Improvement of city streets, see Municipal Corporations, § 7.

In cities, see Municipal Corporations, § 4.

STRIKES.

Interference with the relation of master and servant, see Master and Servant, § 13.

SUBMISSION OF CONTROVERSY.

Equity *held* empowered to set aside the submission of a controversy under Rev. St. 1899, § 793 (Ann. St. 1906, p. 767), for a mutual mistake of the parties.—*Peake v. Webb* (Mo. App.) 13.

An agreed case stands for a petition, answer, all the evidence, and a verdict returned to the court.—*Peake v. Webb* (Mo. App.) 13.

SUBROGATION.

*Sureties of a guardian who had paid judgments obtained against him by his wards are

entitled to be subrogated to the rights of the latter.—*Reaves v. Coffman* (Ark.) 194.

SUBSCRIPTIONS.

Subscription of written instruments, see Signatures.

To corporate stock, see Corporations, §§ 1, 2.

SUICIDE.

As defense in prosecution for homicide, see Homicide, § 11.

*One furnishing another the means to commit suicide *held* to violate no law.—*Sanders v. State* (Tex. Cr. App.) 68.

SUIT.

See Action.

SUMMARY PROCEEDINGS.

Collection of taxes, see Taxation, § 2.

Recovery of possession by landlord, see Landlord and Tenant, § 5.

SUMMARY TRIAL.

In criminal prosecutions, see Criminal Law, § 4.

SUNDAY.

Exclusion of, in computation of time, see Time.

SUPERSEDEAS.

On appeal or writ of error, see Appeal and Error, § 6.

SUPREME COURTS.

See Courts, § 4.

SURETY COMPANIES.

See Principal and Surety, § 1.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, § 1.

SURRENDER.

Of written instrument for cancellation, see Cancellation of Instruments.

SURVIVAL.

Of cause of action, see Abatement and Revival, § 1.

SURVIVING PARTNERS.

See Partnership, § 3.

TACKING.

Successive possessions, see Adverse Possession, § 1.

*Point annotated. See syllabus.

TAXATION.

Assessments for municipal improvements, see Municipal Corporations, §§ 7, 8.
Documentary evidence of confirmation of tax sale, see Evidence, § 7.
Drainage assessments, see Drains, § 2.
License taxes, see Licenses, § 1.
Of homestead, see Homestead, § 1.

§ 1. Liability of persons and property.

Securities of a foreign life insurance company, wrongfully withheld by the State Treasurer, cannot be taxed while so withheld at the residence of the wrongful custodian.—Board of Councilmen of City of Frankfort v. Illinois Life Ins. Co. (Ky.) 924.

*Sinking fund created to liquidate bonds issued to purchase waterworks held exempt from taxation under Const. § 170.—Commonwealth v. Sinking Fund Com'rs of Lebanon Waterworks Co. (Ky.) 1128.

§ 2. Collection and enforcement against persons or personal property.

Purchaser at void tax sale held liable to owner of property for conversion.—Brocking v. O'Bryan (Ky.) 631.

*Tax sale of wife's property for taxes of husband held void.—Brocking v. O'Bryan (Ky.) 631.

*Equity will not enjoin the collection of a tax because it is excessive, unless plaintiff tenders the amount actually due.—Porter v. R. J. Boyd Pav. & Const. Co. (Mo.) 235.

§ 3. Sale of land for nonpayment of tax.

*A tax sale for an amount including costs not warranted by the law held void.—Sibly v. Thomas (Ark.) 210.

*A tax sale held void for noncompliance with Kirby's Dig. § 7086.—Frank Kendall Lumber Co. v. Smith (Ark.) 888.

Under the tax law to enforce the state's lien against specific real property a statement of the object and general nature of the petition which omits the land against which the lien is sought is insufficient.—Randall v. Snyder (Mo.) 529.

§ 4. Tax titles.

*A tax deed held void on its face.—Harris v. Brady (Ark.) 974.

TEACHERS.

See Schools and School Districts, § 1.

TELEGRAPHS AND TELEPHONES.

Partition of property of telephone company, see Partition, § 1.

Telephone association as partnership, see Partnership, § 1.

Telephone conversation as evidence, see Criminal Law, § 6.

Weight and sufficiency of evidence in general in action for negligent transmission of telegram, see Evidence, § 10.

§ 1. Regulation and operation.

*In an action for mental anguish caused by delay of a telegram, whereby plaintiff was prevented from attending her mother's funeral, evidence held to make a prima facie case that plaintiff could have got there on time.—Western Union Telegraph Co. v. Shofner (Ark.) 751.

*Evidence in an action for mental anguish from delay in a telegram by which plaintiff was prevented from attending her mother's funeral held sufficient to show that plaintiff would have gone to the town where the funeral was held, and not to the town where her mother died.—

Western Union Telegraph Co. v. Shofner (Ark.) 751.

A message delivered to a telegraph company for transmission held to charge company with notice of damages which might result from negligence in handling it.—Western Union Telegraph Co. v. Shofner (Ark.) 751.

*In an action against a telegraph company for mental anguish resulting from the negligent transmission of a message, question of plaintiff's diligence held for the jury.—Western Union Tel. Co. v. Taylor (Ky.) 844.

*Facts held to show a cause of action against a telephone company for delaying transmission of money, sent to prepare plaintiff's daughter's remains for transportation.—Cumberland Telephone & Telegraph Co. v. Quigley (Ky.) 897.

Facts held not to relieve a telephone company from liability for negligently delaying transmission of money, sent by plaintiff for use in preparing his daughter's remains for transportation.—Cumberland Telephone & Telegraph Co. v. Quigley (Ky.) 897.

*Elements of damages recoverable against a telephone company for delay in transmitting money, sent for use in preparing remains for transportation, stated.—Cumberland Telephone & Telegraph Co. v. Quigley (Ky.) 897.

*Two hundred dollars held not excessive recovery against a telephone company for negligently delaying transmission of money, sent for use in preparing the sender's daughter's remains for transportation.—Cumberland Telephone & Telegraph Co. v. Quigley (Ky.) 897.

It is essential to a recovery for the failure of a telegraph company to deliver a message calling a physician to attend the sender's son that plaintiff show that, had the message been promptly delivered, the physician would have come in response thereto.—Slaughter v. Western Union Tel. Co. (Tex. Civ. App.) 688.

In an action against a telegraph company for failing to deliver a message to a physician, evidence of the whereabouts of the physician the day following the sending of the telegram held immaterial in view of other evidence.—Slaughter v. Western Union Tel. Co. (Tex. Civ. App.) 688.

In an action against a telegraph company for failing to deliver a message calling a physician to attend the sender's son, evidence held not to show that, had the telegram been promptly delivered, the physician would have come.—Slaughter v. Western Union Tel. Co. (Tex. Civ. App.) 688.

TENANCY IN COMMON.

§ 1. Rights and liabilities of co-tenants as to third persons.

*Where land is conveyed to a woman and her infant children, she may create a lien thereon affecting her interest, but not the interests of the minors.—Leavell v. Carter (Ky.) 1118.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY.

See Wills, § 2.

TESTAMENTARY POWERS.

Construction and execution, see Powers, § 1.
Restrictions on power to devise or bequeath, see Wills, § 1.

*Point annotated. See syllabus.

THEFT.

See Larceny.

THREATS.

By parties to homicide, see Homicide, §§ 4, 6.
Harmless error in prosecution for, see Criminal Law, § 20.

TICKETS.

For carriage of passengers, see Carriers, § 5.

TIMBER.

See Logs and Logging.

TIME.

For application to sell property of decedent, see Executors and Administrators, § 4.
For performance of contract for sale of standing timber, see Logs and Logging.
For recording chattel mortgage, see Chattel Mortgages, § 1.

*In computing time within which an act must be done, Sundays will not, as a general rule, be counted.—Porter v. R. J. Boyd Pav. & Const. Co. (Mo.) 235.

*Where an insurance policy required the payment of premiums on October 1st, but allowed an extension of 30 days, that day falling on Sunday, the 30-day extension *held* to begin to run at midnight on October 1st, and the policy was forfeited before insured's death on November 1st.—Aetna Life Ins. Co., of Hartford, Conn., v. Wimberly (Tex.) 1038.

TITLE.

Abandonment as affecting title, see Abandonment.

Color of title, see Adverse Possession.

Dedication as affecting title, see Dedication, § 2.

Of statutes, see Statutes, § 2.

Removal of cloud, see Quietting Title.

Tax titles, see Taxation, § 4.

Title of lessor, see Landlord and Tenant, § 2.

Title to sustain replevin, see Replevin, § 1.

TOOLS.

Liability of employer for defects, see Master and Servant, § 4.

TORTS.

Causing death, see Death, § 1.

Contribution between tort-feasors, see Contribution.

Right of action for between husband and wife, see Husband and Wife, § 5.

Liabilities of particular classes of persons.

See Municipal Corporations, § 10.

Agents, see Principal and Agent, § 2.

Employees, see Master and Servant, § 12.

Particular torts.

See Assault and Battery, § 1; Conspiracy; Forcible Entry and Detainer, § 1; Fraud; Libel and Slander; Negligence; Nuisance; Trespass; Trover and Conversion.

Remedies for torts.

See Trespass, § 2; Trover and Conversion, § 2.

Measure of damages, see Damages, § 3.

*Third persons are answerable for keeping a man out of employment when the means em-

*Paint annotated. See syllabus.

ployed to do so are unlawful.—Carter v. Oster (Mo. App.) 995.

Certain acts *held* to constitute an interference with a laborer's employment within Rev. St. 1899, § 2155 (Ann. St. 1906, p. 1385).—Carter v. Oster (Mo. App.) 995.

TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, § 1.

TRADE UNIONS.

Assessment of damages in action against, see Damages, § 5.

Interference with relation of master and servant, see Master and Servant, § 13.

TRANSCRIPTS.

As evidence, see Evidence, § 7.

Of record for purpose of review, see Criminal Law, § 19.

TRANSITORY ACTIONS.

See Venue, § 1.

TREES.

See Logs and Logging.

TRESPASS.

Care as to trespassers, see Negligence, § 1.

Ejection of trespasser, see Carriers, § 10.

Injuries to trespassers, see Railroads, § 8.

To the person, see Assault and Battery, § 1.

§ 1. Acts constituting trespass and liability therefor.

*Throwing stone or soil on the property of another as a result of blasting amounts to an actual trespass even in the absence of negligence.—Blackford v. Heman Const. Co. (Mo. App.) 287.

§ 2. Actions.

Evidence in an action for cutting and removing timber *held* to support the award of damages.—Doniphan Lumber Co. v. Case (Ark.) 208.

§ 3. Criminal responsibility.

*On a trial for cutting trees on the land of prosecutor, the failure to charge the substance of Pen. Code, arts. 45, 46, *held* reversible error.—Thomas v. State (Tex. Cr. App.) 1049.

TRESPASS TO TRY TITLE.

See Ejectment.

Instructions on insanity, see Insane Persons, § 1.

Review of discretionary rulings, see Appeal and Error, § 15.

§ 1. Proceedings.

In trespass to try title, where defendants claimed under a deed from T., executed under a power of attorney from the owner, and the deed recited a leasehold to T. and a subsequent conveyance to his principal, as well as the power of attorney, the lease to T. was properly admitted to explain the transaction between T. and his principal.—Neill v. Kleiber (Tex. Civ. App.) 694.

A plea of improvements in trespass to try title *held* insufficient under Rev. St. 1895, art. 5277.—Kaack v. Stanton (Tex. Civ. App.) 702.

An instruction in trespass to try title *held* not erroneous as tending to lead the jury to believe that, if plaintiff was once adjudged insane, he was necessarily insane at the time of the trial.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

In trespass to try title *held* not error to receive the verdict, on the theory that it failed to find whether plaintiff was insane when certain possession was taken.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

TRIAL.

See New Trial; Witnesses.

Assignment of errors to instructions, see Appeal and Error, § 8.

Contributory negligence of passenger as question for jury, see Carriers, § 9.

Damages as question for jury, see Damages, § 5.

Disputed claims against estate of decedent, see Executors and Administrators, § 3.

Existence of boundary as question for jury, see Boundaries, § 2.

Harmless error in instructions, see Appeal and Error, § 21.

Instructions as to contributory negligence of passenger, see Carriers, § 9.

Instructions as to payment, see Payment, § 2.

Parties entitled to allege error in instructions, see Appeal and Error, § 13.

Presentation of rulings in appeal record for purpose of review, see Appeal and Error, § 7.

Presumptions on appeal as to instructions, see Appeal and Error, § 14.

Trespass to try title to real property, see Trespass to Try Title.

Proceedings incident to trials.

See Continuance.

Entry of judgment after trial of issues, see Judgment, § 3.

Right to trial by jury, see Jury, § 1.

Summoning and impaneling jury, see Jury, § 2.

Trial of actions by or against particular classes of persons.

See Master and Servant, § 11.

Trial of particular civil actions or proceedings.

See Ejectment, § 3; Fraud, § 2; Libel and Slander, § 3; Negligence, § 4; Trespass to Try Title, § 1.

For breach of contract, see Contracts, § 4.

For causing death, see Death, § 1.

For compensation of attorney, see Attorney and Client, § 4.

For damages from nuisance, see Nuisance, § 1.

For death caused by operation of railroad, see Railroads, §§ 7, 9.

For injuries from flowage, see Waters and Water Courses, § 2.

For negligent transmission of telegram, see Telegraphs and Telephones, § 1.

For personal injuries, see Carriers, § 8; Master and Servant, § 11; Railroads, § 7; Street Railroads, § 2.

For price of goods sold, see Sales, § 5.

On insurance policy, see Insurance, § 9.

On note, see Bills and Notes, § 6.

Probate proceedings, see Wills, § 4.

To establish drain, see Drains, § 1.

Trial of criminal prosecutions.

See Conspiracy, § 2; Criminal Law, §§ 7-14; Homicide, §§ 10-18; Larceny, § 2; Trespass, § 3.

For offense against liquor law, see Intoxicating Liquors, § 4.

§ 1. Notice of trial and preliminary proceedings.

Under the facts, submission of a suit to enjoin defendant from destroying a boundary fence *held* not improper, though defendant had

failed to take his proof.—*Adams v. Mineral Development Co.* (Ky.) 624.

§ 2. Course and conduct of trial in general.

*Under the facts, *held* improper to refuse defendant an adjournment during the noon hour, asked on account of the nonarrival of depositions constituting its case.—*Sun Ins. Office v. Stegar* (Ky.) 922.

A trial judge's remark, on objection to a witness' qualification, *held* not erroneous as an expression of opinion as to whether the witness could determine as to plaintiff's sanity.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

§ 3. Reception of evidence.

*A motion to exclude all of a witness' testimony is properly overruled where part of the testimony is competent.—*Taylor v. McClintock* (Ark.) 405.

It is not proper to ask a witness an incompetent question as preliminary to one that is competent.—*Taylor v. McClintock* (Ark.) 405.

*A general objection to testimony, only a part of which is incompetent, *held* insufficient.—*St. Louis, I. M. & S. R. Co. v. Taylor* (Ark.) 745.

*The allowance on rebuttal of testimony not proper on rebuttal is within the trial court's sound discretion.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*A trial court's discretion as to the admission of belated testimony is judicial, and not arbitrary.—*Sun Ins. Office v. Stegar* (Ky.) 922.

*Refusal to allow reading of depositions after the argument had commenced *held* improper.—*Sun Ins. Office v. Stegar* (Ky.) 922.

*In an action for injuries by being struck by a street car, plaintiff should introduce as evidence in chief testimony as to the distance in which the car could have been stopped before striking him.—*Louisville Ry. Co. v. Gaar* (Ky.) 1130.

In libel certain evidence *held* not competent in rebuttal.—*Flowers v. Smith* (Mo.) 499.

*Objections to evidence in assault and battery, elicited on a question showing that the answer would be incompetent, *held* made too late.—*Stewart v. Watson* (Mo. App.) 762.

In an action against carriers for injury to a live stock shipment, the admission of testimony *held* not error as against the objection made.—*Missouri, K. & T. Ry. Co. of Texas v. Rich* (Tex. Civ. App.) 114.

Admission of defendant in an action on a contract for the sale of machinery *held* not to preclude a recovery for plaintiff's failure to ship the machinery within the time contracted for.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

An admission by a defendant entered under district and county courts rule 31 (67 S. W. xxiii) *held* to relieve plaintiff of the obligation of proving his case and to allow a recovery to the extent of the claim pleaded.—*Berry Bros. v. Fairbanks, Morse & Co.* (Tex. Civ. App.) 427.

§ 4. Arguments and conduct of counsel.

*The statement, in argument of counsel, of material facts not in evidence is reversible error, as evidence cannot be presented in the form of argument.—*Boone v. Holder* (Ark.) 1081.

*In an action for alienation of affections, statements by defendant's counsel in argument *held* prejudicial error.—*Boone v. Holder* (Ark.) 1081.

*Defendant *held* not prejudiced by plaintiff's counsel's argument outside the record.—*Cum-berland Telephone & Telegraph Co. v. Quigley* (Ky.) 897.

*Point annotated. See syllabus.

It is improper for counsel for a party to refer in his argument in a disparaging way to the fact that the adverse party made use of his unquestioned right to object to certain testimony.—*Ivy v. Ivy* (Tex. Civ. App.) 110.

§ 5. Taking case or question from jury.

*It is for the jury to settle conflicts in testimony as to physical, as well as other, facts.—*Kansas City Southern Ry. Co. v. Henrie* (Ark.) 967.

*Where the proof is such that the jury would be bound to find a verdict for defendant, a verdict for it is properly directed.—*Sinclair's Adm'r v. Illinois Cent. R. Co.* (Ky.) 910.

*Where there is evidence tending to support plaintiff's claim, it is error to direct a verdict for defendant.—*Stevens v. Stevens* (Mo. App.) 35.

*The trial court should not direct a verdict for defendant unless under the evidence no other verdict could be rendered as a matter of law.—*Walker v. Texas & N. O. R. Co.* (Tex. Civ. App.) 430.

§ 6. Instructions to jury—Province of court and jury in general.

*Instructions assuming facts to exist are improper, where the existence of such facts are jury questions.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

An instruction *held* not objectionable as charging as a fact that plaintiff was in the exercise of ordinary care.—*Louisville & N. R. Co. v. Carter* (Ky.) 904.

*An instruction *held* not erroneous as assuming the existence of a contract for the breach of which suit was brought.—*Hollerbach & May Contract Co. v. Wilkins* (Ky.) 1126.

*An instruction assuming as true a fact proven by the uncontroverted evidence was not erroneous.—*Orcutt v. Century Bldg. Co.* (Mo.) 532.

*An instruction in an action for injuries caused by a collision with a street car *held* erroneous as assuming defendant's negligence.—*Gessner v. Metropolitan St. Ry. Co.* (Mo. App.) 30.

*The mere indorsement on a note, directing payment to the payee's husband, was not sufficient evidence that she made it, and, where the uncontradicted evidence was that she did not make or authorize the indorsement, the court should have assumed the fact as so proven in charging the jury.—*McMahon v. Welsh* (Mo. App.) 43.

*A requested charge in an action against a city for an assault *held* properly refused, as submitting a question of law to the jury.—*Barree v. City of Cape Girardeau* (Mo. App.) 724.

*An instruction, in an action against a railway company for injuring a pedestrian, *held* not objectionable as a charge on the weight of the evidence.—*Gulf, C. & S. F. Ry. Co. v. Coleman* (Tex. Civ. App.) 690.

*In a personal injury action against the railroad company by a switchman, there being evidence that plaintiff did not go between the cars while they were in motion, charges, based on the assumption that the uncontroverted evidence showed the contrary, were properly refused.—*Texas & N. O. R. Co. v. Powell* (Tex. Civ. App.) 697.

§ 7. — Necessity and subject-matter of instructions.

*Each party has the right to have the theory of the case he contends for, and which he has adduced evidence to support, submitted to the jury upon proper instructions, unless the court in its general charge has declared the law so

that the respective contentions may be presented in argument to the jury without unfairness or prejudice to either party.—*Taylor v. McClintock* (Ark.) 405.

*Where statements are made in argument of matters material to the issues, which are not in evidence, the trial court should admonish counsel that the statement is improper, and direct the jury to disregard it.—*Boone v. Holder* (Ark.) 1081.

*Where the jury were practically told what facts would constitute negligence, *held*, that a definition of the term was not necessary.—*Landrum v. St. Louis & S. F. R. Co.* (Mo. App.) 1000.

§ 8. — Form, requisites, and sufficiency.

*Undue prominence should not be given in the instructions to any single fact.—*Bennett v. Knott* (Ky.) 849.

*An instruction is properly refused which restates the measure of damages.—*Sires v. Clark* (Mo. App.) 526.

*A requested charge *held* properly refused as singling out certain facts.—*Landrum v. St. Louis & S. F. R. Co.* (Mo. App.) 1000.

*An instruction in an action for negligent injury, directing the jury to adopt as their verdict the lowest estimate of plaintiff's damages made by any of the witnesses, was erroneous as being on the weight of the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Rich* (Tex. Civ. App.) 114.

*An instruction in trespass to try title, brought on behalf of an insane person, that one is deemed to be insane when unable to transact the ordinary affairs of life, to understand their nature and effect, and exercise his will respecting them, was not on the weight of the evidence.—*Kaack v. Stanton* (Tex. Civ. App.) 702.

§ 9. — Applicability to pleadings and evidence.

*Instructions should be confined to the issues.—*Taylor v. McClintock* (Ark.) 405.

*Instructions embodying general statements of law are improper.—*Bryant Lumber Co. v. Stastney* (Ark.) 740.

*In replevin by a chattel mortgagee, an instruction *held* erroneous as ignoring evidence and taking an issue from the jury.—*Doyle & Booth v. Kavanaugh* (Ark.) 889.

*Issues submitted to a jury must be confined to those supported by testimony.—*Arkansas Cent. R. Co. v. Workman* (Ark.) 1082.

*Where, in an ejectment, plaintiff gave no evidence in support of his claim of adverse possession, it was error to submit his right to recover under title acquired by adverse possession.—*Hightower v. Borden* (Ky.) 675.

An instruction in an action against a railway company for killing one on its track, unsupported by evidence, *held* error.—*Louisville & N. R. Co. v. Veach's Adm'r* (Ky.) 869.

*An instruction in an action for the death of a person struck by a train *held* erroneous, in view of the evidence.—*Illinois Cent. R. Co. v. France's Adm'r* (Ky.) 929.

*In an action on a premium note, an instruction *held* erroneous as inapplicable to the pleadings.—*Sympton v. Bell* (Ky.) 1133.

*An instruction failing to give any statement of facts from the evidence on which a verdict for defendant could be found was not erroneous, where no such facts were disclosed by the evidence.—*Brown v. Globe Printing Co.* (Mo.) 462.

*Point annotated. See syllabus.

*On a trial for libel based on a publication not privileged, an instruction ignoring the defense of privilege is not erroneous.—*Brown v. Publishers: George Knapp & Co. (Mo.)* 474.

*Instruction on contributory negligence *held* justified in an action by a passenger against a carrier.—*Gerhart v. Metropolitan St. Ry. Co. (Mo. App.)* 12.

*An instruction *held* erroneous as outside the issue presented by the pleading.—*Kellogg v. City of Kirksville (Mo. App.)* 296.

*In an action against a city for an assault committed by an individual holding the positions of street commissioner and police officer, an instruction *held* properly refused because of the want of evidence on which to predicate it.—*Barree v. City of Cape Girardeau (Mo. App.)* 724.

*In an action against a carrier for damages to cattle in transit, an instruction submitting a certain issue *held* erroneous under the evidence.—*Atchison, T. & S. F. Ry. Co. v. Harrington (Tex. Civ. App.)* 100.

*A requested instruction, expressly excluding consideration of evidence and assuming facts contrary to evidence, is properly refused.—*Texas & G. Ry. Co. v. First Nat. Bank of Carthage (Tex. Civ. App.)* 589.

*In an action by a servant for injuries sustained by the negligence of defendant's engineer in moving cars without signal or warning, charges upon defendant's liability for the condition of the car, or upon plaintiff's assumption of risk from defects therein, were properly refused.—*Texas & N. O. R. Co. v. Powell (Tex. Civ. App.)* 697.

*In a personal injury action by a switchman against the railroad company, the evidence showing no violation of the company's rules by plaintiff, a charge as to the effect of the violation of such rules, and of a waiver of the rules by the company, was error.—*Texas & N. O. R. Co. v. Powell (Tex. Civ. App.)* 697.

*Refusal of a charge that if the water was diverted by a ditch cut by another, defendant was not liable for flooding plaintiff's lands, *held* not erroneously refused, where the evidence failed to show that any injury resulted from the ditch.—*Missouri, K. & T. Ry. Co. of Texas v. Hagler (Tex. Civ. App.)* 783.

*Certain objection to instruction in an action against a carrier for injury to plaintiff's wife *held* not sustainable where the evidence did not raise a certain issue.—*Texas & P. Ry. Co. v. Boleman (Tex. Civ. App.)* 805.

§ 10. — Requests for instructions.

*Instructions covered by those given are properly refused.—*McDonough v. Williams (Ark.)* 164; *Shafstall v. Downey (Ark.)* 176; *Chicago, R. I. & P. Ry. Co. v. Lannon (Ark.)* 177; *Taylor v. McClintock (Ark.)* 405; *Brown v. Globe Printing Co. (Mo.)* 462; *Gulf, C. & S. F. Ry. Co. v. Coleman (Tex. Civ. App.)* 690; *Missouri, K. & T. Ry. Co. of Texas v. Hogler (Tex. Civ. App.)* 783; *Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*Where, in an action for injury to a passenger while boarding a train, the main charge correctly stated the relative duty of carrier and passenger, the refusal to charge on contributory negligence was not erroneous.—*St. Louis, I. M. & S. Ry. Co. v. Stell (Ark.)* 876.

*It is not reversible error to fail to instruct on a point where no instruction is requested.—*Swann-Day Lumber Co. v. Thomas (Ky.)* 907; *Brown v. Globe Printing Co. (Mo.)* 462.

*Where an instruction given by the court is not misleading, a party desiring a more pointed instruction must request it.—*Brown v. Globe Printing Co. (Mo.)* 462.

*Any instruction incorrect in any particular or covered by instructions given is properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Kennedy (Tex. Civ. App.)* 339.

*A party desiring a more complete instruction on a given subject should request it.—*Kaack v. Stanton (Tex. Civ. App.)* 702.

*Where the court correctly charged as to negligence of a railroad company, the refusal to give a requested charge on the same subject *held* not erroneous.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

§ 11. — Objections and exceptions.

*By confining an objection to an instruction to a specific ground one waives all other objections.—*St. Louis, I. M. & S. Ry. Co. v. Richardson (Ark.)* 212.

General objection *held* insufficient to reach error in instructions.—*Pettus & Buford v. Kerr (Ark.)* 886.

§ 12. — Construction and operation.

*Instructions in a case should be considered as a whole.—*Taylor v. McClintock (Ark.)* 405.

*Where each of the instructions clearly state the law, and, when considered together, present every proper view of the facts, and are not in conflict, there is no error in presenting them separately.—*St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.)* 744.

*In an action for the failure of a carrier to furnish cars for the shipment of freight, instructions *held* not in conflict.—*St. Louis Southwestern Ry. Co. v. Leder Bros. (Ark.)* 744.

*If instructions in an action for injuries to a servant were misleading, *held* any error was removed by another instruction.—*Pettus & Buford v. Kerr (Ark.)* 886.

*Instruction *held* not capable of being understood that servant could not be guilty of contributory negligence, in view of another instruction given.—*Pettus & Buford v. Kerr (Ark.)* 886.

*An erroneous instruction is not cured by another correct instruction.—*Doyle & Booth v. Kavanaugh (Ark.)* 880.

*An instruction in an action for the death of a person struck by a train *held* not erroneous for failing to state that decedent's contributory negligence would defeat a recovery, in view of the other instructions.—*Illinois Cent. R. Co. v. France's Adm'r (Ky.)* 929.

*Instructions, fairly presenting the issues when taken as a whole, *held* sufficient.—*Brown v. Globe Printing Co. (Mo.)* 462.

*Where the instructions when read together cover the entire case and require the jury to find all the facts essential to a recovery, they are not objectionable in that each undertakes to cover the entire case but erroneously omits some essential fact.—*Orcutt v. Century Bldg. Co. (Mo.)* 532.

*Where the instructions of the successful party state an erroneous rule, and those of the defeated party state the rule correctly, the latter should not be considered as curative of the former.—*Ross v. Metropolitan St. Ry. Co. (Mo. App.)* 9.

*No fault can be found with a charge which as a whole correctly instructs the jury.—*Young v. Lanznar (Mo. App.)* 17.

*In an action for the death of a child struck by a train, the defect in one instruction *held* not cured by another.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*All the instructions must be considered, and each of its parts construed, in connection with all its other parts.—*Galveston, H. & N. Ry. Co. v. Olds (Tex. Civ. App.)* 787.

*Point annotated. See syllabus.

*If the use of a certain word in an action against a carrier for injury to plaintiff's wife did not furnish a proper guide to determine the degree of violence in a coupling which would constitute negligence, the error *held* not reversible in view of other instructions.—*Texas & P. Ry. Co. v. Boleman* (Tex. Civ. App.) 805.

§ 13. Custody, conduct, and deliberations of jury.

*The refusal to discharge the jury on the ground that one of the jurors was asleep during the trial *held* proper under the evidence.—*Continental Casualty Co. v. Semple* (Ky.) 1122.

§ 14. Verdict.

*Where the petition contains several causes of action in separate counts, one of which is bad for insufficiency, a general verdict for plaintiff on all counts will not be sustained.—*Flowers v. Smith* (Mo.) 499.

*Where several causes of action were united in one count, a verdict for plaintiff after a trial on all *held* bad.—*Flowers v. Smith* (Mo.) 499.

A verdict stating the amount awarded for the separate causes of action alleged in the separate counts in the petition *held* valid.—*Graves v. St. Louis, M. & S. E. Ry. Co.* (Mo. App.) 736.

*Where one cause of action is alleged in several different ways, a separate verdict on each count, *held* not necessary, as a finding upon any one of them would bar further recovery on any count.—*Moseley v. Missouri Pac. Ry. Co.* (Mo. App.) 1010.

TROVER AND CONVERSION.

Action against personal representative, see Executors and Administrators, § 5.
Conversion by bailees, see Bailment.
Conversion by purchasers at void tax sale, see Taxation, § 2.

§ 1. Acts constituting conversion and liability therefor.

One may abandon his right to property by evidencing his intention by an act legally sufficient to divest ownership, and another reducing the property to possession after such abandonment is not guilty of conversion.—*Huggins v. Reynolds* (Tex. Civ. App.) 116.

§ 2. Actions.

*Measure of damages for conversion of property obtained by fraud stated.—*Witliff v. Spreen* (Tex. Civ. App.) 98.

*Defendant, having converted to his own use a note owned jointly by him and plaintiff, became liable to plaintiff for its value.—*Morris v. Smith* (Tex. Civ. App.) 130.

*In recovering for the conversion of a note owned jointly by plaintiff and defendant, plaintiff's right to recovery *held* not limited to the note's market value.—*Morris v. Smith* (Tex. Civ. App.) 130.

*Under the facts plaintiff *held* not entitled to recover interest as damages for defendant's conversion of a note.—*Morris v. Smith* (Tex. Civ. App.) 130.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Charitable trusts, see Charities.
Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

Persons entitled to review in action against trustee, see Appeal and Error, § 2.

§ 1. Creation, existence, and validity.

*In an action by trustees of property donated for a specified purpose for advice as to the disposition of the property upon the termination of the trust, the donors or their heirs should be made parties.—*Taylor v. Rogers* (Ky.) 1105.

*Manner of disposing of a trust fund created for a school, on the trust terminating, determined.—*Taylor v. Rogers* (Ky.) 1105.

*Property *held* conveyed to maintain a school, so that the trust terminated when the school could no longer be conducted.—*Taylor v. Rogers* (Ky.) 1105.

*Plaintiff's remedies on defendant converting a note in which plaintiff had an undivided interest stated on the theory of a constructive trust.—*Morris v. Smith* (Tex. Civ. App.) 130.

§ 2. Construction and operation.

Facts *held* not to bar a community's right to use the lower story of a building for school purposes.—*Rhodes v. Maret* (Tex. Civ. App.) 433.

§ 3. Execution of trust by trustee or by court.

A single testamentary trustee *held* authorized to partition land among devisees in accordance with the provisions of the will, though he himself would take under the division.—*Davis v. Davis* (Tex. Civ. App.) 948.

§ 4. Establishment and enforcement of trust.

*Trust funds wrongfully converted may be followed into other property as long and as far as they can be identified.—*Reaves v. Coffman* (Ark.) 194.

Where a will conveyed property to trustees to be equally divided among certain persons on the death of testator's widow, any division by the trustee contrary to the will would be subject to control of a court of equity, but its control could not be invoked until the trust was abused.—*Davis v. Davis* (Tex. Civ. App.) 948.

Where property was devised in trust to be equally divided by trustees on the death of testator's widow, testimony of the trustee to his willingness to make partition did not prevent a finding of unreasonable delay by him in making partition; there being nothing to prevent partition after the widow's death.—*Davis v. Davis* (Tex. Civ. App.) 948.

§ 5. Liabilities on trustees' bonds.

A trustee who fails to pay over to his successor as trustee all of the trust fund received from his predecessor, is liable on his bond for the deficit to his successor.—*Bogard v. Planters' Bank & Trust Co.* (Ky.) 872.

The trustee of a fund, the net interest on which belonged to a life tenant and the principal to remaindermen, *held* personally liable for part of the principal paid by him to the life tenant in addition to the interest.—*Bogard v. Planters' Bank & Trust Co.* (Ky.) 872.

In an action on the bond of a trustee for the loss of part of the trust fund, he must show affirmatively that the loss was despite reasonable diligence on his part to prevent it.—*Bogard v. Planters' Bank & Trust Co.* (Ky.) 872.

ULTRA VIRES.

Contracts of corporation, see Corporations, § 4.

UNDISCLOSED AGENCY.

See Principal and Agent, § 2.

*Point annotated. See syllabus.

UNDUE INFLUENCE.

Procuring making of will, see Wills, § 3.

UNIONS.

Interference with relation of master and servant, see Master and Servant, § 13.

UNITED STATES.

See Census.

Courts, see Removal of Causes.

Priority of claims of, against insolvent, see Insolvency, § 1.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

USAGES.

See Customs and Usages.

USE AND OCCUPATION.

*To succeed in an action for use and occupation the relation of landlord and tenant must be shown.—Starbuck v. Avery (Mo. App.) 33.

VACATION.

Of particular acts, instruments, or proceedings.

See Execution, § 3; Judgment, § 5.

Agreed case, see Submission of Controversy.

Foreclosure of vendor's lien, see Vendor and Purchaser, § 5.

Sale of property of decedent, see Executors and Administrators, § 4.

Sale on execution, see Execution, § 4.

VALUE.

Limits of jurisdiction, see Appeal and Error, § 1.

Of services of attorney, see Attorney and Client, § 4.

Opinion evidence as to, see Evidence, § 9.

VENDOR AND PURCHASER.

See Sales.

Conformity of judgment to pleading and proof in suit to foreclose vendor's lien, see Judgment, § 3.

Estoppel to assert vendor's lien, see Estoppel, § 1.

Notice of pendency of suit affecting land, see Lis Pendens.

Purchasers at sale of standing timber, see Logs and Logging.

Purchasers at sale of wife's separate property, see Husband and Wife, § 4.

Purchasers at sale on execution, see Execution, § 4.

Sales by or to executor or administrator, see Executors and Administrators, § 2.

Specific performance of contract, see Specific Performance.

§ 1. Requisites and validity of contract.

A certain matter *held* a circumstance to be considered on the question whether inclusion of land in a contract of sale was a mistake.—Moore v. Pennington (Ky.) 858.

Evidence *held* sufficient to show that the inclusion of certain land in a contract of sale was by mistake.—Moore v. Pennington (Ky.) 858.

§ 2. Modification or rescission of contract.

*A vendor of land on installments having waived his right to forfeit the contract for delayed installments until after a levy thereon as the property of the vendee, a purchaser at execution sale was entitled to the property on paying the vendor the balance due.—Braddock v. England (Ark.) 883.

§ 3. Performance of contract.

A tramroad company, under an agreement by a landowner to convey a right of way, becomes entitled to such conveyance on building the road unless a condition precedent to such performance remains unperformed.—Union Sawmill Co. v. Felsenthal Land & Townsite Co. (Ark.) 205.

§ 4. Rights and liabilities of parties.

The fact that a deed in the chain of title was only a quitclaim *held* not of itself to give notice of defect in the title or of secret equities of the grantor.—Brown v. Nelms (Ark.) 373.

A purchaser of land *held* not bound by a secret agreement of a prior grantor and grantees that a quitclaim deed absolute on its face was only given as security.—Brown v. Nelms (Ark.) 373.

§ 5. Remedies of vendor.

*That a husband induced plaintiff to rescind a contract with his wife by fraud *held* not to entitle plaintiff to recover the husband's debt secured by such contract from the wife.—Hotfil v. Deweese's Trustee (Ky.) 1095.

*Evidence *held* insufficient to authorize a finding that plaintiff had been induced by fraud to release a vendor's lien, and accept a note in lieu thereof.—Hotfil v. Deweese's Trustee (Ky.) 1095.

Plaintiff's insanity at the time suit was brought for his benefit by a bank for the foreclosure of a vendor's lien would be presumed, in a suit by plaintiff to set aside a sale for inadequacy of price, to have resulted in deterring bidders.—McLean v. Stith (Tex. Civ. App.) 355.

A purchaser from the purchaser at a sale of land sold under a judgment foreclosing a vendor's lien in an action fraudulently instituted *held* chargeable with knowledge of the facts and not thereafter entitled to hold the land against plaintiff, the true owner of the lien.—McLean v. Stith (Tex. Civ. App.) 355.

Laches is no defense to a suit to set aside a sale on foreclosure of a vendor's lien brought within the period of limitations.—McLean v. Stith (Tex. Civ. App.) 355.

A purchaser who has notice of a fact that will avoid the title of his grantor accepts the risk of having his title defeated.—McLean v. Stith (Tex. Civ. App.) 355.

VENUE.

Venue of action joining several causes of action, see Action, § 2.

Of particular actions or proceedings.

Criminal prosecutions, see Criminal Law, § 2.

For personal injuries, see Carriers, § 8.

On bond of insurance company to state, see Insurance, § 9.

§ 1. Nature or subject of action.

*Under Civ. Code Prac. §§ 73, 92, a demurrer to a petition in an action against a carrier on a contract of carriage on the ground of want of jurisdiction of the court *held* properly overruled.—Richardson v. Louisville & N. R. Co. (Ky.) 582.

Under Cr. Code Prac. § 11, Civ. Code Prac. § 63, a penal action against a corporation violating Ky. St. 1903, § 4087, must be brought in Franklin county.—Commonwealth v. Morrell Refrigerator Car Co. (Ky.) 860.

*Point annotated. See syllabus.

VERDICT.

Directing verdict in civil actions, see Trial, § 5.
 In civil actions, see Trial, § 14.
 Operation and effect as curing defects in pleadings, see Pleading, § 8.
 Review on appeal or writ of error, see Appeal and Error, § 18.
 Setting aside, see New Trial, § 1.

VESTED REMAINDERS.

Creation, see Wills, § 5.

VICE PRINCIPALS.

See Master and Servant, § 6.

VIEWERS.

In drainage proceedings, see Drains, § 1.

VILLAGES.

See Municipal Corporations.

VINDICTIVE DAMAGES.

See Damages, § 2.

VOIR DIRE.

See Jury, § 3.

VOTERS.

See Elections.

WAGES.

See Master and Servant, § 2.

WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Appearance; Depositions; Pleading, § 8.
 At trial, see Trial, § 11.

Error waived in appellate court, see Appeal and Error, § 22.

Failure to swear commissioners in highway proceedings, see Highways, § 1.

Grounds of abatement, see Abatement and Revival, § 2.

Of rights or remedies.

See New Trial, § 1; Notice.

Exemption of homestead, see Homestead, § 4.

Forfeiture of insurance, see Insurance, §§ 5, 6, 9.

Proofs of loss insured against, see Insurance, § 8.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

Carrier as warehouseman, see Carriers, § 2.

WARNING.

Duty of master to warn servant of danger, see Master and Servant, § 5.

WARRANT.

County warrants, see Counties, § 4.
 Orders for payment from public funds, see Municipal Corporations, § 11.

WARRANTY.

By insured, see Insurance, §§ 4, 5.
 On sale of goods, see Sales, §§ 4, 6.

WATERS AND WATER COURSES.

See Drains; Navigable Waters.

Applicability of instructions to case in action for injuries from flowage, see Trial, § 9.

Construction of waterworks by city, see Municipal Corporations, § 3.

Judgment against water company as denying due process of law, see Constitutional Law, § 5.

Liability of railroad for injuries caused by overflow, see Railroads, § 2.

Mandamus to compel performance of contract to furnish water, see Mandamus, §§ 1-3.

Motions relating to pleading in action for pollution of stream, see Pleading, § 7.

Water courses in cities, see Municipal Corporations, § 10.

§ 1. Surface waters.

*Lot owner in populous city who obstructs underground drain on his lot to prevent its carrying surface waters from other lots held not liable for damages nor subject to be enjoined.—*Levy v. Nash* (Ark.) 173.

§ 2. Artificial ponds, reservoirs, and channels, dams, and flowage.

*In an action against a railroad for flooding lands, all the evidence, when taken together, held not to violate the correct criterion of the value of a growing crop.—*Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Tex. Civ. App.) 783.

Omission of the word "place" from an instruction defining the measure of damages for overflow of land held not calculated to mislead the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Tex. Civ. App.) 783.

In an action against a railroad company for flooding land, certain evidence held pertinent; and, being legitimate, that it might serve the purpose of comparison did not render it objectionable.—*Missouri, K. & T. Ry. Co. of Texas v. Hagler* (Tex. Civ. App.) 783.

§ 3. Public water supply.

Primarily the duty of a water company, bound to furnish water to property owners on streets containing mains, carries with it the duty to construct, at its own cost, the necessary connections.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

A water company, possessing a franchise to supply a city and its inhabitants with water, held bound thereby to construct, at its own cost, the connections necessary to supply consumers with water.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

A judgment, requiring a company possessing a franchise to supply a city and its inhabitants with water to lay pipes from its mains in the streets to the property line on the streets, held not open to certain objections.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 816.

A water company, possessing a franchise to supply a city and its inhabitants with water, held not to justify its refusal to construct, at its own cost, necessary connections to supply consumers with water, on the ground of leg-

*Point annotated. See syllabus.

islative action by the council.—*International Water Co. v. City of El Paso* (Tex. Civ. App.) 818.

WAYS.

Private rights of way, see Easements.
Public ways, see Highways; Municipal Corporations, § 10.

WEAPONS.

One may carry money on his person, and may carry concealed weapons to defend his property, if he believes in good faith that there is danger of attack or robbery.—*State v. Cook* (Mo. App.) 710.

*Evidence that defendant turned aside and engaged in a personal difficulty held admissible in rebuttal, where he, on prosecution for carrying a pistol contended he was carrying it home.—*Griffin v. State* (Tex. Cr. App.) 1068.

WIDOWS.

Dower, see Dower.
Rights under statutes of descent and distribution, see Descent and Distribution, § 2.

WILLS.

See Descent and Distribution; Executors and Administrators.

Charitable bequests and devises, see Charities.
Competency of witnesses in will contest, see Witnesses, § 1.

Construction and execution of powers, see Powers, § 1.

Construction and execution of trusts, see Trusts.
Harmless error in will contest, see Appeal and Error, § 19.

Hearsay evidence in will contest, see Evidence, § 6.

Opinion evidence in will contest, see Evidence, § 9.

§ 1. Nature and extent of testamentary power.

*Every one has the untrammelled right to dispose of his property by will as he pleases within statutory limitations.—*Taylor v. McClintock* (Ark.) 405.

§ 2. Testamentary capacity.

*Testator's daughter's conduct and declarations showing her mental attitude towards testator and others are original evidence on an issue as to the falsity of his belief that she did not care for him or was ungrateful to him, etc., as affecting his testamentary capacity.—*Taylor v. McClintock* (Ark.) 405.

*On a will contest by testator's daughter on the ground that he had an insane delusion that she did not care for him, proponents claiming that he discriminated against her because of her marriage, testimony showing her husband's character and reputation was proper.—*Taylor v. McClintock* (Ark.) 405.

*Rule as to admissibility of evidence as to the inequalities of a will, nature and extent of testator's estate, etc., where testator's mental capacity is questioned, stated.—*Taylor v. McClintock* (Ark.) 405.

*On a will contest by testator's daughter she could show what property of her mother passed to testator and its value.—*Taylor v. McClintock* (Ark.) 405.

Exclusion of particular evidence on a will contest by testator's daughter on the ground that he had an insane delusion held not error.—*Taylor v. McClintock* (Ark.) 405.

Admission and exclusion of evidence in a will contest held not error.—*Taylor v. McClintock* (Ark.) 405.

*Matters subject to proof, where a testator's mental capacity respecting a particular person is questioned, stated.—*Taylor v. McClintock* (Ark.) 405.

In a will contest by testator's daughter, it was improper to allow her to show that her stepmother did not send her any notice of testator's last illness, if the daughter could have shown that testator did not request that she be notified of his illness.—*Taylor v. McClintock* (Ark.) 405.

Exclusion of testimony in a will contest held not error.—*Taylor v. McClintock* (Ark.) 405.

*Testamentary capacity being presumed, the burden of proof is on one attacking a will on the ground of insanity, and, if testator's general capacity is conceded, the proof must be of the clearest and most satisfactory kind.—*Taylor v. McClintock* (Ark.) 405.

*Test of testamentary capacity stated.—*Taylor v. McClintock* (Ark.) 405.

*A belief in something that no sane man could believe is evidence of insanity.—*Taylor v. McClintock* (Ark.) 405.

*A belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason, and in such cases, no matter how imperfect the reasoning process may be or however erroneous the conclusion reached, it is not an insane delusion.—*Taylor v. McClintock* (Ark.) 405.

*"Paranoia" defined.—*Taylor v. McClintock* (Ark.) 405.

"Systemized delusion" defined.—*Taylor v. McClintock* (Ark.) 405.

*Effect of an insane delusion upon one's testamentary capacity, stated.—*Taylor v. McClintock* (Ark.) 405.

*An insane delusion as affecting one's testamentary capacity cannot be based upon any purely esoteric and abstract subject, since beliefs concerning such subjects are speculative and cannot be proven false.—*Taylor v. McClintock* (Ark.) 405.

*Effect of testator's belief as to his daughter's lack of affection and gratitude towards him on his will, stated.—*Taylor v. McClintock* (Ark.) 405.

*Where one's testamentary capacity is attacked on the ground that he had an insane delusion, it is not enough that his belief was false, but it must also have been adhered to against all evidence and argument.—*Taylor v. McClintock* (Ark.) 405.

Effect of a testator's mental unsoundness as to one subject only, stated.—*Taylor v. McClintock* (Ark.) 405.

No disorder of the moral affections, feelings, or propensities will affect one's testamentary capacity unless accompanied by an insane delusion.—*Taylor v. McClintock* (Ark.) 405.

*The test of testamentary capacity is the same whether testator's insanity be attributable to dementia or insane delusion.—*Taylor v. McClintock* (Ark.) 405.

*"Moral" or "medical" insanity defined.—*Taylor v. McClintock* (Ark.) 405.

*Effect of testator's "moral" or "medical" insanity on his will stated.—*Taylor v. McClintock* (Ark.) 405.

§ 3. Requisites and validity.

*Evidence held insufficient to show that fraud or undue influence was exercised over a testator.—*Sanger v. McDonald* (Ark.) 363.

*Point annotated. See syllabus.

*Rule of evidence governing will contests on the ground of undue influence or fraud stated.—*Sanger v. McDonald* (Ark.) 365.

*Rule as to proof required to defeat a will on the ground of undue influence stated.—*Sanger v. McDonald* (Ark.) 365.

*Nature of fraud or undue influence which will avoid a will stated.—*Sanger v. McDonald* (Ark.) 365.

*Rule respecting fraud in inducement of the execution of a will stated.—*Sanger v. McDonald* (Ark.) 365.

A will providing for children as a class, without naming them, *held* valid under Kirby's Dig. § 8020, providing that a testator omitting to mention a living child in his will shall be deemed intestate as regards the child.—*Brown v. Nelms* (Ark.) 373.

*Rule as to necessity for a testator meting out equal justice to relations stated.—*Taylor v. McClintock* (Ark.) 405.

A memorandum made after a will *held* not to revoke the will.—*Simon v. Middleton* (Tex. Civ. App.) 441.

A memorandum *held* to be in the nature of a codicil to a will and to be probated with it.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*Evidence *held* not to show that a will was executed as a result of undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Evidence that a disinherited son of testator had been excluded from the table with the family and compelled to eat in the kitchen, and that his brothers objected to his eating with them, was not evidence of undue influence by the other members of the family, where it appeared that he was excluded on account of his vile habits and vicious life, and because he was afflicted with a loathsome disease.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Rule as to nature and scope of proof of fraud or undue influence, connected with the making of a will, by circumstances, stated.—*Simon v. Middleton* (Tex. Civ. App.) 441.

On the question of undue influence affecting the execution of a will, evidence that testator, about the time of making the will, had told a road superintendent, under whom testator's disinherited son was working, to turn him loose, and testator would pay the fine, *held* entitled to little probative force.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*Evidence of the reasons testator had for withdrawing an allowance to a disinherited daughter, contained in a letter written to her two years after the execution of the will *held* inadmissible to establish undue influence affecting the will.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Declaration of testator in a letter to a disinherited daughter *held* not evidence of undue influence exerted upon the execution of his will two years before.—*Simon v. Middleton* (Tex. Civ. App.) 441.

On the question of undue influence affecting the execution of a will, testimony of a witness that he had never seen any immorality on the part of one of testator's disinherited children *held* immaterial.—*Simon v. Middleton* (Tex. Civ. App.) 441.

On the question of undue influence affecting the execution of a will, evidence as to the financial condition of a disinherited daughter of testator 14 or 15 years before the will was made *held* immaterial.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Evidence of altercations between a disinherited daughter and a son who was a beneficiary, three years before the will was made, *held* im-

properly admitted as immaterial on the question of undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Evidence that a son of a disinherited daughter had taken notes to testator from the daughter, in which she sought to obtain money, and of the suggestion of testator that she should wash and iron, *held* improperly admitted as immaterial on the question of undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

Evidence that a disinherited son heard two of his brothers, who were beneficiaries, say after testator's funeral that there were three wills, and that the children disinherited by the last will knew nothing about it, and "we will give them \$5 and let them go to hell," *held* improperly admitted, since their knowledge of the existence of other wills was not relevant to the issue of undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*In a will contest, evidence of the execution of prior wills concerning which no undue influence is shown, which disposed of the property substantially as in the last will, *held* admissible to prove the absence of undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

The financial condition of legatees may be shown as bearing on the question whether a will was the product of a mind not unduly influenced by beneficiaries.—*Simon v. Middleton* (Tex. Civ. App.) 441.

If a beneficiary, to influence testator's mind, fabricates false and slanderous charges against one who would ordinarily have been a recipient of favors under a will, and his slanders have induced the making of a will cutting off the slandered person from benefits, evidence of the slander would be important as bearing on the question of fraud and undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*The fact that some of testator's children are disinherited and others favored, and the distribution appears unnatural or unreasonable, raises no presumption of undue influence, but that fact may, when taken with others, show undue influence.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*Extent of the burden of proof upon contestants of a will as executed under undue influence, stated.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*Unreasonable prejudice or erroneous convictions as to the unworthiness of one who has a natural claim upon testator's bounty, to form a basis for a refusal to probate a will because of fraud or undue influence, must have been nursed or fostered by a beneficiary, and the will procured wholly by his lying or false representations, made with intent to secure its execution.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*The undue influence which invalidates a will is an influence which destroys the free agency of testator, and places him in a position where he is dominated by another, and acts directly on his mind at the very time when he executes the will.—*Simon v. Middleton* (Tex. Civ. App.) 441.

*Statutory deed *held* not testamentary because of a clause that it was not to take effect before the grantor's death.—*Garrison v. McLain* (Tex. Civ. App.) 773.

§ 4. Probate, establishment, and annulment.

*Whether a will was procured by undue influence is for the jury.—*Sanger v. McDonald* (Ark.) 365.

*Refusal of an instruction in a will contest *held* improper.—*Taylor v. McClintock* (Ark.) 405.

*Point annotated. See syllabus.

*An instruction on the subject of testamentary capacity *held* properly refused as being argumentative.—Taylor v. McClintock (Ark.) 405.

*Modification of an instruction in a will contest *held* improper.—Taylor v. McClintock (Ark.) 405.

*Refusal of an instruction *held* improper where testator's testamentary capacity was questioned on the ground that he had an insane delusion.—Taylor v. McClintock (Ark.) 405.

*The province of court and jury where a testator's testamentary capacity is questioned, stated.—Taylor v. McClintock (Ark.) 405.

*On a will contest by testator's daughter, evidence *held* to require submission to the jury of an issue as to whether her marriage caused testator to discriminate against her in his will.—Taylor v. McClintock (Ark.) 405.

Upon a contest of a will by testator's daughter, *held* improper to refuse to limit inquiry as to mental incapacity to that brought about by a particular delusion.—Taylor v. McClintock (Ark.) 405.

*It will be conclusively presumed that the county court had proper evidence before it when it probated a will, and the probate is conclusive unless legally vacated, so that the probated will of an ancestor was properly admitted in partition proceedings, though not properly authenticated.—Adams v. De Dominquez (Ky.) 663.

*In proceedings to probate a will, not produced in court, the evidence *held* insufficient to overcome the presumption that it had been revoked during testator's lifetime.—Buchanan v. Rollings (Tex. Civ. App.) 785.

*In proceedings to probate an alleged will not produced in court, testator's declarations tending to show the execution of the will, its contents, and that it was in existence until about 10 days before her death, while not in themselves sufficient to prove the execution of the will, were admissible for that purpose.—Buchanan v. Rollings (Tex. Civ. App.) 785.

*Testator's declarations were admissible, in probate proceedings to prove the contents of a lost or destroyed will shown to have been executed.—Buchanan v. Rollings (Tex. Civ. App.) 785.

*Where an alleged will was not produced in court in probate proceedings, and was last seen several months before testator died, it is presumed to have been revoked during her lifetime, and the burden was on proponent to show the contrary.—Buchanan v. Rollings (Tex. Civ. App.) 785.

§ 5. Construction.

A will construed to entitle only those who have gifts of money to share in the residue.—Roberts v. Chenoweth (Ky.) 625.

A will *held* to entitle one to whom a gift out of the residue was made to share in the balance of the residue.—Roberts v. Chenoweth (Ky.) 625.

Although the words "devise" and "devisee" properly and technically apply only to real estate, and the words "legacy," "legatee," "bequest," and "bequeath" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467.—Roberts v. Chenoweth (Ky.) 625.

A will *held* to pass testator's reversionary interest in land to designated beneficiaries, to the exclusion of others.—Mayes v. Kuykendall (Ky.) 673.

Will construed, and *held* to vest in testator's daughter, on her becoming of age, an estate in fee in the property devised to her, released from the charge of a legacy in the will.—Frye's Adm'r v. Frye (Ky.) 919.

*Where an estate is devised to one and his heirs and assigns forever, and there is added either by express words or by plain implication an absolute power of alienation, a limitation over is void.—Jackson v. Littell (Mo.) 53.

*A will construed, and *held* to give testator's widow a fee-simple estate in the property.—Jackson v. Littell (Mo.) 53.

*While the words "heirs and assigns" are not necessary in Missouri to create a devise of a fee simple, they were necessary at common law.—Jackson v. Littell (Mo.) 53.

*When the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised absolutely to the first donee, that estate will not be cut down by subsequent or ambiguous words inferential in their intent.—Jackson v. Littell (Mo.) 53.

WITNESSES.

See Depositions; Evidence.

Absence of ground for continuance, see Continuance; Criminal Law, § 7.

Experts, see Evidence, § 9.

Objections to rulings as to, for purpose of review, see Appeal and Error, § 3.

Opinions, see Evidence, § 9.

Perjury, see Perjury.

§ 1. Competency.

In view of Kirby's Dig. § 3095, subd. 4, declarations of a husband are not competent testimony against his wife in an action wherein they are defendants.—Reaves v. Coffman (Ark.) 194.

*Kirby's Dig. § 3095, *held* not to authorize will contestant's husband to testify concerning a copy of a letter by contestant to testator.—Taylor v. McClintock (Ark.) 405.

*Kirby's Dig. § 3093, relating to the competency of witnesses, *held* not to apply to will contest.—Taylor v. McClintock (Ark.) 405.

*On a claim against decedent's estate for services rendered her, claimant could not testify as to anything that occurred between her and decedent.—Thomas v. Hobbs' Ex'r (Ky.) 574.

*In an action for the alienation of a husband's affections, statements to the wife by the husband in the absence of any other person *held* privileged, within Civ. Code Prac. 606.—Leucht v. Leucht (Ky.) 845.

*Under a disqualifying statute a physician *held* not disqualified to testify that on the occasion of his visiting his patient for the purpose of collecting a bill he saw her walk about the house and upstairs without crutches.—Chlanda v. St. Louis Transit Co. (Mo.) 249.

Under Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), defendant *held* not incompetent as a witness where his testimony did not affect any deceased party to the action, and no contract was involved.—Collins v. Crawford (Mo.) 538.

*Under Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), *held* improper, in an action by a corporation on notes, to allow defendants to testify as to an agreement by a deceased agent of the corporation to cancel the notes.—Columbia Brewery Co. v. Rohling (Mo. App.) 767.

*The act of a witness *held*, even if done in his professional character as an attorney, not to be privileged, because done to perpetrate a fraud.—Hyman v. Grant (Tex.) 1042.

*Evidence *held* not inadmissible as of a transaction between attorney and client in a professional capacity.—Hyman v. Grant (Tex.) 1042.

*The rule making incompetent testimony as to communications by a client to his attorney *held* to be limited to cases strictly within the

*Point annotated. See syllabus.

principle of the policy giving it birth.—*Hyman v. Grant* (Tex.) 1042.

*In a prosecution for homicide, testimony of defendant's wife given on cross-examination *held* not to make her a witness against her husband within the prohibition of Code Cr. Proc. art. 774.—*Hobbs v. State* (Tex. Cr. App.) 308.

A will contest between legatees and disinherited children of testator *held* not an action "by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent," within Rev. St. 1895, art. 2302, and hence that a party in such an action could testify as to a statement made to her by decedent.—*Simon v. Middleton* (Tex. Civ. App.) 441.

The exception to the general rule that no person shall be incompetent to testify because he is a party to a suit or proceeding or interested in the issue tried, which denies the right of an heir or legal representative of a decedent to testify as to any transaction or statement by decedent in an action by or against the heirs or legal representatives arising out of any transaction with decedent, unless called by the opposite party, will not be extended by judicial construction.—*Simon v. Middleton* (Tex. Civ. App.) 441.

§ 2. Examination.

Though a witness may not be required to answer a question that would subject him to a prosecution, the fact that the answer may degrade, disgrace, or humiliate him will not excuse him.—*Leach v. Commonwealth* (Ky.) 595.

*Questions on cross-examination upon a subject not alluded to upon accused's examination in chief were improper.—*State v. Cook* (Mo. App.) 710.

Where, in a prosecution for homicide, defendant's wife testified in his behalf that decedent grossly insulted her, and that she informed defendant thereof before the commission of the homicide, a question propounded to her by the prosecution as to what she said to a neighbor as to decedent's conduct was proper cross-examination.—*Hobbs v. State* (Tex. Cr. App.) 308.

On a trial for homicide, questions asked a witness for accused *held* legitimate cross-examination.—*Marsh v. State* (Tex. Cr. App.) 320.

*Where a witness on a second trial stated that he could not remember and that his memory was better at the first trial, the court properly permitted him to refresh his memory by reading his former testimony.—*Proctor v. State* (Tex. Cr. App.) 770.

*A question asked defendant *held* improperly allowed; the question being suggestive.—*Darnell Lumber Co. v. City Loan & Trust Co.* (Tex. Civ. App.) 128.

*Answers to interrogatories not responsive to the same and containing volunteered and immaterial statements are objectionable.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

Answer to interrogatory *held* objectionable as not responsive.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

Certain interrogatory *held* objectionable as leading.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

Certain interrogatories to witness *held* objectionable as leading.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

*Answers to leading questions are objectionable as far as responsive to the same.—*Gate City Roller Rink Co. v. McGuire* (Tex. Civ. App.) 436.

§ 3. Credibility, impeachment, contradiction, and corroboration.

*The admission of a witness that he wrote letters to creditors of an insolvent making un-

true statements for the purpose of deceiving them lessened the credibility of his testimony.—*Brewer v. Johnson* (Ark.) 364.

*Contradiction of a witness' testimony to a collateral matter on cross-examination *held* not proper.—*Taylor v. McClintock* (Ark.) 405.

Evidence affecting the credibility of deposition taken on interrogatories *held* improper; the remedy being to quash the deposition if Kirby's Dig. § 3181, was not complied with.—*Taylor v. McClintock* (Ark.) 405.

Civ. Code Prac. § 597, *held* not to excuse a witness from disclosing his relation with the one in whose behalf he testifies, though such disclosures may develop particular acts tending to degrade or disgrace the witness.—*Leach v. Commonwealth* (Ky.) 595.

In a murder trial, *held* proper to show the character of the relations between decedent and a witness for the purpose of affecting the weight to be given her testimony.—*Leach v. Commonwealth* (Ky.) 595.

A question on trial as to whether accused made certain statements in police court was not admissible to impeach his testimony; it not being contended that his statements on trial and in police court were conflicting.—*State v. Cook* (Mo. App.) 710.

*On a trial for murder by poison, the refusal to permit accused by way of impeachment of a state's witness to show a certain fact *held* erroneous.—*Sanders v. State* (Tex. Cr. App.) 68.

*Statements made out of court by witness contradictory of statements in court *held* to form a basis for impeachment.—*Sanders v. State* (Tex. Cr. App.) 68.

*On a trial for murder by poison, the exclusion of certain evidence by way of impeachment of a state's witness *held* erroneous.—*Sanders v. State* (Tex. Cr. App.) 68.

A witness should not be permitted to testify that certain other witnesses who testified against accused were hostile to him, unless the witness' knowledge as to such feeling, attitude, and disposition of such other witnesses is shown.—*Burnett v. State* (Tex. Cr. App.) 74.

*It is always competent to prove by proper evidence the hostile attitude of a witness either to a party or to the cause to affect the witness' credibility.—*Burnett v. State* (Tex. Cr. App.) 74.

*Everything legitimate for the purpose of testing the knowledge of the fact testified to by a witness, his bias, prejudice, and any matter that legitimately goes to discredit him, is admissible on cross-examination.—*Marsh v. State* (Tex. Cr. App.) 320.

On a trial for homicide, certain evidence *held* not admissible either for the purpose of impeaching a witness or as a circumstance adverse to accused.—*Marsh v. State* (Tex. Cr. App.) 320.

*The state, in a homicide case, *held* entitled, after laying a proper predicate, to impeach a witness for accused.—*Marsh v. State* (Tex. Cr. App.) 320.

*On a trial for homicide, the state *held* properly allowed to impeach a witness for accused.—*Marsh v. State* (Tex. Cr. App.) 320.

On a trial for homicide, certain evidence *held* admissible to impeach a witness for accused.—*Proctor v. State* (Tex. Cr. App.) 770.

*A witness for accused *held* properly impeached by proof of his having made a certain contradictory statement.—*High v. State* (Tex. Cr. App.) 939.

Evidence *held* inadmissible to contradict witness' statement on cross-examination respecting his own conduct.—*Gonzales v. State* (Tex. Cr. App.) 941.

*Point annotated. See syllabus.

*In a prosecution for illegally selling intoxicants, certain evidence *held* admissible to contradict accused's testimony that he did not know of the prosecution until several days before trial.—Taylor v. State (Tex. Cr. App.) 942.

*Witness for accused having given conflicting evidence, accused could prove that his first statement was made because of threats of personal injury.—Cornett v. State (Tex. Cr. App.) 1071.

*In an action against a carrier for injury to a live stock shipment, exclusion of cross-examination of a witness who testified as to the extent of plaintiff's damages *held* error.—Missouri, K. & T. Ry. Co. of Texas v. Rich (Tex. Civ. App.) 114.

WORDS AND PHRASES.

"Action for libel."—Brown v. Publishers: George Knapp & Co. (Mo.) 474.

"Administration."—Kansas City Southern Ry. Co. v. Henrie (Ark.) 967.

"Agency."—Harkins v. Murphy & Bolanz (Tex. Civ. App.) 138.

"Agreed case."—Peake v. Webb (Mo. App.) 13.

"All liabilities."—Binyon v. Smith (Tex. Civ. App.) 138.

"Apparatus."—Simmang v. Pennsylvania Fire Ins. Co. (Tex.) 1044.

"Appearance."—Carden v. Bailey (Ark.) 743.

"As dower."—Perry v. Dance (Ky.) 911.

"Assistance."—Ray v. James (Ky.) 641.

"Attorney in fact."—Harkins v. Murphy & Bolanz (Tex. Civ. App.) 138.

"Bequeath."—Roberts v. Chenoweth (Ky.) 625.

"Request."—Roberts v. Chenoweth (Ky.) 625.

"Bill of lading."—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock (Ark.) 154.

"Bona fide occupant."—Brown v. Nelms (Ark.) 373.

"Business."—Bridges v. Missouri, K. & T. Ry. Co. (Mo. App.) 38.

"Business transacted."—Taylor v. McClintock (Ark.) 405.

"Capital stock."—London & Lancashire Fire Ins. Co. v. Ludwig (Ark.) 197.

"Casualty."—Hargis v. Begley (Ky.) 602.

"City and town."—Morris v. Randall (Ky.) 856.

"Common nuisance."—Commonwealth v. Cincinnati, N. O. & T. P. R. Co. (Ky.) 613.

"Communication."—Leucht v. Leucht (Ky.) 845.

"Complied with."—McMinn v. Cope (Tex. Civ. App.) 809.

"Constructed."—Sparks v. Barber Asphalt Paving Co. (Ky.) 830.

"Contract of pledge."—Tennent v. Union Cent. Life Ins. Co. (Mo. App.) 754.

"Corrupt."—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

"Counsel."—Harkins v. Murphy & Bolanz (Tex. Civ. App.) 138.

"Court record."—Allen v. Phillips (Ark.) 403.

"Devise."—Roberts v. Chenoweth (Ky.) 625.

"Devisee."—Roberts v. Chenoweth (Ky.) 625.

"Doubleheader."—Vencill v. Quincy, O. & K. C. R. Co. (Mo. App.) 1030.

"Evidence."—Taylor v. McClintock (Ark.) 405.

"Family."—Sykes v. Speer (Tex. Civ. App.) 422.

"Fellow servant."—Robinson v. St. Louis & S. F. R. Co. (Mo. App.) 730.

"Flag station."—Clark v. Jonesboro, L. C. & E. R. Co. (Ark.) 961.

"Fraud."—Sanger v. McDonald (Ark.) 365.

"Good cause."—Armstrong v. National Life Ins. Co. (Tex. Civ. App.) 327.

"Homicide."—Cordes v. State (Tex. Cr. App.) 943.

"Horse stealing."—Smith v. Commonwealth (Ky.) 615.

"Humanitarian doctrine."—Ross v. Metropolitan St. Ry. Co. (Mo. App.) 9.

"Incompetency."—Tucker v. Missouri & K. Telephone Co. (Mo. App.) 6.

"Infanticide."—Cordes v. State (Tex. Cr. App.) 943.

"In lieu of dower."—Perry v. Dance (Ky.) 911.

"Insane."—Kaack v. Stanton (Tex. Civ. App.) 702.

"Insane delusion."—Taylor v. McClintock (Ark.) 405.

"Interference with employment."—Carter v. Oster (Mo. App.) 995.

"Judicial purposes."—First Nat. Bank v. McElroy (Tex. Civ. App.) 801.

"Legacy."—Roberts v. Chenoweth (Ky.) 625.

"Legatee."—Roberts v. Chenoweth (Ky.) 625.

"Lottery."—Grant v. State (Tex. Cr. App.) 1068.

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76	88	448	177	89	425	257	90	160	325	89	809	398	89	796	529	90	537
78	88	892	184	89	419	260	89	442	328	89	445	403	90	69	533	90	720
82	88	401	193	89	84	265	89	308	328	89	803	407	90	71	536	91	647
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